LEGAL CULTURE AND LEGAL TRANSPLANTS THE EVOLUTION OF THE INDIAN LEGAL SYSTEM (WITH REFERENCE TO PRIVATE LAW)

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I. INTRODUCTION

Legal culture and legal transplants

Legal transplants, as a concept, were designed by Alan Watson in the context of comparative law. Comparative law helps to gain insight into the question of legal transplants, i.e. the transplanting of law and legal institutions from one system to another. It would be pertinent to open with Montesquieu on comparative law, legal transplants and legal culture as follows:

> *The political and civil laws of each nation should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another.*
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> *They should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions.*
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> *They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. As the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law.*[1]

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[1] Baron de Montesquieu, *De l'esprit des lois* (The Spirit of Laws), Translated by Thomas Nugent, J. V. Prichard (ed.), London, G. Bell & Sons, Ltd., 1914.

Now let us proceed to understand the legal culture and legal transplants in the Indian legal history and system in the background of Montesquieu's assessment.

The Republic of India, the land of the Mahatma, as we see it today, with a recorded history of over 5000 years of Hindu, Muslim and British periods with distinct legal systems,[2] is a country with over 1.2 billion people and counting, with a majority Hindu population and a minority comprising of Muslims and Christians as well as others, each governed by their personal laws, based on religion, in matters relating to marriage, divorce, succession and other issues essentially within the domain of private law.

India is a multicultural and multilingual predominantly agrarian society, with a hierarchical social structure and in an urban-rural manifestation with a strong inclination towards industrialisation. India is a puzzle and a paradox[3] besides having the distinction of proving John Stuart Mills's proposition that democracy is next to impossible in multi-ethnic societies and completely impossible in linguistically divided countries. It is a country with the world's largest and most heterogeneous democracy and is the best example for 'unity in diversity'.

It is a land of complex society because of its fabled capacity to absorb all manner of diversities in a setting with no parallel in history and a civilisation marked by complexity and diversity setting it apart from other major civilisations.

The legal culture and legal transplantation in India encompassing its laws, legal institutions and the legal system can be best understood in the background of its historical process, its evolution, growth and development. The roots of private law and the legal culture as we understand today are deeply buried in the past. The legal culture including its psychological component and legal transplantation of laws in the private and public law spheres, the legal institutions and system is the result of a collective effort, endeavour and experience.

Though it is generally believed that the present legal system has hardly any correlation, continuity and integral relationship with the pre-British period and institutions, such belief cannot be applied appropriately to the personal laws of the land falling within the private law sphere.

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[2] Jain, M.P., *Outlines of Indian Legal History*, 1997, p. 1.
[3] Arend, Lijphart, *The Puzzle of Indian Democracy: A Consociational Interpretation*, American Political Science Review, vol. 90, num. 2, June, 1996.

In this area the study of the past and the historical background provides an insight to the working of the present prevailing personal laws with scope for refinement in the future development of law particularly in a legal system, of laws and institutions characterised by legal culture, transplantation and importation in a comparative and global context. An outline or an introduction of the history is, thus, essential to understand the legal transplants and culture.

India, that is *Bharat*, for political, administrative and legal purposes, is a 'union of states', a federation with a strong tendency to incline and lean towards the central government. The provinces of British India and the princely Indian states is now the 'union of states' and the territorial integrity of the republic consists of 28 States and 6 Union Territories with 1 National Capital Territory at present. The units of the federation is organised on linguistic basis.

India attained independence on 15 August 1947 after a non-violent struggle for independence from British rule, under the leadership of Mahatma Gandhi and became a Republic on 26 January 1950 with the adoption of a written Constitution for the country, which was the result of deliberations of the Constituent Assembly in the background of the then existing system of administration and which also marks the culmination of the political struggle for independence, the end of an era of colonial rule and the beginning of a 'tryst with destiny'.

Historically India was a collection of kingdoms and empires. The ancient empire of King Ashoka and the later Mughal Empire united a substantial portion of the nation. India has a known and recorded history of more than 5000 years of Hindu and Muslim periods before the British period and each period had a distinctive and well organised legal system of its own. In most ancient societies at the early state of their development, law and culture could almost be said to be inseparable. Principles of religion and ethics were mixed with legal precepts.

To understand the legal culture and transplants in its present form a brief survey of the historical process of development of the laws and legal institutions in the Hindu and the Muslim periods is required.

II. NATURE AND PERSPECTIVE OF LAW IN ANCIENT INDIA

In ancient India the dawn of civilization began much before the advent of the Vedic culture which is enshrined in the Vedas and the various other allied literature. The evolution of law in ancient India has very interesting and charming stages and phases. The legal culture during the

period of ancient India is unparalleled and highly dignified in the legal history of the world. Different periods of legal culture and wide extending duration of the history of ancient India have to be rationally and categorically classified not merely on the basis of the political achievements but predominantly on the cultural basis.

Law in ancient India had its foundation on ethical and moral background. Such luminous phases and aspects of the legal culture of ancient Indian law may be visualised only on a closer and realistic study of the abundant materials in their chronological order. The source materials of law in ancient India extend from the Vedas down to the classical literature. All these materials cover a very wide period of several centuries beginning from the Vedas down the 1200 A.D. with which the period of ancient India comes to a close. In ancient India, society, institutions and beliefs gradually developed and a definite shape was given to them. The life in ancient India cannot be separated from the Indian philosophical thinking which tended to evolve rational laws.

The four Vedas reveal a culture not of any primordial civilization but a civilization of some developed stage as in the Vedic literature the traces of the formation of the State, pictures of various fundamental and individual rights and liberties in the language of duties of the people, of the various advisory, legislative, administrative, executive and the judicial organs of the State are portrayed in a pellucid manner. The law developed to a great extent in a practical shape in the post-Vedic age.

Societies in ancient India were governed by 'moral law' and it was not law in the Austinian sense of positive law or as we understand it today. It was *jus receptum* – law by acceptance and was constituted in part through recollections of precepts claimed as of divine origin and in part by conventional and customary law. The personal laws, administration of justice and the legal system embodied in the *smritis* would seem to be based not on a general habit of obedience to or of determinate persons but rather on "a general acceptance of a constituent rule, simple or complex, defining the manner in which the ordinary rules of the system are to be identified. The acceptance of such fundamental rules cannot be equated with habits of obedience of subjects to determinate persons, though it is of course evidenced by obedience to the laws. The sanction behind that law was not the will of any supreme temporal power but that which was inherent in the law itself and the nature of and sanctity attached to its sources. Except in comparatively recent times, law in Ancient India was at no stage issued in the form of edicts or statutes. The *Srutis*, the *Smritis*, compiled by revered sages, learned in the law, and commentaries compiled by learned scholars on the *Smritis*, represented the body of the law which was in ancient times

administered by the king and his courts. The king was as a rule under the law and bound by the law as laid down by the *Srutis* and the *Smritis*.

The modification of the law to the changing conditions of the society and altered social values and conditions was carried out through interpretation and commentaries on the texts. Hindu culture which had spread over the whole sub-continent varied from region to region. Commentators from different regions working on the same *Smritis* would produce interpretations of law which would accord with the beliefs, customs and usages of those regions.

It was Hindu Law thus adapted and in conformity with social habits and customs which the Muslims and later the British found when they came to India. This strong and inevitable influence of varying cultures over the length and breadth of the country compelled these foreign rulers to administer in each region different schools of Hindu law prevalent in these different regions.

Hindu law throughout its centuries-old history has conformed to the Hindu way of life and sentiment. In the words of Maine, "The earliest Sanskrit writings evidence a state of law, which allowing for the lapse of time, is the natural antecedent of that which now exists. It is equally obvious that the later commentators describe a state of things, which, in its general features and in most of its details, corresponds fairly enough with the broad facts of Hindu life as it then existed; for instance, with reference to the condition of the undivided family, the principles and order of inheritance, the rules regulating marriage and adoption, and the like".

In the Vedic age or in the post-Vedic age, the word *'Dharma'* has a compendious meaning. The word *'Dharma'* assumed a greater importance in the post-Vedic age. It meant general daily rituals for spiritual culture and it also meant legal duties and obligations as well as the law itself. The word *'Dharma'*, has come out from the root *'Dhri'*, signifying the sense of sustaining. Thus the word *'Dharma'* means that which sustains the human mind and also the state. It generated the ethical surroundings among the people, evolved consciousness among the individuals of their duties and obligations and also maintained the state within the bounds of law and order. The word *'Dharma'*, however, should not be misunderstood as religion. There is no prefix to the word *'Dharma'* in any of the *Smritis* or *Dharmashastras* and there is no justification for attributing a restricted meaning. It is a word of the widest import. There is no corresponding word in any other language. *Dharma* includes law.[4]

[4] Justice Rama Jois, *Seeds of Modern Public Law in Ancient Indian Jurisprudence*, p. 8.

The law evolved on the basis of the doctrine and philosophy of *trivarga*, that is, *Dharma*, *Artha* and *Kama* as also on the fourth *varga* which is *Moksha* which led to the belief that the ultimate aim of human life was salvation of soul or the peacefulness of soul which had a great impact on the evolution of well-managed and well-organised state and more ethical and balanced law which inherently generated peace and harmony in the society. *Dharmasastra* texts, which continue to be the best source, deal with both procedural law and substantive law.[5]

The Upanishads, a source of law, for example, is an adjunct to the legal culture which helped in constructing an ideal society with potent and equitable systems of law founded on ethical surroundings. The Arthashastra of Kautilya[6] reveals aspects of state craft, constitutional philosophy and also about the court and the judicial administration. The *Smiritis* deal with both adjective and substantive, constitutional law and international law as well. Out of them, the works of Gautama, Apastamba, Baudhayana, Vasishtha and Vishnu and the works of Manu and Yajnavalkya stand out as great contributions to the realm of law. They deal with almost every aspect of law systematically and effectively. The *Puranas* also serve significantly in reconstructing the legal culture of ancient India. It may further be emphasised that the philosophical literature of ancient India deals with realities of human life and show the path of legal thinking and solves the problems to a great extent for avoidance of violations of law.

Law in ancient India had a wider approach. Its field is extensive and wide. Custom forms an important source of law.[7] It reflects the powerful impact of social values on law. Manu regards custom as the third source of Hindu law. On matters not covered by the *Smritis* and the commentaries, usage can supplement the law laid down in them. Even where a custom exists in derogation of the law laid down in the *Smritis* it is nonetheless a binding source of law. The *Smritis* themselves repeatedly assert that customs must be enforced and that they either override or supplement the *Smriti* rules. Manu declares that it is the duty of a king to decide all cases according to the principles drawn from local usages and says that "a king who knows the sacred law must enquire into the laws of castes, of districts, of guilds and of families and (thus) settle the peculiar laws of each". Narada who deals only with civil law says "custom decides everything, it overrules sacred law"; and one of the earliest writers says "immemorial usage of every country (or

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[5] For a detailed historical exposition see prof. Kane's, P. V., *History of Dharmasastra*, Vol. III.

[6] Kautilya was the greatest Indian exponent of the art of government, the duties of kings, ministers and officials and methods of diplomacy.

[7] For a description of sources see Kumar Raj (ed.), *Essays on Legal Systems in India*, pp. 27 and 28.

province) handed down from generation to generation can never be over-ruled on the strength of the sastras".

To understand and appreciate the ancient judicial system of India in is proper perspective, three important factors have to be considered in the following order:

a. The social institutions in ancient India,
b. its political system and institutions, and
c. its religion and religious philosophy.

The caste system and the joint family system are the parameters within which the socio-legal order evolved from the period of ancient India. The *caste system* emerged in ancient India as a unique and one of the most rigid social systems ever developed in any part of the world. A caste was a social group consisting solely of persons born in it.

The *joint family system* was another important institution which determined the social order and legal relationships in ancient India. A family was regarded as a unit of the social system. In ancient India a family included parents, children, grandchildren, uncles and their descendants, their collaterals on the male side. This social group had common dwelling and enjoyed their estate in common. At the head of the family was the patriarch, whose authority was absolute over the members of his family. He represented all the members of his family before the law and he is referred to as the *kartha* of the joint family. The concept of family led to private property which in turn led to disputes and struggles which necessitated law and a controlling authority. In later centuries problems concerning the division of land and inheritance came in for special attention.

The development of the law of joint family property in India can be said in a manner to reflect the change of social values in regard to property. There was a time when the village community owned the property in common and traces of such ownership remain till today in the common rights of villagers in pasture lands. As society developed the family grew in strength and became the unit in which property vested. Partly as a result of the influence of religion which attached great significance to ceremonies for the benefit of the souls of deceased persons, descendants of Hindus up to a certain degree who would perform such ceremonies acquired an interest in the property of their ancestors by birth. Initially this co-ownership in the property of the family could not be severed. But changing ideas evolved new legal rules based in a changed interpretation of the texts so that partition of the family property among the co-sharers came into vogue. In certain parts of the country the social impact of the practices of the people on the law was

so great that the doctrine of acquisition of an interest in property by birth altogether disappeared.

The institution of the adoption of sons peculiar to Hindu law has its origin in religious belief deeply entertained by the community. Spiritual benefit to the person adopting and his ancestors by the offer of funeral cakes and libations of water to their souls by the adopted son (where there was no natural male issue) continued to be the dominant motive supporting this institution not known probably to any other system of law. Adoptions for the spiritual benefit of the husband were permitted to be made even by their widows. As religious beliefs underwent modification the rigorous rules of law which were required for a valid adoption came to be relaxed. The secular motive became more and more predominant and in some sections of the Hindu community like Jains adoption came to have a purely secular basis, quite unlike adoption in other sections of the community.

How religious beliefs of a society influence contemporary law is also noticeable in the obligation imposed by Hindu law on sons, grandsons and great grandsons to pay their ancestors' debt to the extent of their interest in the property of the joint family. The obligation owes its origin to the belief that the soul of the ancestor who died without discharging his debts could not obtain repose. The obligation on the sons was, therefore, described as pious obligation and though its rigours have been mitigated the obligation survives to this day.

Two systems of family law, namely, *Mitakshara* and *Dayabhaga*, became the basis of civil law.[8] The *Dayabhaga* School was widely followed in Bengal and Assam while the rest of India followed the *Mitakshara* School.

1. *Mitaksara*

The *Rju Mitakshara* or the *Mitakshara* is celebrated commentary on the *Yajnavalka Smrti*. Its author is Vijnanesvara. He was a minister in the court of the Caulukya Vikramaditya VI. This period is between 1070 – 1100 CE. A great merit of the *Mitakshara* is that it reflects fully all the modes adopted by a commentator of an ancient text to bring the original in tune with his times and yet preserve its sanctity. In the process it has borrowed extensively from other smrtis. Vijnanesvara had to make a careful selection of rules from other works and leave out much of their material. He had to reconcile many of the rules in the *Yajnavalka Smrti* with those in other works. He appears to be a bold author who did not feel inhibited in rejecting outdated laws ascribed to a great authority like Manu. The *Mitakshara*, therefore is an important

[8] For a comparison of the ancient and subsequent changes in Hindu law see Ashutosh Dayal Mathur, "Medieval Hindu Law, Historical Evolution and Enlightened Rebellion.

document for the purpose of studying the changes in Hindu law as well as the reasons behind those changes. The Mitakshara emphatically asserts the supremacy of custom as a source of law and quotes tests to the effect that "even practice expressly inculcated by the sacred ordinances may become obsolete and should be abandoned if opposed to public opinion".

2. *Dayabhaga of Jimutavahana*

Known in contemporary Hindu law as the founder of the Bengal school of the law of inheritance, Jimutavahana wrote two important texts on law. His Vyavaharamatrka is a work on procedural law and the Dayabhaga is a digest on the law of inheritance. He had to struggle hard to refute the views held by the Mitakshara School and to hold out his own on the basis of the very texts which were considered to be authentic by his rivals. His literary activity covered the period 1090 – 1130 CE.

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

3. *The Administration of Justice*

A. *Constitution of Courts*

In ancient India, the King was regarded as the fountain-head of justice.[9] His foremost duty was to protect his subjects. He was respected as the Lord of Dharma and was entrusted with the supreme authority for the administration of justice in his kingdom. The King's Court was the highest court of appeal as well as an original court in cases of vital importance to the state. In the King's Court, the king was advised by learned Brahmins, the Chief Justice and other judges, ministers, elders and representatives of the trading community. Next to the King was the Court of the Chief Justice (Pradvivaka). Apart from the Chief Justice, the Court consisted of a board of judges to assist him. All the judges were from the three upper castes preferably Brahmins. Sometimes some of these judges constituted separate tribunals having specified territorial jurisdiction. There were four kinds of tribunals, namely, stationary, circuit, courts held under royal signet in the absence of the King, and commissions under the King's presidency.

[9] For further reading see Kane, P. V., *History of Dharmastra*, vol. III, chapter XI – Law and Administration of Justice, pp. 242-316.

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

In villages, the local village councils or *Kulani*, similar to modern *panchayats*, consisted of a board of five or more members to dispense justice to villagers. It was concerned with all matters relating to endowments, irrigation, cultivable land, punishment of crime, etc. Village councils dealt with simple civil and criminal cases. At a higher level in towns and districts the courts were presided over by the Government officers under the authority of the King to administer justice. The link between the village assembly and the official administration was the headman of the village. In each village, local headman was holding hereditary office and was required to maintain order and administer justice. He was also a member of the village council. He acted both as the leader of the village and the mediator with the government.[10]

In order to deal with the disputes amongst members of various guilds or association of traders or artisans *(Sreni)*, various corporations, trade-guilds were authorised to exercise an effective jurisdiction over their members. These tribunals consisting of a president and three or five co-adjudicators were allowed to decide their civil cases regularly just like other courts. No doubt, it was possible to go in appeal from the tribunal of the guild to a local court, then to royal judges and from there finally to the King but such a situation rarely arose.

Due to the prevailing institution of joint family system, family courts were also established. Custom, tradition and practice in a caste guided the settlement of disputes. *Puga* assemblies made up of groups of families in the same village decided civil disputes amongst family members. According to Brihaspati: "First come the family arbitrators; the judges are superior to the families; the Chief Justice *(Adhhyaksha)* is superior to the judges; the King is superior to all of them and his decision becomes law".[11]

One of the cardinal rules of the administration of justice in ancient India was that justice should not be administered by a single individual. A bench of two or more judges was always preferred to administer justice. "No decision shall be given by a person singly",[12] is a formula found frequently repeated in the old texts. Thus Vaisistha says, "Let the King or his ministers (or the King taking counsel with *Brahmins*) transact the business on the

[10] *Ibidem*, p. 66.
[11] Dr. Sen, P.N., *Hindu Jurisprudence*, p. 368.
[12] Cited by Varadachariar, S., *The Hindu Judicial System*, p. 64.

