I. ADMINISTRATIVE OF JUSTICE IN THE PRESIDENCY TOWNS AND DEVELOPMENT OF COURTS UNDER EAST INDIA COMPANY.(1600-1773)

1. FROM 1600 TO 1726

1599-British East India Company was established
1600-Brutish East India Company was incorporated in England by the Crown's Charter to promote British trade in Asia, America and Africa.

a).Administration of Justice in Surat

1612-First Factory was established in Surat by the British East India Company.
1615- Firman was issued by Moghul Emperor to Sir Thomas Roe granting certain facilities to Englishmen

b). Administrative of Justice in Madras before 1726

Madraspatnam- Black Town & White Town

Black Town-Indian Inhabitants
Adigar or Adhikari-maintenance of law and order
Choultry Court-to decide small civil and criminal cases by Adigar as Judge

White Town-Englishmen and European
Agent-Administrative Head

Court of Admirality- estd 1683 & 1686 to hear and decide all cases concerning maritime and mercantile transactions, piracy, trespass, forfeiture of ships.

1668-Mayor Court was estd at Madras under company's charter Act.

c). Administrative of Justice in Bombay before 1726

1534- The Islands of Bombay was acquired by the Portuguese from the King of Gujarat.
1661- The Islands of Bombay was transferred by the Portuguese King as Dowry to the British Crown on the marriage of his sister.
1668- The British Crown transferred the Islands of Bombay to British East India Company for annual rent of pound 10.

d). **Administrative of Justice in Calcutta before 1726**

1690- Fort William was constructed on the River Hoogly in Bengal by Englishmen.

e).Main features of the Administrative of Justice in the Presidency Towns of British East India Company before 1726

i). Administrative of Justice was executive ridden.
ii).There was no separation between Executives and Judiciary.
iii). There was non-professional Judges in the Judicial administration.
iv).The Courts were court of east India Company and they derived their authority not from british crown but from British East India Company.
v).The Judgements delivered by the Company's Court not recognized by the Englishmen and the Court in England.
vi).The Judicial system in the Company's settlement was not uniform.

2.ESTABLISHMENT OF MAYOR'S COURT (1726)

1726- Charter Act created Corporation & Mayor's Court in Presidency Towns

Corporation-One Corporation was estd in 3 presidency Towns, consisting of Mayor and 9 Aldermen. It was made an autonomous body to look after the local administration of Presidency Town.

The Mayor's Court:-The Charter of 1726 created a Mayor's Court in each Presidency Towns i.e. Bombay, Madras & Calcatta.

a).The Court consisted of the Mayor and the Aldermen of the Corporation of the presidency Towns.
b).The Mayor and 2 Aldermen constituted the Quorum of the Court.
c).The Court was court of record, namely a court whose records were kept on a permanent basis and which had the power to punish for contempt of its authority.
d).Jurisdiction:- It had civil and testamentary jurisdiction in all matters arising in the Presidency Towns.
d).Appeal:-An appeal from the decision of the Mayor's Court could filed before the Governor-in-Council and second appeal could be filed before the King-in-Council (Privy Council).
e).A junior member of the Governor-in-Council was appointed as the Sherrif to execute the process of the court.
f).It applied English Law when deciding cases.

3.WORKING OF THE MAYOR'S COURT OF 1726

(Conflict between the Mayor's Court & the Governor-in-Council)

a).The Judges of the Mayor's court were not professional persons and had limited knowledge of English Law.
b).The Governor-in-council also often acted in despotic manner,showing little respect for Judiciary.
c).The Judges took view that since they were appointed by the crown, they were independent of executive control.
d).The conduct of the Mayor's court can be considered to be major revolt against the executive for judicial independent.

4.CHANGES INTRODUCED BY THE CHARTER OF 1753

-This was issued to rectify some of the problems arising from the operation of 1726 Charter.
a).Organisation of Mayor's Courts
b).Juristdiction of Mayor's Courts

c).Courts Estd under the Charter of 1753
i).**The Court of Requests**:-It was to hear civil cases up to 5 pagodas (i.e, 15 Rupees)
ii). The Mayor's Court
iii).The Courts of Governor and Council
iv).Privy Council or King-in- Council

Demerits:-
a).Too much executive oriented
b).Non-professional Judges
c).Judges independent on the Company and the Governor-in-Council.

5. WARREN HASTINGS PLAN OF 1772,

1757-Battle of Plassey- British East India Company defeated the Nawab of Bengal
1764-Battle of Buxar- British East India Company defeated the combined forces of Mir Kasim (Nawab of Bengal), Shuja-ud daula (Nawab of Awadh), Emperor Shah Alam of Delhi
1765-Robert Clive was sent from England as Governor of Bengal.
1765-Treaty by Robert Clive with Mughal Emperor Shah Alam who granted Diwani of Bengal, Bihar & Orissa.
1772-Warrren Hastings was appointed as Governor of Bengal and revenue collection were brought under the direct control of the servants of the company.

1772-Warren Hastings Plan -For administer of Justice, Warren Hastings prepare a new Plan

1.The territories of Bengal, Bihar & Orissa were divided into districts and each district were placed under English Officer designated as Collector of that district.

2.Each District became a separate unit, not only for the collection of Revenue but also administration of Justice.

3.New Courts were set up for adjudication of civil and criminal cases:-

a).Civil Cases:-

i).Mofussil Diwani Adalat was estd in each district to decided civil matters. The Collector of the District presided over this court, which had jurisdiction to hear and decide all civil cases as for instances contracts ,partnerships, movable and immovable property, rent matters, disputed debt and matter relating to marriage, inheritance and caste.

ii).Sadar Diwani Adalat Appeal from Mofussil Diwani Adalat consists of Governor & 2 members of his Council.

Criminal Cases:-

i).Mofussil Faujdari Adalat was estd in each district to hear all criminal cases. In these court, the Kazi and the Mufti assisted by two Maulvies held trails in all criminal matters.

ii).Sadar Nizamat Adalat :- Appeal from Mofussil Faujdari Adalat.It was headed by Indian Judge assisted by Chief Kazi, the Chief Mufti and 3 Maulvies.

6.REFORMS UNDER THE PLAN OF 1774 AND REORGANIZATION IN 1780

II. REGULATING ACT OF 1773

1. PROVISIONS OF THE ACT

a).Introduction:-

There were rampant acts of corruption and misappropriation by the employees of the east India Company in the middle of the eighteenth century. Although the servants of the Company posted in India were paid low salaries, they were able to amass huge wealth by corruption and exploitation. After their return to England, they would make an ostentatious show of such wealth and were referred to as the Nobobs. The Regulating was passed by the British Parliament to regulate the affairs of the company in the future.

b).Object:-

i).To regulate the affairs of the Company and to bring its management under the control of the British Parliament.
ii).To introduce reforms in the constitution and working of the British East India Company.
iii).To establish a Supreme Court at Culcatta.
iv). To restrict ~~acts~~ corruption, illegalities and irregularities committed by the company's servants in India.

c).Main Provisions:-

i).Reconstitution of the British East India Company.
a).The terms of the company's directors was increased from one year to four years, with one-fourth of the Directors retiring every year.
b).To enable British Government to have an effective control over the Company.

ii).Executive authority in the presidency of Calcutta:-
In the presidency town of Calcutta, a new government was established under the Governor-General and a council of four members.
Warren Hastings was appointed as the first Governor-General and Richard Barwell,Phillip Francis, General Clavering and Colonel Monson were appointed as the four Councillors.

iii).Management of the Presidencies of Bombay and Madras:-
The Presidencies of Bombay and Madras were brought under the control as superintendence of the Governor-General-in-Council at Calcutta in matters of war and peace.

iv). Prohibition on acceptance of rewards and engaging in private trade:-

The Governor-General-in-Council and the Judges of the Supreme Court were specifically prohibited from accepting any present or reward from the Indian princes.They were also prohibited from engaging in any private trade.

v).Good Governance:-

The Governor-General-in-Council was empowered to make rules and regulations and to issue Ordinance for the good governance of Fort William and its subordinate factories.

vi).Establishment of Supreme Court at Calcutta:-

The Regulating Act 1773, also empowered the crown to establish a Supreme Court, at Calcutta by issuing a Charter, and in the following year the Supreme Court was established by the Charter Act of 1774.

Merits & Demerits of the Regulating Act 1773

2. ESTABLISHMENT OF SUPREME COURT AT CALCUTTA UNDER CHARTER OF 1774

The Regulating Act, 1773 made a provision for establishment of a Supreme Court at Calcutta but it was established by issuing Charter of 1774.

a).Constitution:-

The Supreme Court at Calcutta consisted of the Chief Justice and three ~~puisne~~ (subordinate) Judges.

b).Qualification:-

Barrisrter of not less than five years standing were eligible to be appointed on the Bench and they were to hold office during the pleasure of the Crown.

c).Court of Record:-

The Supreme Court was a court of record and was empowered to administer justice according to the principle of *Justice, Equity and Good Conscience.*

d).Jurisdiction of Supreme Court:-

i).Civil Jurisdiction
ii).Criminal Jurisdiction
iii).Ecclesiastical and testamentary Jurisdiction
iv).Admiralty Jurisdiction

v).Equity Jurisdiction
vi).Writ Jurisdiction

e).Appeals:-

i).In Civil cases appeals from Orders passed by the Supreme Court could be filed within Six months before the Privy Councils with leave of the Supreme Court.

ii).In Criminal Cases appeals lay before the Privy Council with the leave of the Supreme Court.

3. THE WORKING OF THE SUPREME COURT AT CALCUTTA WITH SPECIAL REFERENCE TO:-

Cases

a).Trial of Raja Nandkumar
b).Trial of Radha Charan
c). Patna Trial
d).Kamalluddin's Case
e).Cossijurah Case
f). Saroopchand's Case
g).Gora Gopichand's Case

a).Introduction:-

Elijah Impey was appointed as the first Chief Justice of the Supreme Court at Calcutta in 1774.He was a towering personality who was determined to make the presence of the rule of law felt in India. He was equally determined to make the executive and the people of India realize the existence and importance of the judiciary. He struggled to introduce the Independent Court in India.

The Working of the Supreme Court resulted in serious friction between the Court and the Governor-General-in-Council (Supreme Council)

The uncertainty and confusion regarding the powers and jurisdiction of the Supreme Court were mainly due to the following factors:-

a). Both the Supreme Court and the Governor-General-in-Council (Supreme Council) were constituted by the Crown but each of them claimed superiority over the other.

b).The territorial Jurisdiction of the Supreme Court was vague and uncertain which resulted in utter confusion and chaos.

c).Confusion on whether the Supreme Court has jurisdiction over farmers and zamindars who collected revenue on commission basis on the behalf of the Company.

d).Uncertainty over Revenue officers of the company who were engaged in collection of revenue in Bengal, Bihar and Orissa.

e).There was confusion over the relation between the Supreme Court and Company's adalat.

f).There was no clarity which law to be administered by the Supreme Court.

g).Confusion and uncertainty regarding the writ jurisdiction of the Supreme Court.

CASES:-

A).TRIAL OF RAJA NANDKUMAR

Raja Nand Kumar was an influential Zamindar in west Bengal and a Hindu Brahmin by religion. His loyalty to East India Company right from the days of Robert Clive earned him the title of " the Black Colonel".

There were two groups in the Governor-General-in-Council.
One Group-The Governor-General- Warren Hastings and Councillor, Barewell
Other Group-The Councillors- Francis, Clavering and Monsoon.

The Majority was against Warren Hastings. Raja Nand Kumar was encouraged by the majority to bring certain charges against Warren Hastings before Council. They instigated Nand Kumar to file charges of bribery and corruption against the Governor-General, which he did in March 1775 in a letter which he handed to Francis.

In this letter he stated:-
i).That in 1772 Hastings had accepted a bribe of Rs.1,04,105 from him for appointing Nand Kumar's son, Gurudas as Diwan.
ii).That he had also taken a bribe of Rs.2,50,000 from a lady by the name of Munni Begum for appointing her as guardian of minor.

This letter was placed before the Council in a meeting and Monson moved a motion that Nand Kumar be summoned before the Council to prove these charges.

The Governor-General- Warren Hastings who was presiding at this meeting in his capacity as The Governor-General strongly opposed this motion observing that he would not sit in a meeting to hear charges against himself.

Only Barewell supported the Governor-General- Warren Hastings and suggested that there was no need for the Council to go into the Complaint and Nand kumar may be asked to file his complaint before the Supreme Court as only Court could investigate such a matter.

But Monson's proposal to summon Nand Kumar had the support of the majority. So Hastings immediately dissolved the meeting.

The other three members objected to this and decided to continue the meeting after electing Clavering to preside over the meeting in place of Hastings. At this continued meeting, it was decided to call Nand Kumar before the Council and allow him to prove his charges.

After few days Nand Kumar appeared before the Council and was briefly examined by the majority group of the Council, which then declared that the charged against Hastings were duly proved. Hasting was asked to deposit a sum of Rs.3,54,105 in the Treasury, being the amount of the two bribes accepted by him.

Due to this incident Nand kumar made a bitter enemy of Hastings who was waiting for opportunity to get back Nand Kumar. Soon after he got opportunity where Nand Kumar and Mr.Fawkes were arrested and charged with conspiracy. Hastings succeded in getting one **Mr. Mohan Prasad** to file charge against Nand Kumar. It was alleged, in this charge, that in 1770, Nand Kumar had forged a **Will** to recover a bad debt, and he ought to be punished under provisions of the Forgery Act,1728, an Act passed by the British Parliament, under which the punishment for forgery was the death penalty.

After hearing the **conspiracy** case, the Supreme Court imposed a fine on Fawkes in July 1775 but reserved its judgment against Nand Kumar as the **forgery** was still pending against him.

The majority group of the Governor-General-in-Council protested against the charge of forgery leveled against Nand kumar before the Supreme Court, but the court proceeded with hearing unheeded.

On behalf of Nand Kumar, it was strongly contended that the Supreme Court have no Jurisdiction to try him.

The Chief Justice Impey, who presided over the Bench *(and who happened to be a school friend of Hastings)* ruled other,vise. The Supreme

Court took the view that Nand Kumar *was* an inhabitant of Calcutta, and therefore, within the court's jurisdiction.

Defences:-

1.That English law was introduced into Calcutta by the Charter of 1726. This would mean that all English laws prior to 1726 would apply to Calcutta under this Charter. However, the Forgery Act was passed in England only in 1728, and the Act did *not* contain any provision that it would be applicable in India

2.That Nand Kumar was being tried under an *ex post facto law.* It was pointed out that the alleged offence was committed in 1770, and the Supreme Court itself was established much later — in 1774.

3.That the Forgery Act was passed by the British Parliament and the death penalty was prescribed under the Act because of the peculiar conditions prevailing in England at that time

The whole defence of Nand Kumar thus collapsed.

The trial lasted for eight continuous days, at the end of which the court, with the help of a Jury (consisting of all non-Indians) found Nand Kumar guilty of the offence of forgery and sentenced him to death.

An application was immediately moved before the Supreme Court seeking the court's leave to appeal to the Privy Council, but the same was rejected. Another application was then given to the court to forward the case for mercy to the British Crown. The court, however, refused to do this also. As all efforts to save the Raja failed, the death sentence was executed, and Nand Kumar was hanged on August 5, 1775.

Conclusion

It a "**judicial murder**" as stated by most of the Historian. It is perceived, even today, that there was a conspiracy between Chief Justice lmpey and his school friend, Warren Hastings, to put Nand Kumar hastily and unjustly to death. In the words of P E. Roberts, even if one concludes that this trial was not a judicial murder, it was certainly a **gross miscarriage of justice.**

The Chief Justice lmpey and Warren Hastings were impeached by the British Parliament. Hastings was charged with corruption and the Chief Justice was called upon to answer the British Parliament on Nand Kumar's death. Although the impeachment proceedings did not succeed, it is interesting to note that the first judicial murder in India led to the **first impeachment** in England.

(B) TRAIL OF RADHA CHARAN'S CASE:-

Warren Hastings, the Governor-General, lodged a complaint of conspiracy against several persons, including **Radha Charan Mitra**, who was a vakil of the Nawab. The majority of the Council, consisting of Clavering, Monson and Francis, wrote a letter to the Supreme Court, informing the judges that Radha Charan was the vakil of the Nawab, and was therefore entitled to rights, privileges and immunities under the Law of Nations and the statute law of England.

The Sardar Faujdari Adalat was shifted from Calcutta to Murshidabad in 1775, the administration of justice was in the hands of **Nawab Mubarikuddoaula**, a sovereign prince, who possessed a royal mint that coined money. The Nawab also maintained his own troops.

The court heard the case in June, 1775 and the Nawab's position as a sovereign prince was hotly contested before the court.