Bench.[13] The King sitting in his council heard the cases and administered justice.

B. *Judicial Procedure*

Judicial procedure was very elaborate. According to Brihaspati a suit or trial *(Vyavahara)* consisted of four parts: (i) the plaint *(poorva paksha)*; (ii) the reply *(uttar)*; (iii) the trial and investigation of dispute by the court *(Kriyaa)*; and (iv) the verdict or decision *(nirnayaya)*.[14] Filing of plaint before the court meant that the plaintiff submitted himself to the jurisdiction of the court. The court was then entitled to issue an order to the defendant to submit his reply on the basis of allegations made in the plaint. If the defendant admitted the allegations levelled against him in the plaint, the business of the court was to decide the case. Where the defendant contested the case before the court, it was the duty of the court to provide full opportunity to both the parties to prove their cases. After the trial was over final decision was given by the court. During the course of proceedings both parties were required to prove their case by producing evidence. Ordinarily, evidence was based on any or all the three sources, namely, documents, witnesses[15] and the possession of incriminating objects.

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

C. *Trial by Jury*

In the ancient judicial system of India trial by jury existed but not in the same form as we understand the term now. In the court scene of the *Mrichchhaakatika*, which according to Jayaswal[16] is the product of the third century, the jury is mentioned. It shows that the members of community assisted in the administration of justice. They were merely the examiners of the cause of conflict and to place true facts before the judge. But the administration of justice was done by the presiding judge and not by juries.

In ancient India during the extensive period of several thousand years legal civilisation had a prosperous growth and it ended only with the change of political rule under the foreign conquest and dominance. The legal culture in ancient India is characterised by adjustment of law to the needs of the people and the most important guiding principle was *dharma* and the needs of life were never separated from law. The king was under an

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[13] Dr. Jayaswal, K.P., *Hindu Polity: A Constitutional History of India in Hindu Times*, p. 313.
[14] Kane, P.V., *History*…, *cit.*, pp. 379-410.
[15] *Ibidem*, p. 330-360.
[16] Jayaswal, K.P., *Hindu*…, *cit.*, pp. 46, 92, 312.

obligation to uphold *dharma* and dedicated to its maintenance in the course of his governance.

III. JUDICIAL SYSTEM IN MEDIAEVAL INDIA

Muslim period marks the beginning of a new era in the legal history of India. The social system of Muslims was based on religion, Islam. The political theory of Muslims was governed by their religion, Islam. Sovereignty in a Muslim State belonged to God. The Muslim Kings in India in general regarded themselves as God's humble servants *(Nyazmande-dargah-e-llahi)*.

The Muslim polity was based on the conception of the legal sovereignty of the *Shariat* or Islamic law. The *Quran* being of absolute authority, all controversy centres round its interpretation from which has arisen the Muslim law or *Shariat*. The Muslims also proliferated into many sects. Two main sects are – the *Sunnis*, to which the Turks and Afghans in India adhered, and the *Shias* who became dominant in Persia.

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

1. *The Sultanate of Delhi: Judicial System*

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

2. *Civil Administration: Administrative Units*

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

The Sultan was represented in each Province *(Subah)* by a Governor *(Nazim* or *Mufti)*, under whom a number of departmental heads were appointed. The Governor was responsible to maintain law and order and also to collect revenue in each province. In each District *(Sarkar)*, the *Fauzdar*

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

3. *The Administration Of Justice: Constitution Of Courts*

In Mediaeval India the Sultan, being the head of the State, was the supreme authority to administer justice in his kingdom. The administration of justice was one of the important functions of the Sultan which was actually done in his name in three capacities: (i) as arbitrator in the disputes of his subjects he dispensed justice through the *Diwan-i-Qaza*; (ii) as head of the bureaucracy, justice was administered through the *Diwan-i-Mazalim*; (iii) as the Commander-in-Chief of Forces through his military commanders who constituted *Diwan-i-Siyasat* to try the rebels and those charged with high treason.

The judicial system under the Sultans was organised on the basis of administrative divisions of the kingdom. A systematic classification and gradation of the courts existed at the seat of the capital, in Provinces, Districts, *Parganahs* and villages.[17] The powers and jurisdiction of each court was clearly defined.

A. *Central Capital*

Six courts which were established at Delhi, Capital of Sultanate, may be stated as follows:

The King's Court, Diwan-i-Mazalim, Diwan-i-Risalat, Sadre Jehan's court, Chief Justice's Court and Diwan-i-Siyasat.

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

The Court of *Diwan-i-Mazalim* was the highest Court of Criminal Appeal and the Court of *Diwan-i-Risalat* was the highest Court of Civil Appeal. Though the Sultan nominally presided over these two courts, he seldom sat in them. The Chief Justice *(Qazi-ul-Quzat)* was the highest judicial officer next to the Sultan. From 1206 to 1248 in the absence of the Sultan the Chief Justice presided over these Courts.

[17] Ahmad, M.B., *The Administration of Justice in Medieval India*, 1941, pp.104-125.

In 1248 Sultan Nasir Uddin, being dissatisfied with the then Chief Justice, created a superior post of *Sadre Jahan* and appointed Qazi Minhaj Siraj to this post. Since then *Sadre Jahan* became *de facto* head of the judiciary. The Court of Ecclesiastical cases, which was under the Chief Justice up to 1248, was also transferred to the *Sadre Jahan* and later on became popular as *Sadre Jahan's* Court. *Sadre Jahan* became more powerful and occasionally presided over the King's Court.

The offices of the *Sadre Jahan* and Chief Justice remained separate for a long time. Alauddin amalgamated the two. They were again separated by Sultan Firoz Tughlaq.

The Court of *Diwan-i-Siyasat* was constituted to deal with the cases of rebels and those charged with high treason. Its main purpose was to deal with criminal prosecutions. It was established by Muhammed Tughlaq and continued up to 1351.

The Chief Justice's Court was established in 1206. It was presided over by the Chief Justice *(Qazi-ul-Quzat)*. It dealt with all kinds of cases. Earlier, the Chief Justice or *Qazi-ul-Quzat* was the higher judicial officer but with the creation of a new post of *Sadre Jahan* its importance was reduced for some time. The Chief Justice and Puisne Judges were men of ability *(Afazil-e-Rozgar)* and were highly respected. Four officers, namely, *Mufti*,[18] *Pandit*,[19] *Mohtasib*[20] and *Dadbad*,[21] were attached to the Court of the Chief Justice.

B. *Province*

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

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

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[18] Mufti was a lawyer of eminence attached to the court to expound law and law expounded by him was accepted by the Judge as authoritative. He was appointed by the Chief Justice in the name of the Sultan.

[19] A Brahmin lawyer, generally known as Pandit, was appointed to explain personal law of Hindus in civil cases. His status was the same as that of Mufti.

[20] He was in charge of prosecutions on original side and in appeal he answered for the prosecution.

[21] An administrative officer of the court.

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

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

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

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

C. *Districts*

In each District *(Sarkar)* at the District Headquarters, six courts were established, namely, *Qazi, Dadbaks* or *Mir Adls, Faujdars, Sadr, Amils, Kotwals.*

The Court of the District *Qazi*[22] was empowered to hear all original civil and criminal cases. Appeals were also filed before this Court from the judgments of the *Parganah Kazis, Kotwals* and *Village Panchayats.* The Court was presided over by the District *Qazi-e-Subah* or directly by *Sadre Jahan.* The same four officers, namely, *Mufti, Pandit,* the *Mohtasib* and *Dabbak,* were attached to the Court of District *Qazi.*

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

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[22] A person selected as Qazi usually possessed good knowledge of law.

D. *Parganah*

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

E. *Villages*

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

4. *Judicial Reforms of Sher Shah*

In 1540 Sher Shah laid the foundation of Sur Dynasty in India after defeating Mughal Emperor Humayun, son of Babur. During the reign of Sur Synasty from 1540 to 1555, when Sher Shah and later on Islam Shah ruled over India, the Mughal Empire remained in abeyance. Sultan Sher Shah was famous not only for his heroic deeds in the battle field but also for his administrative and judicial abilities. In spite of the fact that Sher Shah ruled only for five years, he introduced various remarkable reforms in the administrative and judicial system of his kingdom. His important judicial reforms, as summarised by M.B. Ahmad,[23] may be stated as follows:

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

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

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[23] Ahmad, M.B., *The Administration*…, *cit.*, p. 129.

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

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

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

(*v*) The duties of Governors and their deputies regarding the preservation of law and order were emphasised.

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

5. *The Mughal period: Judicial System*

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

6. *Administrative Divisions*

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

7. *The Administration of Justice: Constitution of Courts*

During the Mughal period, the Emperor was considered the "fountain of Justice". The Emperor created a separate department of Justice *(Mahakma-e-Adalat)* to regulate and see that the justice was administered properly. On the basis of the administrative divisions, at the official headquarters in each Province, District, Parganah and Village, separate

courts were established to decide civil, criminal and revenue cases.[24] At Delhi, the Imperial capital of India, highest courts of the Empire empowered with original and appellate jurisdictions were established. A systematic gradation of courts, with well defined powers of the presiding Judges, existed all over the empire.

A. *The Imperial Capital*

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

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

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

The Chief Justice was appointed by the Emperor. He was considered the next important person, after the Emperor, holding the highest office in the judiciary. It is needless to emphasis that men of high scholarship and reputed sanctity of character wherever available were selected and appointed. Sometimes a Chief Provincial *Qazi* was promoted to the post of the Chief Justice.

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[24] Ahmad, M.B., *The Administration…*, *cit.*, pp.143-166.

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

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

In each court, as stated above, the four officers attached were *Darogha-e-Adalat*, a *Mufti*, a *Mohtasib*, a *Mir Adil*.

B. *Provinces*

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

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

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

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

C. *Districts (Sarkars)*

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

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

Faujdari Adalat dealt with criminal cases concerning riots and state security. It was presided by the *Faujdar.* Appeals lay to the governor's Court. *Kotwali* Court decided cases similar to those under modern Police Acts and had appellate jurisdiction. It was presided by *Kotwal-e-Shahar*. Appeals lay to the District *Qazi.*

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

D. *Parganah*

In each *Parganah* there were three courts, namely, *Adalat-e-Parganah, Kotwali* and *Kachehri.*

Adalat-e-Parganah was presided over by *Qazi-e-Parganah*. The Court had jurisdiction over all civil and criminal cases arising within its original jurisdiction.

E. *Villages*

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

8. *Judicial Procedure*

A systematic judicial procedure was followed by the courts during the Muslim period.[25] It was mainly regulated by two Muslim codes, namely, *Figh-e-Firoz* and *Fatwa-i-Alamgiri*. The status of the Court was determined by the political divisions of the kingdom.

In civil cases, the plaintiff or his duly authorised agent was required to file a plaint for his claim before a court of law having appropriate jurisdiction in the matter. The defendant, as stated in the plaint, was called upon by the court to accept or deny the claim. Where the claim was denied by the defendant, the court framed the issues and the plaintiff was required to produce evidence supporting his claim. The defendant was also given an opportunity to prove his case with the assistance of his witnesses. Witnesses were cross-examined. After weighing all the evidence the presiding authority delivered judgment in open court.

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

IV. BRITISH PERIOD

1. *Introduction*

The legal system, laws and legal institutions of modern India are based on British law, British legal system and the English language. The legal system in India is inextricably linked with the English language: both were originally imported from abroad. Originally an English transplant with Anglo-Saxon roots, the legal system in India has grown over the years, nourished in Indian soil. What was intended to be an English oak has turned into a large, sprawling Indian banyan tree, whose serial roots have descended to the ground to become new trunks.[26]

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[25] Ahmad, M.B., *The Administration*…, *cit*., pp. 176-188.
[26] Nariman, Fali S., *India's legal system: Can it be saved*?, 1941.

The emergence of the British Empire in India stands out as a unique event in the history of the world. Unlike many other empires, the huge edifice of this Empire was created by a company which was organised in England for promoting British commercial interests overseas.

The history of the present-day legal system goes back to the Charters granted in 1600 and 1609 by Elizabeth I and James I of England to the East India Company, with its official title as "The Governor and Company of Merchants of London trading into the East Indies", incorporated in England on the 31st of December 1600, which was authorised "…to make, ordain and constitute such and so many reasonable laws, constitutions, orders and ordinances as to them … shall seem necessary … so always that the said laws, orders, ordinances, imprisonments, fines and amerciaments be reasonable and not contrary or repugnant to the law, statues, customs of this Our realm".

Though the purpose was primarily to make arrangements for keeping discipline among the employees of the company, despite its limited scope, the early grant of legislative power to the Company is of historic interest as it is the germ out of which the Anglo-Saxon codes were ultimately developed and it is out of this modest beginning in the year 1600 that the vast powers of legislation grew in course of time.[27]

The Charter of 1661 conferred powers, enlarged in scope and application, on the Company to administer justice in its settlements, not only on Englishmen but also on all persons living within the settlements and authorised the Governor and Council of each factory to judge all persons, whether belonging to the Company or living under them, in all causes, civil or criminal, according to the laws of England and to execute judgment accordingly. It created a judicial system for the Company's territorial possessions indicating that the Company was no longer a trading concern but it was on its way to becoming a territorial power and laid the foundation for the evolution of the British judicial system in India-sowing the seeds of transplantation. Justice was required to be administered according to English Law and the local indigenous population within the settlements were placed under the yoke of English law and did not reserve to them their own peculiar and distinctive laws, customs and usages.[28] The Charter of 1661 drew no line of demarcation between the executive and the judiciary and justice was required to be administered according to the English law.

The first factory of the company was established at Surat, during the reign of Jehangir. The factory at Surat had a rudimentary administrative and

[27] Jain, M.P., *Outlines…*, *cit.*, p. 6.
[28] *Ibidem*, pp. 7-9.

judicial set-up. In the area of law and justice, the Englishmen at Surat were under a dual system of law, viz., the English law and the Indian law.

The English had settled in Surat with the leave of the Mughal Government and normally they should have been subject to the local laws and courts. The local law had a religious character. The prevailing concept of law in India at this point of time was the personal law and there was no concept of a territorial law. There were no uniform or common *lex loci* to regulate inheritance, succession and other subjects. In civil cases, justice was administered according to the personal laws of the Hindus or Muslims and criminal law was entirely Mohammedan. The Mughal Emperor issued a *firman* granting certain facilities/privileges to the Englishmen in and by which they were allowed to live according to their own religion and laws without interference and disputes among them were to be settled by their President, among other privileges. Disputes between an Englishman and an Indian were to be settled by the established local native authorities according to justice. The *firman* provided and conceded the right to self-government to the English with regard to their internal affairs and relations among them were to be regulated according to their own law and by their own authorities within the factory. This peculiar character is the hall mark of the English wherever they settled in India and it contributed as the single most important factor which exerted a profound effect on the growth and development of the Indian legal system.

2. *Administration of Justice in Presidency Towns*

The first centres of British power in India were the three Presidency Towns of Madras, Bombay and Calcutta which were established by the British from scratch and the period of growth of judicial institutions can be divided into two parts, viz., the first part is from inception (1639) up to 1726 and the second part is from 1726, the year is a landmark in the evolution of legal transplants as it gave a new orientation to the judicial system in the presidency towns.[29]

The judicial institutions grew in three stages before 1726. In *the first stage*, from 1639 to 1665, administration of justice was in an extremely elementary state and conspicuous by the absence of any systematic and regular administration of justice according to the laws of England. The indigenous population which was governed by the traditional system,

[29] The administrative head of the company/factory in India was designated as the President or the Governor, who was the chief representative of the company/factory in India and the territories acquired in and around the factory and were organized around the presidency came to be known as Presidency Towns and the territories around these towns were known as *mofussil*.

characterised by a choultry court, was allowed to continue. The second period, which runs from 1665 to 1686, is characterised by the establishment of the court of the Governor-in-Council. During the third period, from 1686 to 1726 the Admiralty Court and the Mayor's Court were established.

Madras (1639-1726) was the first Presidency Town to be established by the British in India. It was founded in 1639 by Francis Day, who acquired a piece of land on the Eastern sea board, wherein the Company constructed a fortified factory and named it as Fort St. George and the Company was granted power and authority to govern Madraspatnam, a small village near the fort. Due to the facilities of trade and commerce available at the Fort, in course of time many Indians were attracted and the small village grew in size and population and came to be known as the Black Town while inside the fort the settlement comprised of British and other Europeans and came to be known as the White Town. The whole settlement comprising the Black and White Towns came to be known as Madras.

The judicial institutions grew in three stages before 1726. In the first stage, from 1639 to 1665, administration was in an extremely elementary state. No regular judicial tribunal was established and the old, traditional, indigenous system, which had been operating in the Village of Madraspatnam before the advent of the British was allowed to continue and a Choultry Court with an *Adigar* (the village headman and the term *adigar* is derived from the term *adhikari* meaning one who has authority) who acted as a judge to decide small civil and criminal cases. This period is conspicuous by the absence of any systematic and regular administration of justice. The rudimentary system consisted of the Agent and Council for the White Town and the Choultry Court for the Black Town.

The *second period* is from 1665-1686. The Charter of 1661 which conferred broad powers on the Company to administer justice in its settlements had an important bearing on the evolution of the judicial system in India. The Charter of 1661 authorised the Governor and Council to administer justice according to English Law and to judge all persons, whether belonging to the Company or living under them, within the settlements, in all causes, civil or criminal. The Charter of 1661 had a wider perspective and its purpose was to create a judicial system for the Company's territorial possessions and it indicated that the Company was no longer merely a trading concern but was on its way to becoming a territorial power.

In Madras the Charter of 1661 did not become operational immediately. Status quo was maintained in this place for sometime. A criminal case in 1665 proved to be the turning point.[30] The case also exposed

[30] For further details see Jain, M.P., *Outlines…*, *cit.*, p. 13.

the lack of men trained in law and justice was continued to be dispensed by the Governor and Council according to their wisdom and commonsense and this gloomy picture continued until 1802 when the Supreme Court was established. Justice did not gain much by the establishment of the Court of the Governor and Council as it did not function regularly, efficiently or earnestly.

The *third period* (1686-1726) saw the establishment of an Admiralty Court to protect the trade monopoly of the Company granted under the Charter of 1600. On August 9, 1683 Charles II granted a Charter to the Company authorising it to establish one or more courts at such place or places as it might direct. The court was to consist of a person 'learned in civil law' and two merchants appointed by the Company. It was to have power to hear and determine all cases, mercantile and maritime in nature, concerning persons within the charter limits of the Company. The court was to decide cases according to the rules of equity and good conscience and the laws and customs of merchants. It could settle its own procedure subject to the directions of the Crown, if any. The same provisions were repeated in a fresh Charter issued by James II on April 12, 1686. The reason for the Charter to prescribe a 'civil' rather than a 'common' lawyer as the head of the Admiralty Court was that the Admiralty law was of an international character as it was based on the Civil Law and Law of Nations rather than the Common Law of England, for "ships are no respecter of frontiers". Further, in 1683 the English Common Law was practically devoid of rules governing mercantile cases. Lord Mansfield worked the subject out a century later.[31] The mercantile law in 1683 could be regarded as an amalgam of mercantile customs, the basis of which was Roman law. Similarly, maritime law was based on admiralty principles which involved knowledge of Roman law.

A Court of Admiralty was established in Madras on July 10, 1686 and it started to function properly and in right earnest. The Governor and Council relinquished his judicial functions which he had been exercising hitherto under the Charter of 1661 and ceased to sit as a court. The Admiralty Court in practice came to function as a general court of the land and it was not confined merely to maritime and admiralty cases proper as was envisaged by its Charter. It exercised a much wider jurisdiction and dispensed justice in all cases, civil, criminal, maritime and mercantile. After 1704 it ceased to sit on a regular basis. This period saw the arrival of a professional lawyer and separation of the executive from the judiciary.

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[31] Cross and Hard, *The English Legal System*, 1971, p. 252.

The year 1688 saw the establishment of the Mayor's Court in Madras. The court was part of the Madras Corporation, which came into existence on September 29, 1688. The court was established under a Charter dated December 30, 1687 issued by the Company itself. It was customary in England in those days to confer judicial powers on municipal corporations and a Mayor's Court was functioning in London as part of the London Corporation. In issuing the Charter the Company depended on its power of making laws under the Charter of 1600 and of governing its settlements conferred by the Charter of 1683. The Mayor' Court was to be a court of peace and its members (Mayor, Aldermen and Burgesses) were justices of peace. It was also a Court of Record. The Mayor's Court dispensed justice not according to any fixed law but, as its Charter laid down, in a summary way according to justice and good conscience and the laws made by the Company, thus lacking in uniformity and consistency in its decisions. After the Mayor's Court came on the scene, the Choultry Court, an important institution, lost its importance and functioned as a court of petty jurisdiction.

Thus, during 1686 to 1726 in Madras there existed the Choultry Court, the Mayor's Court and the Admiralty Court, albeit for sometime. An interesting feature of the period is that justice was mostly administered by non-lawyers, except for the Admiralty Court which had some professional element but only for a brief span of active life.

Bombay (1668-1726), an island, was first acquired by the Portuguese in 1534 by cession from the King of Gujarat, Sultan Bahadur. In 1661 the Portuguese King Alfonsus VI transferred the island to King Charles II of England as dowry on the marriage of his sister Princess Catherine with the British King. The British King finding it uneconomical to govern this territory from England transferred it to the East India Company in 1668 for an annual rent.

Before 1726, the judicial system in the Island of Bombay grew in three stages: the first stage from 1668 to 1683; the second from 1683 to 1690; and the third from 1718 to 1726.

A. *First Period. 1668-1683*

Charter of 1668: At the time of the transfer, Charles II granted a charter to the company conferring on it full powers, privileges and jurisdiction requisite for the administration, legislation and dispensation of justice in Bombay. The Charter empowered the company to make laws for the good government of the Island, and to impose for the due observance of the said laws, pains, penalties and punishments by way of fines, imprisonment, or even death.

The Company was also authorized to create courts to judge all persons and all actions. Their proceedings, however, were to be like those as were "established and used in England". The charter thus very characteristically contemplated establishment of courts and laws in the island on the same lines as in England. The charter contained “the fullest powers for governing the Island, which any form of words could convey. It concedes *imperium* and *jurisdicto*, and although it indicates the model on which the legal establishments and law should be framed, it does not fetter the grantees with any technical rules derived from English judicature, which might prove wholly unsuitable to a mixed community in the East"[32] The Charter of 1668 marks the "transition of the company from a trading association to a territorial sovereign invested with the powers of civil and military government".

The first judicial system was established in 1670. By any standard, the system of 1670 was very elementary and suffered from several drawbacks A new judicial system was inaugurated in Bombay in 1672.

Judicial system of 1672: Before the British take-over, Bombay had been under the Portuguese domination for well over a century. This long association had transplanted Portuguese laws and customs there. The treaty of cession between the Portuguese and the British Monarchs did not stipulate the continuance of Portuguese Laws and customs. On the other hand, the Charter of 1668 envisaged the application of the English Law on the Island. The Portuguese laws and customs, which were left untouched in 1670 when the first judicial system was created, were now formally abolished and the English law was introduced instead by a government proclamation on august 1, 1672. This was a prelude to the creation of a new judicial system. The new judicial system consisted of a court with jurisdiction in all cases, civil, criminal, probate and testamentary. Civil cases were tried by jury and provisions were made for speedy trials and quick decisions by the court.

B. *Second Period. 1684- 1690*

The second phase in the development of the judiciary at Bombay opened with the setting up of an Admiralty Court in 1684 under the charter of 1863. The Admiralty Court, to start with, took cognizance of all cases civil and criminal, in addition to the admiralty and maritime matters falling properly within the ambit of the Charter of 1683. In 1685 the Admiralty Court was divested of the function of deciding ordinary civil and criminal cases and it was confined only to maritime and mercantile cases. In 1690, Bombay was attacked by Moghul Admiral Siddi. Siddi's attack put an end to the judicial system and thus came to an end the second period of judicial

[32] Perry, J., *Perozeboye vs. Ardeshir Cursetjee, Indian Decisions (old series),* Vol. IV, p. 53.

development in Bombay. From 1690 to 1718 is the dark period in the legal history of the Island. The orderly development of the judicial system was thus interrupted for over three decades.

C. *Third Period. 1718-1726*

After an eclipse of 30 yrs, a court appeared again in Bombay on March 25 1718. It consisted of a Chief Justice and nine other judges of whom five were British. The remaining four were Indian judges who represented the four communities on the Island, viz., Hindus, Mohammedans, Portuguese, Christians and Parsis. The Chief Justice and few of the English judges were members of the Governor's council. The Court was authorized to decide all cases, civil, criminal and testamentary. It administered justice according to law, equity and good conscience and the Company's rules and ordinances; it was required to pay due regard to caste customs, Company's orders and known laws of England. The judicial system such as it was continued to function till it was superseded by a new judicial system under the Charter of 1726.

3. *Administration of Justice at Calcutta: 1660-1726*

The foundations of the premier Indian city of Calcutta were laid on the 24th August, 1690, when a few Englishmen under the leadership of Job Charnock landed at Sutanti on the banks of the river Hooghly. A fortified factory was constructed which was named as Fort William. In 1668, the Company secured the zamindari of three adjacent villages, Calcutta, Sutanti and Govindpur, from Prince Azimush-Shah, grandson of Aurangazeb, Subahdar of Bengal. On the site of these villages grew up the modern city of Calcutta.

In December, 1699, Calcutta became a Presidency. The acquisition of the zamindari right was a significant event for the Company since it provided a secured, legal and constitutional status within the framework of the Moghul administrative machinery. As a zamindar, the Company became entitled to exercise all those functions and powers within the zamindari territory as other zamindars in Bengal commonly exercised at that time within their domains.

The zamindars of Bengal collected land revenue and maintained law and order within their zamindari limits. They enjoyed no significant judicial power. Kazi courts, interspersed throughout the country, decided civil and criminal cases. Village panchayats were also quite active and they decided all kinds of cases except those pertaining to serious crimes. These panchayats fulfilled the judicial functions very effectively. The judicial system was simple

and served the needs of the people. Civil cases among the Hindus were decided by their own elders or Brahmins. The practice of the Moghul Government was to leave the Hindus free to decide their cases as best they could and the government made no arrangements for the purpose.

The zamindari functions of the company within the settlement of Calcutta were entrusted to an English officer, known as the collector or the zamindar, who used to be a member of the Governor's council. He discharged judicial powers in all cases, criminal, civil and revenue, pertaining to the Indian inhabitants of the settlement. The zamindar also decided civil cases arsing among the Indians or cases in which a European was the plaintiff and an Indian was the defendant. The judge acted in a summary manner, according to the customs and usages of the country, and in their absence, in his own discretion.

The judicial system at Calcutta was extremely rudimentary and was not at all conductive to impartial administration of justice. All judicial powers were concentrated in a single individual, the collector, who was an executive officer and the authority vested in him was very extensive. This system continued to operate till 1727 when it was replaced by a new system under the Charter of 1726 in common with the other Presidency Towns. It may be noted that while before 1727, the judicial system at Calcutta was based on the company's authority as a zamindar, after 1727, it derived its authority for the royal Charter.

4. *The Charter of 1726*

The Charter issued to the Company by King George I on the *24th September, 1726,* turned over a new leaf in the evolution of judicial institutions in the three Presidency Towns. Before 1726, as already been seen, development of the judiciary in each of these places followed a course of its own without any historic uniformity and the system established was hardly satisfactory. The charter of 1726 introduced uniformity of approach in this respect as in each Presidency Town, similar judicial institutions were established, and even subsequent developments followed more or less a similar course. The Charter introduced civil and criminal courts in the Presidency Towns which derived their authority not from the Company but from the British Crown. These courts could, therefore, be designated as royal courts in the true sense of the term. The status of the courts prior to 1726 was very vague and indefinite. Instead, the new civil and criminal courts had more formal, regular and definite bases. The advantage of having royal courts in India was that their decisions were authoritative as those of the courts in England because the source of authority for both the courts was the same, viz., the Crown, who was regarded as the fountain of justice. Further,

the charter of 1726 initiated the system of appeals from the courts in India to the Privy Council in England[33], and thus was established a bridge between the English and the Indian legal systems. A channel for the reception of the English law into India was thus created and this resulted in the English law making a deep impact on, and profoundly influencing, the Indian law in course of time. The Privy Council saw to it that wherever the Indian law was deficient to wanting, and wherever it was possible, principles of English law were applied by the courts to decide disputes. The result of this approach was that in 1833, when codification of Indian law was initiated, English law could be accepted as the foundation of the Indian law as it did not seem to be a foreign system to India. In addition, the Charter of 1726 also established a local legislature in each Presidency Town, and thus the locus of legislative power was shifted from England to India. This was an important development for it now became possible to make laws consistent with local needs. Last, but not the least, the Charter has an important bearing on the question of the date of introduction of English law into Presidency Towns. The Charter of 1726, therefore, constitutes a landmark in the Indian Legal History and it came to be characterised as the 'Judicial Charter'.

However, in two respects, the Charter continued the previous traditions, viz., (1) justice continued to be administered by non- professional judges; and (2) intimate and integral relationship between the executive and the judiciary was maintained. It is only after 1773 that the situation in regard to these two elements underwent a change.

Each Presidency Town was to have a Mayor's Court. The Charter did not explicitly lay down what law the Mayor's Court was to apply. It merely said that the court was to render its decisions according to 'justice and right.' but as the English law had already been prescribed by the Charter of 1661, it was clear from the whole context that the Mayor's court was to be a court of English law.[34] The company repeatedly impressed on the judges that they were required to administer the English law.

In Madras, the Charter was put into execution on the 17th August, 1727, in Bombay, on the 10th February, 1728, and in Calcutta, in December, 1727.

In September, 1746, the French occupied Madras and surrendered it to the British in August, 1749. During the period of the French occupation, the Madras Corporation established under the Charter of 1726 ceased to

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[33] The Privy Council came to be called officially as the Judicial Committee of the Privy Council after 1833 acted as the highest court of appeal for over two centuries.

[34] The Charter did not expressly declare that the English law should be applied to the Indians but that was the necessary consequence of the provisions contained therein.

function. The lawyers advised the company that the foreign occupation had put an end to the charter of 1726 in its application to Madras and that a fresh charter was necessary to revive the old institutions. Accordingly, King George II issued a new Charter on the 8th January 1753.

5. *Judicial Plan o 1772*[35]

A *Mofussil Diwani Adalat*, established in each district under the Warren Hastings administrative plan of 1772, in which the judicial plan was incorporated with the scheme for revenue collection, with the collector as the judge, was authorised to decide all civil causes such as disputes relating to real and personal property, inheritance, marriage, caste, debts, disputed accounts, contracts, partnerships and demands of rent. In all suits regarding inheritance, marriage, caste and other religious usages and institutions, the laws of Koran with regard to Mohammedans, and those of the Shastras with respect to the Hindus were to be applied. The collectors who were called upon to administer justice, being Englishmen, did not know much about these legal systems and therefore to make the system workable and to enable the collector-judges to decide cases according to the Indian laws, native law officers like the kazis and the pundits were appointed to expound respectively the Muslim and Hindu personal laws applicable to the facts and circumstances of the case in dispute.

6. *Evolution and Development Of Civil Law in Presidency Towns*

There are two essential requisites for any sound and effective system of administration of justice. In the first place there must be a well organized system of courts and in the second place a well developed system of law. The British made several attempts to evolve a system of judicature in accordance with their own liberal traditions and in conformity with the exigencies and demands of the Indian situation. From 1661 to 1833 they made and unmade several schemes of courts in an endeavour to achieve a viable system of judicature. But a peculiar feature of the early British rule in India was that no, or very little, attempt was made to develop a body of substantive law on a systematic basis.

The British Parliament enacted the Act of Settlement, 1781 provided a guide line to the Supreme Court at Calcutta as to how it was to decide cases coming before it. The Act directed the application of personal laws for Hindus and Muslims in matters regarding inheritance, succession, caste,

[35] See Chapter VIII for an in depth treatment of the Supreme Court at Calcutta established under the Regulating Act, 1773 at pages 67 to 109 and for Supreme Courts at Bombay and Madras in Chapter IX at pp. 110-117 of M. P. Jain, Outlines of Indian Legal History.

marriage, adoption and the like while English Law was applied to others and in all other causes.

Accordingly, the law administered by the Supreme Courts in the three Presidency Towns after 1781 but before the establishment of the all India Legislature in 1834 can be classified as follows:

(1) The Common Law as it prevailed in England in 1726 and which had not been altered or amended by the statutes of British Parliament especially extending to India

(2) The statute law which prevailed in England in 1726 and which had not been subsequently altered by the statutes of the British Parliament especially extending to India

(3) The statute law of the British Parliament which was passed subsequent to 1726 was extended to India either expressly or by necessary implication and not repealed

(4) The civil law as it obtained in the Ecclesiastical and Admiralty Courts in England

(5) Regulations made by the Governor General in Council and the Governors in Council prior to the Act of 1833 and registered in the Supreme Courts

(6) Hindu law and usages in matters concerning inheritance and succession to lands, goods and rents, all matters of contract and dealing between parties, when both the parties or the defendant were Hindu

(7) Mohammedan law and usages in actions regarding inheritance and succession to lands, goods and rents, all matters of contract and dealing between parties, when both the parties or the defendant were Muslim

India was neither newly discovered nor was it an uninhabited country at the time when the British came to the sub-continent. It was already inhabited by civilized people and had a well established government. It was a privilege to be governed by their own laws in a foreign country. This privilege was under the permission of the Indian rulers and the rational behind granting such a privilege is not far to seek. The Indian laws existing at the time were very much interwoven with religious usages, institutions and beliefs and were inconsistent with the beliefs, principles, feelings and habits of the European Christians. Moreover, in India, there had not emerged as yet the concept of uniform lex loci to regulate inheritance, succession and

other important matters of all people. The two great classes of the native inhabitants, Muslims and Hindu, were governed then, as they are governed now, in these matters by different laws derived from their religious institutions. The native local laws being unsuitable to these new settlers, the Indian potentates showed them the indulgence of allowing them the use of their own laws starting from Surat.

The introduction, evolution and transplantation of English law in India, applicable not only to the British settlers but also to the Indians, is intricately linked to the evolution of the three Presidency Towns, which were the first territories to fall under the sovereignty of the British Crown. English law came to be introduced on a general basis, applicable to all its inhabitants, with the Charter of 1726, on a uniform basis. But a material question that caused uncertainty in the content of the English law was whether the whole of English Law, Common Law or statute law, existing in England in 1726 was introduced in India or was there some qualifications attached thereto? The view that came to be held was that not the whole of the English law existing at the time in England was introduced into the Presidency Towns but only so much of it as suited to the conditions of these settlements.

The principle that the English law was to be applied selectively and not indiscriminately made it necessary for the courts to consider whenever a question arose, whether a particular provision of the English law should be applied or not in the Presidency Towns, the courts would have to consider whether the particular provision, existing in England in 1726, could be held applicable to the peculiar circumstances of the settlements in India.[36]

However, not all English Law of property was applied. The courts refused to apply many rules of English Law of property in the Presidency Towns on the ground that the English Law applied to "the wants of a state of society widely differing from that which prevails among Hindus in India" and thus the Privy Council refused to accept the proposition that a gift of property could be made by a testator to an unborn person and insisted that only a person in existence at the death of the testator could take under a will.[37]

In England, common law and equity had developed in two different separate channels and it was only through the Judicature Act, 1873 that the courts of law and equity were fused, without at the same time fusing the two

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[36] Nandkumar's case illustrates forcefully the anomalous character of the first impact of the English law on the Indians and depicts the difficulties that arise when a foreign system of law is transplanted suddenly in a society and is enforced with all its rigors. See pages 81 to 83 about the facts of the case of Chapter VIII of Jain, M.P., *Outlines… cit.*

[37] Tagore *vs.* Tagore, I.A. Supp. 70 (1872).

systems of rules. In India, there were never separate courts of law and equity. In the Presidency Towns, the Supreme Courts administered both law and equity. In England, an equitable right of estate is recognized as something different from a legal right of estate. This dichotomy was never recognized in India. As Setalvad observes: "In effect what was applied in India was common law as liberalized by equity. In India equity worked through and not in opposition it the common law".[38] Thus, as early as 1872, in *Tagore v. Tagore*, the Privy Council refused to recognize any distinction between legal and equitable interests. The Privy Council said there: "The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property in the sense in which it was understood when equity was administered by the Court of Chancery in England". And further: "The anomalous law which has grown up in England of a legal estate which is paramount in one sets of courts, and an equitable estate which is paramount in Courts of Equity, does not exist in and ought not to be introduced into Hindu Law.

The approach that only such English Law existing in England in 1726 as was suitable to the conditions of the Presidency Towns was introduced there, rendered very doubtful the question of applicability to the Presidency Towns of the statutes extisting in England in 1726. There were 732 such statues and it was not definite which of them were, and which were not, applicable to the local conditions. The question bristled with great difficulty. Applying the test "applicable to local circumstances," It could positively be asserted that sum of the statutes were obviously excluded.

There thus existed a great deal of uncertainty as regards the statute law in force in the Presidency Towns not only on questions of rare occurrence, but at times even on questions of common occurrence. It was left to the courts to decide, whenever necessary, whether a particular statute was applicable to the Presidency Towns. Such controversies continued to arise till the end of the 19th Century.