On the one hand, it was argued that since he administered justice, coined money and kept troops, it was evident that he was a sovereign prince. It was also contended that if a sovereign was held not to be sovereign, it would produce "the most dreadful consequences. On the other hand, it was contended that the Nawab had no effective power. Hastings and some ex-members of the Council submitted affidavits that the Nawab's sovereignty was "a mere delusion".

After hearing both the sides, the Chief Justice came to the conclusion that, in effect, all the powers were in the hands of the Company and the Nawab performed no act of sovereignty independently or without the consent of the Company.

The court described him as a "phantom" and a "man of straw". The court went on to observe that just interposing the name `Nawab' would not screen any criminal from the justice of the court.

The claim for immunity of the Nawab's vakil, Radha Charan, was therefore disallowed and he was sentenced to death for the crime. It was only on account of strong representations from the inhabitants of Calcutta that he was pardoned. Radha Charan thus escaped the death penalty, and was, in this sense, luckier than Raja Nand Kumar.

(C) PATNA TRAIL

In this case, a native of Kabul, **Shahbaz Beg Khan**, came to Bengal, joined the services of the Company and then retired. After his retirement, he settled down at Patna and married **Naderah Begum**. There were no issues of this marriage. Later, his nephew, **Bahadur Beg** (whom Shahbaz treated as his son) came from Kabul to live with him until Shahbaz expired in 1776, leaving considerable property and estate.

After his death, both the widow and the nephew staked a claim to his property. The widow claimed that her husband's *entire property* was given to her in his life-time under a Gift Deed and a Deed of Dower.

On the other hand, the nephew contended that he was entitled to the *whole property* as the adopted son of the deceased. He filed a petition against the widow in the ***Patna Provincial Council***, which was established as a *Diwani Court*.

According to the nephew:-

1. that the Gift Deed and the Deed of Dower were *not* executed by the deceased, but were forged by a cousin of the widow;
2. that the Kazi & Mufti (Muhammadan Law Officers) be appointed by the court to ascertain over the property of the deceased: and
3. that the widow had embezzled some valuables of the deceased and that she should be directed to return them to the nephew.

The Provincial Council directed the *Kazi* and *Muftis* to prepare an inventory of the property, provide for its safe custody and make a Report to the Council on the rights of the parties. Accordingly, the Officers went to make an on-the spot investigation, where they were alleged to have misbehaved with the widow and acted rudely, harshly, and even cruelly, with her. Scared by such behaviour, the widow fled and took refuge in a *durgah*, taking away same title deeds with her.

After investigations, the Officers gave a Report to the Provincial Council that the Gift Deed and the Deed of Dower were *forged documents*. They recommended that, as under Muslim Law, a widow is entitled to one-fourth of her late husband's property, one-fourth of the property should go to her and the balance three-fourths to the nephew. Without any further investigation, the Provincial Council ordered that the Report be implemented and those responsible for the forgery be arrested and put on trial.

The widow, however,, refused to accept only one-fourth of the property and also refused to hand over the title deeds which were with her. She filed an appeal against the decision before the *Sardar Diwani Adalat.,* As this appeal

remained unheard for a long time, she brought an action in the ***Supreme Court*** against the nephew and the *Kazi* and *Muftis* for assault, battery, false imprisonment and other personal injuries, for which she claimed a sum of Rs. 6 lakhs as damages.

The Supreme Court issued an arrest warrant against the defendants, who were arrested in Patna and brought to a jail in Calcutta. Later, bail was offered for the *Kazi* and *Muftis*, but not for the nephew. The court heard the case for ten days, after which it concluded that the Deeds in question were not forged, and therefore, the widow was entitled to the whole property.

The court also found that the widow was, in fact, harshly treated by the Officers and awarded her Rs. 3 lakhs as damages. As the defendants were not in a position to pay this amount, they were ordered to be imprisoned and sent to Calcutta. The old Kazi died on the way, and the other defendants remained in the Calcutta prison until 1781, when the British Parliament passed the Act of Settlement under which they were directed to be released. The widow, then instructed her attorney to file prosecution proceedings against the Patna Provincial Council for the false imprisonment caused by ordering a sepoy to force her to come back.

The Supreme Council defended this suit, pointing out that the members of the Patna Provincial Council had only acted in their official capacity, and therefore, the claim was baseless.

The Supreme Court, however, found the action of the Provincial Council to be illegal, irregular and corrupt, and granted the widow Rs. 15,000 as damages. The Provincial Council thereupon filed an indictment against the widow and others for forgery.

This was, however, quashed by the Supreme Court on the ground that she and others were neither residents of Calcutta, nor were they servants of the East India Company. Apart from highlighting the conflict and clash between the Supreme Court and the Supreme Council (that is, the Governor-General-in-Council), this case raised several interesting questions.

The first issue was whether the Supreme Court had jurisdiction over the nephew, Bahadur Beg. Under the 1773 Act, Indians residing outside Calcutta fell within the court's jurisdiction only if they were, directly or indirectly, in the service of the East India Company or in the service of His Majesty's subjects. it was argued, on behalf of the nephew, that he did not fall in any of these categories and therefore, the Supreme Court had no jurisdiction over him.

However, this contention was rejected by the court following a rather strange line of reasoning. It was held that since he was a farmer of land revenue of some villages in Bihar, he was in the service of the East India Company, and therefore within the jurisdiction of the court.

It is submitted that this reasoning is indeed flawed and questionable. The nephew was no doubt a farmer of land revenue — but not a collector of revenue. There is a distinction between the two, and although a collector of revenue employed by the Company on a fixed salary could be said to be in the service of the Company, it would be stretching it too far to say that a farmer of land revenue was also a servant of the Company. Such reasoning appears to be neither logical nor reasonable. The second issue was whether the Kazi and the Muftis could be tried for acts which they claimed were in discharge of their official duties. The Supreme Court took the view that since they exceeded their powers, their acts were, in no way, in discharge of their duties. The court concluded that their functions were to explain and interpret Muslim Law — and not t3 hear and inquire into the facts of any given case. When it was contended that the authority to do so was delegated to them by the Provincial Council, the court rejected this possibility by pointing out that since the function of administration of civil justice was delegated to the Provincial Council by the Governor-General-in-Council, it could not be further delegated to these Officers. In taking this view, the court relied on the maxim, Delegatus non potest delegare; a delegate cannot delegate. Thirdly, this case had an impact on other farmers of land revenue. The effect of the ruling was that all farmers of land revenue would be deemed to be in the service of the East India Company, and therefore within the jurisdiction of the Supreme Court. This created a panic amongst the farmers and a large number of them gave a petition to the Patna Provincial Council, requesting that they be relieved of the management of the farms. In other words, most farmers expressed their inability to co-operate with the Council in the matter of collection of revenue. Needless to state, this had an adverse effect on revenue collection and administration.

The Patna case was one of the reasons why the Act of Settlement was passed in 1781. The defects and deficiencies prevailing in the administration of justice at that time were squarely reflected in this •case, and this made the British Parliament realise the need to remedy by passing an appropriate law.

(D) KAMALUDDIN'S CASE

In this case, once again, the question arose whether the Supreme Court had jurisdiction over the revenue officers of the East India Company who were engaged in collection of revenue in Bengal, Bihar and Orissa.

Kamaluddin was the ostensible owner of a farm, which in reality belonged to another person, **Kantu Babu.** As there were arrears of land revenue due from Kamaluddin, the Calcutta Revenue Council sent him to prison, although Kamaluddin disputed the claim against him. At that time, it was customary to release such persons on bail, but Kamaluddin was refused bail. So, he approached the Supreme Court which issued a writ of habeas corpus and ordered him to be set free. The court took the view that since the amount in question was in dispute, he should be set free on bail until the completion of the inquiry as to the exact extent of his liability. The court also observed that he should not be imprisoned again until his under-renter (that is, Kantu Babu) had been called upon to pay the amount.

The Governor-General-in-Council, however, took exception to this. They took the stand that they had exclusive jurisdiction over all revenue officers of the Company and that the Supreme Court had no power to take cognizance of any matter related to revenue.

The Supreme Court, on the other hand, took a firm stand that it was the very object of the Regulating Act to empower the court to punish the revenue officers of the Company for their illegal or irregular activities. It was contended that it was a practice to release such persons on bail and that it was equally a practice to demand rent from the under-renter before proceeding against the farmer. The court therefore justified its action as being in conformity with well-established customs and usages of revenue collection.

The Governor-General-in-Council expressed strong resentment in the matter and a majority of the Council took a decision to direct the Provincial Council to arrest Kamaluddin once again. It was also decided to order the Provincial Council to ignore any order coming from the Supreme Court in matters of revenue.

However, the Governor-General, Warren Hastings, refused to support the Council's decision, and so, the same could not be implemented. However, the chain of events reflected in no uncertain terms, the serious conflict between the Supreme Court and the Governor-General-in-Council.

(E) COSSIJURAH'S CASE

Raja Sundernarain was a Zamindar of Cossijurah in Midnapur, Orissa, and was engaged by the Company for collection of revenue (about 20,000 pounds every year). **Kashinath**, a merchant of Calcutta, was his surety.

Raja Sundernarain owed certain sums of money payable under two bonds which he had executed in Calcutta in favour of Kashinath.

Not being able to recover the money through the Board of Revenue, Kashinath filed a debt suit against the Raja in the Supreme Court.

The defence of Kashinath was that the Raja Sundernarain was a Zamindar collecting revenue for the Company, and was thus in the service of the Company. The Supreme Court therefore had jurisdiction over him.

This contention was accepted by the court, and a writ was issued by it for the arrest of the Raja Sundernarain, who went into hiding.

In the meanwhile,- the Supreme Council, after consulting the Advocate-General, Naylor informed the Raja Sundernarain, as well as the other landholders, that they did not fall within the jurisdiction of the Supreme Court and therefore, they need not to obey order of the court.

After receiving this directive, Raja Sundernarain came out of hiding and decided to use force and resist the Sheriff if he came to serve the writ and arrest him.

Accordingly, when the Sheriff came once again, the Raja's men drove him away. The Supreme Council also directed the Collector of Midnapur not to give any assistance to the Sheriff in serving the warrant.

The Collector also gave no assistance to the Sheriff. Thereafter, one more writ was issued by the Supreme Court, this time to seize the contents of the Raja's house, in order to compel his appearance before the court. The Raja alleged that this time, the Sheriff's men entered his house as well as the Zenana (room reserved for ladies) and also committed sacrilege in the prayer room. In the meanwhile, the Governor-General-in-Council directed the Commanding Officer of Midnapur to send troops to intercept and arrest the Sheriff's men.

Accordingly, two companies of Sepoys, with the assistance of the Collector of Midnapur, arrested the Sheriff and his men, kept them in confinement for three days and then sent them to Calcutta as prisoners. Although the Sheriff and his men were released later, the troops were directed to resist any further writ coming from the Supreme Court.

Kashinath then brought an action against the Governor-General and all the members of his Council individually, for having assaulted the Sheriff and his

men. Initially, the Councillors appeared before the court and pleaded that they were not liable as the acts complained of were done by them in their official capacity.

Later, however, they decided to withdraw their appearance and refused to submit to the process of the court. Thereupon, the Supreme Court issued a writ against all the Counsellors, except Barwell and Warren Hastings (the Governor-General). This writ, however, could not be served as the army officials prevented the court officials from serving it. Annoyed and insulted, the Supreme Court committed the Advocate-General, North Naylor, to prison for having wrongly advised the government to ignore the court's process. Incidentally, the North Naylor later died in jail.

At this juncture, it became clear to the court that it had no force to compel the appearance of the Councillors. Then came the anti-climax. At this critical point of time, for some reason which is not clear, Kashinath withdrew his suit against the Raja and the Governor-General-in-Council, and thus ended an acrimonious legal drama.

Apart from once again highlighting the bitter conflict between the Supreme Court and the Governor-General-in-Council, this case raised several important issues:-

1.The most important question was whether the Zamindars were subject to the jurisdiction of the Supreme Court. As the Zamindar in this case did not appear before the court, the issue could not be argued. The proper course would have been for the Zamindar to appear before the court and argue that he did not fall within the court's jurisdiction.

2.Question arises as to which authority was to decide whether or not the Zamindars fell within the jurisdiction of the Supreme Court. According to the Supreme Court, it was the court — and not the Council — which was competent to decide this point, a contention with which the Council vehemently disagreed.

3.It is also clear that the Governor-General and his Council showed scant respect for the process of the court. They hoped to settle the issue by force — and not by the use of constitutional means. Not only that, they also encouraged the Raja to use force and to disregard the orders and directions of the court.

4.The most shocking event was the issue of a Notification by the Governor-General-in-Council that Zamindars residing outside Calcutta should pay no heed to the process of the Supreme Court.

(F) SAROOPCHAND'S CASE

Saroopchand was a surety for payment of revenue of district. Every Zamindar or farmer of land revenue in those days had to bring a person who would stand surety for him. In case the farmer defaulted, the surety would be he liable to pay the dues to the East India Company.

It was alleged that Saroopchand was liable to pay a sum of Rs. 10,000 to the Dacca Provincial Council as arrears of revenue a claim which was disputed by him. He contended that he had advanced a loan of Rs. 10,000 to a member of the said Council named John Shakespeare. This member denied any such loan, although admitted that he did have some financial dealings with Saroopchand.

This matter was taken to the Supreme Court, in meanwhile, Saroopchand was committed to custody without bail by the Provincial Council until such time as he paid Interestingly, the member who had allegedly taken the loan also took part in the proceedings of the Council when the decision against Saroopchand was taken.

Thereafter Saroopchand then moved the Supreme Court for a writ of habeas corpus. After hearing the matter, the court came to the conclusion that the Council was guilty of arbitrary use of powers.

It held that the Council had no right to arrest a person without bail for arrears of rent or revenue. In the circumstances, the Supreme Court ordered Sarocpchand to be released on giving the necessary securities. In the course of its judgment, the court passed severe strictures on the government, observing that it was continuing to act in the same way as it had been acting before the Regulating Act was passed.

Conclusion

In this case, the conflict-between the judcial and the executive came out in the open.

(G) GORA CHAND DUTT'S CASE

In Murshidabad **Gora Chand Dutt** filed a suit against **Mirza Jalleel** for the recovery of a sum of money. The defendant, Mirza, put in a counter-claim against the plaintiff for a larger amount. The case was heard by different judges at different stages. Ultimately, a decree was passed against the plaintiff, Gora Chand, and his property was seized.

It appears that certain irregularities were committed in the execution of this decree and Gora Chand_filed_a_suit against Hosea, the chief of the Provincial Council, for such irregularities, contending that the proceedings of the adalat were grossly irregular.

The Advocate-General of the Company gave an opinion that the Council had in fact, indulged in irregularities for which no successful defence was available. He pointed out that the style of the proceedings, the mode of giving evidence and the principles followed in the adjudication were quite repugnant.He therefore suggested that the matter ought to be compromised with Gora Chand — as the Council would not succeed before the Supreme Court.

The Council, however, did not accept this opinion. It was of the view that the case was the first one of its kind, where members of a Diwani Adalat were sued for acts done in their judicial capacity, and therefore, the case ought to be allowed to take its own course, so that a judgment may be given on the competency of the Diwani Adalats. In retort, the Advocate-General pointed out that the competency of the adalats was not in question; rather, the question before the Supreme Court was whether they exercised their powers or abused such powers. As the Council was adamant in its view, the case Was allowed to proceed before the Supreme Court.

The Supreme Court took a rather lenient view in the matter and held that, except in cases of manifest corruption, the court would not go into the question of regularity or irregularity of the proceedings. The only remedy available in such cases was to file an appeal before the Sardar Adalat. Although this case went in favour of the Company's adalats, it also exposed the serious irregularities that were committed by these adalats.

Conclusion

The study of the above cases shows the unsatisfactory state of the courts and the haphazard manner in which the judiciary functioned at that time. It is clear that the courts often claimed jurisdiction on an arbitrary basis — even over persons not within their jurisdiction. The cases also reveal how English law was often blindly applied to native Indians, without regard to the difference between the cultures of the two countries.

THE ACT OF SETTLEMENT, 1781

i).Due to the conflict between the executive and the judiciary that is, between the Supreme Council and the Supreme Court, had reached a very serious stage, as is amply reflected in' the cases discussed above.

ii).A petition was made to the British Parliament against the activities of the Supreme Court by the Supreme Council. Another petition was also submitted to the British Parliament by the zamindars, servants of the Company and other British subjects residing in Bengal.

iii).A Parliamentaiy Committee was set up in England to make inquiries and submit a report in the matter. It is on the basis of this report that the Act of Settlement was passed by the British Parliament in 1781.