There was comparatively less difficulty about the applicability of the statutes passed in England after 1726. They did not apply to India automatically. Only such of them as were expressly made applicable to India, or which extended to India by necessary implication, could be regarded as operative. Parliament and Indian Legislature however more than once acted as if this question should have been answered in the negative. Such confusion continued to disfigure the Indian Legal system for long. Only the process of codification improved the matters.

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[38] The Common Law in India, 59

The three Presidency Towns were inhabited not only by the British subjects, but also by large number of Hindus and Muslims. The Mayors Courts established in 1726 were courts of English law, and the Charter of 1726, as we have already seen, introduced English law in Presidency Towns. How justice was administrated to the Indians under this Charter has already been discussed earlier where it has been shown that the Indians did not like to be governed by the English Law in their family matters. Thus arose in an acute form the problem whether the Law of England was to be applied to them or not. The Charter of 1753, which superseded the Charter of 1726, expressly provided that the Mayor's Court was not to try actions between Indians, unless both parties accepted to its determination by the court concerned. This, therefore, appears to be the first attempt made to reserve to the Hindus and Muslims of the Presidency Towns their own personal laws and customs.

In 1774, the Mayor's Court at Calcutta was replaced by the Supreme Court. The Regulating Act of 1773 and the Charter of 1774 were silent as to the law which the Supreme Court was to apply to the Indians. The Supreme Court was a Court of English Law and applied English Law not only to the British subjects but also the Hindus, Muslims and others.

The question was graphically described by Chief Justice Elijah Impey thus: "The inhabitants of Calcutta inhabited a narrow district, and that district an English town and settlement, not governed by their own laws, but by those of England, long since there established, when there were no courts of criminal justice but those of the King of England, which administered his laws to the intent and in the form and manner in which they were established in England… The town was part of the dominion of the Crown by unequivocal right, originally by the cession founded on compact, afterwards by capture and conquest. The submission was voluntary, and if they dislike the laws, they had to only cross a ditch, and were no longer subject to them…".

But there is evidence to show that the Supreme Court did not disregard the indigenous laws in matters of marriage and succession. Chief Justice Impey gave an assurance to the Indians that the court would administer to them their own laws. In a Patna case, the court did apply the Mohammedan law of succession to the parties concerned as they were Muslims. There are cases on record in which the Supreme Court invoked the help of the Indian Law Officers of the *Sadar Diwani Adalat* to throw light on controversial points of Hindu or Muslim Law.

However, when in 1781, Parliament considered the question of amending the Regulating Act, it was realized that the matter of applying to

the Hindu and Muslim inhabitants of Calcutta their respective personal laws must be placed beyond any shadow of doubt. "What is the object or public expediency in presenting native Indian subjects with English Laws and courts? Is it on the supposition that they have no laws of their own?" This was the question raised and, consequently, S.17 of the Act of Settlement, 1871, directed that the questions of inheritance and succession, and all matters of contract and dealing between party and party should be determined in the case of Mohammedans and Hindus by their respective laws, and were only one of the parties should be a Mohammedan or Hindu "by the laws and usages of the defendant." Similar provisions were introduced in the course of time in Madras and Bombay when these towns came to have first the Recorder's Courts and then the Supreme Courts. In all matters not covered by S.17 of the Act of Settlement, or other similar provisions made in Bombay or Madras, the Hindus and Muslims were governed, as any British subject, by the English law. The proposition was reiterated again and again that the English Law would be applied to the Hindus and Muslims, as to the British subjects, in all matters except those falling within the specific exception of the Act of Settlement, 1781, and other similar provisions.

S. 17 of the Act of 1781 constitutes the first express recognition of Warren Hastings' rule in the English statute law ". But the two provisions, S.17 and rule XXIII of Warren Hastings, differed from each other rather fundamentally. S.17 reserved the indigenous personal laws to the Hindus and Muslims only in two classes of cases- inheritance and contract, while the provision in the Warren Hastings Scheme had much wider coverage. It included marriage, caste and other religious usages and institutions but it did not include contract and dealing which were mentioned in S. 17.

However, as regards the application of the personal laws to the two communities, the Supreme Court interpreted S.17 benevolently, in a liberal and not in the literal sense, and did not restrict the application of the Hindu and Muslim laws only to the two titles specifically mentioned, viz., inheritance and contract, but gave the benefits of these laws to these communities in all family and religious matters.

As in the famous case of Tagore V .Tagore, which arose out of a will made by a Hindu, the Privy Council held that the questions presented by the case must be dealt with and decided according to the Hindu law prevailing in Bengal to which alone the property in question was subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property or the right of inheritance or succession thereto." Various complicated rules which had been established in England were wholly in applicable to the Hindu system because in the Hindu law of

inheritance, "the heir or heirs are selected, who are most capable of exercising those religious rites which are considered to be beneficial to the deceased." But the Privy Council went on to observe: "Whilst, however, rules of detail prevailing in England were to be led aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character….as to which there is no precise authority." At another place, the Privy Council said that "the anomalous law which has grown up in England of a legal estate which is paramount in courts of equity does not exist in and ought not to introduced into Hindu Law." In another case, Bhooobun Moyee *vs.* Ram Kishore,[39] the Privy Council held that the testamentary power of disposition by the Hindus was established in Bengal, "but it would be to apply a very false and mischievous principle if it were held that the nature and extent of such power can be governed by analogy to the law of England," and applied to the wants of a state of society widely differing from that which prevailed amongst the Hindus in India.

One confusing aspect of S. 17 of the Act of 1781 was that when the parties to a suit belonged to different persuasions, then 'the law of the defendant' was to apply. What exactly was the significance of the phrase 'law of the defendant'? The courts did not find it very easy to define what these words did really mean. Did the words mean that a Hindu should lose his law of inheritance whenever he entered the court as a plaintiff to enforce a claim against a non – Hindu? "Whatever their proper construction," observed the Calcutta High Court, "it is clear that they do not mean this, that when a Hindu purchases land from a European, in which the vendor has only a limited interest, the Hindu purchaser is to be in any better position as regards his purchase than a European purchaser would be.[40] The Madras High Court stated that the phrase "law of the defendant" does not mean that whenever the defendant in a suit is a European British subject no law but the law of England shall be applied to ascertain the validity of any past transaction which may be brought under consideration in the suit.[41] It would appear to be reasonable that in a case where the deceased was a Hindu, the Hindu law of succession should be applied to his property irrespective of the race or religion of the defendant. Similar would be the case with respect to a Muslim. Nevertheless, the phrase 'the law of the defendant' made 'the rule of law' uncertain and the courts had to decide from case to case as to what law to apply.

The Presidency Towns also contained several other classes of persons, besides Hindus, Muslims and the British. There were Armenians,

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[39] 10 M.I.A. 279

[40] Sarkies case, I.L.R. 6 Cal at 806

[41] Azimunnissa Begum V. Dale, 6 Mad. H.C. 455 (1871)

Portuguese, Christians, Jews, Anglo-Indians and Parsees. To all those who were neither Hindus nor Muslims the Supreme Court applied the English law, for no reservation of any kind of law had been made in their case. The Act of 1781 reserved the personal laws only for the Hindus and Muslims and for no other group specifically. In this situation, the Supreme Court could do nothing else but apply the English law to all other groups of people. This point was clarified by the Calcutta Supreme Court in *J.S. Jebb v. C. Lefevere & Caroline,*[42] where it applied the English law to the property of a Portuguese descendant situated in Calcutta. The Court held that there were only three systems of law which it administered, viz., the English, Hindu and Muslim. All classes of persons who were neither Hindus nor Muslims were liable to the English law only. Apart from the Hindu and Muslim laws, there was no law other than the British law which could be recognized by the Supreme Court as affecting descent of land in Calcutta. In *Jacob Joseph v. Rowand Ronald*,[43] the Calcutta Supreme Court held that the lands of the Americans must be dealt with according to the English Law. In *Emin v. Emin*,[44] the Court applied the English law to the Armenians. In this case, it held that the widow of an Armenian inhabitant of Calcutta at the time of his death was entitled to dower out his lands in the mofussil. By a majority, the Court held that it had no jurisdiction to administer any other personal law except the Hindu and Muslim laws and since the parties and the property were alike subject to the jurisdiction of the Court, and the parties were not within the exception, the English law was the only law which the Supreme Court was competent to administer between them. The Calcutta High Court held in *Sarkies v. Prosonomoyee Dossee*[45] that an Armenian widow could claim dower out of the lands which her husband had sold in his life time. The Court stated that the English law of dower had always been recognized as a part of the law of inheritance in India and that the Armenians were subject to that law.

In 1844 in *Gardiner v. Fell*,[46] it was held by the Court of Chancery in England that the descent of lands in the mofussil of a British subject was governed by common law. Applying this in the Martin suit, the Privy Council held that the English law rather than the French law was to be applied in a suit in the Supreme Court involving the question of the right to exercise testamentary power over lands in the mofussil by a French man having a British domicile.[47] The law applied uniformly to the parsees in the Presidency Towns was the English law.

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[42] Ind. Dec. (O.S.),1, 92
[43] Ind. Dec. (O.S), I, 68 (1818)
[44] Cited in Stephen V. Hume, Ind. Dec. (O.S) I, 778
[45] I.L.R. 6 Cal. 794 (1818)
[46] I M.I.A.299
[47] Mayor of Lyons v. E.I. Co., I M.I.A. 175

In *Musleah* vs. *Musleah*[48] the Supreme Court considered the question of law applicable to the Jews. Here Musleah, a Jew, subject to the jurisdiction of the Supreme Court, died leaving behind lands both in Calcutta and the mofussil. The question was how his lands in the mofussil were to descend and what law the Supreme Court should apply in such a situation. A cleavage of opinion arose in the Court, and this illustrates rather forcefully the difficulties of administration of justice in those days of the uncertainty of the law. In a forceful dissent, Justice Grant disagreed with the majority view and held that the Jewish law should apply to the case as regards immovable property in the mofussil. The real property in the mofussil, he said, should go according to the *lex loci rei sitae*. The mofussil courts, on the basis of "justice, equity and good conscience," would apply Jewish law and so the same law should be applied in the Supreme Court as well. Peel, C.J, agreeing with Seton, J, however held that the lands in question "descend according to the course of the English law." He emphasized that in the Supreme Court the law of descent was the same for all except the Hindus or Muslims. "The general law of this Court is the English law. The exceptions are statutory, and introduction of those very exceptions proves that general law" and that a "British subject has no privilege in this Court to have a special law applied to his case". Accordingly, it was held that eldest son would exclude the younger children from inheritance as to the lands.

Peel, C.J further ruled as to the mofussil lands that there was no *lex loci rei sitae*, and therefore they were bound to decide by the *lex fori*. On the question of jurisdiction of the Supreme Court to try causes relating to the lands in Bengal Bihar and Orissa he said:

> *The local boundaries of Calcutta circumscribe its jurisdiction over persons, not over things. The laws by which it is to decide are prescribed. It has no discretionary power, it is not a Court of conscience, and must decide by those laws alone which are ordained for it. The general law of the Court is the English law. The exceptions are statutory, and the introductions of those very exceptions prove the general rule.*

Detailing the difficulties which the Supreme Court would have to face if Justice Grant's view was accepted, Peel, C.J. made the following graphic observation:

That lands unaffected by any *lex loci* should be on one side of a ditch, and (being in no sense extraterritorial) be declared to go in one course of descent by a Court; and that the same Court in the same suit should declare that lands on the other side should go in another course of descent; that it should decide one law for British subjects, and another for Europeans, not of British origin, one law for the Armenians and another for the Jew and

[48] Ind. Dec. (O.S) I, 894

another for the Parsee, and that it should be forced to collect the law on which it should decide like the facts by reference to testimony, all these must be admitted to be most grave inconveniences.

The above decision in the *Musleah* case was delivered in 1884. In 1885, on the equity side of the Supreme Court, a petition for rehearing of the case was filled and decision was given.[49] The main question considered was the question of law applicable in the case and the Supreme Court reiterated that it would be the English Law. The former decision was unanimously affirmed. It was held that there was no *lex loci* in the mofussil and, therefore, the Court would have to apply the English law.[50]

The Privy Council ruled in 1856 that the English Ecclesiastical law was not applicable to the non Christians.[51] The effect of this ruling was that in the Presidency Towns, there was no forum and no law to give relief to non Christians (other than the Hindus and Mohamedans) in matrimonial cases.

7. *Evolution Of Civil Law: Mofussil*

A survey of the process of evolution and development of law, as that of the system of *adalats*, in the mofussil of Bengal, Bihar and Orissa, has to start with the Warren Hastings plan of 1772. This plan introduced a semblance of judicial system in Bengal, Bihar and Orissa. Under the plan, a system of judicial tribunals, known as *adalats* was created for the first time. As regards the law to be administered by the *adalats*, the plan of 1772 was not by any means of elaborate or complete .There was only one notable provision to deal with the matter, viz., Article XXIII, which provided that in suits regarding inheritance, marriage, caste, and other religious usages and institutions, the laws of Koran, with respect to the Mohammedans, and those of the Shastras with the respect to the Gentoos, shall be invariably adhered to." And further, that "on all such occasions, the Maulvies or Brahmins shall respectively attend to expound the law, and they shall sign the report, and assist in passing the decree".

The chief merit of this provision was that it prescribed Hindu law and Muslim law for Hindus and Muslims respectively for certain types of disputes. Otherwise, it was an extremely sketchy provision and the scheme of law laid down did not amount to a good or a satisfactory system of law. It was defective, incomplete and had very serious limitations. It expressly prescribed the law only for a few topics, viz. inheritance, marriage, caste and other religious usages and institutions. These did not by any means exhaust

[49] The bench consisted of Colville, C. J., Buller and Jackson, J. J.
[50] Ind. Dec. (O.S), III, 140.
[51] Perozeboye *vs.* Ardaseer Cursetjee, Ind. Dec. (O.S) IV, 53.

the whole field civil litigation. It was not stated what law was to be applicable to matters other than those mentioned specifically. No provision was thus made for many other heads of litigation, such as, contracts, debts, torts, etcetera. This was a serious gap.

The rule in question applied only to the Hindus and Mohammedans. But, besides these two large cases, there were many categories of persons like Parsees, Christians, who had their own peculiar laws and usages in many cases connected with religious beliefs. It was nowhere mentioned as to what law was to be applied to such persons. The reason for the failure to prescribe any specific laws for these classes was perhaps ignorance on the part of early British administrators of the actualities of the Indian scene.

Then there was the question of law applicable to such groups as Jains, Buddhist, and Sikhs etcetera. A number of religious groups have sprung up and developed, at various periods and various circumstances, out of the two main classes. Nothing was said of the law applicable to these people. The early British administrators had no clear idea of existence of these groups at the time the first judicial plan was introduced. For quite sometime, therefore, the question of law applicable to the groups continued to be a subject of debate and discussion in various courts. It was only late in the day that the various groups came to be recognized by the courts and the position viz- a- viz the law to be applied to them became crystallized by a course of judicial decisions. Some of these groups even came to be mentioned specifically in later legislation when legislators had gathered more complete knowledge about their existence. Thus, the Hindu Wills Act, 1870, was made applicable to the wills of a Hindu, Jain, Sikh or Buddhist. The Married Women's Property Act 1874, distinguished among Hindus, Mohammedans, Buddhist, Sikhs and Jains. The Special Marriage Act 1872 was enacted to provide a form of marriage to persons not professing the Christian, Jewish, Hindu, Mohammedans, Parsee, Buddhist, Sikh or Jain religion.

There was also question of law applicable to the many creeds, sects and sub sects of the Hindus or Muslims. There was also a question of recognition of various schools and sub schools of the Hindu and Muslim laws. There was vagueness also regarding the interpretation of the terms, "law of Koran" and the "law of Shastras". What did these terms imply? Did these terms include customs and other sources of law apart from the Koran and the Dharmasasthras?

The scheme of 1772 was adapted to the manners and understanding of the people and the exigencies of the country adhering as closely as possible to their ancient usages and institutions. In the first place, the bulk of Indians

had been given the advantage of their own indigenous system of law in all their family affairs. In the second place, the introduction of English law as such in the mofussil was avoided - a very essential point of civil liberty for a nation that, as far as possible, its own law should be preserved to it. To enforce on the people a code borrowed from a nation in a totally different stage of civilization was a greater hardship than to allow anomalies and imperfections of their own laws to continue. The success of any system of law depends on how far it is consistent with the manners and usages of the people among whom it has to operate. The greatest objection against imposition of English law on the Indian people was that the English Law of the 18th century was extremely technical.

It may however, be noted that although the English law was not introduced as such into the mofussil initially, the seeds for the reception of the English forms and norms had however been sown. English man had now come on the scene as judge. The Courts had to have more formal procedure, better defined jurisdiction and a hierarchy of appellate courts. These elements were undoubtedly British in character. Above all, from 1781 onwards, appeals from the *sadar adalats* were permitted to go to Privy Council, and this established a direct link, a bridge, between the mofussil judicature and the British legal system, and, in course of time, India gradually came under the influence of the English Law.

Another act of 'enlightened policy' on the part of Warren Hastings in 1772 was to give equal status to the Hindu law and Muslim law. During the Muslim rule, the Hindus had the status of *zimmies* -"infidels who inhabited a country which had fallen to a Moslem conqueror but who had been left in comparative freedom on terms of a land tax and a poll tax". The Muslim law and not the Hindu law was the law of land. The Hindus were left free to observe their own laws and customs, and regulate their family matters according to their own law and customs but without the help or aid of the state. Their cases were usually determined by their own pandits or panchayat or jurors. They had to resort to arbitration or panchayats to resolve their disputes as they had no courts to resort to since the courts of the land applied the Muslim law not the Hindu law. The attitude of the Muslim Government was permissive, one of tolerance towards the Hindu law, but it did not actively assist the Hindus in having their disputes resolved through any formally established forum. In this context, it was an act of courage and understanding on the part of Warren Hastings to give to the Hindu law a status equal to that of Muslim Law.

The Warren Hastings plan as noted above prescribed Hindu law and Mohammedan law for certain topics only. It gave no guidance to the courts as to how they were to decide several other heads of litigation like

contracts, torts etc. To cover these matters, Sir Eligh Impey, as the sole judge of *Sadar Diwani Adalat*, had it prescribed through a regulation in 1780 that in all cases for which no specific directions are hereby given, the judges of the *Sadar Diwani Adalat* should act according to justice, equity and good conscience. A similar rule was made applicable to the *mofussil diwani adalat* in Bengal, Bihar and Orissa in 1781. In this way, the gaps in the judicial scheme of 1772 were sought to be filled by introducing a concept of justice, equity and good conscience. These few rules designed by Warren Hastings and Impey thus regulated the question of substantive law to be applied by the a*dalats* in the discharge of the judicial functions. This completed, for the time being, the scheme concerning 'the rule of decision' which the *adalats* were to apply in adjudicating upon disputes coming before them. This scheme remained in force and regulated the administration of justice by the *adalats* for over 100 years till codification of laws was taken in hand.

When Lord Cornwallis came on the scene as Governor General and undertook a thorough reconstitution of civil and criminal *adalats* in the country, no change was envisaged in the scheme of substantive law obtaining in the *adalats*, or the rule of decision already prescribed during the Warren Hastings time. Section XXI of Regulation III of 1793 provided again that in cases coming within the jurisdiction of zilla and city courts for which no specific rule may exist, the judges are to act according to justice, equity and good conscience. Similar provisions were made for the Provincial Courts of Appeal and Sadar Diwani Adalat through section XXXI of Regulation V and section XXXI of Regulation VI respectively.

The Bengal scheme of 1793 was modified a little in 1795 in his application to Banaras when Section III of Regulation VIII enacted that in causes in which the plaintiff should be of a different religious persuasion from the defendant, decision was to be regulated by law of religion of the latter except where a European, or other person, not being either Mohammedan or Hindu should be defendant, in which case the law of plaintiff was to be made the rule of decision in all plaints and actions of a civil nature. This provision was changed in Bengal in 1832 when Regulation VII, Section 9 laid down:

Whenever, therefore, in any civil suit the parties to such suit may be of different persuasion, when one party of the Hindu and other of the Mohammedan persuasion, or where one or more of the parties to such suit shall not be either of the Mohammedan or Hindu persuasion, the laws of those religion shall not be permitted to operate to deprive such party or parties of any properties to which, but for the operation of such laws, they would have been entitled. In all such cases the decision shall be governed by the principle of justice, equity and good conscience; it being clearly

understood, however, that this provision shall not be considered as justifying the introduction of English or any foreign law or the application to such cases of any rules not sanctioned by these principles.

The intention thus was that whenever a rule of English law was applied this was to be because it happened to be an expression of justice, equity and good conscience. Thus, the maxim of justice, equity and good conscience came into vogue in 1780. It was repeatedly laid down in a number of statutes passed from time to time prescribing the scheme of law to be applied by the courts in administration of justice. For example Section 37 of the Act constituting civil courts in Bengal, Bihar and Orissa, Act XII of 1887, directs the court to proceed, in the absence of any specific rule, according to justice, equity and good conscience.[52]

The scheme of law applied by the *adalats* in the mofussil of Bengal, Bihar and Orissa was as follows:

(1) First and foremost came the Acts enacted by British Parliament. All those Acts of Parliament which were made applicable to India expressly or by necessary implication, had an overriding authority and had to be observed by all courts. However, there were only a few Acts of Parliament which deal with matters of substantive law. By and large, they deal with matters of constitutional law, government and administration.

(2) Next in importance were the Regulations promulgated by the Governor General in Council.

(3) Failing in the first and second sources, mentioned above, Hindu law or Muslim law was applied amongst the Hindus or Muslims, as the case maybe, in all suits pertaining to succession, inheritance, marriage, caste and other religious institutions.

(4) Lastly came the concept of "justice, equity and good conscience".

As is evident from the above scheme, no law was prescribed for a large segment of litigation and it was left to be decided by the *adalats* by applying the maxim of justice, equity and good conscience.

8. *Madras and Bombay: Scheme Of Law In The Mofussil*

The replica of the Bengal Scheme of 1793 was introduced in the mofussil of Madras through Regulation II of 1802. Section XVI of the Regulation provided that in suits regarding succession, inheritance, marriage, caste and religious usages and institutions, the Mohammedan law

[52] The Bengal, Agra and Assam Civil Courts Act, 1887.

with respect to the Mohammedans, and the Hindu law with respect to the Hindus, were to be considered as the general rules by which the judges were to form their decisions. According to Section XVII of the same Regulation: "In cases coming within the jurisdiction of the zilla courts for which no specific rule may exist, the judges are to act according to justice, equity and good conscience". These provisions were then enacted in the Madras Civil Courts Act, III of 1873. The innovation made in Bengal I 1832 was confined only to Bengal, and was not introduced in Madras.

In the Bombay province, the following scheme of law was laid down in Sec.26 of Regulation IV of the Elphinstone Code of 1827.

First, the Acts of Parliament were to be applied; then, in order of priority, came the Regulations promulgated by the Bombay Government; in the third place came the usage of the country in which the suit arose; fourthly, the law of defendant was to be applied. Lastly, when all the previous sources failed to give the guidance as to law applicable to the case, and the Court was to decide the matter according to justice, equity and good conscience.

It will be seen that prima facie the scheme adopted in the Bombay Province was somewhat different from the Bengal Scheme. First, there was a difference in the emphasis laid on the customs and usages of the people prevailing in the two territories. A greater care had been taken in the Bombay scheme to give effect to custom in preference to the ancient text of the religious law.[53]

Another difference between the Bombay scheme and the Bengal scheme would appear to be that whereas in Bengal, personal laws were reserved only for Hindus and Muslims specifically, in Bombay the words law of the defendant would refer to any caste, community or group and, thus, the personal law of every identifiable religious or racial group was preserved in the Bombay Province. Thirdly, while in Bengal, the personal law only reserved for a few heads of litigation, in the Bombay scheme there was no such restriction and the personal law could be applied to all sorts of claims. But these differences between the Bombay Scheme and the Bengal Scheme were more superficial than real. In practice, the Courts gave to customs the same place in the Bengal as was prescribed for them in the Bombay province. In practice, therefore, the scheme of law in the mofussil of the three presidencies was more or less uniform.

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[53] A similar principle was applied to the Punjab which was pre-eminently the land of customary law, and where neither the sacred text-books of the Hindus nor those of the Mohammedans supplied a safe guide to the usages actually observed.

That there was a fundamental difference between the provisions made for the Presidency towns and those made for the mofussil laying down the law to be applied by the courts to decide disputes can be illustrated by the reference to the contract law. In the Presidency Towns, indigenous personal law were reserved to the Hindus and Muslims only in the two types of cases - inheritance and contract. In the Presidency Towns, Hindu law of contracts was to be applied to the Hindus, Muslim law of contract to the Muslims and the English law to all others. There could thus develop at least three systems of contract law in the Presidency Towns.

In the mofussil, while the personal law of the two communities was made applicable to all the religious matters, contract cases were to be decided according to justice, equity and good conscience. Thus, in the mofussil, under the maxim 'justice, equity and good conscience' courts could apply personal law of contract, or any relevant customs, to the parties concerned.

It will thus be seen that seeds were sown through these provisions for the development of several channels of contract law of the Presidency Town and the mofussil. There could thus develop as many system of contract laws there were communities inhabiting the mofussil. Such a development would have been extremely chaotic and mischievous. The judicial process, however, kept under control the mischief which might have otherwise arisen out of these provisions. Not so many systems of contract law were ever developed or applied by the Courts in practice. The Supreme Court applied the English law of contracts to all rather than the personal law of the parties. In the mofussil also, the same practice developed.

Warren Hastings initiated and tenaciously pursued the policy of application and preserving the personal laws for Hindus and Muslims. His policy of preserving the indigenous Indian laws came to be increasingly appreciated and eulogised. He was convinced that it would be a great evil to impose on the Indian people a foreign legal system. The first step towards ascertaining the personal laws of Hindus and Muslims were undertaken by Warren Hastings. He also commissioned the compilation of codes for the personal laws of Hindus and Muslims.

A wrong notion appears to have gone abroad that the Hindus and the Muslims did not have any definite system of laws and that, whatever laws they had, were all mixed up with superstitions and nothing else. Warren Hastings worked very hard and succeeded in removing the misapprehension from the minds of the powers to be in England.

Cornwallis, who succeeded Warren Hastings, reiterated and pursued the same policy of preservation and application of the personal laws of the indigenous population. In course of time, Hastings's policy of preserving the indigenous Indian laws came to be pursued and recognised for ensuring the stability of the British Government in India. It was pointed out that a similar policy had led to the success of the Romans who not only allowed their foreign subjects the free exercise of their own religions and administration of their own laws, but sometimes even naturalised such parts of the mythology of the conquered as were in any respect compatible with their own system.

To a very great extent the scheme holds good even today after a lapse of nearly two hundred and fifty years. The personal laws govern such areas like marriage, adoption, joint family, debts, inheritance and partition, succession, dower, divorce, etcetera.

9. *Hindu Law And The Courts*

The real work of ascertaining and defining the system of Hindu law was performed by the courts, especially the Privy Council. While in the earlier stages of decision making the Privy Council and other courts had to consider the original texts very often, as a result of the judicial process, in course of time, principles of personal laws became identifiable and ascertainable, so much so that a time came when, barring a few exceptional points of first impression, practically all the disputes under the personal laws could be decided by reference to the case-law without the need always to go to the original source. The Hindu law as administered in this country is not as given in the original text, but as declared by courts of law.[54] The courts have thus rendered a yeoman service to the cause of personal laws. Only rarely the courts embark upon interpretation of original texts when there is no clear cut authoritative judicial pronouncement covering the point at issue.[55]

Hindu law, thus, became largely a matter of case-law, until codification after independence. But in the process, the character of Hindu law also underwent transformation at the hands of the British courts.

The Privy Council developed and formulated a number of norms to be observed by the Courts in the task of ascertaining the principles of Hindu law. The Privy Council handled Hindu law with some sensitivity. It affirmed that it approached the somewhat delicate subject "with an unfeigned desire to decide" questions of Hindu law "in harmony with the religious feelings of the Hindus" and was careful to emphasize that the "Hindu law contains in

[54] Duth Nath v. Sat Narain Ram, AIR 1966 All 315 at p.318.
[55] Shyam Sunder v. State of Bihar, AIR 1981 SC 177.

itself principles of its own exposition…Nothing from any foreign source should be introduced into it, nor should Courts interpret the text by the application to the language of strained analogies.[56] The Court emphasized that the judges ought to apply rules of Hindu law even if it appeared incongruous to the western minds to apply the same as such rules originated in "a state of society possibly simpler than, and certainly different from, the state of society existing in the present day" and went on to observe that "….they conceive it to be of the highest importance that no variations or uncertainties should be introduced into the established and widely recognised laws which govern an ancient Eastern civilisation, and least of all in matters affecting family rights and duties connected with ancestral customs and religious convictions".[57]

However the courts were faced with a number of problems in their task of expounding and applying the law. The amount of literature on Hindu law is vast and often conflicting as it represents different strata of civilisation and social growth. "Hindu law has the oldest pedigree of any known system of jurisprudence and even now it shows no signs of decrepitude".[58]

The sources of Hindu law, traditionally speaking, are the *Srutis*, *Smritis* or *Dharmasastras* and a large number of commentaries or digests. The most ancient of the Hindu law code is the *Gautama Smriti* (600 to 300 BC). This was replaced by the *Manu Smriti* round about 200 BC and the *Yajnavalkya Smriti* came about in 200 AD. The *Narada Smriti* which is dated near about the 4th century AD is the first legal code unhampered by the mass of moral and religious teaching as was the case with the earlier *Dharmasastras*. There was great difficulty in interpreting the *Smritis* because of two main reasons: (1) the uncertainty of their chronology and (2) the existence of conflicting texts, sometime in the same *Smriti*. Thereafter came the commentaries. *Vijnaneswara* wrote his *Mitakshara*, a commentary on *Yajnavalkya Smriti* in the 11th century and in Bengal *Jimutavahana* wrote his *Dayabhaga* near about 1200 AD. In Bombay, in 1700 AD *Nilkantha Bhattar* wrote his *Vyavahara Mayukha.* In many respects, commentaries differed from the *Smritis* because the commentaries belonged to a much later age. The commentaries effectuated many beneficial changes in the antiquated *Smriti* law.

The courts have rendered multitude of decisions on Hindu law over a period of two centuries and introduced order and system into this amorphous mass. The courts ascertained Hindu law by following several principles.

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[56] Bhyah Ram Singh v. Bhyah Ugar Singh, 13 M.I.A. 373.
[57] Gokal Chand v. Hukum Chand Nath Mal, 48 I.A. 162.
[58] Mayne, J. D., *Hindu Law*, first edition, 1875.

(1) The Privy Council held in *Bhyah Ram Singh v. Bhyah Ugar Singh* that 'in the event of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted' and followed the commentaries in preference to the anterior literature.[59] This was in conformity with the spirit of Hindu law itself according to which while respect was always paid to the older works, the centre of gravity of authority had always been moving towards the newer works which sought to syntheside the old dogma with the customs which had arisen in the society so as to bring the old law more in accord with the aspirations, needs and demands of the people.

The commentaries, though seeking to interpret the *smritis,* in effect, performed a more creative and meaningful function. They discarded much of what had become obsolete, they modified and supplemented the rules in the *smritis* so as to assimilate customs of the people and thus create a legal system keeping in view the facts of contemporary life. The commentators, in fact, had done their work so well that by and large they superseded the *Smritis* for all practical purposes. The Privy Council, therefore, emphasized that the duty of a European judge was not so much to inquire "whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and there has been sanctioned by usage".[60]

(2) Out of a large number of existing commentaries emphasis came to be laid by the courts mainly on two works, viz., *Mitakshara* of *Vijnaneswara* and *Dayabhaga* of *Jimutavahana. Vijaneswara's Mitakshara* freed Hindu law from its religious fetters and he made it readily acceptable to all communities in all parts of India.[61] The Privy Council in *Buddha Singh v. Laltu Singh*[62]paid high tribute to *Vijnaneswara* by observing "…the work of this great jurist whose logical acumen, judging from his work, seems to have been remarkable". *Jimutavahana* wrote his *Dayabhaga* in the 13th century and is the prevailing authority in Bengal. These two works were given great respect by the British courts in the administration of justice. Other works were used only to clarify the ambiguous points in these works or to supply the deficiencies therein or to establish that in a particular sub school of *Mitakshara*, a different rule had

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[59] See also Atmaram Abhimanji vs. Bajirao Janrao, 62 I.A. 139; Bhagwan Singh vs. Bhagwan Singh, 26 I.A. 153

[60] Collector of Madura vs. Mootoo Ramalinga, 12 M.I.A. 397

[61] Mayne, J. D., *Hindu Law*, 11th edition, 1950, 44.

[62] 42 I.A. 208, 220

come to prevail. The Privy Council and later on the Supreme Court of India had accepted the authority of these works.[63]

(3) The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible and the courts developed a rule to separate the legal from the moral by distinguishing what was directory from what was mandatory and to give effect to the latter and not to the former.[64]

(4) The Courts in British India came to give a place of importance to custom. Custom was given precedence over all the purity of the Hindu legal doctrine. The living law was assimilated with the traditional law and the system which developed as a result of this amalgam was more in accord with the contemporary values cherished by the people. Custom acted as an in-built source of change in law. Custom became an important source of law and large volume of case-law arose around various customs. Custom was given preference over the religious law of the parties. This could be regarded as a just and reasonable approach for, in practice, the law of the *Shastra was not observed by the people in all its pristine purity, and all kinds of customs had become ingrained into the daily life of the people.* It was just and equitable that the law which the people observed in practice be enforced rather than the theoretical law contained in the religious books, about which they did not know much. It would have been harsh on them to force them to forego their customs which constituted the living law for them to force them in favour of the orthodox system of law. The courts adopted a tolerant attitude towards the customary law of the people. Taking note of the great importance accorded to custom, which *Narada* declared as 'decisive and overrules sacred law', in the traditional Hindu jurisprudence, the Privy Council ruled that "under the Hindu system of law, clear proof of usage will outweigh the written text of the law."[65] There were certain territories in India, like Punjab, Oudh, Kumaon Hills, Central Provinces, called the non-Regulation Provinces, were the sacred books of Hindus had not penetrated and had not had much impact on rural life and accordingly these areas were predominantly under the influence of customary law rather than the *Shastric* law. In these areas, custom was specifically made the first rule of decision. If no custom was proved, then the personal law was applied. In Kangra in Punjab, adoption of a married man was held valid under the custom prevailing in the area.[66] This approach was in accord with the genius of the Hindu law which always gave high regard to custom in ancient India.

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[63] Bhagwan Singh vs. Bhagwan Singh, 26 I.A. 153 (1898) and Shyam Sunder vs. State of Bihar, AIR 1981 SC 177.
[64] Balwant Singh vs. Ranikishori, 25 I.A. 54 and Sri Balusu Gurulingaswamy vs. Sri Balusu Ramalakshmamma, 26 I.A. 113; Bal Gangadhar Tilak v. Shriniwas Pandit, 42 I.A. 135.
[65] Collector of Madura vs. Mootoo Ramalinga, 12 M.I.A. 397, 436 (1868).
[66] Brij Lal vs. Tulsi, AIR 1970 Delhi 116.

During the British administration custom came to be given a place of honour and pre-eminence in the administration of justice. The courts gave the utmost scope to custom in administering justice to Hindus. All types of customs, like, general, tribal, community based, sectarian, local, family[67], etc. were applied. Through the process outlined herein, the courts helped in the evolution of a definitive system of Hindu law. The courts played a selective, creative and not merely a mechanical role in ascertaining the principles of Hindu law.

After independence, the Supreme Court of India also adopted the view that the textual rule can be over ridden by custom. The orthodox view against a *sudra* taking a religious order has been held to have been overridden by the existing practice.[68] Custom is considered to have the same force of statutory law and after the Constitution of India came into effect custom is tested for its constitutional validity in the context of fundamental rights.[69]

10. *Muslim Law And The Courts*

The judicial process in the sphere of Muslim law has been no less significant than in the case of Hindu law. The Courts not only ascertained the Muslim law from the ancient sources to the best of their ability but at times also sought to introduce though to a much lesser extent than in the case of Hindu law, notions derived from the English equity and law. But any such attempt was always frowned upon by the orthodox opinion and the Muslim jurists criticised such judicial pronouncements.

A Muslim jurist characterises the judicial process in the area of Muslim law as follows:[70]

"If we analyse the rulings, the result may be thus summarised. In the domain of law governing domestic relations and succession, the courts have allowed themselves much narrower margin of freedom, if any freedom at all, in applying the rules laid down in books written by medieval writers to the altered circumstances of modern world than in matters relating to dispositions of property, such as by gift, wakf or will".

In several pronouncements, the Privy Council laid down guidelines for the courts to follow while ascertaining the rules of Muslim law[71] and warned of the danger of relying upon ancient texts and even precepts of the

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[67] Shiba Prasad Singh v. Prayag Kumari, 59 I.A. 331 (1932) the Privy Council observed, "but where a family is found to have been governed as to its property by a customary rule of succession different from that of the ordinary law, that custom is itself law…".