The main purpose of the 1781 Act :-

i).To settle and remove the defects and deficiencies of the Regulating Act, 1773. As seen earlier, terms and expressions used in 1773 Act were not defined with any degree of clarity, resulting in serious conflicts between the Supreme Council and the Supreme Court.

ii).The 1781 Act was therefore passed to "settle" the disputes relating to the jurisdiction of the Supreme Court and its relation With the Supreme Council and the Company's courts. The Act also sought to provide relief to certain persons who had been imprisoned under the orders of the Supreme Court in the Patna case. The Governor-General-in-Council and other officers who had acted in the course of their official duties were also indemnified under the Act.

The main provisions of the Act of Settlement, 1781, are summarised below:-

1. **Restrictions on the jurisdiction of the Supreme Court –**
   The Act clarified that the Supreme Court would have no jurisdiction in any matter concerning the revenue or any act done in the matter of its collection.
   a).It was provided that no person would fall within the jurisdiction of the Supreme Court merely because he was a landowner or landholder or zamindar collecting revenue for the East India Company.
   b).The Governor-General and his Council would not be subject to the jurisdiction of the Supreme Court in matters done by them in their official capacity.

2. **Clarification on the law to be applied by the Supreme Court**

It was provided by the 1781 Act that the Supreme Court had to decide all suits between Hindus on the basis of Hindu law and usages. Suits between Mohammedans were to be settled by applying the laws and usages applicable to Mohammedans. In a case where only one party was a Hindu or a Muhammadan, the matter was to be decided according to the law of the defendant.

3. **Recognition of the Company's courts**

The jurisdiction of the Sardar Diwani Adalats was expressly recognised by the Act. It was also clarified that this Adalat would hear all appeals from decisions of Mofussil Adalats in civil cases. The judgment of the Sardar Diwani Adalat was declared to be final, and appeals against such judgements could be filed before the Privy Council only if the value of the subject-matter in dispute was 5,000 pounds or more.

4. **Power to frame rules and regulations**

The Governor-General-in-Council was empowered to frame rules and regulations for the Provincial Courts and Provincial Councils. Copies thereof were to be sent to the Court of Directors and the Secretary of State for India within six months. The Privy Council had the power to amend or abrogate any such rule or regulation within a period of two years.

5. **Release of certain persons and indemnity provisions**

The Act also made provisions for the release of the defendants in the Patna case (discussed earlier) on security being given by the Governor-General-in-Council for the damages awarded. The defendants were also allowed to appeal to the Privy Council, despite the fact that such an appeal was already time-barred. The Governor-General and his Council, the Advocate General and other persons acting under their orders were also indemnified and discharged from any suit, action or other prosecution, for resisting the execution of the orders of the Supreme Court between the period 1.1.1770 and 1.1.1780.

Critical evaluation of the Act of Settlement

i).The Act of Settlement was to remove the defects of the Regulating Act. The controversy and doubtful issues that had arisen in the Patna case were settled by the Act of Settlement once and for all.

ii).The Act also clarified the position of the zamindars collecting revenue for the Company. The Act also gave recognition to the Company's adalats and raised their status. It also clarified the doubts that had earlier arisen as to the applicable law in certain cases.

iii).The Act of Settlement also curtailed the powers of the judiciary. By doing so, it put an end to the chaos and confusion that had prevailed earlier as regards the court's jurisdiction.

iv).The Supreme Court was able to effectively enforce its orders and thus earn greater authority and prestige.

There is, however, no doubt that the Act was substantially in favour of the Governor-General and his Council and curtailed the powers the Supreme Court. The Governor-General-in-Council became the supreme, and often arbitrary, authority in the country.

II. REGULATING ACT OF 1773

1. PROVISIONS OF THE ACT

a).Introduction:-

There were rampant acts of corruption and misappropriation by the employees of the east India Company in the middle of the eighteenth century. Although the servants of the Company posted in India were paid low salaries, they were able to amass huge wealth by corruption and exploitation. After their return to England, they would make an ostentatious show of such wealth and were referred to as the Nobobs. The Regulating was passed by the British Parliament to regulate the affairs of the company in the future.

b).Object:-

i. To regulate the affairs of the Company and to bring its management under the control of the British Parliament.
ii. To introduce reforms in the constitution and working of the British East India Company.
iii. To establish a Supreme Court at Calcutta.
iv. To restrict acts corruption, illegalities and irregularities committed by the company's servants in India.

c).Main Provisions:-

i. Reconstitution of the British East India Company.
   a. The terms of the company's directors was increased from one year to four years, with one-fourth of the Directors retiring every year.
   b. To enable British Government to have an effective control over the Company.

ii. Executive authority in the presidency of Calcutta:-
   a. In the presidency town of Calcutta, a new government was established under the Governor-General and a council of four members.
   b. **Warren Hastings** was appointed as the first Governor-General and Richard Barwell, Phillip Francis, General Clavering and Colonel Monson were appointed as the four Councillors.

iii. Management of the Presidencies of Bombay and Madras:-

The Presidencies of Bombay and Madras were brought under the control as superintendence of the Governor-General-in-Council at Calcutta in matters of war and peace.

iv. Prohibition on acceptance of rewards and engaging in private trade:-
The Governor-General-in-Council and the Judges of the Supreme Court were specifically prohibited from accepting any present or reward from the Indian princes. They were also prohibited from engaging in any private trade.

v. Good Governance:-
The Governor-General-in-Council was empowered to make rules and regulations and to issue Ordinance for the good governance of Fort William and its subordinate factories.

vi. Establishment of Supreme Court at Calcutta:-
The Regulating Act 1773, also empowered the crown to establish a Supreme Court, at Calcutta by issuing a Charter, and in the following year the Supreme Court was established by the Charter Act of 1774.

Merits & Demerits of the Regulating Act 1773

2. ESTABLISHMENT OF SUPREME COURT AT CALCUTTA UNDER CHARTER OF 1774

The Regulating Act, 1773 made a provision for establishment of a Supreme Court at Calcutta but it was established by issuing Charter of 1774.

a) Constitution:-
The Supreme Court at Calcutta consisted of the Chief Justice and three puisne (subordinate) Judges.

b) Qualification:-
Barrisrter of not less than five years standing were eligible to be appointed on the Bench and they were to hold office during the pleasure of the Crown.

c) Court of Record:-

The Supreme Court was a court of record and was empowered to administer justice according to the principle of *Justice, Equity and Good Conscience*.

d) Jurisdiction of Supreme Court: - *(expand more)*
   i. Civil Jurisdiction
   ii. Criminal Jurisdiction
   iii. Ecclesiastical and testamentary Jurisdiction
   iv. Admiralty Jurisdiction
   v. Equity Jurisdiction
   vi. Writ Jurisdiction

e) Appeals:-
(Mayor's court to Governor General Counsel)
   i. In Civil cases appeals from Orders passed by the Supreme Court could be filed within Six months before the Privy Councils with leave of the Supreme Court.
   ii. In Criminal Cases appeals lay before the Privy Council with the leave of the Supreme Court.

3. THE WORKING OF THE SUPREME COURT AT CALCUTTA WITH SPECIAL REFERENCE TO:-

Cases

i. Trial of Raja Nandkumar
ii. Trial of Radha Charan
iii. Patna Trial
iv. Kamalluddin's Case
v. Cossijurah Case
vi. Saroopchand's Case
vii. Gora Gopichand's Case

Introduction:-

Elijah Impey was appointed as the first Chief Justice of the Supreme Court at Calcutta in 1774.He was a towering personality who was determined to make the presence of the rule of law felt in India. He was equally determined to make the executive and the people of India realize the existence and importance of the judiciary. He struggled to introduce the Independent Court in India, (independent judiciary).

The Working of the Supreme Court resulted in serious friction between the Court and the Governor-General-in-Council (Supreme Council)

The uncertainty and confusion regarding the powers and jurisdiction of the Supreme Court were mainly due to the following factors:-

a) Both the Supreme Court the Governor-General-in-Council (Supreme Council) were constituted by the Crown but each of them claimed superiority over the other. (Superiority complex)

b) The territorial Jurisdiction of the Supreme Court was vague and uncertain which resulted in utter confusion and chaos.

c) Confusion on whether the Supreme Court has jurisdiction over farmers and zamindars who collected revenue on commission basis on the behalf of the Company.

d) Uncertainty over Revenue officers of the company who were engaged in collection of revenue in Bengal, Bihar and Orissa.

e) There was confusion over the relation between the Supreme Court and Company's adalat.

f) There was no clarity which law to be administered by the Supreme Court.

g) Confusion and uncertainty regarding the writ jurisdiction of the Supreme Court.

Cases:-

1. **Trial of Raja Nandkumar**

Raja Nandkumar was an influential Zamindar in west Bengal and a Hindu Brahmin by religion. His loyalty to East India Company right from the days of Robert Clive (governor before warren Hastings) earned him the title of "The Black Colonel".

There were two groups in the Governor-General-in-Council.

1. **One Group-** The GG. Warren Hastings and Councillor Barewell

2. **Other Group-**The Councillors- Francis, Clavering and Monsoon.

The Majority was against Warren Hastings. Raja Nandkumar was encouraged by the majority to bring certain charges against Warren Hastings before Council. They instigated Nandkumar to file charges of bribery and corruption against the Governor-General, which he did in March 1775 in a letter which he handed to Francis.

In this letter he stated:-

i. That in 1772 Hastings had accepted a bribe of Rs. 1,04,105 from him for appointing Nandkumar's son, Gurudas as Diwan.
ii. That he had also taken a bribe of Rs. 2,50,000 from a lady by the name of Munni Begum for appointing her as guardian of minor.

This letter was placed before the Council in a meeting and Monson moved a motion that Nandkumar be summoned before the Council to prove these charges.

The GG Warren Hastings who was presiding at this meeting in his capacity as The GG strongly opposed this motion observing that he would not sit in a meeting to hear charges against himself.

Only Barewell supported the Governor-General- Warren Hastings and suggested that there was no need for the Council to go into the Complaint and Nandkumar may be asked to file his complaint before the Supreme Court as only Court could investigate such a matter.

But Monson's proposal to summon Nandkumar had the support of the majority. So Hastings immediately dissolved the meeting.

The other three members objected to this and decided to continue the meeting after electing Clavering to preside over the meeting in place of Hastings. At this continued meeting, it was decided to call Nandkumar before the Council and allow him to prove his charges.

After few days Nandkumar appeared before the Council and was briefly examined by the majority group of the Council, which then declared that the charged against Hastings were duly proved. Hasting was asked to deposit a sum of Rs. 3,54,105 in the Treasury, being the amount of the two bribes accepted by him.

Due to this incident Nandkumar made a bitter enemy of Hastings who was waiting for opportunity to get back Nandkumar. Soon after he got opportunity where Nand Kumar and Mr.Fawkes were arrested and charged with conspiracy. Hastings succeded in getting one Mr. Mohan Prasad to file charge against Nand Kumar. It was alleged, in this charge, that in 1770, Nand Kumar had forged a **Will** to recover a bad debt, and he ought to be punished under provisions of the Forgery Act,1728, an Act passed by the British Parliament, under which the punishment for forgery was the death penalty.

After hearing the **conspiracy** case, the Supreme Court imposed a fine on Fawkes in July 1775 but reserved its judgment against Nand Kumar as the **forgery** was still pending against him.

The majority group of the Governor-General-in-Council proyested against the charge of forgery leveled against Nand kumar before the Supreme Court, but the court proceeded with hearing unheeded.

On behalf of Nand Kumar, it was strongly contended that the Supreme Court have no Jurisdiction to try him.

The Chief Justice Impey, who presided over the Bench *(and who happened to be a school frierpd of Hastings)* ruled otherwise. The Supreme Court took the view that Nand Kumar *was* an inhabitant of Calcutta, and therefore, within the court's jurisdiction.

Defences:-

1. That English law was introduced into Calcutta by the Charter of 1726. This would mean that all English laws prior to 1726 would apply to Calcutta under this Charter. However, the Forgery Act was passed in England only in 1728, and the Act did *not* contain any provision that it would be applicable in India
2. That Nand Kumar was being tried under an *ex post facto law.* It was pointed out that the alleged offence was committed in 1770, and the Supreme Court itself was established much later — in 1774.
3. The Forgery Act was passed by the British Parliament and the death penalty was prescribed under the Act because of the peculiar conditions prevailing in England at that time

The whole defence of Nand Kumar thus collapsed.

The trial lasted for eight continuous days, at the end of which the court, with the help of a Jury (consisting of all non-Indians) found Nand Kumar guilty of the offence of forgery and sentenced him to death.

An application was immediately moved before the Supreme Court seeking the court's leave to appeal to the Privy Council, but the same was rejected. Another application was then given to the court to forward the case for mercy to the British Crown. The court, however, refused to do this also. As all efforts to save the Raja failed, the death sentence was executed, and *Nand Kumar was hanged on August 5, 1775.*

Conclusion

It a "**judicial murder**" as stated by most of the Historian. It is perceived, even today, that there was a conspiracy between Chief Justice lmpey and his school friend, Warren Hastings, to put Nand Kumar hastily and unjustly to death. In the words of P E. Roberts, even if one concludes that this trial was not a judicial murder, it was certainly a **gross miscarriage of justice**.

The Chief Justice lmpey and Warren Hastings were impeached by the British Parliament. Hastings was charged with corruption and the Chief Justice was called upon to answer the British Parliament on Nand Kumar's death. Although the impeachment proceedings did not succeed, it is interesting to note that the **first judicial murder in India led to the first impeachment in England.** (WH)

2. The Patna case

In this case, a native of Kabul, **Shahbaz Beg Khan**, came to Bengal, joined the services of the Company and then retired. After his retirement, he settled down at Patna and married **Naderah Begum**. There were no issues of this marriage. Later, his nephew, **Bahadur Beg** (whom Shahbaz treated as his son) came from Kabul to live with him and was with him until Shahbaz expired in 1776, leaving considerable property and estate.

After his death, both the widow and the nephew staked a claim to his property. The widow claimed that her husband's *entire property* was given to her in his life-time under a Gift Deed and a Deed of Dower.

On the other hand, the nephew contended that he was entitled to the *whole property* as the adopted son of the deceased. He filed a petition against the widow in the *Patna Provincial Council,* which was established as a *Diwani Court.*

According to the nephew:-

i. that the Gift Deed and the Deed of Dower were *not* executed by the deceased, but were forged by a cousin of the widow;
ii. that the Kazi & Mufti (Muhammadan Law Officers) be appointed by the court to ascertain over the property of the deceased: and
iii. That the widow had embezzled some valuables of the deceased and that she should be directed to return them to the nephew.

The Provincial Council directed the *Kazi* and *Muftis* to prepare an inventory of the property, provide for its safe custody and make a Report to the Council on the rights of the parties. Accordingly, the Officers went to make an on-the spot investigation, where they were alleged to have misbehaved with the widow and acted rudely, harshly, and even cruelly, with her. Scared by such behaviour, the widow fled and took refuge in a *durgah,* taking away same title deeds with her.

After investigations, the Officers gave a Report to the Provincial Council that the Gift Deed and the Deed of Dower were *forged documents.* They recommended that, as under Muslim Law, a widow is entitled to one-fourth of her late husband's property, one-fourth of the property should go to her and the balance three-fourths to the nephew. Without any further investigation, the Provincial Council ordered that the Report be implemented and those responsible for the forgery be arrested and put on trial.

The widow, however, refused to accept only one-fourth of the property and also refused to hand over the title deeds which were with her. She filed an appeal against the decision before the *Sardar Diwani Adalat.* As this appeal remained unheard for a long time, she brought an action in the *Supreme Court* against the nephew and the *Kazi* and *Muftis* for assault, battery, false imprisonment and other personal injuries, for which she claimed a sum of Rs. 6 lakhs as damages.

The Supreme Court issued an arrest warrant against the defendants, who were arrested in Patna and brought to a jail in Calcutta. Later, bail was offered for the *Kazi* and *Muftis,* but not for the nephew. The court heard the case for ten days, after which it concluded that the Deeds in question were not forged, and therefore, the widow was entitled to the whole property. The court also found that the widow

was, in fact, harshly treated by the Officers and awarded her Rs. 3 lakhs as damages. As the defendants were not in a position to pay this amount, they were ordered to be imprisoned and sent to Calcutta. The old Kazi died on the way, and the other defendants remained in the Calcutta prison until 1781, when the British Parliament passed the Act of Settlement under which they were directed to be released.

The widow, then instructed her attorney to file prosecution proceedings against the Patna Provincial Council for the false imprisonment caused by ordering a sepoy to force her to come back. The Supreme Council defended this suit, pointing out that the members of the Patna Provincial Council had only acted in their official capacity, and therefore, the claim was baseless. The Supreme Court, however, found the action of the Provincial Council to be illegal, irregular and corrupt, and granted the widow Rs. 15,000 as damages. The Provincial Council thereupon filed an indictment against the widow and others for forgery. This was, however, quashed by the Supreme Court on the ground that she and others were neither residents of Calcutta, nor were they servants of the East India Company. Apart from highlighting the conflict and clash between the Supreme Court and the Supreme Council (that is, the Governor-General-in-Council), this case raised several interesting questions. The first issue was whether the Supreme Court had jurisdiction over the nephew, Bahadur Beg. Under the 1773 Act, Indians residing outside Calcutta fell within the court's jurisdiction only if they were, directly or indirectly, in the service of the East India Company or in the service of His Majesty's subjects. it was argued, on behalf of the nephew, that he did not fall in any of these categories and therefore, the Supreme Court had no jurisdiction over him. However, this contention was rejected by the court following a rather strange line of reasoning. It was held that since he was a farmer of land revenue of some villages in Bihar, he was in the service of the East India Company, and therefore within the jurisdiction of the court.