[68] Krishna Singh vs. Mathura Ahir, AIR 1980 SC 707.

[69] Bhan Ram vs. Baij Nath, AIR 1962 SC 1476.

[70] Rahim, Mohammedan Jurisprudence, 44.

[71] Abdul Fata vs. Russomoy Dhur Chowdhry, 22 I.A. 76.

Prophet himself, taking them literally and deducing from them new rules of law especially when such proposed rules do not conduce to substantial justice.[72]

The Privy Council leaned heavily towards an orthodox and dogmatic view of the law. Such an approach did not leave much leeway to the courts to interpret the law liberally and the Privy Council eschewed the idea of playing a creative role by way of moulding the old law to the present day notions of justice and equity. The Privy Council made Muslim law rigid by adhering to the views of the old commentators and ignoring the views of the present day jurists seeking to interpret the old texts in the light of contemporary circumstances.

It would be pertinent to point out that the Muslim law grew and remained flexible so long as the doctrine of *ijtihad* (use of independent reasoning) prevailed. But by 10th century 'the gate of *ijtihad*' was closed. I*jtihad* gave way to *taqlid* which means "follow or imitate" the doctrines of the predecessors and the right of independent inquiry was denied and the doctrine of *taqlid* became binding. The Privy Council followed the doctrine of *taqlid* and rejected the notion that the rules of *Shariat* law can be interpreted by independent interpretation of the basic texts.[73]

In India, the courts have mainly relied on the *Hedaya* and the *Futawa Alamgiree* as sources of Muslim law and these were regarded as the paramount authorities in Hanafi law. Chronologically *Hedaya* came first and *Futawa Alamgiree* came later. A majority of Muslims in India belong to the *Sunni* class and there were only a few *Shia* families or groups. The rule in the Warren Hastings Plan of 1772 or the Cornwallis Plan of 1793 did not clarify the position as the former used the expression "law of the Koran" and the latter used the expression "Mohammedan Law" and when the question arose whether the shias were entitled to their own law the Privy Council noted that in India Sunni law had generally prevailed in the courts so far because the great majority of the Indian Muslims were Sunni but asserted that there isno practice which excludes the application of the shia law to the rights of persons professing the tenets of that sect. The natural and equitable construction of the Regulations must therefore prevail. The Regulation of 1793 was therefore interpreted so as to apply the law of each sect.[74]

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[72] Baker Ali Khan vs. Anjuman Ara Begum, 30 I.A. 94, 111-112
[73] Aga Mahomed Jaffer Bindaneem vs. Koolsom Bee Bee, 24 I.A. 196
[74] Rajah Deedar Hossein vs. Ranee Zuhooroon Nissa, 2 M.I.A. 441

11. *Justice, Equity and Good Conscience*

The maxim 'Justice Equity and good conscience was introduced for the first time in Bengal in the year 1780. It was later transplanted in the mofussil of Bombay and Madras Presidencies. Gradually, the maxim was introduced into other territories of India as and when judicial system was introduced there.

S. 5 of the Central Provinces Laws Act, 1875 provided that in questions regarding certain topics, the Hindu law had to be applied in cases where the parties were Hindu and the Mohammedan law in cases where the parties were Mohammedans. According to S.6 in cases not provided for by S.5 or any other law for the time being force, the courts were to act according to "justice, equity and good conscience. In the North-West Frontier Province, the question of law was governed by the North West frontier Province Law and Justice Regulations. S. 27 of Regulation VII prescribed that decisions in certain matters would be according to the law of the parties concerned. S.28 laid down in the cases not otherwise specially provided for, the judges were to decide accordingly to justice, equity and good conscience. In Punjab, the doctrine of justice, equity and good conscience was introduced by the Punjab Laws Act 1872. According to the Privy Council, the maxim of 'justice, equity and good conscience' was adopted as the ultimate test for all the provincial courts in India.[75]

The maxim constituted the residual source of law. The general scheme of law was that if on the particular point of dispute before the court, there was no parliamentary law, no Regulation, and if it fell outside the heads for which Hindu and Mohammedan laws were prescribed, then the court was to decide the matter according to "justice, equity and good conscience".

Only as much of personal law was applied to matters not specifically mentioned in the scheme of 1772 was not deemed inconsistent with justice, equity and good conscience. It was on the same basis that the Muslim Law of gifts came to be applied to the Muslims. The Muslim law of pre-emption came to be recognized in UP and Bengal on the ground of equity.[76] In the Madras, however, the High Court refused to enforce the law of pre-emption on the ground that it was not consistent with equity and good conscience because it was opposed to the principle of personal freedom of contract administered in Madras.[77] Similarly, the Bombay High Court refused to apply the law of pre-emption in Bombay except Gujarat on the ground that

[75] Muhammad Raza vs Abbas Bandi, 59 I.A. 245.
[76] Gobind Dayal vs. Inayatullah, I.L.R. 7 All. 775 (1885).
[77] Ibrahim vs. Muni Mi, 6 Mad. H.C.R. 26 (1870).

local conditions of UP and Bengal were not reproduced in the Bombay Presidency.[78]

Custom prevailing in the country formed another source upon which the courts could draw for principles to decide cases within their 'discretion' under the maxim of justice, equity and good conscience. In the absence of any other more authoritative source, the courts thought it quite proper and legitimate to look to the customs of the parties, place, family, community, tribe or class to the extent it might be feasible in the particular case. But, there were not many customs operating outside the area of personal laws. In course of time, however, a new orientation began to be given to the maxim 'justice, equity and good conscience'.[79]

The Court started interpreting the maxim to mean English law so far as applicable to the Indian situation. This trend was very much encouraged by a two developments in the 19th century. The first was the advent of the High Courts in 1862 which consisted of English men as the judges who were barristers and thus were trained in the English law. They had a natural bias in favor of their own law and, therefore, whenever they came across this situation which they had to decide according to justice, equity and good conscience, to which no local custom was applicable, they invariably began to base their decisions on the rules of English law with which they were acquainted. The process of reception of the English law in the mofussil became inevitable with the arrival of the scene of the English barristers-judges. The second factor to help this trend was the activisation of the Privy Council as the ultimate court of appeal from India from 1833 onwards. The intimate association of the Privy Council with the Indian judicature affected the latter very profoundly. The Privy Council acted as a channel through which English legal concepts came to be assimilated with the body and fabric of Indian law. Emphasizing the role of Privy Council in this respect, Setalvad has observed.[80]

As the companies territories became enlarged by settlement and conquest the Privy Council, as the highest court of appeal from the decisions of the Indian Courts, became a growing difference in the application of the basic principles of English jurisprudence as the rules of decision all over the country. It was natural, perhaps inevitable, that the eminent English judges who presided over the tribunal should attempt to solve the problems that

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[78] Md. Beg vs. Narayan, AIR 1929 Bom 225.

[79] The courts made references to Roman law, Laws of Continental Countries, English law and finally Natural law. In R.A. Roy vs. R.K. Debea, Ind. Dec. (O.S) 15, 114 citing parallel maxims both from Common Law and Civil Law, the Court said, "these maxims commend themselves so thoroughly to our reason and our sense of justice that they must be held to be of universal application".

[80] The Common Law in India, 31-2 (1960).

came before them wherever Indian regulations no statutes contained no provisions applicable to them by drawing upon the learning on which they had been brought up and the rules and maxims to which they had been accustomed for life time. This explains why from the earliest times the decisions of this tribunal in appeals from India have resulted in a steady and continuous grafting of the principles of common law and equity into the body of Indian jurisprudence.

Thus, slowly and gradually, step by step, English law began to infiltrate into India. The wide door of 'justice, equity and good conscience' made it possible for the courts to fill in the vast gaps and interspaces existing in the substantive law of the country with the principles underlying the English common law and statute law. The process was inevitable with the domination of the Indian judicial scene by the English Barrister-judges. The position became established through a number of judicial pronouncements of High Courts and the Privy Council that 'justice, equity and good conscience' meant the rules of English law so far as they could be regarded as applicable to the Indian circumstances. Thus, the process of reception of English Law in India commenced. But this was subject to an overall condition of suitability to India. The Privy Council always kept the following question before it: "… how far a rule established in this country (England) can be usefully applied in another whose circumstance, historical, geographical and social are widely different?" The Privy Council cautioned: 'in proposing to apply to the juristic rules of a distant time or country to the conditions of a particular place at the present day regard must be had to the physical, social and historical conditions to which that rule is to be adapted".[81]

An important point to note is that in India, unlike England, no separation was ever maintained between courts administering law or equity. In India, law and equity were treated as a part and parcel of one and the same system of law. In the mofussil, under the rubric of 'justice, equity and good conscience' the courts applied both English common law and English equitable doctrines under the overall conditions of suitability. Thus, the courts combining both law and equity jurisdiction brought about a fusion between the two much before the same could be achieved in England. What thus came to be applied in India was common law liberalized by equity. The Indian law did not recognize any dichotomy between legal and equitable estates or interests.[82] The Privy Council said "the law of India speaking broadly knows nothing of the distinction between legal and equitable property in the sense in which it was understood when equity was observed

[81] Srinath Roy vs. Dinabandhu Sen, 42 I.A. 221, 241, 243.
[82] Tagore vs. Tagore, (1872) I.A. Suppl. 47, 71.

by the Court of Chancery in England. In India, therefore, there could be one owner and if the property was vested in a trustee then he was the owner.[83]

At times, there arose a tussle between legal and equitable principles creating a lot of confusion in the law relating to property. Till the year 1858, the Madras Sadar adalat followed the rule that mortgage came to an end in accordance with the intention of the parties and that in India there was no principle analogous to the British equitable doctrine of equity of redemption. In 1858, the current of decisions changed suddenly and the Sadar Adalat started applying the principles of equity of redemption.[84] The same thing happened in Bombay from 1864 onwards.[85]

The Privy Council frowned on this change in judicial opinion in India and refused to countenance the same and to apply the doctrine of equity of redemption in Madras on the ground that it had never been applied by the courts, and that the ancient Hindu law did not recognize any such rule. Said the Privy Council: "Such a doctrine was unknown to the ancient law of India; and if it could have been introduced by the decisions of the courts of the East India Company, their Lordships can find no such course of decision. In fact, the weight of authority seems to be the other way".[86]

But some observations by the Privy Council let the courts in the India to believe that the Privy Council ruling was not obligatory on them and hence they continued to apply the principle of equity of redemption.[87]

However, the Privy Council reaffirming the ruling in Pattabhiramier again criticized this change in the judicial opinion saying that the judges took upon themselves, in contravention of the laws of India as enforced by the decisions of the predecessors, to apply for the first time the principle of equity of redemption.[88] It characterised this as "assumption by the courts of the functions of the legislature". The Privy Council observed further …this action of the courts is open to grave objection not only because in so altering the existing law they usurped the functions of the Legislature , but also because the change as effected, involved very mischievous consequences." Because under the rule of equity of redemption, a mortgagor could claim to redeem property even after 50 years of the expiry of the agreed date of redemption. But even though the Privy Council regarded the *Pattabhiramier*

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[83] Webb vs. Macpherson, 30 I.A. 238.
[84] Venkata vs. Parvati, 1 Mad. H.C.R. 460.
[85] Ramji vs. Chiuto, 1 Bom. H.C.R. 199 (1864).
[86] Pattabhiramier vs. Vencatarow Naicken, 13 M.I.A. 560.
[87] The position was explained by the Madras High Court in Ramasami Sastrigal vs. Samiyappanayaban, I.L.R. 4 Mad. 179, 188.
[88] Thumbusawmy Moodelly vs.Mahomed Hossain Rowthen, 2 I. A. 241.

ruling as based upon 'sound principles', and the new course of decisions in Madras and Bombay 'to have been, in its origin, radically unsound', as many titles in land had come into existence on the base of new position the Privy Council reluctantly accepted the new law with respect to the post 1858 transactions, but continued to apply the old law with respect to the pre 1858 securities. But, observed the Privy Council: 'this state of the law is eminently unsatisfactory, and one which seems to called for the interposition of Legislature'. The Privy Council suggested enactment of a law to clarify the respective rights of the mortgagors and mortgagees. The doctrine of equity of redemption was incorporated in S. 60 of the Transfer of Property Act.

Under the maxim 'justice, equity and good conscience' to ascertain the applicable rule of law to a case, the courts looked normally to the English common law, but what were the courts to do when a common law principle was abrogated in England by a statute enacted by the British Parliament. Should the courts still apply the common law rule in India or refuse to apply the same and apply the statutory rule instead? The courts, often, adopted the later course. A rule of common law found unsuitable in England and replaced by the statute law could hardly be considered to be according to 'justice, equity and good conscience'. The same reason that made it unsuitable for England must be held to make it unsuitable for India.

The courts also used the 'justice, equity and good conscience' maxim in another way. Some laws were enacted by Indian legislature in course of time. These acts were made applicable to certain territories. When a question arose in a place where a specific Act did not apply, the courts could still apply the principle underlying the Act on the basis of 'justice, equity and good conscience'.

It would, therefore, be seen that the maxim 'justice, equity and good conscience' made the role of the courts unusually creative and influential though at the same time unusually difficult and complex as well. The maxim exerted a potent and deep impact on the progress, development and content of the Indian law in many branches. The decision of Indian courts proved to be a prolific source of incorporation of principles of English law into the Indian jurisprudence. In many areas, as for example, law of torts, the Indian courts lifted bodily the whole mass of English law and transplanted the same into India. As there was nothing in India to fall back upon the courts in this area, they followed the trail of English courts and the English law. This process was nothing short of judicial legislation. Throughout the 19th and the 20th centuries the influence of the English law in India continued to expand. The mofussil had been kept insulated from the impact of English law for quiet sometime, but, ultimately, this policy broke down.

The process of reception of English law through the agency of judiciary had both its strong as well as weak points. Its advantages lay in the fact that it helped in the development of number of different branches of law in India for which perhaps there was no precedent in the indigenous law. Many new patterns of human relationship were developing in the country under the impact of new economic and social forces. No guidance was to be had from the personal laws either of the Hindus or Muslims or from the customs prevailing in India; or, even if were indigenous rules, they were archaic, primitive and not suitable to the emerging social structure and conditions and, therefore, in this context the English law did provide a valuable source of legal principles. The fact that the English law was to be the reservoir to draw upon somewhat controlled the otherwise extremely broad discretion conferred upon the judges by the maxim of 'justice, equity and good conscience' and instead of borrowing legal principles at random from anywhere, and from any legal system, the judges were required to look to one source only and this introduced some element of certainty in an otherwise uncertain and fluid legal system. Also, the possibility of dichotomy of law between the mofussil and the Presidency Towns was very much reduced as English law was being used as the common source of law by all the courts. Nevertheless, some differences did come to existence in the law between the Presidency Towns and the mofussil because of the difference of the approach of the concerned courts.

The drawbacks and weaknesses of the process of receiving English law through judicial decisions were many. As the scheme of law envisaged, there was to be a selective and discriminative adoption of the rules of English law by the courts. That is, what was envisaged, for the Presidency Towns under the requirement that only such English law as was existing in 1726 was to apply as was suited to the Indian conditions and the same judicial selectivity was inherent in the maxim 'justice, equity and good conscience', with this difference that in the mofussil, the courts were not limited to English law as existing in England in 1726. Thus, it was not to be an uncritical or automatic application of any principle of English law into India. The courts had often to undergo great pains in deciding whether a particular rule of English law would be applicable in India or not.[89] A few principles of law were refused to be applied both in the Presidency Towns and the mofussil on the ground of their unsuitability to local conditions. But it was not always that the courts in India brought to bear upon the question a discriminating attitude towards the adoption of English law as were suitable to India, but even a few rules of a technical nature, or those which were the product of peculiar condition in England, were made applicable. Thus some rules of English law which were not consistent with the genius, customs, traditions, habits and institutions of the Indians found their way into the

[89] For an elaborate discussion see Secretary of State vs. Rukhminibai, AIR 1937 Nagpur 354.

country. Judicial selectivity of the principles of law to be applied was not always careful, judicious and discriminating. It was this aspect of the matter on which Maine commented in the following words: "In British India judicial legislation is, besides, in the long run, legislation by foreigners, who are under the thraldom of precedents and analogies belonging to a foreign law, developed thousands of miles away, under a different climate, and for a different civilization".[90]

In course of time, it was found to be extremely necessary and desirable that introduction of the technical rules of English law be checked in some way and for this purpose codification of the law was thought to be the most effective expedient. In a dispatch to the Government of India, the Secretary of State for India stated: "The only way of checking this process of borrowing English rules from the recognized English authorities is by substituting for those rules a system of codified law, adjusted to the best native customs and to the ascertained interest of the country".[91] There were vast gaps and interspaces in the substantive law subjects on which no rules existed.

A system of law which depends heavily for its foundation, development and exposition on case law is bound to be haphazard, uncertain and incoherent and can scarcely be satisfactory. The reasons are obvious. A large number of points will necessarily be left unsettled under such a system till the highest tribunal has had an opportunity to adjudicate on them. Further, the judicial pronouncements on similar points are not always uniform or coherent. Quite often they are likely to differ because the judges being the human are influenced by their own notions, whims and fancies. The evils of divergence of judicial views have a tendency to increase rather than diminish. Views in the same court may under go a change in course of time about a legal proposition, as for example in the area of maintenance and champerty.

As the conflicting precedents go on accumulating, the task of ascertaining the law applicable to a particular case becomes relatively more and more difficult. And, when the right to appeal is allowed to two or more courts, the uncertainty of law becomes overwhelming and necessarily entails great embarrassment to the course of proper administration of justice, because when the highest court in India had made a pronouncement on a point of law, it did not always set the doubt at rest. There were a number of occasions when the Privy Council differed from the High Courts on the

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[90] Quoted in M.P. Jain, Outlines of Indian Legal History, p. 452 cited from the Minute of Sir H.S. Maine dated 17th July 1879.

[91] Despatch from Lord Salisbury, Secretary of State for India to the Government of India, dated January 20, 1876 referred in M.P. Jain's book, Outlines of Indian Legal History.

applicability or non-applicability to India of a particular rule of English law. All this involved extra expense and delay in disposal of cases. Sir Henry Maine said of judicial legislation that "it is haphazard, inordinately dilatory, and inordinately expensive, the cost of it falling almost exclusively on the litigants".

There was in 1833, a number of Chief Courts in India, subject to the legislative power of the local Governments in the Presidencies, some established by the royal charters, and others deriving their authority from the company. Each of these courts was independent of the other and could thus put its own gloss in the law. Under such a scheme of thing, it was inevitable that there would arise a number of decisions diametrically opposed to each other, but all of equal authority, thus making the law bulky, uncertain, contradictory and inconsistent. The remedy out of the morass in the legal system was codification.