It is submitted that this reasoning is indeed flawed and questionable. The nephew was no doubt a farmer of land revenue — but not a collector of revenue. There is a distinction between the two, and although a collector of revenue employed by the Company on a fixed salary could be said to be in the service of the Company, it would be stretching it too far to say that a farmer of land revenue was also a servant of the Company. Such reasoning appears to be neither logical nor reasonable. The second issue was whether the Kazi and the Muftis could be tried for acts which they claimed were in discharge of their official duties. The Supreme Court took the view that since they exceeded their powers, their acts were, in no way, in discharge of their duties. The court concluded that their functions were to explain and interpret Muslim Law — and not t3 hear and inquire into the facts of

any given case. When it was contended that the authority to do so was delegated to them by the Provincial Council, the court rejected this possibility by pointing out that since the function of administration of civil justice was delegated to the Provincial Council by the Governor-General-in-Council, it could not be further delegated to these Officers. In taking this view, the court relied on the maxim, Delegatus non potest delegare; a delegate cannot delegate. Thirdly, this case had an impact on other farmers of land revenue. The effect of the ruling was that all farmers of land revenue would be deemed to be in the service of the East India Company, and therefore within the jurisdiction of the Supreme Court. This created a panic amongst the farmers and a large number of them gave a petition to the Patna Provincial Council, requesting that they be relieved of the management of the farms. In other words, most farmers expressed their inability to co-operate with the Council in the matter of collection of revenue. Needless to state, this had an adverse effect on revenue collection and administration. Last but not the least, the Patna case was one of the reasons why the Act of Settlement was passed in 1781. The defects and deficiencies prevailing in the administration of justice at that time were squarely reflected in this case, and this made the British Parliament realise the need to remedy by passing an appropriate law.

i. **Shahbaz Beg Khan** – came from Kabul to Bengal,
   Naderah Begum – wife of Shahbaz, (had no child)
   Bahadur Beg – Nephew of Shahbaz (Treated like a son)
ii. Shahbaz Died in 1786
iii. Issue: Property claim
iv. Nephew filed in Patna provincial council
v. Kazi & Mufti went to acquire papers from Naderah, behaved rudely. She ran away.
vi. Patna provincial council: ¼ to Wife & ¾ to nephew
vii. Naderah filed in Diwani court
viii. Naderah also filed in Supreme Court,
ix. SC reversed the judgement
   Kazi, Mufti & Bahadur arested

3. Kamaluddin's case

In this case, once again, the question arose whether the Supreme Court had jurisdiction over the revenue officers of the East India Company who were engaged in collection of revenue in Bengal, Bihar and Orissa.

Kamaluddin was the ostensible (apparent) owner of a farm, which in reality belonged to another person, **Kantu Babu.** As there were arrears of land revenue due from Kamaluddin, the Calcutta Revenue Council sent him to prison, although Kamaluddin disputed the claim against him. At that time, it was customary to release such persons on bail, but Kamaluddin was refused bail. So, he approached the Supreme Court which issued a writ of habeas corpus and ordered him to be set free. The court took the view that since the amount in question was in dispute, he should be set free on bail until the completion of the inquiry as to the exact extent of his liability. The court also observed that he should not be imprisoned again until his under-renter (that is, Kantu Babu) had been called upon to pay the amount.

The Governor-General-in-Council, however, took exception to this. They took the stand that they had exclusive jurisdiction over all revenue officers of the Company and that the Supreme Court had no power to take cognizance of any matter related to revenue. The Supreme Court, on the other hand, took a firm stand that it was the very object of the Regulating Act to empower the court to punish the revenue officers of the Company for their illegal or irregular activities. It was contended that it was a practice to release such persons on bail and that it was equally a practice to demand rent from the under-renter before proceeding against the farmer. The court therefore justified its action as being in conformity with well-established customs and usages of revenue collection.

The Governor-General-in-Council expressed strong resentment in the matter and a majority of the Council took a decision to direct the Provincial Council to arrest Kamaluddin once again. It was also decided to order the Provincial Council to ignore any order coming from the Supreme Court in matters of revenue. However, the Governor-General, Warren Hastings, refused to support the Council's decision, and so, the same could not be implemented. However, the chain of events reflected in no uncertain terms, the serious conflict between the Supreme Court and the Governor-General-in-Council.

4. Saroopchand's case

Saroopchand was a surety for payment of revenue of district. Every Zamindar or farmer of land revenue in those days had to bring a person who would stand surety for him. In case the farmer defaulted, the surety would be he liable to pay the dues to the East India Company.

It was alleged that Saroopchand was liable to pay a sum of Rs. 10,000 to the Dacca Provincial Council as arrears of revenue a claim which was disputed by him. He contended that he had advanced a loan of Rs. 10,000 to a member of the said Council named **John Shakespeare**. This member denied any such loan, although admitted that he did have some financial dealings with Saroopchand.

This matter was taken to the Supreme Court, in meanwhile, Saroopchand was committed to custody without bail by the Provincial Council until such time as he paid. Interestingly, the member who had allegedly taken the loan also took part in the proceedings of the Council when the decision against Saroopchand was taken.

Thereafter Saroopchand then moved the Supreme Court for a writ of habeas corpus. After hearing the matter, the court came to the conclusion that the Council was guilty of arbitrary use of powers.

It held that the Council had no right to arrest a person without bail for arrears of rent or revenue. In the circumstances, the Supreme Court ordered Saroopchand to be released on giving the necessary securities. In the course of its judgment, the court passed severe strictures on the government, observing that it was continuing to act in the same way as it had been acting before the Regulating Act was passed.

Once again, in this case, the conflict-between the judicial and the executive came out in the open.

5. Radha Charan's case

Warren Hastings, the Governor-General, lodged a complaint of conspiracy against several persons, including Radha Charan Mitra, who was a vakil of the Nawab. The majority of the Council, consisting of Clavering, Monson and Francis, wrote a letter to the Supreme Court, informing the judges that Radha Charan was the vakil of the Nawab, and was therefore entitled to rights, privileges and immunities under the Law of Nations and the statute law of England.

The Sardar Faujdari Adalat was shifted from Calcutta to Murshidabad in 1775, the administration of justice was in the hands of Nawab Mubarikuddoaula, a sovereign prince, who possessed a royal mint that coined money. The Nawab also maintained his own troops.

The court heard the case in June, 1775 and the Nawab's position as a sovereign prince was hotly contested before the court. On the one hand, it was argued that

since he administered justice, coined money and kept troops, it was evident that he was a sovereign prince. It was also contended that if a sovereign was held not to be sovereign, it would produce "the most dreadful consequences. On the other hand, it was contended that the Nawab had no effective power. Hastings and some ex-members of the Council submitted affidavits that the Nawab's sovereignty was "a mere delusion".

After hearing both the sides, the Chief Justice came to the conclusion that, in effect, all the powers were in the hands of the Company and the Nawab performed no act of sovereignty independently or without the consent of the Company.

The court described him as a "phantom" and a "man of straw". The court went on to observe that just interposing the name `Nawab' would not screen any criminal from the justice of the court.

The claim for immunity of the Nawab's vakil, Radha Charan, was therefore disallowed and he was sentenced to death for the crime. It was only on account of strong representations from the inhabitants of Calcutta that he was pardoned. Radha Charan thus escaped the death penalty, and was, in this sense, luckier than Raja Nand Kumar, whose case has been discussed earlier.

6. Gora Chand Dutt's case

Gora Chand Dutt filed a suit against Mirza Jalleel for the recovery of a sum of money. The defendant, Mirza, put in a counter-claim against the plaintiff for a larger amount. The case was heard by different judges at different stages. Ultimately, a decree was passed against the plaintiff, Gora Chand, and his property was seized.

It appears that certain irregularities were committed in the execution of this decree and Gora Chand filed a suit against Hosea, the chief of the Provincial Council, for such irregularities, contending that the proceedings of the adalat were grossly irregular.

The Advocate-General of the Company gave an opinion that the Council had in fact, indulged in irregularities for which no successful defence was available. He pointed out that the style of the proceedings, the mode of giving evidence and the principles followed in the adjudication were quite repugnant. He therefore suggested that the matter ought to be compromised with Gora Chand — as the Council would not succeed before the Supreme Court.

The Council, however, did not accept this opinion. It was of the view that the case was the first one of its kind, where members of a Diwani Adalat were sued for acts done in their judicial capacity, and therefore, the case ought to be allowed to take

its own course, so that a judgment may be given on the competency of the Diwani Adalats. In retort, the Advocate-General pointed out that the competency of the adalats was not in question; rather, the question before the Supreme Court was whether they exercised their powers or abused such powers. As the Council was adamant in its view, the case was allowed to proceed before the Supreme Court.

The Supreme Court took a rather lenient view in the matter and held that, except in cases of manifest corruption, the court would not go into the question of regularity or irregularity of the proceedings. The only remedy available in such cases was to file an appeal before the Sardar Adalat. Although this case went in favour of the Company's adalats, it also exposed the serious irregularities that were committed by these adalats.

Conclusion

The study of the above cases shows the unsatisfactory state of the courts and the haphazard manner in which the judiciary functioned at that time. It is clear that the courts often claimed jurisdiction on an arbitrary basis — even over persons not within their jurisdiction. The cases also reveal how English law was often blindly applied to native Indians, without regard to the difference between the cultures of the two countries.

7. Cossijurah's case

Raja Sundernarain was a Zamindar of Cossijurah in Midnapur, Orissa, and was engaged by the Company for collection of revenue (about 20,000 pounds every year). Kashinath, a merchant of Calcutta, was his surety. The Raja owed certain sums of money payable under two bonds which he had executed in Calcutta in favour of Kashinath. Not being able to recover the money through the Board of Revenue, Kashinath filed a debt suit against the Raja in the Supreme Cotirt.

His contention was that the Raja was a Zamindar collecting revenue for the Company, and was thus in the service of the Company. The Supreme Court therefore had jurisdiction over him. This contention was accepted by the court, and a writ was issued by it for the arrest of the Raja, who went into hiding. In the meanwhile,- the Supreme Council, after consulting the Advocate-General, informed the Raja, as well as the other landholders, that they did not fall within the jurisdiction of the Supreme Court and therefore, they need not pay any heed to the process of that court.

After receiving this directive, the Raja came out of hiding and decided to use force and resist the Sheriff if he came to serve the writ and arrest him. Accordingly, when the Sheriff came once again, the Raja's men drove him away. The Supreme

Council also directed the Collector of Midnapur not to give any assistance to the Sheriff in serving the warrant.

Accordingly, the Collector also gave no assistance to the Sheriff. Thereafter, one more writ was issued by the Supreme Court, this time to seize the contents of the Raja's house, in order to compel his appearance before the court. The Raja alleged that this time, the Sheriff's men entered his house as well as the Zenana (room reserved for ladies) and also committed sacrilege in the prayer room. In the meanwhile, the Governor-General-in-Council directed the Commanding Officer of Midnapur to send troops to intercept and arrest the Sheriff's men.

Accordingly, two companies of Sepoys, with the assistance of the Collector of Midnapur, arrested the Sheriff and his men, kept them in confinement for three days and then sent them to Calcutta as prisoners. Although the Sheriff and his men were released later, the troops were directed to resist any further writ coming from the Supreme Court.

Kashinath then brought an action against the Governor-naoral and all the members of his Council individually, for h_aving assaulted the Sheriff and his men. Initially, the Councillors appeared before the court and pleaded that they were not liable as the acts complained of were done by them in their official capacity.

Later, however, they decided to withdraw their appearance and refused to submit to theprocess of the court. Thereupon, the Supreme Court issued a writ against all the Counsellors, except Barwell and Warren Hastings (the Governor-General). This writ, however, could not be served as the army officials prevented the court officials from serving it. Annoyed and insulted, the Supreme Court committed the Advocate-General, North Naylor, to prison for having wrongly advised the government to ignore the court's process. Incidentally, the North Naylor later died in jail.

At this juncture, it became clear to the court that it had no force to compel the appearance of the Councillors. Then came the anti-climax. At this critical point of time, for some reason which is not clear, Kashinath withdrew his suit against the Raja and the Governor-General-in-Council, and thus ended an acrimonious legal drama.

Apart from once again highlighting the bitter conflict between the Supreme Court and the Governor-General-in-Council, this case raised several important issues.

i. The most important question was whether the Zamindars were subject to the jurisdiction of the Supreme Court. As the Zamindar in this case did not appear before the court, the issue could not be argued. The proper course would have

been for the Zamindar to appear before the court and argue that he did not fall within the court's jurisdiction. If this argument was rejected, he could have appealed to the Privy Council, which could have decided this point once and for all. Unfortunately, . however, the Supreme Council and the Zamindar (with the active encouragement of the Council) used force to stop the process of the Supreme Court.

ii. Again, a question arises as to which authority was to decide whether or not the Zamindars fell within the jurisdiction of the Supreme Court. According to the Supreme Court, it was the court — and not the Council — which was competent to decide this point, a contention with which the Council vehemently disagreed.

iii. Further, it is also clear that the Governor-General and his Council showed scant respect for the process of the court. They hoped to settle the issue by force — and not by the use of constitutional means. Not only that, they also encouraged the Raja to use force and to disregard the orders and directions of the court.

iv. The most shocking event was the issue of a Notification by the Governor-General-in-Council that Zamindars residing outside Calcutta should pay no heed to the process of the Supreme Court — unless they were of the view that they were servants of the Company or if they voluntarily accepted the court's jurisdiction. In other words, every Zamindar residing outside Calcutta was given the liberty-to decide whether or not he fell within the court's jurisdiction, a proposition that is as astounding as it is illogical.

THE ACT OF SETTLEMENT, 1781

Due to the conflict between the executive and the judiciary that is, between the Supreme Council and the Supreme Court, had reached a very serious stage, as is amply reflected in' the cases discussed above. A petition was made to the British Parliament against the activities of the Supreme Court by the Supreme Council. Another petition was also submitted to the British Parliament by the zamindars, servants of the Company and other British subjects residing in Bengal. A Parliamentaiy Committee was set up in England to make inquiries and submit a report in the matter. It is on the basis of this report that the Act of Settlement was passed by the British Parliament in 1781.

The main purpose of the 1781 Act was to settle and remove the defects and deficiencies of the Regulating Act, 1773. As seen earlier, terms and expressions used in 1773 Act were not defined with any degree of clarity, resulting in

serious conflicts between the Supreme Council and the Supreme Court.. The 1781 Act was therefore passed to "**settle**" the disputes relating to the jurisdiction of the Supreme Court and its relation With the Supreme Council and the Company's courts. The Act also sought to provide relief to certain persons who had been imprisoned under the orders of the Supreme Court in the Patna case (discussed earlier). The Governor-General-in-Council and other officers who had acted in the course of their official duties were also indemnified under the Adt.

The main provisions of the Act of Settlement, 1781, are summarised below.

1. **Restrictions on the jurisdiction of the Supreme Court –**

   The Act clarified that the Supreme Court would have no jurisdiction in any matter concerning the revenue or any act done in the matter of its collection.

   a) It was provided that no person would fall within the jurisdiction of the Supreme Court merely because he was a landowner or landholder or zamindar collecting revenue for the East India Company.
   b) The Governor-General and his Council would not be subject to the jurisdiction of the Supreme Court in matters done by them in their official capacity.

2. **Clarification on the law to be applied by the Supreme Court**

   It was provided by the 1781 Act that the Supreme Court had to decide all suits between Hindus on the basis of Hindu law and usages. Suits between Mohammedans were to be settled by applying the laws and usages applicable to Mohammedans. In a case where only one party was a Hindu or a Muhammadan, the matter was to be decided according to the law of the defendant.

3. **Recognition of the Company's courts**

   The jurisdiction of the Sardar Diwani Adalats was expressly recognised by the Act. It was also clarified that this Adalat would hear all appeals from decisions of Mofussil Adalats in civil cases. The judgment of the

Sardar Diwani Adalat was declared to be final, and appeals against such judgements could be filed before the Privy Council only if the value of the subject-matter in dispute was 5,000 pounds or more.

4. **Power to frame rules and regulations**

   The Governor-General-in-Council was empowered to frame rules and regulations for the Provincial Courts and Provincial Councils. Copies thereof were to be sent to the Court of Directors and the Secretary of State for India within six months. The Privy Council had the power to amend or abrogate any such rule or regulation within a period of two years.

5. **Release of certain persons and indemnity provisions**

   The Act also made provisions for the release of the defendants in the Patna case (discussed earlier) on security being given by the Governor-General-in-Council for the damages awarded. The defendants were also allowed to appeal to the Privy Council, despite the fact that such an appeal was already time-barred. The Governor-General and his Council, the Advocate General and other persons acting under their orders were also indemnified and discharged from any suit, action or other prosecution, for resisting the execution of the orders of the Supreme Court between the period 1.1.1770- and 1.1.1780.

Critical evaluation of the Act of Settlement

1. The Act of Settlement was to remove the defects of the Regulating Act. The controversy and doubtful issues that had arisen in the Patna case were settled by the Act of Settlement once and for all.

2. The Act also clarified the position of the zamindars collecting revenue for the Company. The Act also gave recognition to the Company's adalats and raised their status. It also clarified the doubts that had earlier arisen as to the applicable law in certain cases.

3. The Act of Settlement also curtailed the powers of the judiciary. By doing so, it put an end to the chaos and confusion that had prevailed earlier as regards the court's jurisdiction.

4. Despite this negative impact, it is interesting to see that, even with its diminished jurisdiction, the Supreme Court was able to effectively enforce its orders and thus earn greater authority and prestige.

5. There is, however, no doubt that the Act was substantially in favour of the Governor-General and his Council and curtailed the powers the Supreme Court. The Governor-General-in-Council became the supreme, and often arbitrary, authority in the country.

B. HISTORY OF LEGISLATURE

1. Charter of 1600
2. Regulation Law and Charter of 1813
3. Charter Act of 1833
4. Indian Councils Act of 1861
5. Indian Councils Act of 1892
6. Indian Councils Act 1909
7. **Govt. of India Acts, 1919**
8. **Govt. of India Acts, 1935**
9. I**ndian Independence Act 1947**
10. Development of Civil Law Codification of Law
11. **Law Reforms**

1. Charter of 1600

Establishment of East India Company

The history of the legal system in British opens with the establishment of the East India Company. The East India Company was incorporated in England by the Crown's Charter of 1600. The Company was incorporated for a period of 15 years, but it could be wound up earlier on two years Notice of trade was found unprofitable. The Company was given exclusive trading rights in Asia (including India), Africa and America. No British subject could carry on trade within these areas without the license granted by the Company.

All the members of the Company constituted themselves as General Court. The General Court was to elect annually the Court of the Directors. The Court of Directors consisted of Governor and Twenty- four directors.

2. Regulation Law and Charter of 1813

The System of Regulation Law played an important role in the development of the law in India. The Charter of 1726, for the first time conferred the power of the legislation on the Governor and Council of each Presidency Town.

Before 1726, the legislative Power was conferred on the Company. The Charter of 1726 empowered the Governor-in-Council of each Presidency Town to make by-laws, rules and ordinances for the regulation of the Corporation and inhabitants of the settlement concerned.

The Charter of 1726 also empowered the Governor-in-Council of each Presidency Town to make by-laws, rules and ordinances for the for the good governance of the settlement of Fort William (Calcuta) and factories subordinate to it.

Charter Act of 1813

This Act declared formally the Sovereignty of the British Crown over the Company's territorial acquisition of India; however, it allowed its possession with the Company. The Charter Act of 1813 renewed the Charter of the Company for further period of 20 years. This Act threw open the Indian trade to all the Britishers except the tea trade which continued under the Company's monopoly.
The Charter Act of 1813 extended the legislature powers of the Governments to all the presidency Towns.

3. Charter Act of 1833

The Charter Act, 1833, introduced many reforms in the then existing legislative machinery in India. It played a vital role in the consolidation and codifications of Indian laws. The Company acquired many territories in India. It was very difficult for it to have control over them with the then constitutional setup of the company. A strong Central Government was felt necessary for the effective administration of such vast empire.

i. Establishment of the All India Legislature

Before 1833, there were five sources of Indian Legislation

i. The Charter issued by the British Crown
ii. The Act passed by the British Parliament
iii. The order of the Governor-General-in-Council (knowns as regulations).
iv. The orders of the Supreme Court and
v. The regulations made by the Governor-in-Council of the Presidencies.

Thus, before there were five authorities to make laws and regulations. On account of it the uncertainty and diversity developed in the field of law. To remove this defect, it was necessary to remove the different sources of legislation and to establish one All India Legislature having authority to make laws for the whole territory in possession and under control of Company in India.

The Charter Act, 1833 was enacted with the object to remove the defects. It ws great steps in the process of Centralization. The Provision was made to the establishment of an All India Legislature and strong Central Government.

ii. Establishment of Law Commission

Section 53 of the Charter Act of 1833 made a provision for codification and consolidation of the Indian Laws. It made provision for appointment of Law Commission in India.

iii. Adminsitrative Centralisation

The provisions were made for establishment of a strong Central Government. The Governor-General of Bengal was designated as Governior- Genaral of India. The Presidencies of Bombay, Madras and Calcutta were placed under his control.

4. Indian Councils Act of 1861

To remedy the difficulties arising out of the cetralisation, the Indian Councils Act, 1861, was enacted. This started the process of Decentralisation. The object of the act was to give power of the Governor-in-Council of Madras, Bombay to make and to establish new Council in other provinces.

Besides, the Revolution opened the eyes of the Britishers and they realized the important of the co-operation of the Indians in the administration. The Indian association in the legislation was allowed by this Act.

Provisions:-

i. Provincial Executive and Provincial Legislature (Powers conferred on the Governor)- The Governor-in-Council constituted the Provincial executive. The Governors had power to make rules for the conduct of the business in the Council. Each Governors was authorised to determine times and places of the meetings of his Legislative Council.

ii. Central Executive and Central Legislature. (central Legislative Council-its composition, powers and functions)-

5.Indian Councils Act of 1892

The Indian Council Act, 1892 many changes in the Constitutiinal set up of the Government of India. They may be summed up as follows:-

i. The number of the Additional Members of the Governor-in-Council would not be less than and no more than 16 and the Additional Members of the Governor-in-Council

ii. 2/5 of the Additional Members were to be non-officials.

iii. The members of the Legislative Councils were authorised to discuss annual financial statements.

6.Indian Councils Act 1909

The Indian Councils Act, 1892, failed to satisfy the Indian leaders. The political situation developing in India led the British authorities to think of introducing constitutional reforms with a view to secure the support of the moderate section in the Indian National Congress.

Mr. Gopal Krishna Gokhale, the Chief leader of the moderate section in the Congress went to England, met the Secretary of State for India, Lord John Morley and placed his views before him. Mr. Gokhale tried to convince Lord Morley, the Secretary of State for India, of the urgency of the Constitutional reforms. Lord Morley was sympathetic to the views of Mr. Gokhale. Lord Minto, the Viceroy of India, was also in favour of introducing constitutional reforms.

A Committee was appointed by Lord Minto, the Viceroy of India, to enquire into the matter. The Committee submitted its report to the Viceroy in October, 1906. The report was discussed in the Council and thereafter it was forwarded to Lord Morley, the Secretary of State for India.

A Bill was prepared on the basis of the report of the committee negotiations between Lord Morley, the Secretary of State for India and Lord Minto, the Viceroy of India. In 1909, the British Parliament passed it to become an Act. This Act, the Indian Councils Act, 1909, in the result of the efforts of Lord Minto, the Viceroy of India and Lord Morley, the Secretary of State for India and consequently, the reforms introduced by this Act are popularly known as Minto-Morley Reforms.

The main objects of the Indian Councils Act, 1909, were as follows
(a} to increase the size of the Legislative Councils;
(b) to enlarge the functions of the Legislative Councils;
(c) to increase the proportion of elected members; and
(d) to secure the support of the moderate section in the Indian National Congress.

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i. Size of the Legislative Councils. The size of the Legislative was increased.
ii. Functions of the Legislative Councils
iii. System of election
iv. Vice-presidents
v. Executive Council

7. **Govt. of India Acts, 1919**
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The Act of Settlement also curtailed the powers of the judiciary. By doing so, it put an end to the chaos and confusion that had prevailed earlier as regards the court's jurisdiction.

Despite this negative impact, it is interesting to see that, even with its diminished jurisdiction, the Supreme Court was able to effectively enforce its orders and thus earn greater authority and prestige.

There is, however, no doubt that the Act was substantially in favour of the Governor-General and his Council and curtailed the powers the Supreme Court. The Governor-General-in-Council became the supreme, and often arbitrary, authority in the country.

IV. CONFLICT ARISING OUT OF THE DUAL JUDICIAL SYSTEM

INTRODUCTION:-

A. THE DUAL SYSTEM OF COURTS IN INDIA BEFORE 1861

Before the year 1861, two parallel systems of judicial institution of entirely dissimilar origin prevailed in British India. The country had two sets of courts: the Crown's courts and the Company's courts. The Supreme Courts in the three Presidency Towns of Calcutta, Bombay and Madras constituted the courts set up by the British Crown. In the mofussil areas, namely, the areas lying outside the Presidency Towns, adalats were set up by the East India Company.

The organisation, jurisdiction and powers of the two sets of courts were different and they applied different laws. A continuous clash and conflict was seen between them, mainly because their respective jurisdictions were not clearly defined. Thus, ordinarily, the jurisdiction of the Supreme Court was confined to the inhabitants of the Provincial Towns, whereas persons residing outside these towns fell within the jurisdiction of the Company's adalats. However, in an attempt to extend its jurisdiction, the Supreme Court gave a very broad meaning to the term "inhabitant'. it took the view that even if a person lived outside a Presidency Town, the court would nevertheless have jurisdiction over him if he had some property or land or shop or an agent for commercial transactions within the Presidency Town. Thus, jurisdiction over such persons was claimed by both the sets of courts — by the Supreme Court for the reason given above and by the Company's adalats because such persons resided in the mofussil areas. This led to utter confusion. Parties would file cross-suits against each other in respect of the same matter in different courts, which often gave conflicting judgments.

Both the sets of courts claimed concurrent jurisdiction in respect of immovable property, further complications arose when conflicting decrees were to be executed in respect of the same property.

The pendency of a suit in the Company's court in a mofussil area was no bar to filing a fresh suit in the Supreme Court as regards the same subject-matter.

The main features that distinguished the two sets of courts:

1.The Supreme Courts established in the three Presidency Towns derived their authority from the British Crown, whereas the Company's adalats were established by the East India Company.

2. The Judges of the Supreme Courts were appointed by the Crown and held office during the pleasure of the Crown. On the other hand, judges of the adalats were appointed by the Company and could be removed by the Company.

3. The judges of the Supreme Courts were English Barristers, whereas the "judges" of the adalats had little or no legal knowledge or training.

4. There was no system of hierarchy as far as the Supreme Courts were concerned; there was just one Supreme Court in each Presidency Town. The Company had, however, established a hierarchy of civil and criminal adalats. In each province, the Sardar Diwani Adalat heard appeals in civil cases and appeals against its orders could be filed before the Privy Council. The Sardar Nizamat Adalat likewise exercised appellate jurisdiction in criminal matters. Additionally, both these adalats had supervisory jurisdiction over subordinate courts.

5. The laws applied by the two sets of courts were also different. The Supreme Courts applied English IRw to all cases, whether civil or criminal, except in matters involving the personal laws of Hindus or Muslims, where it applied the Hindu .or the Mohammadan Law, respectively. In a dispute between a Hindu and a Muslim, the law of the defendant was applied. The Company's adalats, on the other hand, mainly decided suits between native Indians. They therefore applied rules of Hindu and Mohammadan law. In case of persons who were neither Hindus nor Muslims, the native laws and customs of such persons were applied by the adalats. Where no specific rule

of law existed, the adalats were required to act on the principles of justice, equity and good conscience.

6. Even the procedure followed by the two sets of courts was different. The Supreme Courts adopted the procedure followed by the English courts, including the English law of evidence. On the other hand,

7.There was no uniform or definite procedure prescribed for the Company's adalats. Although these adalats generally followed the English law of evidence, in so far as the facts of the case permitted, it was not mandatory to do so. The adalat often applied the customary law of evidence derived from Mohammadan Law Officers attached to the adalat.

It was clear that if two sets of laws were administered by two sets of courts whose respective jurisdictions were not well-defined, all kinds of contradictions and conflicts were bound to follow. When the subject-matter of the litigation was situated partly in a Presidency Town and partly in a mofussil area, the Supreme Court and the Company's adalats both claimed jurisdiction in the matter, and when cross-suits were filed in both the courts, the two decisions were often inconsistent with each other.

Cases which highlight the chaos and confusion created by the dual system of courts are given below.

Morton v. Khan

Morton, a resident of the town of Calcutta, filed a suit in the Supreme Court at Calcutta against Khan, who was a resident of Oudh (a mofussil area) for the recovery oi certain debts which Khan's servants had contracted in Calcutta. Although Khan was residing in a mofussil, he did carry on some trade through his servants in the town of Calcutta. On this ground, the Supreme Court came to the conclusion that he was subject to its jurisdiction and passed an order seizing his goods and property. When it was contended that Khan was in fact living outside the Presidency Town and that the Supreme Court had illegally assumed jurisdiction over him, the court justified its stand on the ground that he was a "constructive inhabitant' of Calcutta. The court pointed out that several Indians lived

outside the Presidency Towns, that is, in the mofussil areas, but carried on trade or business in such towns. If such persons were not treated as being within the court's jurisdiction, no relief could be claimed against them. The Supreme Court also took the view that, as a court of equity, it had jurisdiction over movable and immovable properties in the mofussils .in all cases where the owner of such properties was personally liable to its jurisdiction. On this basis, the Supreme Court issued attachment orders of Khan's property in the mofussil.

Musleah V. Musleah

In this case, Musleah, a Jew, who resided in the Presidency Town of Calcutta died, leaving immovable property in the Presidency Town as well as in the mofussil areas. His son approached the Supreme Court at Calcutta, claiming the entire property of his late father under English law. An argument was raised against him that only a mofussil adalat would have jurisdiction over the property outside Calcutta and would dispose of the same applying Jewish law. This contention was, however, not accepted by the Supreme Court, which observed that the Company's adalats had concurrent, but not exclusive, jurisdiction.

Choudhary v. Choudhary

A suit for partition of property filed between two residents of Calcutta was decreed by the Supreme Court at Calcutta, although a part of such property was in the mofussil area. The court repelled the argument that it had no jurisdiction to partition property in the mofussil. It justified its stand on the ground that it had power to decide all suits if the parties were inhabitants of Calcutta.

Mutty Loll Seal v. Joygopaul

In this case, the Supreme Court held that the pendency of a suit in a mofussil adalat could not be pleaded as a bar if a fresh suit was filed between the same parties in respect of the same subject-matter. It observed that the system and the procedures in the two sets of courts were different,

and the Supreme Court would have the jurisdiction to entertain a new suit, even if the same dispute was pending In a mofussil adalat.

Aga Mohd. Jaffer v. Mohd. Saduk

The plaintiff in this case had obtained a decree against the defendant from the Supreme Court at Bombay. The court allowed him to execute the decree by seizure of some horses of the defendant at Nasik, a mofussil area. A creditor of the defendant filed a suit in the Nasik adalat against the European bailiff of the Supreme Court, leading to the arrest of the bailiff. The Supreme Court at Bombay took the view that such creditor at Nasik was guilty of contempt of court and was, therefore, liable to be punished.

The solution to the problem

It was clear that the confusion and conflict arising from the dual system of courts could be resolved only if they were merged into one set of courts. In 1853, a Law Commission was appointed to prepare a scheme for the merger of the Supreme Court and the Sardar adalats. Besides, the East India Company was also dissolved in 1858 and the Government of India was taken over by the British crown. As a result, the distinction between the Company's adalats and the Crown's courts had become academic. It was against this background that the British Parliament passed the Indian High Courts Act in 1861.

B. THE ESTABLISHMENT OF HIGH COURTS UNDER THE INDIAN HIGH COURTS ACT, 1861

Although the Indian High 'Courts Act, 1861, did not itself establish any High Court, it empowered the British Crown to establish one High Court in each of the Presidencies of Calcutta, Bombay and Madras. Accordingly, High Courts were established in Calcutta, Bombay and Madras in 1862.

The main object of the Act was to abolish the Supreme Courts in the Presidency Towns and the Sardar Adalats in the mofussil areas, and establish in their place, one High Court in each Presidency town. Such a High Court was vested with the jurisdiction which was earlier vested in the Supreme Court and the Sardar adalats. In other words, the dual system of

courts was to be abolished and a unified judicial system was to be established in the country.