The unsatisfactory legal system existed for long. It could be improved only by the legislature but it was singularly inactive so far as the question of substantive law was concerned. But then a time came when the need to improve the legal system in India was recognized and the process of codification was taken in hand. The process of codification gained momentum after 1853, though its beginnings are traceable to 1833. Codification involves the enunciation of the law in simple, certain and definite language.

12. *Law Applicable to Non-Hindus and Non-Muslims*

The rule of 'justice, equity and good conscience' had one other ramification also from the process of reception of the English law. Besides the Hindus and Muslims, there were many other classes of people in the mofussil. The early Anglo-Indian administrators perhaps failed to perceive this and thought wrongly that the Indian native population comprised only of two broad categories, Hindus and Muslims. They did not know that there were others like Portuguese, Armenians, Christians, Parsees, Sikhs, Jews, etc. The result of this was omission on their part to specifically prescribe any law for these various groups.

In Madras and Bengal, while Hindus and Muslims were given the advantage of their personal laws in family and religious matters, no provision was made for decision of cases arising between members of these various communities; nor was it prescribed that the courts would administrate to these people their peculiar usage, customs and laws even though in many cases the usage were connected with their respective religious creeds. By the time the Elphinstone Code was on its anvil in Bombay, the British

administrators had come to have a better appreciation of the Indian scene. They came to have a better realization and knowledge of the customs, division and distinctions prevalent among the Indians. A provision was therefore made in the Code for applying 'customs of the country' and the 'law of the defendant' which phrases were not necessarily limited to Hindus and Muslims alone but covered all the various classes of people.

This formal distinction in the phraseology of the Regulation in Bengal and Madras, on the one hand, and those in Bombay, on the other, made no effective practical difference as regards the law applicable to the various groups, for the adalats in all the three provinces developed a uniform practice of applying their peculiar laws and customs. In Bombay this was done under the provisions of the Regulation, in Bengal and Madras, the same position was obtained under the maxim of 'justice, equity and good conscience; in exercise of the discretion thus conferred on the judges, they were entitled, even though not obligated, to give to the people other than Hindus and Muslims the benefit of their special laws and they did so. The courts taking a benevolent view of their functions, tried to ascertain the laws and customs of the various groups and classes of people and give effect to them in family matters.

A few cases will illustrate the position. The Calcutta Sadar Adalat decided a question of succession amongst the French in accordance with the French law.[92] In *Joanna Fernandez v. Domingo de Silva*,[93] where the parties were Portuguese, a question of succession of property was decided according to the customs and usage of the native Portuguese in India and the court took evidence to ascertain the Portuguese in India and the court took evidence to ascertain the Portuguese law of succession. In 1820, in *Aviatick Ter Stephanos v. Khaja Michael Aratoon*,[94] a question of intestate succession to the property of an Armenian dying was disposed of according to the Armenian law and the Armenian Bishop was consulted by the Adalat on the law applicable to the case. Even as late as 1842, in a case between Armenians, the Sadar Adalat applied the Armenian law and usage and consulted for this purpose the Vicar of the Armenian Church at Calcutta.[95]

Cases arising among the Parsees were decided according to the Parsi law. Thus, in *Furidoonjee Shapoorjee v. Jumshedjee Nowshirwanjee*, it was held, according to an award of the Dastur, that among the Parsis, if a son dies in his father's life time, the father was entitled to the son's property because he

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92 Durand vs. Boilard, 5 Ben. Sad. Rep.176.
93 2 Beng. Sad. Rep. 227.
94 3 Beng. Sad. Rep. 9.
95 Musleah vs. Musleah, infra.

paid the funeral expenses. In *Modee Kaikhooscrow Hormusjee v. Coover Bhaee*,[96] The Privy Council held that the question of the power of a Parsi to dispose of his property by a will must be decided by a reference to the custom of the Parsis. In a case concerning the right of a Parsi husband to contract a second marriage, the Parsi law was applied. In many cases, the adalats consulted the Parsi Panchayat as to the Parsi law applicable to a matter before them. It is interesting to note that in early days even the Sikhs were given the benefit of the Sikh law as distinguished from the Hindu law. Thus in *Juggomohan Mullick v. Saum Coomur Bebe*, a case of a Sikh dying intestate was decided by applying the Sikh law.[97] When in a case the right of a Jain by inheritance was involved, the court sought the solution of the disputed points which arose in the case according to Jain shastra by referring them to Hindu law officier of the court and the Jain pandits.[98]

No law had been prescribed for the East Indians or the Anglo-Indians - descendants of a European and a Native, half-caste as they were called. These persons followed in all matters the usage and customs of the English residents in India. In the common bond of union in religion, customs, and manners, the East Indians approached the class of British subjects. On the basis of 'justice, equity and good conscience', the company's adalats administered to these persons the English law. This course was evidently a just and proper exercise of the discretion entrusted to the courts. Elucidating the point, the Privy Council observed in the leading case of *Abraham v. Abraham*:[99]

> *The English law, as such, is not the law of those courts. They have, properly speaking no obligatory law of the forum as the Supreme Courts had. The East Indians could not claim the English law as of right; but they were a class most nearly resembling the English, they conformed to them in religion, manners and customs, and the English law as to the succession of movables was applied by the courts in the mofussil to the succession of the property to this class.*

But in *Barlow vs. Orde*,[100] a case of an Anglo-Indian having no religion, the Privy Council applied justice, equity and good conscience to the interpretation of his will rather than the principles of English law. The facts of the case were such that it would have been inequitable to apply the English law. Skinner, an illegitimate child of a native woman by a European father, left behind large property and a large number of illegitimate children.

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96 6 M.I.A. 448.
97 Moore's Digest I. 350; II. 43.
98 Maharajah Govindnath Rai vs. Gulal Chand, 5 S.D.A. Reports 276.
99 9 M.I.A. 195 (1861-1864).
100 13 M.I.A. 277:Richard Boss Skinner vs. Naunihal Singh & another, (1912-1913) 40 L.R (I.A) 105.

He was a resident in Delhi. In his Will, he bequeathed the property to 'my children' and the question was whether the term 'children' included illegitimate children or not. In English law there is a technical rule of construction that 'children' in a will do not include illegitimate children. The Privy Council had to decide whether this rule should be applied to Skinner's will. The Privy Council held that there was no *lex loci* of the province in which Skinner was domiciled; therefore, the law of succession depended on his personal status, which again mainly depended upon his religion. As a general rule, succession of an East Indian Christian was regulated by the English Law, "but in every case, for the purpose of determining the *status personalis*, regard was to be had to the mode of life and habits of the individual, and to the usages of the class or family to which he belonged." In the absence of any specific rule, judges were to act according to "justice, equity and good conscience." There was little evidence of Skinner's personal status except that he was an illegitimate Anglo-Indian following no religion. In the circumstances, the court refused to apply the English rule of interpretation and held that the word 'children' should include illegitimate children as well.

Courts applied to the English people residing in the mofussil the principles of English Law. Another category of presons for whom no law had been specifically provided were the Native Christians. Their position was very typical. These people belonged originally either to the Hindu or the Mohammedan stock, and thence they became converted. A question often arose in the courts as to how to decide their cases of inheritance and succession. Were they to be governed by law of their old religion or was some other law to be applied to them? Such question can only be rightly pronounced upon, on consideration of the usage of persons situated as the parties who are described as Christians whose ancestors are of Hindu stock, and the usage in their particular family as indicated by the acts of the parties and their predecessors, in respect of their property since they have belonged to the Christian community.[101] In India, in such cases referring the decision to the usage of the class to which the convert might have attached himself, and of the family to which he might have belonged, was considered as "most consonant both to equity and good conscience".

It is an indication of the extreme fluidity of the law as the convert could voluntarily choose the law applicable to him. Thus, the Christians were not subject to a single law uniformly, but were under different laws and usages, and at least five different laws applicable to them could be identified: Hindu law, Mohammedan law, modified Hindu law, modified Mohammedan law, some other law, and customs; and even the last category was amorphous. The court had to decide the question of law applicable to a

[101] See Abraham vs. Abraham, 9 M.I.A. 195 at 240 (1861-1864).

particular Christian by taking evidence on his conduct and mode of living after conversion which only produced extreme uncertainty of law which prolonged the litigation. *Abraham's* case also illustrates in a remarkable manner the methods adopted by the mofussil courts to decide cases arising among sections of people for whom no specific law had been prescribed. There was no uniformity of law as every case had to be decided on its own merits. The courts tried to ascertain the law of the parties coming before them, and they did this not with reference to any codes or law books, but by taking evidence to ascertain the customs prevailing among them governing the specific point that arose for decision.

Needless to say that such a state of affairs could not be conducive to proper administration of justice. The fact that the courts applied all kinds of law - French, Parsi, Armenian, Jewish - produced a very peculiar state of affairs: "five men each under different law may be found walking or sitting together". The position of the law was extremely anomalous as the decisions fluctuated with the status of the parties concerned and so the law varied from person to person.

Two points may, however, be noted in this connection. In the first place, the doctrine of applying the personal law was confined to a few matters only like marriage, inheritance, succession and family relations - precisely the topics for which Hindu law and Muslim law were made applicable to the Hindus and Muslims respectively. In other cases, the position was the same as in case of the Hindus and Muslims. The courts would apply the local customs or the principles of English law under the maxim of justice, equity and good conscience.

Secondly, there was a dichotomy between the law applicable to non-Hindus and non-Muslims residing in the Presidency Towns and the mofussil. In the Presidency Towns, as we have already seen, the English law was the *lex loci* and was thus applied to all except the Hindus and Muslims. In the mofussil, as we have seen, the personal law of the parties was sought to be applied. This made matters worse, for each of the various communities became divided into two parts- one part being subject to English law, the other being subject to the personal law. Suppose a Parsi died leaving behind property both in the mofussil and Presidency Town. The situation could then become very confusing because either the whole property could descend according to English law, if the case was filed in the Supreme court, or partly, according to the English law, and, partly, according to the Parsi law, if separate cases for separate segments of property were to be filed in the Supreme Court and the mofussil adalats.

The concerned communities themselves were not satisfied with this situation- some of them did not want to be under the English law at all, e.g., the Parsis, while others did not want to be under their own archaic personal law. In 1836, the Armenians of Bengal presented a petition to the Governor-General in which, after stating the destitution of their legal condition, they added: "As Armenians have ceased to be a nation since the year of our Lord 1375, and no trace of their own law is now to be discovered, your petitioners humbly submit that the law of England is the only one that can, upon any sound principle, be allowed to prevail".

In the beginning, the number of non-Hindus and non-Muslims in India was small, and, from a practical point of view, perhaps, the question of ascertaining the law for them might not have been important or pressing. But as years rolled by, more and more foreigners came to settle in India. The Charter Act of 1833 threw open India to Englishmen and the Europeans. The number of Indian Christians also increased considerably due to proselytisation by the missionaries. There were the great bodies of domiciled communities - East Indians, Eurasians, now called 'Anglo-Indians', and the number of Parsis, Jews etc. was also getting larger. It was no longer politic or advisable to maintain the confused and the totally inadequate state of the law concerning these communities in matters of succession and inheritance. The effort to give them a law thus began from 1840 onwards, but it bore fruit only in 1865 when the Indian Succession Act and other Acts were enacted by the Indian Legislature. That was the important result of another phase in the Indian Legal History-the movement for codification of the Indian laws which began to take shape with the passage of the Charter Act of 1833.

13. *Justice, Equity and Good Conscience: Position to-Day*

The importance of the concept of justice, equity and good conscience to-day is much less than what it was in 19th century when the bulk of the Indian law was uncertain and uncodified. Today the bulk of the Indian law is codified. Whenever codified law is available on a point in India it is to the codified law, and not to the English common law, that the Indian court is to look to for guidance. Accordingly, the scope for applicability of the maxim of 'justice, equity and good conscience' has been very much reduced. But once in a while, the court may have to take restore to this maxim in the absence of a statutory rule.

Even after the Independence of India, reference is continually made to English case-law by the Indian courts either to interpret the Indian

statutes,[102] or as a residuary source of law whenever need has been felt to decide a case according to justice, equity and good conscience. But, there is a judicial tendency to strike a new line of approach. There have been quite a few cases where the Supreme Court of India has dissented from the English approach[103] and from time to time the Indian courts also refer to cases from other jurisdictions, such as, the U.S.A.[104]

In *Rattan Lal v. Vardesh Chander*,[105] a dispute regarding determination of a lease had to be decided according to justice, equity and good conscience. Justice Krishna Iyer, speaking on behalf of the Supreme Court, pleaded for a new approach in the matter. He pleaded that in Independent India, "we should develop our own brand of justice and equity rather than follow blindly the English law. India should shake off its neo-colonial jurisprudence". The imperatives of Independence and the jural postulates based on the new value system of a developing country must break off from the borrowed law of England. Free India has to find its conscience in our rugged realities and no more in alien legal thought.

14. *Theory of Precedent*

The theory of binding force of precedent is firmly established in England. According to this theory, a decision of a court on a point of law is an authority to be followed by all subordinate courts. Whatever his own opinion may be, a judge is bound to follow the decision of a court recognized as competent to bind him, and it becomes his duty to administer the law as declared by such a court. The justification of the theory is that it is conducive to legal certainty and that it also provides a basis for orderly development of legal rules. The system of precedent has been a powerful factor in the development of the common law in England.

In spite of some codification of law, it would be still correct to say that English law is precedent-oriented. But now some reservations are being made as regards the efficacy of the doctrine in so far as it is argued that law is not static; it is developing continually and, therefore, too rigid an adherence to *stare decisis* may detract from a scientific development of law. Therefore it is argued that courts must use precedents creatively and not mechanically. However, in spite of the reservations, the doctrine of precedent still remains

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[102] Gherulal & Parakh vs. Mahadeodas, AIR 1959 SC 781, where the Supreme Court of India accepted the common law view with regard to the concept of public policy under the Indian Contract Act.
[103] State of Bihar vs. Abdul Maji, AIR 1954 SC 245; J. C. Mehta vs. P.C. Modi, AIR 1959 Bombay 289; Keshav Sahu v. Dasrath, AIR 1961 Orissa 154; Supdt. and Legal Remembrancer, West Bengal Corporation of Calcutta, AIR 1967 SC 997.
[104] Kushro vs. N.A. Guzdar, AIR 1970 SC 588.
[105] AIR 1976 SC 588.

a reality and a lower court remains bound to follow the decision of a higher court.

The theory of precedents has come to prevail in India as well since the advent of the British system of justice. The Englishmen who presided as judges, and who practiced as lawyers in the courts in India, whether of the Crown or of the company, soon started following the English tradition and began to rely on precedents. The company's courts under the maxim of justice, equity and good conscience, and the Crown courts being bound to administer it used to draw freely on the English law and therefore on the decision of the English courts.

To a limited extent, statutory recognition was given to the theory of precedent when section 212 of the Government of Indian Act, 1935, laid down that the law declared by the Federal Court and by any Judgment of the Privy Council must, so far as applicable, be binding on and must be followed by, all the courts in British India. Art. 141 of the present Constitution of India lays down that the law declared by the Supreme Court shall be recognized as binding on all courts within in India. As regards the decisions of the High Courts, however, the theory of precedent is still based on judicial declarations. It is thus clear that the binding force of precedents is firmly established in the Indian Legal System. The judgments delivered by the superior courts are as much the law of the land as legislative enactments.

The Mogul rulers of India permitted the Company to establish trading outposts or factories in various places in India. By a treaty between England and the Mogul signed in 1618, the Company was given the privilege of adjudicating the disputes between the English employees of the Company and other Englishmen dwelling in the Company's first factory, which was located in Surat. In due course, the Company extended its commercial, and subsequently its political interests in India, to such an extent that it assumed, for all practical purposes, the powers of a sovereign ruler over the territories under its control. After the Indian Mutiny in 1857, generally considered as the first war of independence, the British Parliament, by the Government of India Act, 1858, by one legislative stroke, took over from the Company, and transferred to the Crown, the sovereignty over large tracts of territory of India.

In 1947, the process was reversed. The British Parliament passed the historic Indian Independence Act, 1947 by which India was declared to be a separate and independent Dominion.

Direct or indirect British rule in India for nearly three hundred years has made a durable impact on many Indian institutions. When the British left India in 1947, they left behind a well-organised legal system.

India is a democratic republic. The striking features of India are of course its large population, its diversity in religion and culture and its absolute commitment to democracy. The present day legal system and hierarchy of courts is based on the English legal system and the codification of the laws through legislations on the various aspects of private law affecting succession, inheritance, marriage, matrimonial remedies, guardians, maintenance and adoption, particularly for the Hindus, the majority of the population, had been carried out soon after independence and the secular laws have been made applicable to other communities, after independence, except the Muslims, who are still governed by their personal laws. Custom is still recognised as a source of law.

Legal transplantation is still evident is certain pockets of the country. French law is applied in places like the Union Territory of Pondicherry and Portuguese code is applied to the native inhabitants of Goa.

V. APPLICATION OF FRENCH LAW WITHIN THE UNION TERRITORY OF PONDICHERRY

The Union Territory of Pondicherry at present comprises of a geographically separated pockets of land, viz., Pondicherry, Karaikal (Tamil Nadu), Mahe (Kerala) and Yenam (Andhra Pradesh). Initially Chandernagore (West Bengal) was also part of the French establishment. French law was extended to parts of Indian territory over a century and a half ago. Even today a large number of French citizens, renoncants and Christians residing within the former French settlements in the Union Territory of Pondicherry are governed by the French Code Civil which continues to influence the course of legal developments in these territories.

The French did not introduce any sudden change in the legal fabric of the territories in which they settled. The French were governed by French law and in the area of personal law for the French the custom of Paris applied to all of them, irrespective of the province from they came and whatever the custom applicable to them in France. French law penetrated progressively in Pondicherry.

By a Regulation dated 06.01.1819 all the French Codes, except the Code of Criminal Procedure, containing the quasi totality of the substantial and adjective laws of France, including the personal law have been made applicable to Pondicherry.

However Section 3 of the Regulation embodied a saving clause to the effect that Indians, whether Hindus, Muslims or Christians, would continue to be governed by usages and customs of their respective castes.

French law became the law of the land though in matters of personal law it was applicable only to a minority of the population and the personal laws of Hindus and Muslims being tolerated as customary laws.

The Regulation dated 24.04.1880 made applicable to the French establishments in India the provisions of the Code Civil relating to civil status, viz., those relating to the declaration of births and deaths and the performance of marriages, but a saving clause left it open to Indians to marry as per their own custom. However the saving clause did not apply to Christians who were from that time governed by French law in respect of marriage and divorce barring some modifications provided in the decret in respect of age of the spouses to a marriage.