Under the Act, each High Court was to consist of one Chief Justice and as many puisne (subordinate) judges, not exceeding fifteen, as the Crown thought it fit to appoint. It was provided that: -

At least one-third of the Judges, including the Chief Justice, were to be Barristers of at least five years' standing. - At least one-third of the.Judges were to be appointed from members of the Civil Service of at least ten years' standing and who had served as Zilla Judges for at least three years.

- The remaining one-third posts were to be filled by subordinate judges with at least five years' service or pleaders of the Supreme Court or the Sardar adalats with at least ten years' standing.

All judges of the High Court were to hold office during the pleasure of the British Crown.

Earlier, the Supreme Court had judges who had a good knowledge of English law, but who were least familiar with native laws and customs. Likewise, the Company's adalats had judges who were well-versed with native laws and customs, but had inadequate knowledge of the laws and procedures prevailing in England. Now, the High Court would have both these types of judges, which would be more conducive to the administration of justice in the country.

Jurisdiction of the High Courts

The High Courts established under the 1861 Act were to be courts of record with very wide jurisdiction in civil, criminal, admiralty, matrimonial, testate and intestate matters. [A court of record is a court whose decisions and orders are preserved permanently. Such a court also has the power to punish for contempt of its authority.]

a).Ordinary original civil jurisdiction

In the exercise of its ordinary original civil jurisdiction (OOCJ), the High Court exercised jurisdiction within the local limits of the Presidency town.

This was similar to the jurisdiction earlier exercised by the Supreme Court. However, before this Act, the Supreme Court had exercised jurisdiction in certain cases even over persons outside the Presidency town; such jurisdiction was not conferred on the High Court under the Act. Its ordinary jurisdiction was confined to the local limits of the Presidency town. Subject to what is stated above, the High Court had power to try suits of every description — unless the subject-matter of the suit was below Rs. 100, in which case the suit was to be tried by the Small Causes Court 'established in that Presidency town.

As regards immovable property, the High Court wasgiven jurisdiction to try all suits — - if the immovable property was situated in the Presidency town; or - if the cause of action arose in the Presidency town; or

if the defendant, at the commencement of the suit, resided in the Presidency town or carried on business or personally worked forgain within the limits of that Presidency town.

Here also if the dispute involved a sum below Rs. 100, the suit would have to be filed in the Small Causes Court.

b).Extraordinary original civil jurisdiction

The High Court could also exercise extraordinary original civil jurisdiction. Under this jurisdiction, it could withdraw a suit pending in a subordinate court which was subject to its superintendence and decide the matter itself, if justice so required. When exercising such jurisdiction, the High Court could also try offences committed outside the Presidency town.

c).Criminal jurisdiction

In the exercise of its ordinary original criminal jurisdiction, the High Court had jurisdiction in criminal matters over all persons residing in that Presidency town. It also had criminal jurisdiction over Europeans and Britishers outside the local limits of the Presidency town. When exercising its extraordinary criminal jurisdiction in criminal matters, the High Court had jurisdiction over all persons residing in any place within the jurisdiction of any court which was subject to its superintendence.

d).Admiralty jurisdiction

As an admiralty court, the High Court could exercise civil, criminal and maritime jurisdiction which extended to all maritime offences committed anywhere in India.

e).Testamentary and intestate jurisdiction

The High Court was also given the power to grant probates of wills and testamentary .dispositions, as well as letters of administration in respect of the property of deceased persons. It was provided that the court was to have "like power and authority" as regards testamentary matters as was earlier exercised by it predecessor, the Supreme Court.

f).Matrimonial jurisdiction

The High Court had jurisdiction in matrimonial matters concerning persons professing the Christian religion. However, in doing so, the court could not interfere with the exercise of any jurisdiction in matrimonial matters by any other court.

g).Appeals to the High Court

In civil cases, the High Court was em'mbowered to hear appeals from the judgments of all civil courts subordinate to it. In criminal matters, the High Court could hear appeals from any court subject to its superintendence. The High Court could also transfer any criminal case or appeal from one subordinate court to another.

h).Appeals from the High Court

In civil cases, an appeal could be filed before the Privy Council against the final judgment of the High Court if the suit was valued at Rs. 10,000 or more or if the High Court certified that the case was a fit one for appeal to the Privy Council. In criminal matters, an appeal to the Privy Council lay from any judgment or order of the High Court made in the exercise of its original criminal jurisdiction, or if in a criminal matter, a point of law had been reserved for the opinion of the High Court by a lower court — provided

that the High Court certified that the case was a fit one for appeal to the Privy Council.

Law to be applied by the High Courts

As regards the law to be applied by the High Courts, the following provisions were made in the Act:

1. When exercising its ordinary original civil jurisdiction, the High Court was to apply the same law or principles of equity as would have been applied to such a case by the erstwhile Supreme Court. Effectively, this meant that English law would be continued to be applied by the High Court in such matters.
2. In the exercise of its extraordinary original civil jurisdiction, the High Court had to apply the same law or principle of equity as would have been applied to such a case by the local court having jurisdiction in the matter.
3. When exercising its appellate jurisdiction, the High Court was to apply the same law or principles of equity as the court in which the proceedings originated ought to have applied in such a case.
4. In criminal cases, the High Court was required to apply the provisions of the Indian Penal Code, 1860, when acting as a court of original jurisdiction or as a court of appeal, reference or revision. Thus, in criminal matters, a uniform body of law was applicable on all sides of the High Court.
5. Uniformity in the matter of procedural law was also sought to be achieved by applying the Code of Civil Procedure (CPC) in all cases.
6. An effort was made to fuse law and equity, so as to achieve uniformity in this sphere also.

The Government of India Act, 1919

Introduction:-

After the First World War broke out in 1914, with a view to prepare a scheme of reforms, Montague, the Secretary of State for India came to India in November 1917, along with the Viceroy, Lord Chelmsford and extensively toured large parts of the country. He also met top-ranking Indian leaders, held extensive discussions with them and personally studied the problems facing the country. A report was then prepared by Montague, the Secretary of State for India in consultation with Lord Chelmsford, which became well-known as the Montague-Chelmsford (or the Mont-Ford) Reforms. It was on the basis of this report that the Government of India Act, 1919, was passed by the British Parliament.

Main objects of the Act

The principal objects of the 1919 Act may be summarised as under:

• The main purpose of the Act was to increase the association and participation of Indians in every branch of the administration of India. To achieve this, the Act sought to put a little more power and responsibility in the hands of Indians.

• The Act aimed at establishing responsible government in India. However, this was to be done, not immediately, but in gradual stage. The time and manner of finally establishing full responsible government in the country was to be decided by the British Parliament, taking into account the co-operation given by Indians.

• The Act sought to develop — but in a gradual manner —self-governing institutions in India. Before allowing Indians to take full charge of the administration, it was thought necessary to give them proper training in the right direction. It was conceived that, at first, only local affairs could be left in their hands, and after they obtained sufficient experience, they could gradually be given complete control over all matters concerning the country.

• The Act sought to give the provinces a large measure of independence in provincial matters. This would ultimately lead to a good amount of decentralisation in the government.

Main provisions of the Act

The most important provisions of the Act may be summed up as follows:

1. The 1919 Act introduced diarchy (dyarchy) in the provinces.

2. Changes were made in the constitution of the Indian Council, which was to consist of eight to twelve members. The number of Indians in the Council was increased from two to three. Their salaries and allowances were increased although their tenure was reduced from seven years to five years.

3. As regards the Governor-General, it was provided as under: - The Governor-General had to carry out his functions with the advice and concurrence of his Executive Council. However, he was given the power to override the view of the Council, if he was satisfied that such view was harmful or wrong or if it was necessary to do so for preserving peace and tranquillity in the country.

Likewise, even if a Bill was rejected by the legislature, the Governor-General had the power to put it on the statute book if, in his opinion, it was in the interests of British India. This power popularly called the 'power of certification' was, in fact, used by the Governor-General on several occasions.

- Bills affecting certain matters (for instance, foreign relations, public debt and public revenue) could not be introduced in the legislature without the prior sanction of the Governor-General.

4. The Act made the central legislature a bicameral legislature. It was to consist of two Houses, the Upper House (or the Council of States) and the Lower House (or the Legislative Assembly). The Upper House was to consist of a maximum of 60 members — some of whom were nominated and the rest were elected. The Lower House had 140 members_ As the Governor-General was part of the central legislature, this legislature consisted of the Governor-General, the Upper House and the Lower House. Under the scheme of the Act, the Upper house was meant to serve as a check on the Lower House.

5. The Act divided subjects of administration into two classes: central subjects and provincial subjects. Central subjects, being matters of national importance (like defence, post & telegraphs and currency & coinage) fell within the domain of the central legislature, whereas provincial subjects, being of local interest and importance (like education, agriculture, police, etc.) were left to be legislated by the provincial legislature. It was also clarified that all matters not

included in the list of provincial subjects were to be treated as central subjects. If any dispute arose as to whether a particular subject fell within the central list or the provincial list, the same was to be decided by the Governor-General-in-Council, whose decision was final.

6. In the matter of elections, the Act introduced the principle of communal representation for Muslims, Sikhs, Anglo-Indians and Indian Christians.

THE DIARCHY SYSTEM UNDER THE 1919 ACT

~~As stated above, the Government of India Act, 1919, introduced diarchy in the provinces. The word diarchy (or dyarchy) is made up of two words, 'd/ (or di) meaning two and `archid meaning rule. The word thus signifies a system of double rule or a~~ double form of government.

Under the Act, all subjects of administration were divided into two classes: central subjects (being matters of central importance like defence) to be legislated by the central legislature, and provincial subjects (being matters of local importance like agriculture) to be administered by the provinces. The provincial subjects were further sub-divided into two categories: the transferred subjects and the reserved subjects. Some examples of matters which fell in the list of transferred subjects were:

local self-government; education; public health; sanitation; public works; agriculture; co-operative societies; religious and charitable endowments; museums; registration of births and deaths, etc.

On the other hand, matters such as the following fell in the category of reserved subjects: - irrigation and canals;

administration of justice; development of industries; development of mineral resources; water supplies; police; land revenue and land acquisition; famine relief; newspapers, etc.

The transferred subjects were to be administered by the Governor with the assistance of his ministers, who were responsible to the provincial legislature. Such ministers were appointed by the Governor and held office during his pleasure. In the administration of these subjects, the Governor was expected to

act on the advice of his ministers. However, he could refuse to act on such advice if he had sufficient reason to dissent from their opinion.

The reserved subjects were to be administered by the Governor with the assistance of his executive Councillors, who were not responsible to the legislature. The Governor was not bound, under the Act, by the majority decision of the Council and he could override such a decision if, in his opinion, the majority decision was wrong or fraught with grave danger to the safety, peace and tranquillity of the province.

The Councillors (who assisted the Governor as above) were appointed by the Crown on the recommendation of the Secretary of State for India, the appointment being for five years. Although such Councillors were ex officio members of the Provincial Legislature, they were not responsible to such legislature. The Councillors were responsible to the Governor-General, and through him, to the Secretary of State for India, and through the latter, ultimately to the British Parliament.

It will be seen that an experimental version of responsible government was introduced only in the provinces. There was no element of responsible government at the centre.

Critical evaluation of dyarchy in the provinces under the 1919 Act

Although the 1919 Act was a bold and commendable step towards the establishment of complete provincial autonomy in India, the working of the system of dyarchy left much to be desired. A Commission was appointed under the chairmanship of Sir Alexander Muddimon to examine the working of dyarchy in the provinces, and this Commission revealed the various shortfalls of the system. The main defects of dyarchy in the provinces were the following:
1. Even in pure theory, the concept of dyarchy is rather unsound, as it pre-supposes a perfect and logical division of various departments, which in practice is impractical and even impossible.

2. The division of subjects into transferred subjects ani, reserved subjects under the Act was irrational and unclear Thus, while agriculture was a transferred subject, irrigation was a reserved subject. It is clear that dyarchy was an experiment by the British in constitution-making, but one which failed miserably.

3. Ministers could exercise little control over the public servants of their own departments. They had no say in their transfer or promotions — as this was under the control of the Governor.

4. The Ministers had to please two masters — the Governor and the Provincial Legislature. On the one had, the Governor could dismiss a Minister without giving any reason; on the other hand, the Provincial Legislature could force a Minister to resign if he had lost its confidence. This made the position of the Ministers weak and vulnerable.

5.In practice, the Ministers did not act on the principle of the collective responsibility. They were individually — and not collectively — responsible for the working of their departments. As the Governor dealt with each Minister separately, joint responsibility did not exist.

6. The Governor became a very powerful authority in the province. He administered both the reserved and the transferred subjects. Although he was supposed to administer the reserved subjects with the help of the Council, he was not bound by the decision of the majority of the Council. Transferred subjects were administered by him with the help of the Ministers, but he had the power to refuse to act according to their advice. Besides, the Ministers held office during his pleasure, and he could therefore dismiss any Minister without giving any reason.

7.As the Finance Department was controlled by the Council, often, the Ministers could not implement their policies and programmes as the Council refused to sanction the necessary funds.

8. Some functions of the Government were handled by the Governor with his Councillors and others by him and his Ministers. There was, however, a tussle between the Councillors and the Ministers. The Governor did little to encourage any joint deliberation between the two. In fact, this conflict between the Councillors and the Ministers led to administrative inefficiency and ultimately resulted in the failure of the system of dyarchy.

9. Moreover, the Indian National Congress was opposed to the system of dyarchy. Because of non-cooperation from the Congress, Ministers were chosen from other groups and they did not enjoy popular support.

10. Other events like the passing of the Rowlatt Act in March 1919 (which authorised unlimited detention in the name of public safety), the Jallianwalla

Baug massacre in April 1919, and the enforcement of martial law in Punjab, shattered the aspirations of all Indians. As Mahatma Gandhi remarked, the working of the reforms were only a way of draining India of her wealth and prolonging her servitude. The system of dyarchy in the provinces was ultimately abolished by the Government of India Act, 1935.

THE GOVERNMENT OF INDIA ACT, 1935

Introduction:-

As per the Government of India Act, 1919, a Commission of Inquiry be set up within ten years to inquire into "the development of representative institutions in British India". Accordingly, a Commission headed by Sir John Simon (the Simon Commission) was set up in 1927.

After the Commission gave its report in 1930, there were three Round Table Conferences in London between 1930 and 1932.

Although all these exercises resulted in a deadlock, the British government nevertheless went ahead and passed the Government of India Act, 1935, an Act which conferred a substantial measure of autonomy on the provinces and also established a responsible government in the country for the first time.

It is generally accepted that the 1935 Act was a product of four diverse forces, namely, (a) Indian nationalism, (b) British imperialism, (c) Indian communalism, and (d) the role played by the Indian princes.

It is widely perceived that this Act was forced upon India by the British Parliament because the provisions of the Act were far from the expectations of the Indian leaders.

Nevertheless, the 1935 Act can be regarded as a milestone in Indian legal history for three reasons.

Firstly, it introduced a federal form of government in India in place of the unitary structure which prevailed earlier.

Secondly, it envisaged a federation to which the native states were to accede. Last, but not the least, it played a vital role in the shaping and moulding of the Constitution of India in 1950.

The most important provisions of the Government of India Act, 1935, may be summed up as follows:

1. **Establishment of a federation**
   So far, the country had a unitary form of government. The 1935 Act sought to introduce a federal structure for India. The Act provided for the formation of an all-India federation. All the provinces were to join the new federation automatically.
   However, as far as the native Indian states were concerned, it was purely voluntary as to whether a particular state would or would not join the federation. If such a state opted to join the federation, its ruler

was required to sign an Instrument of Accession, which stated the extent of surrender of the ruler's powers in favour of the federal government.

2. **Division of legislative power between the centre and the units**

The 1935 Act envisaged a division of power between the centre and the units. It provided for three Lists of subjects to be legislated upon, namely the Federal List, the Provincial List and the Concurrent List. Subjects falling in the Federal list were to be legislated by the centre and those falling under the Provincial List by the units (provinces). Subjects included in the Concurrent List would be legislated upon both by the centre and the provinces, but in case of a conflict, the central legislation would prevail.

3. **Diarchy at the centre**

The system of diarchy in the provinces which was introduced by the 1919 Act was abolished. The Government of India Act, 1935, introduced the system of diarchy at the centre. The federal subjects were divided into reserved subjects and transferred subjects. Reserved subjects were subjects of national importance like defence and external affairs, and were to be administered by the Governor-General with the assistance of his executive Councillors. The transferred subjects, namely those which were central subjects, but of lesser national importance, were to be administered by the Governor-General with the aid and advice of his Ministers.

4. **Bi-cameral legislature at the centre**

The federal legislature was to be a bi-cameral legislature, consisting of the Federal Assembly (the Lower House) and the Council of States (the Upper House). The Federal Assembly had a life of five years, whereas the Council of States was a permanent body of which one-third members would retire every three years. [Here also, the introduction of a bi-cameral legislature at the federal level is strikingly similar to the framework of the Constitution of India which has the Rajya Sabha (the Upper House) and the Lok Sabha (the lower House)]

5. **Appointment of the executive**

The Governor-General was appointed by the British Crown and was responsible to the Secretary of State for India, and through him, to the British Parliament. He was not responsible to the federal legislature.

Neither he nor the executive Councillors could be dismissed by the federal legislature. The executive Councillors were appointed by the Governor-General and were ex officio members of the federal legislature. However, they were responsible to the Governor-General — and not to the federal legislature. The Council' of Ministers was to consist of not more than ten members to be appointed by the Governor-General. They held office at the pleasure of the Governor-General, who could dismiss them at will.

6. **Strong position of the Governor-General**
The Governor-General became a very powerful authority under the 1935 Act, with vast administrative, legislative and financial powers. He was not a mere constitutional head, but enjoyed very wide discretionary powers. He could even promulgate Ordinances overriding the will of the central legislature. Although the Governor-General was, in general, to go by the advice of his Ministers in the administration of the transferred subjects, he could refuse to follow such advice in matters which were his 'special responsibilities'. Moreover, there were certain powers which he could exercise even without consulting his Ministers. As regards his financial powers, ,he could exercise full control over all non-voatable heads of expenditure — which constituted more than 80% of the entire budget. He could also restore any demand for a grant which had been rejected or reduced by the central legislature.

7. **Administration of the provinces**
At the provincial level, the executive consisted of the Governor and his Council of Ministers, which was to aid and advise the Governor in the exercise of his executive powers. The Ministers were responsible to the provincial legislature and could be dismissed by it. The Governor became a very strong authority in the province and was authorised to exercise certain powers at his discretion, that is, even without consulting the Ministers. For instance, he had the power to take any step to prevent an attempt to overthrow the government, and when doing so, he was not required to consult his Ministers. No doubt, there were certain matters where he was bound to act on the advice of his Ministers, but such matters were very few and were of hardly any importance. In most provinces, there was only one House, namely, the Legislative Assembly, but in some provinces like Assam, Bengal, Bihar, etc., there were two Houses, the Legislative Assembly (the Lower House) and the Legislative Council (the Upper House).

8. **Establishment of a federal court and High Courts**
   The Government of India Act, 1935, established a Federal Court at the centre and High Courts in the provinces.

The Federal Court

One of the most important — and significant — features of the 1935 Act was S. 200 thereof, which provided for the establishment of a Federal Court, consisting of a Chief Justice and such number of puisne (subordinate) Judges as the Crown may deem necessary, not however exceeding six in number. All the Judges were to be appointed by the British Crown and were to hold office until the age of 65 years. Such a Judge could resign before attaining this age; he could also be removed from office on the ground of misbehaviour or on the ground of mental or bodily infirmity, if so recommended by the Privy Council on a reference made to it by the British Crown.

A person was qualified to be appointed as a Judge of thg, Federal Court — if he had been a Judge of a High Court in British India or in a federal state for at least five years; or if he was a Barrister of England or Northern Ireland with a standing of at least ten years; or if he was a member of the Faculty of Advisors in Scotland with at least ten years' standing; or if he was a pleader of a High Court for ten years or more.

The Chief Justice, however, was required to be a Barrister or Advocate or pleader with at least fifteen years' standing.

Jurisdiction of the Federal Court

The Federal Court enjoyed three types of jurisdiction : original, appellate and consultative. The Court had exclusive original jurisdiction in all matters of dispute between the federation, any of the provinces or any of the federated states, if the dispute involved any question of law or fact on which the existence or extent of any legal right depended. This jurisdiction would not extend to a dispute where a state was a party, unless the dispute involved the interpretation of the 1935 Act or an Order-in-Council made under the Act or if it involved the extent of legislative or executive authority vested in the federation by virtue of the accession of that state under its Instrument of Accession. As regards its appellate jurisdiction, the Federal Court was empowered to hear appeals from any judgment, decree or final order passed by any High Court in British India — provided that the High Court certified that the case involved a substantial question of law as regards the interpretation of the 1935 Act or an Order-in-Council made under the Act. However, the federal legislature could enact a law, with the previous sanction of the Governor-General, for such appeals to be filed even without the High Court's certificate if the dispute in that case exceeded at Rs. 50,000 or such other amount as might be specified by law.

The Federal Court also enjoyed advisory or consultative jurisdiction. If the Governor-General referred any point of law to the Federal Court, it could give its opinion on such a reference in open court.

Appeals against orders of the Federal Court

If a judgment was passed by the Federal Court in the exercise of its original jurisdiction, an appeal would lie against the judgment to the Privy Council, provided the dispute involved an interpretation of the 1935 Act or an Order-in-Council made under the Act or which related to the extent of the legislative or executive authority vested in the federation under an Instrument of Accession. In all such cases, no leave of the Federal Court was necessary to file an appeal. In all other cases, an appeal from a judgment of the Federal Court would lie to the Privy Council only if leave to file such an appeal was granted by the Federal Court or by His Majesty-in-Council.

Supercession of the Federal Court After independence, the Federal Court was converted into the Supreme Court of India on January 26, 1950. All the Judges of the Federal Court on that day became Judges of the Supreme Court, thus establishing a historical continuity between the highest court of the country established in the British era and the highest court of independent India.

High Courts

The 1935 Act also made provisions for High Courts. The existing High Courts of Bombay, Calcutta, Madras, Lahore and Patna were recognised as High Courts. Cprtain other courts which were in existence at that time, as for instance, the Chief Court of Oudh, were also recognised as High Courts. The High Court was to be a court of record and was to consist of a Chief Justice and such other Judges to be appointed by the Crown from time to time. His Majesty-in-Council was empowered to fix the maximum number of judges for each High Court.

A person could be appointed as a judge of a High Court

if —

he was a Barrister or Advocate of Britain for at least ten years; or he was a member of the Indian Civil Services for at least ten years and had served as a District Judge for at leas, three years; or he held a judicial office in India, not inferior to a subordinate judge or a judge of a Small Causes Court for at least five years; or

he was a pleader of any High Court for at least ten years. The Governor-General was empowered to appoint additional judges in any High Court for a period of two years to clear the arrears of such High Court. The existing

High Courts were to enjoy the same jurisdiction as they had before the 1935 Act. Every High Court was also given the power of superintendence over all courts subject to its appellate jurisdiction. An appeal could be filed before the Federal Court from any judgment, decree or final order of a High Court, if the High Court certified that the case involved a substantial question as to the interpretation of the 1935 Act or an Order-in-Council made thereunder. The Federal Legislature was empowered to pass laws to provide that, in specified civil cases, an appeal could be filed before the Federal Court without the certificate of fitness if the amount involved was not less than Rs. 50,000 or such other amount as might be specified in that law. Power was also given under the Act to His Majesty to issue Letters Patent to constitute new High Courts or to reconstitute existing High Courts.

11. Law Reforms

Introduction

Law Reform has been a continuing process particularly during the last 300 years or more in Indian history. In the ancient period, when religious and customary law occupied the field, reform process had been ad hoc and not institutionalized through duly constituted law reform agencies. However, since the third decade of the 19th century, Law Commissions were constituted to recommend reforms.

As times change, the laws too need to evolve. A law which stood the test of time yesterday may not be the best law today. Hence, Law Commissions have been appointed in most countries to review the prevailing law and recommend reforms in existing laws. Thus, In England, the Law Commission of England and Wales is a statutory independent body created by the Law Commissions Act, 1965, to keep the law under review and to recommend reform where it is needed. Likewise, in New Zealand, a Law Commission has been established by the Law Commission Act, 1985, to review, reform and develop the law of New Zealand.

The main purpose and object of a Law Commission is to ensure that the law is — a). fair b). up-to-date c).simple, and d). as cost-effective as possible.

In other words, Law Commissions promote systematic review, reform and development of the law. At the same time, they recommend the repeal of outdated and redundant laws of the nation.

In doing so, they also give a tremendous boost to legal research in the country. Pre-independence period In the days of the East India Company, two sets of laws prevailed in the country : one which applied to British citizens and the other which applied to local inhabitants. This was considered to be a major set-back and stumbling block for efficient administration during the British raj. In order to ensure the uniformity of legal administration, various options were considered. However, it was only in 1833 that a Law Commission was constituted to undertake a comprehensive examination of the existing legal system.

The First Law Commission was appointed in India according to the provisions of Section 53 of the Charter Act of 1833. The Law

Commission was headed by T.B. Macaulay and consisted of four members—C.H. Cemeron, Macleod, G.W. Anderson and F. Millet who was appointed in 1837.

In 1837, Lord Macaulay went back to England. Andrew Amos was appointed as Chairman in his place and in 1840, C.H. Cameron was appointed as Chairman of Commission.

The Law Commission was to function under the direction and control of the Governor-General-in-Council. The terms of reference of the Commission were "to enquire into the jurisdiction, powers of the existing courts of justice... in the Indian territories and all existing forms of judicial procedure, and into the nature and operation of all laws whether civil or criminal, written or customary prevailing and in force...". The Commission was therefore, assigned the task of —

i). codification of Penal Law;

ii).the law applicable to non-Hindus and non-muslims with regard to their various rights; and

iii).Codification of Civil and Criminal Procedural Law.

S. 53 of the Government of India Act, 1833 (also known as the Charter Act, 1833), authorised the Governor-General to establish Law Commissions in India, with the twin objects of preparing a code of laws common to all persons in the country and to systematise the application of laws in the administration of justice. Pursuant thereto, four Law Commissions were constituted in India before independence and their contribution to the codification of laws in India remains unparalleled. These Commissions were responsible for the drafting of several Acts, most of which remain in force even today, as for instance, --. The Indian Penal Code

The Civil Procedure Code • The Criminal Procedure Code • The Indian Evidence Act • The Indian Contract Act • • The Limitation Act • The Indian Succession Act • The Indian Trusts Act.

The first Law Commission in pre-independent India was set up in 1834 with Lord Macaulay as its Chairman. The greatest contribution of this Commission was the preparation of a common penal code for the whole of India. The Macaulay 's Code', as it was then referred to, became the Indian Penal Code in 1860. Drafts of the Civil Procedure Code and the Law of Limitation were also submitted by this Law Commission. However, perhaps the most x loci in Latin means controversial Report of this Law Commission was the Le Loci Report. Le "the law of the land". At that time, although English law was applied as the lex loci to non-Hindus and non-Muslims in

the Presidency towns, there was no lex loci for these persons in the mofussil areas. The Law Commission therefore recommended that the substantive English law (though not the procedural English law) be declared toibe the lex loci in the mofusslls also — so that the prevailing uncertainty and obscurity in the application of laws could be put to an end. Although the Lex Loci Report and the Lex Loci Act drafted by the First Law Commission are regarded as its unique contribution, the Report was profusely criticised and ultimately rejected. The only recommendation which was put into effect was in the form of passing the Caste Disabilities Removal Act in 1850. This Act invalidates all laws and usages which affect the right of inheritance of a person who has renounced his religion or caste. In other words, such a person retains his full rights of inheritance, despite such renunciation.

Post independence period

After independence, there had been demands - in Parliament and outside - for establishing a Central Law Commission to recommend revision and updating of the laws inherited from the British in order to serve the changing needs of independent India. The Government of India reacted favourably and established the first Law Commission of independent India in 1955.

In India, the Law Commission is an executive body established by an Order of the Government of India, and works as an advisory body to the Ministry of Law and Justice. It consists of high-ranking legal experts who are entrusted with a mandate by the Government. It is usually headed by a law expert like a retired Judge or Attorney General. This adds to the prestige and value of the Commission.

The First Law Commission was established under the chairmanship of the then Attorney-General of India, Mr. M. C. Setalvad. The tenure of this Law Commission was for three years — a practice which is followed till date. This Commission made several useful recommendations, inter alit% on the following topics: • Liability of the State in tort • Legislation relating to sales tax • The law of limitation • British statutes applicable to India • The law of registration • The law of partnership • The law relating to specific relief • The law relating to acquisition and requisition • The law governing negotiable instruments • Reform of judicial administration.

This was followed by the Second, Third and Fourth Law Commissions. A significant contribution was made by the Fifth Law Commission, which was established in 1968 under the Chairmanship of Mr. K. V K. Sundaram. This •Commission studied several •prevailing laws and presented six Reports, entitled the following: • Punishment for imprisonmen Penal Code t for life

under the Indian • Law relating to attendance of prisoners in Courts - The Code of Criminal Procedure

• The Indian Penal Code • Offences against national security

• The appellate jurisdiction of the Supreme Court in civil matters. The Twentieth Law Commission, with Justice D. K. Jain, a retired Judge of the Supreme Court, was established on 1st September, 2012, with a three-year term ending on 31st August, 2015. Several important, matters have been referred to this Law Commission, including the following: (a) A review of obsolete laws, with a view to identifying laws which are no longer relevant and which can be immediately repealed. (b) To identify laws which are not in harmony with the existing climate of economic liberalisation and which need to be amended. (c) To identify laws which otherwise require changes or amendments and to make suggestions in this regard. To suggest suitable measures for quick redressal of citizens'grievances in the field of law. (e) To examine the laws which affect the poor and carry out an audit for socio-economic legislations. (f) To suggest simplification of procedural laws to reduce and eliminate technicalities and devices for delay, so that procedure operates not as an end in itself but as a means of achieving justice. (g) To examine the existing laws in the light of Directive and to suggest ways of Principles of State Policy improvement and reform, and to suggest such legislation that may be necessary to implement the Direc five Principles to attain the objectives set out in the P to the Constitution. Preamble To examine the existing laws with a view to promoting gender equality and suggesting amendments thereto. To propose amendments in electoral laws with a view to decriminalise politics and bring in fresh legislation on funding of elections.

How the Law Commission functions

The Law Commission is situated in New Delhi. Its regular staff consists of about a dozen research personnel of different ranks and varied experiences, who work in a research-oriented manner. A small group of secretarial staff looks after the administration of the Commission. The Law Commission generally acts as a starting point for law reform in India. Basically, the projects undertaken by the Commission are initiated in the Commission's meetings. Priorities are discussed, topics are identified and work is assigned to each member of the Commission, depending upon the nature and scope of the topic. Different methodologies are adopted, keeping in mind the scope of the reforms. The Commission has thus given a good boost to legal research in India. Discussions at meetings of the Law Commission during this period help in not only articulating the issues and focusing the research but also evolving a consensus among members of the Commission. What

emerges from this is usually a working paper outlining the problem and suggesting reforms. This paper is then circulated to thepublic and concerned interest groups with a view to eliciting reactions and suggestions. Usually, a carefully prepared questionnaire is also sent along with the working paper. The Commission welcomes suggestions from any person, institution or organisation on the issues under consideration of the Commission. The Law Commission has always been anxious to consult as many people as possible. For this purpose, partnerships are established with professional bodies and academic institutions• the countand workshops are also organised in different parts of country to elicit critical opinion on the proposed reforms.

When all the data assembled, the Commission's staff evaluates and organises the information forappropriate introduction in the report. Such a report is written either by the Member-Secretary or one of the Member s or the Chairman of the Commission. The report is then subjected to close scrutiny by the Commission in subsequent meetings. Often, the Commission also .prepares a draft amendment or a new bill which is appended to its report. Thereafter,ortht e. final report is forwarded to the Government. Once its re is submitted to the Ministry, the task of the Commission is over — and the Government may or may not accept its suggestions. Thus, for instance, the 13th Report of the Law Commission had suggested that instead of striking down all contracts in restraint of trade, it would be better — and fairer — if S. 27 of the Indian Contract Act struck down all contracts where such a restraint was unreasonable. Again, in a bold — though controversial — suggestion, the Law Commission had — in its 42nd Report — proposed that S. 309 of the Indian Penal Code, which prescribes punishment for an attempt to commit suicide, is a "harsh and unjustifiable" provision and deserves to be deleted. However, no action has been taken by Parliament till date on both these recommendations. The Reports of the Law Commission are considered by the Ministry of Law in consultation with the concerned administrative Ministries and are submitted to Parliament from time to time. They are cited in Courts, in academic and public discourses and are acted upon by concerned Government Departments from time to time. The Law Commission of India has, upto mid-2013,prepared 243 Reports on different subjects. Interestingly, the Law Commissions also has the power to suo motu take up new matters and make recommendations to thegovernment. This has worked to the advantage of India's legal system. Thus, noting that there is no statute on admiralty law in India, the Law Commission suo motu took up this daunting task of making practical recommendations on the point, and even prepared a draft of the Admiralty Act to fill up the vacuum.The Government has, however, showed no interest in the matter. Often, the

Commission has also reviewed its earlier Reports in thebackground of changed circumstances, as for instance, its recommendations on euthanasia and related issues, where the Commission had a re-look at the prevailing situation at least three times. In addition to receiving mandates from the Ministry of Law, the Supreme Court has, on several occasions, called upon the Law Commission to review particular matters and submit its Report. The latest direction in this regard was the reference to the Commission in connection with legal issues relating to child marriage and the different ages a person is legally defined as a 'child under different laws. However, as seen above, the Reports of the Law Commissions are not binding on the Government. They are in the form of recommendations — which may or may not be accepted. Several important and innovative recommendations have not been accepted by the ruling governments in the past — for political reasons or otherwise. Till date, only 96 out of 190 Reports submitted by the Commission have been accepted in full by the government. It is, however, heartening to note that successive Law Commissions have nevertheless continued to carry on their good work with the same amount of zeal and gusto.