The exemption clause in the Regulation dated 06.01.1819, as per which Indians will continue to be governed by their own customs, was an exception in favour of the indigenous population. But it was open to that population to espouse French law whenever it liked. If by his conduct, manners and clothing any one has made known that he has adopted the French way of life, the French law was applicable to him. This was termed by the French courts as a tacit renunciation to the personal status. It was also open to the parties to make an express renunciation by declaration made before the Registrar of the Civil Court or a Notary. A further arrangement was made to quicken the process of assimilation by Regulation dated 21.09.1881 by which a possibility was offered to Indians to renounce easily their personal status and to espouse the French law. Such a renunciation was to be effected by way of a declaration in the office of the Mayor of the locality. Incentives were offered to induce people to renounce their personal status through more political rights and more opportunity in government employment. Christians and people belonging to the lesser castes made use of this opportunity. They are usually called as *Renoncants* and till date they are governed by the French Code Civil in matters relating to marriage, divorce and other family matters. The Hindu Succession Act, the Hindu Marriage Act, the Hindu Adoption and Maintenance Act are not applicable to Renoncants in Pondicherry. The same is the case with the Muslims. Though the local population was not prepared to renounce entirely its personal status, they ventured to claim before the courts the benefits of limited provisions. The *Cour de Cassation* by a judgment dated 16.06.1852 declared valid and legal the adoption by the local population of the provisions of Code Civil in a particular sphere.[106] As early as on 12.11.1870 a judgment of the

[106] Justice Annoussamy David, *The French Legal System and its Indian connections*, 1995, p. 146.

Cour d'Appel held that it is valid to have recourse by Muslims to the system of guardianship as organised by Code Civil with a family council presided over by the Justice of Peace and with a surrogate guardian to watch the action of the guardian. Similarly as per French law a Hindu widow was allowed to adopt a son to herself. Such an adoption by a French widow domiciled in French India was also held valid by a decision of the Privy Council in C.S. Nataraja Pillai vs. C. S. Subbaraya Chettiar.[107]

In cases where there is no specific provision in the customary law, the provisions of the Code Civil were applied. Moreover the French courts applied the French Code Civil to the indigenous population through the judicial recognition of the evolution of customs.

By the end of the French regime, the differences between Indians and Europeans in the matter of law were considerably reduced and apart from the personal law, the entirety of the French law became applicable to this part of the country. French law though elaborated in Europe thrived well and could be applied smoothly on Indian soil.

The territory of Pondicherry was taken over *de facto* by the Government of India from 1st November 1954 and the Treaty of Cession was signed on 28th May 1956 and came into effect on 16th August 1962.

In pursuance of the *De Facto Agreement* dated 21.10.1954, the Government of India took over the administration of the territory of the French Establishments in India with effect from 01.11.1954.

Consequently, the Government of India, by a notification dated 30.10.1954 passed The French Establishments (Administration) Order, 1954 for the administration of the French Establishments and it came into force on 01.11.1954.

The Government of India also passed The French Establishments (Application of Laws) Order, 1954 by a notification dated 30.10.1954 and extended the application of laws specified in the Schedule to The French Establishments (Application of Laws) Order, 1954 with effect from 01.11.1954. Till the *de jure* transfer the administration of the French Establishments were carried out by the Government of India through various orders.

The Treaty of Cession, signed between India and France, on 28.05.1956 completed the transfer process and the *de jure* transfer became

[107] AIR 1949 PC 34.

effective from 16.08.1962. The Agreed Proces-Verbal to the Treaty, concluded on 28.05.1956 and signed on 16.03.1963, provided for judicial protection of the French nationals in Pondicherry and stipulated that the "Renoncants" will continue to be governed in respect of personal laws like those relating to marriage, divorce, etc. by the relevant articles of the French Civil Code dealing with these matters.

The Pondicherry (Administration) Act, 1962 was enacted by our Parliament for the administration of Pondicherry and it came into force on 16.08.1962. Section 4 of The Pondicherry (Administration) Act, 1962 provided for the continuance of existing laws in force and their adaptation immediately before 16.08.1962 until amended or repealed by a competent legislature or other competent authority.

The President of India promulgated The Pondicherry (Laws) Regulation, 1963 to extend certain laws to the Union Territory of Pondicherry and U/s 3 the Acts specified in the First Schedule to the Regulation came into force in Pondicherry on 01.10.1963 and correspondingly under Section 4 any law in force in Pondicherry corresponding to the Act referred to in the First Schedule referred to in Section 3 shall stand repealed and specified the law that were repealed in the Second Schedule of the Regulation.

Subsequently the Pondicherry (Extension of Laws) Act, 1968 was passed by our Parliament for the purpose of extending certain Central Acts to the Union Territory of Pondicherry.

Under Section 3 (1) of The Pondicherry (Extension of Laws) Act, 1968, the Acts specified in Part I of the Schedule as they are generally in force in the territories to which they extend and the Acts specified in Part II of the Schedule as they were in force on 01.08.1966 in the State or Union Territory mentioned thereagainst shall extend to Pondicherry, subject to the modifications, if any, specified in the Schedule. Accordingly, as per Section 4 of the Act, the corresponding law in force in Pondicherry shall stand repealed as from the coming into force of such Act specified in Part I or Part II referred to in sub-section (1) of Section 3, except in so far as such law continues to be applicable to Renoncants.

Section 6 of The Pondicherry (Laws) Regulation, 1963 and S. 6 of The Pondicherry (Extension of Laws) Act, 1968, are in *pari materia* and deal with rules of construction in and by which any reference to any provision of law not in force, or to any functionary not in existence in Pondicherry shall be construed as a reference to the corresponding law in force or to the corresponding functionary in existence in that Union Territory and for the

purpose of facilitating the application of any Act (inclusive of any rule, notification, order, regulation or bye-law made or issued thereunder) in relation to Pondicherry any court or other authority may construe it in such manner, not affecting the substance, as may be necessary or proper to adapt it to the matter before the court or other authority.

The Pondicherry (Laws) Regulation, 1963 was not repealed by The Pondicherry (Extension of Laws) Act, 1968. Both under the Regulation as well as under the Act our Parliament extended several central enactments that were in force in other parts of the country.

The Legislative Assembly of Pondicherry enacted the Pondicherry Civil Courts Act, 1966 to consolidate and amend the law relating to the civil courts in the Union Territory of Pondicherry. S.6 of the Act deals with the courts established under the Act to be successors to existing courts.

Renoncants were a section/segment of the local inhabitants of the territory of Pondicherry, who opted to be governed by the French Code Civil by renouncing their personal laws.[108] They renounced their personal laws by making a declaration before the appropriate French authority and they came to be governed under the French Code Civil in matters affecting marriage, divorce, guardianship, etc. The descendants of the Renoncants continued to be governed by the French Code Civil even after the territory of Pondicherry became part of the Union of India. The Renoncants could be found among Christians, Hindus and Muslims and the Schedule Castes. Accordingly Hindu Renoncants were exempted from the application of the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956, both of which were extended to Pondicherry under The Pondicherry (Laws) Regulation, 1963.

Similarly Muslim Renoncants were exempted from the application of The Muslim Personal Law (Shariat) Application Act, 1937 and The Dissolution of Muslim Marriages Act, 1939, both of which were extended to Pondicherry under the Pondicherry (Extension of Laws) Act, 1968.

The Guardian and Wards Act, 1890 does not apply to the Renoncants as per the proviso to Section (1) and the Act was extended to Pondicherry under the Pondicherry (Extension of Laws) Act, 1968.

In effect, Renoncants of Pondicherry, who are Indians and who can be found in all religions and castes, are governed by the provisions of the French Code Civil in matters relating to marriage, divorce, adoption, guardianship, etcetera.

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[108] Justice Annoussamy, David, *The French... cit.*, p. 146.

Thus Renoncants of Pondicherry, Indian Christians and French Nationals are governed by the provisions of the French Code Civil in matters relating to marriage, divorce, adoption, guardianship, etc. While Sub Courts were exercising jurisdiction over such matters prior to the introduction of the Family Courts Act and the establishment of a Family Court at Pondicherry, the District Court was exercising jurisdiction over matters of appointment of guardians of minor persons and of their property and other matters provided therein as per the jurisdiction prescribed under the Guardians and Wards Act, 1890.

However, after the establishment of the Family Court at Pondicherry under the Family Courts Act, jurisdiction over all the matters aforesaid and prescribed under Section 7 (1) Explanation (a) to (g) came to be vested with the Family Court at Pondicherry irrespective of their religion and status.

VI. APPLICATION OF THE PORTUGUESE CODE IN GOA

The Portuguese inaugurated the process of westernisation in India and were one of the last colonial powers to leave its shores. Hence this first legal impact is an evidence of the influence of the western judicial structures on the Indian soil in the 16th century. The history of the legal activities of the Portuguese in Goa, in the 16th and 17th centuries differ from the later British activities in India, for the Portuguese entered Goa as the representatives of a Sovereign King and not as a company of traders. The Portuguese believed in the right and duty on the part of their sovereign to administer justice in Goa. As such administration of justice was the business of the King of Portugal from 1510. Goa was the centre of the Portuguese possessions in the East, its legal history can serve as a background for the studies of judicial structures of other Afro-Asian countries which once under the Portuguese rule.

The judicial system in Goa gradually evolved and flourished over a period of four centuries bringing out a special blend based on the continental jurisprudence. The liberation of Goa and integration into the Indian Union brought an end to the laws and judicial system established by the Portuguese, which was replaced with models based on the Anglo-Saxon jurisprudence. The history of the laws and judicial structures of Goa is from the civil law system to the common law system.

The territory of Goa is situated in the West Coast of India in the Konkan region. The Portuguese conquered Goa in February 1510 and continued to be under the Portuguese till it was liberated in December 1961. It is now a state in the Indian Union.

In the study of judicial institutions and the administration of justice in Goa, the concept of "State of India" is important. It is an expression used by the Portuguese to describe their conquests and discoveries in the maritime regions between the Cape of Good Hope and Persian Gulf on one side of Asia and Japan and Timor on the other. The State of India was an administrative unit. The City of Goa enjoyed a kind of supervisory powers over the whole of the "State of India".

1. *Pre-Portuguese Judicial System*

Just before the conquest of Goa by the Portuguese, Goa was under the Adilshah of Bijapur. Administration of justice was the same as then in the Deccan. The presence of Sultanate rule also led to the increase in the Muslim population in the City of Goa. As such Muslims were to be judged according to the Muslim law.

Apart from the Muslim population, pre-Portuguese Goa had autonomous agriculturally based village communities, known as *Gaonkaria* or in Portuguese *Communidade*. Each village resolved the various conflicting interests arising in it and harmonised them locally. The *Gaonkaria* settled most of the disputes at this level. The *Gaonkaria* was assisted by a village clerk known as *Kulkarni*, who was an expert on uses and customs as well as procedures of the village. At a higher level, there was the Desh level, which the Portuguese called *Camara Geral.* This body was assisted by a scribe known as *Nadkarni* who was an expert in the law, uses and customs of the Desh.

2. *Administration Of Justice Under The Portuguese (1510-1800)*

After the Portuguese conquest and during the Portuguese reign in Goa till the nineteenth century various officials administered justice at different levels for different sections of the community. Though hierarchy existed in the administration of justice, it was carried out sectionally, taking into consideration the different interests and pressures, arising in the cosmopolitan society created by a maritime empire. There was no attempt made to introduce a grand master plan, uniform in administration of justice for the whole Portuguese Empire applicable to all, though some attempts were made to bring uniformity in justice at certain levels, particularly in judicial institutions. Thus in 1586 there was a rather uniform plan for the appointment of judges in the forts of the State of India. In the following year a letter patent clearly set up and consolidated the composition and structure of the High Court *(Relacao)*. As a general rule, the judiciary evolved in the State of India of which Goa formed a part in consonance with the political expansion of the Portuguese Empire in the East. Judicial evolution in State of

India resulted as a sequel of the socio-economic and political structure and form of the maritime Portuguese empire.

The officials and institutions concerned with the administration of justice then were as follows:

1.Viceroy or Governor
2. High Court
3. The Auditor General
4.The Judge of the Instruments of the Crown *(Juiz de Feitos)*
5. The Procurator of the Instruments of the Crown
6.The Promoter of Justice
7.The Judge Conservator of Christians
8. Judges for the Hindus and the Inhabitants of the New Conquests
9.Inquiry Committees
10.Capitan of Forts
11. The Auditor Judges
12. Thanadars
13. Ordinary Judges
14. The Chamber of City of Goa
15. The Judges of Orphans
16. The Village Communities
17. Tribunals and Judges of Account Department
18. Special Judges for the Christians
19. Church courts
20. Inquisition Tribunal

The judicial system prevailing for the Hindu community from the sixteenth up to the mid eighteenth century presents a very confused and vague picture. One reason attributed to this state of affairs is that the inhabitants of the territories possessed by the Portuguese were to a larger extent Christianised.[109] It was difficult to imagine a special structure being envisaged by the sixteenth century Portuguese, merely to cater to the Hindus, on the basis of their religious and cultural differences. However, Affonso de Albuquerque had promised the inhabitants the preservation of their uses and customs and this policy had culminated in the Charter of 1526. The Hindu community had resort to the village communities which functioned with some kind of arbitration powers. The Christians has a system of priests and Portuguese officials to administer justice at the local level.

Moreover the High Court was available to the Hindu community as they were available to other vassals. The Law of 15th January 1691 laid down

[109] D'Souza, Carmo, *Legal System in Goa*, Vol. I, Judicial Institutions, 1510-1982, p. 36.

that the Hindus of the Island of Goa, Bardes and Salcete were to be judged by the Portuguese laws as regards succession.[110] The above law was confirmed by a Law of 11th March 1695 and it can be inferred that the Hindus had accepted at least partly the Portuguese judicial structure. The Hindus had access to both the indigenous arbitration system and the Portuguese judicial structures which is evident from the Carta Regia of 11th January 1734.[111] Under the indigenous custom and usage there was no equal right for sons and daughters in succession while under the Portuguese law both had equal rights.

The mid-eighteenth century saw the winds of change. The Portuguese acquired more possessions in Goa known as the New Conquests where the population was predominantly Hindu and adopted a much broader policy and vision than before. Laws were proclaimed preserving the indigenous system of administration of justice. The Edict of 1763 maintained uses, customs, procedures of the inhabitants of Ponda and surrounding districts and excluded the Portuguese judicial machinery from dispensing justice to these inhabitants. The Proclamation of 1763 was on the same lines which guaranteed that justice would be carried as before in the territories of Ponda and the surrounding districts, except that a Justice called *Intendant (Juiz Intendente)* was appointed to try cases at the higher level and it excluded all the other Portuguese judicial structures from interfering with the indigenous course of justice. The Carta Regis of 1774 confirmed this policy. The traditional modes of administering justice were preserved in these areas in the mid-eighteenth century.

3. *The Period From 1800-1961*

Due to various political changes in Europe and Brazil, Portugal became a Constitutional Monarchy during the first quarter of the nineteenth century. As constitutional ideas picked up in Portugal, need was felt to reform the judiciary. Accordingly the process of reform started with the Decree of 1836 in the State of India followed by other organisational plans for the judiciary in 1858, 1866, 1894 and 1927. The plan of 1836 began with the movement towards a uniform pattern and hierarchical divisions and sub-divisions. At that time, the age of the codes was dawning over Portugal, with experiments carried on administrative codes. But it took time for the Civil Code and the other procedural codes to be applied in Goa. Therefore the regulation was through special laws which would depend on the existing circumstances and the ability of the people of the place.[112]

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[110] *Ibidem*, p. 37.
[111] *Ibidem*, p. 37.
[112] *Ibidem*, p. 126.

4. *Post Liberation Judiciary*

The Union Territory of Goa, Daman and Diu, as it was then known before the grant of statehood[113] by the Central Government, at the time of liberation had a well developed judicial system based on the continental jurisprudence. The system was not mere structures and rules but also a sum total of attitudes and an approach to legal problems, a sort of legal culture.

After liberation the judicial institutions and laws changed from the pre-liberation continental legal system to the constitutional set up prevailing in other parts of India and the Anglo-Saxon legal system and the laws prevailing in other parts of India were introduced to bring in it line with the rest of the country. No attempt was made to preserve the laws and institutions of the Portuguese era except to a very limited area of personal law of the Goans.

VII. CONCLUSION

There are two essential requirements for any sound and effective system of administration of justice – (i) a well organised system of courts and (ii) a well developed system of law. In ancient India the laws and its evolution, its implementation and administration was identified with the King, the fountain head of justice. The King and his appointees were bound by the rule of Dharma which was a combination of religious instructions, code of conduct of life and laws. Custom, a major source of law, exercised an overwhelming influence in the administration of justice. During the medieval period the personal laws of the Hindus were no abolished or interfered with by the Muslim rulers, who created, transplanted and established a sound and effective judicial system and laws based on the Koran. The British, who established sovereignty through a trading company, preserved and applied the personal laws of the indigenous population.

However the principles and doctrines of English law found its way and created a new legal culture through the interpretation of *shastric* laws and custom by the Privy Council and the introduction and application of the maxim 'justice, equity and good conscience'. The legal system and the laws established first by the company and later through the sovereign took strong and deep roots and the transplantation is evident by its continued domination, adherence and following in the present legal system prevailing in India. Pre-independence laws are part of the present legal system within

[113] Goa was liberated on 19.12.1961 and was integrated into the Union of India as a Union Territory of Goa, Daman and Diu but subsequently separate statehood was granted to Goa and the territories of Daman and Diu were delinked.

the Constitution of India[114] with the Supreme Court of India acting as the pointsmen. The indigenous personal laws have been codified, particularly for the Hindus and Christians, in all major areas like marriage,[115] succession,[116] adoption and maintenance[117] while case-laws and custom hold their fort in the uncodified area. The establishment of grass root institutions like the *grama nayalayas* and *grama panchayats* has gained the attention of the government.

Continental legal system as found in the French Code Civil has also left an indelible mark in the Indian soil and French law which continues to govern the marriage, divorce, adoption and guardianship of Renocants, Indian Christians and French nationals domiciled in Pondicherry adds lustre to the comparative confluence of laws.

India, as a nation and as a democratic polity strongly entrenched in the rule of law, is a mosaic and kaleidoscope of laws, legal system and institutions, continuing the peaceful, non-violent change initiated by Mahatma Gandhi, whose principle of local self-government and village administration is gaining momentum, without break downs in a paradise of confluence, diversity and unity.

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114 Article 13 of the Constitution of India.
115 The Hindu Marriage Act, 1955; The Indian Christian Marriage Act, 1872.
116 The Hindu Succession Act, 1956; The Indian Succession Act, 1925.
117 The Hindu Adoptions and Maintenance Act, 1956; The Hindu Minority and Guardianship Act, 1956.