C. HISTORY OF LEGAL PROFESSION

1. Legal profession in Pre-British India

a) The legal profession in pre-British India was not at all organised. Actually, the legal profession as it exists today was created and developed during British period..

b) During the **Hindu Period**, there were local courts which derived their authority from the king. As the king was considered to be the fountain-head of justice, the king's court was superior to all other courts and was the highest court of appeal. When hearing and deciding cases, the king was advised by his Councillor, although such advice was not binding on him. The profession of lawyers, as it exists today, was practically non-existent.

c) During the **Moghul period** also, the king was regarded as the highest judge and the keeper of God's conscience. There was, however, no organised legal profession. Some wealthy zamindars also had their own courts, exercising civil and criminal jurisdiction. The Courts were guided by Quran,Sunna,Ijna etc.

d) Thus, before the British period, the legal professions were not organized. There was no provision for the legal training. Although there existed a class of persons called vakils, they were not educated in law, and acted more like agents than as lawyers.

2.Law Practitioners in the Mayor's Court of 1726

a) Before 1726, the judicial administration was not of high order mainly because the Judges were not lawyers but laymen and did not have sufficient knowledge. They use to decide cases according to their own sense of justice. As a result uncertainty prevailed in the judicial administration.

b) After the entry of the East India Company into India, until 1683, judges of the local courts continued to be lay persons with insufficient knowledge of law. An attempt was made by the Charter of 1683 to provide that only lawyers could be appointed as judges. This Charter provided that the chief judge of the Admiralty Court (who was referred to as the Judge-Advocate) was to be an expert in civil law. Although initially, civil lawyers were appointed as judges, later on, the East India Company was quite reluctant to send English lawyers to India, and lay persons were appointed as judges.

c) The Mayor's Courts were to follow well-defined procedures based on English laws. The Charter did not, however, make any provision for legal training or for professional lawyers, and the judicial administration in India continued to remain in the hands of non-professional persons.

d) In 1753, a new Charter was issued to rectify certain defects in the earlier Charter of 1726. However, the position under the Charter of 1753 was no better. Even this Charter did not introduce the concept of professional judges. Nor did it make any provision for legal training. Persons practising in the Mayor's Courts were devoid of any legal training and a basic knowledge of the law. Interestingly, it is a matter of record that some of these so-called 'lawyers' were in fact dismissed servants of the East India Company.

3.Legal Profession under Charter of 1774

a) The Regulating Act,1773, empowered the British Crown to establish a Supreme Court by issuing a Charter. Accordingly, under the Charter of 1774, a Supreme Court was established at Calcutta. It was at this time that the first concrete step was taken to organise the legal profession in India. Under Clause 11 of this Charier, the Supreme Court was authorised to recognise such Advocates and Attorneys "as it deemed fit". The Court was also empowered to disbar any such Advocate or Attorney for a "reasonable cause". Thus, the only persons entitled to practise before this court were Advocates and Attorneys.

b) The same position continued when Supreme Courts were established in Bombay and Madras. Thus, the only persons entitled to practise in all the three Supreme Courts were British barristers, advocates and solicitors. Indians had no right to appear before these courts.

4.Legal Profession in the Company's Courts and Legal Practitioners Act 1853.

a) Before the rise of the British Power in India the administration of justice in the Northern India was in the hands of the courts established by the Moghul emperor.
b) Until 1793, the state of the legal profession in the adalats of the East India Company was deplorable. Vakils with little or no knowledge of the law practised in these adalats, but they charged exorbitant fees. In turn, the vakils were subject to harassment — and even extortion — by the ministerial officers of the courts. It was to remedy this unsatisfactory state of affairs that the Regulation VII of 1793 was passed.
c) the Regulation of 1793 sought to organise and strengthen the legal profession in India in the best public interest. It recognised that lawyers served as trustees of clients and that it was their duty to assist the courts in the administration of justice. The Regulation sought to establish the practice of law as a regular profession and empowered the Sardar Diwani Adalat to enrol pleaders and also to fix their fees, which were payable only after the decision of the court. A pleader could not demand fees — or any other consideration in cash or kind — in excess of the prescribed fee's, and if he did so, his name could be struck off. Thus, the theory of freedom of contract between the vakil and his client in the matter of fees was not recognised..
c) Regulation, only Hindus and Muslims could be admitted as vakils. This restriction was, however, removed by later Regulations, and still later, litigants were also given the freedom to settle the professional fees with their vakils.

d) The next significant landmark was the passing of the Legal Practitioners Act, 1846, which can be considered to be the first all-India law relating to pleaders in the mofussil areas. This Act is regarded as "the first Charter of the legal profession' and under it, every Barrister enrolled in any of Her Majesty's Courts in India was eligible to plead in the Sardar Adalats. The office of a pleader was thrown open to any person of any nationality or religion, so long as he was duly certified to be of good character and was qualified for this office.

e) Thereafter, under **the Legal Practitioners Act, 1853**, Attorneys on the roll of any of Her Majesty's Supreme Courts were entitled to appear in any of the Company's Sardar Adalats. In other words, whilst Barristers and Attorneys could plead in the Company's Adalats, Indian legal practitioners were kept out of all the three Supreme Courts. The Act also did away with the system of compulsory attendance by pleaders, and a pleader was no longer required to notify the court about his inability to attend to a matter on a particular day.

5.High Courts Act, 1861 and enrolment of Advocates under letters Patent Issued.

6.Legal Practitioner's Act, 1879 and Report of Indian Bar Committee, 1923

a) The Legal Practitioners Act, 1879 brought all the six grades of legal practitioners under one system. Under this Act, an advocate enrolled on the roll of any High Court could practice in that High Court and all courts subordinate to it. He could practise in any other court in British India also, except a High Court on whose roll he was not enrolled (unless he did so with the permission of such a High Court, which permission was often denied) girl students far outnumber the boys in several law colleges in the country.

b). In 1923, the Government of India appointed a Committee under the chairmanship of 'Sir Edward Chamier (the Chamier Committee) to suggest appropriate reforms. In its Report, the Chamier Committee stated that it felt staggered by the variety of legal practitioners entitled to practise in the High Court and subordinate courts. According to the Committee, the ideal to be kept in view would be the ultimate disappearance of different grades of legal practitioners, and in course of time, there should emerg‘e a single grade of legal practitioners entitled to practise in all courts. The Committee also proposed the establishment o2f an all-India Bar Council to regulate matters such as the qualification and admission of proper persons to be advocates, legal education and matters relating to discipline and professional conduct of advocates.

7.Indian Bar Council Act 1926 and All India Bar Committee 1951.

It was to give effect to the above recommendations that the Indian Bar Councils Act, 1926 was passed. The Act sought to establish a separate Bar Council for each High Court, which would have the power to make rules inter alia for the following matters:

- the rights and duties of the advocates of the High Court and their discipline and professional conduct;
- the giving of facilities for legal education and training, and the holding and conduct of examinations by the Bar Council.

The Act also achieved a degree of unification of the Bar by unifying two grades of practitioners, vakils and pleaders, by merging them into one class of 'advocates'. Under S. 8 of the Act, no person could practise in the High Court unless his name was entered in the roll of Advocates maintained under the Act. Attorneys of the High Court were, however, exempted from being entered on this roll. .A duty was imposed on the Bar Councils to decide all

matters concerning legal education, qualifications for enrolment, discipline and general control of the profession. The High Court was also authorised to reprimand, suspend or debar from practice, any advocate of the High Court whom it found guilty of professional or other misconduct.

Although this Act was a definite improvement on the pre-existing position of the Bar in India, it failed to satisfy the Indian legal profession, which felt that the Bar Councils were given unreal and ineffective powers — which in fact were closely controlled by the High Courts. As observed by one native lawyer, "We have been asking for substance. In answer, we are given a sham and a shadow." The aspirations of Indian lawyers to have an autonomous and unified Bar had to wait for more than three decades, when the Indian Parliament enacted the Bar Council Act, 1961.

9.Advocates Act of 1961.

10.Law Reporting in India.

RULE OF LAW

The 'The rule of Law' play an important role in the administration of the country. It provides protection to the people against the arbitrary action of the administrative authorities.

The rule of law is the basic foundation on which the unwritten Constitution of England is based. Although the origin of this concept can be traced to Chief Justice **Sir Edward Coke**, it was **Prof. A. V. Dicey** who developed this theory in its modern form. In his monumental treatise, The Law and the. Constitution (1885), Dicey submitted that the rule of law is th most fundamental principle of the English legal system.

According to Dicey, the expression "rule of law" signifies three inter-related concepts, namely, -

(a) The supremacy of the law.

(b) Equality before the law.

(c) Predominance of the legal spirit.

(a) The supremacy of the law

The supremacy of the law is the first fundamental principle of the rule of law. It signifies that what prevails in the country is the law — as opposed to any wide discriminatory or arbitrary power in the hands of those who govern a country. According to Dicey, if any discretion is given to an administrative authority, individual freedom is in danger and this can be fatal to the supremacy of the law. He believed than an Englishman is ruled by the law — and only by the law. He can be punished or penalised only for a breach of the law, and for nothing else.

Applying this principle, Dicey maintained that no man can be detained or arrested or imprisoned except by the due process of law and for a breach of law proved against him in the ordinary manner in the ordinary courts of the land.

(b) Equality before the law

This expression, according to Dicey, means that all classes of persons are subject to the law. In his view, all persons, howsoever high or low, are governed by one and the same law. In his words, "Every official from the Prime Minister down to a Constable or a Collector of Taxes is under

the same responsibility for every act done without legal justification, as any other citizen."

It is mainly on this ground that Dicey found fault with the French system of droit administratif, under which special courts are established in France to deal with disputes between citizens and government officials. According to Dicey, all persons, whether private individuals or government officials, should not only be subject to the same law, but should also be answerable to the same set of courts.

(c) Predominance of the legal spirit

Dicey strongly believed that the law courts should be the protectors and guarantors of the liberty of the individual. He • was of the view that the citizens of a country are better protected by the courts than by a mere declaration of their rights in a document like the Constitution of the country. He pointed out that England does not have a written Constitution containing any elaborate list of fundamental rights. Nevertheless, the citizens of the country are fully protected by the unwritten Constitution, which is a judge-made Constitution. He contended that the Constitution of England is not the source of judicial pronouncements in England, but the result of such pronouncements. Dicey pointed out that, in several countries, basic human rights like the freedom of speech, freedom from arrest and detention, rights to personal liberty, etc. are elaborately listed in the Constitution of the country. However, such rights remain only paper declarations, which can be ignored, curtailed and trampled upon by the government in power — unless there is an effective judiciary which enforces such rights.

Merits of Dicey's Theory

There is no doubt whatsoever that the doctrine of rule of law has played an extremely important role in the government of every successful democracy. It has proved to be a strong and effective weapon for keeping the administrative authorities ►ithin their boundaries. It has thus operated as the best aossible check on the government of the day. The first principle of Dicey's doctrine is a reminder that, at all times, the government is subject to the law — and not vice versa. It emphasises that the whims and fancies of the government in power have no place in good governance. The second principle is a firm reminder that no one is above the law. All persons are equal before the law, and in a true democracy, justice is dispensed without fear or favour. The third principle of Dicey's theory serves to remind us of the role which an independent judiciary plays in a democracy. Paper declarations, however solemn, are of little value if they cannot be enforced effectively or if they can be abrogated at the will of the government in power.

Criticism of Dicey's Theory

The fact that all constitutional democracies of the world are broadly based on the rule of law is a fact which just cannot be denied. However, as pointed out by Paton, the rules enunciated by Dicey and accepted by the English legal system, were more the result of a political struggle — rather than logical deductions from the principle of the rule of law.

As regards the first principle, critics point out that, according to Dicey, there is no place for any arbitrary or discretionary power in the hands of the _government in the concept of rule of law. Thus, Dicey places discretionary power in the same category as arbitrary power. This is not warranted, and no modern welfare state can effectively function unless some degree of discretion is enjoyed by government officials.

As regards the second principle, critics point out that Dicey appears to have misunderstood the real nature and working of droit administratif in France. Although there are separate sets of courts in that country to settle disputes between individuals and the government, the actual working of these courts has shown that the French courts have given more protection to French citizens than the English courts have given to citizens of England. It is also pointed out that the English maxim, The King can do no wrong' (which was ultimately abolished in England in 1947) was never accepted in France, which gave no such immunity to the sovereign. In other words, sovereign immunity was always a part of English law (until 1947), whereas this doctrine was never a part of French law. Until 1947, equality before the law, in its strictest sense, was thus not available in Dicey's own homeland. As regards the third principle, critics point out that Dicey appears to have over-emphasized the value of a judge-made Constitution. It is far from correct to say that every country with an elaborate list of fundamental rights has a weak judiciary and that such rights are mere "paper declarations". In di fact, constitutional guarantees, like those found in the Indian Constitution, coupled with a strong judiciary, go a long way in safeguarding the liberties of the citizens of a country.

Application of the Doctrine in England

England is the home of this doctrine and the English courts have applied the doctrine of the rule of law to the fullest extent. If a person is wrongfully detained by the police, he can recover damages to the same extent as when such an act is done by a private individual. Thus, in Wilkes v. Wood (1763

19 St. Tr. 1153), the plaintiff successfully sued for damages for a trespass, although the trespass was done pursuant to the order of a Minister. Likewise, when a publisher's house was ransacked by the King's messengers sent by the Secretary of State, the publisher was awarded substantial damages for such a trespass. (Enrick v. Carrington, 1765 19 St. Tr. 1030)

Application of the Doctrine in India

When the Constitution of India was being framed, our founding fathers made sure that it was based on the rule of law. In fact, the Preamble to the Constitution enunciates the triple concepts of justice, liberty and equality. Fundamental rights are guaranteed by the constitution — and the right to enforce them has itself been made a fundamental right. The Supreme Court and the High Courts are fully armed (by Art. 32 and Art. 226, respectively) to protect the individual against all forms of arbitrary action of the government. In India, it is the Constitution that is supreme, and all the limbs of the government — the executive, the legislature and the judiciary — are subject to this all-pervading Charter. The doctrine of judicial review has been accepted in toto and judicial activism has always been in the forefront to protect the individual against arbitrary acts of the state.

Moreover, m Indian ndian Constitution has not accepted the English maxim, 'The King can do no wrong', and all government officials are subject to the jurisdiction of the ordinary courts of the country. No person can be deprived of his life or personal liberty except according to the procedure established by law (Art. 21). Again, full protection is given by the Constitution against ex post facto laws, double jeopardy and self-incrimination (Art. 20). Likewise, Art. 14 guarantees equality before the law and equal protection of the law to all persons in India. In the words of the Supreme Court, "In our constitutional system, the central and most characteristic feature is the concept of the rule of law." (CSC, Punjab V. Om Prakash, AIR 1969 SC 33)

The Habeas Corpus Case :

Until 1975, every Indian could say — with a sense of confidence and an equal amount of pride — that the concept of the rule of law was so deeply rooted in the Indian legal system that it could weather any possible storm. But alas! In 1975, the Supreme Court handed down its judgment in Additional District Magistrate, Jabalpur v. Shivakant Shukia (AIR 1976 SC 1207), also known as the Habeas Corpus Case. When the 4:1 majority decision of the learned Supreme Court Judges was pronounced, people inside and outside India began to re-consider whether the third principle of Dicey's rule of law was ever a part of the Indian legal system. When the

ruling government faced a serious political threat, the then Prime Minister, Mrs. Indira Gandhi, declared an "Emergency" on 25th June, 1975, and suspended all the freedoms under Art. 19 of the Constitution. Two days later, at her behest, the President of India issued an Ordinance suspending all the rights under Arts. 14, 21 and 22 also. On the night of 25th June and on several nights thereafter, hundreds of persons, including prominent leaders of the opposition parties, were arrested from their residences under a draconian law called MISA (Maintenance of Internal Security Act). Most of the detained persons were not even informed of the charges against them. In short, the opposition in Parliament as effectively silenced and the common man totally terrorised.

Several High Courts and the Supreme Court itself were flooded with habeas corpus petitions, which were ultimately consolidated and heard by a 5-Member Bench of the Supreme Court. After hearing arguments, a majority of four Judges, led by Chief Justice Ray, agreed with the view of the government that since Art. 21 itself was suspended during the "Emergency , all the petitions were liable to be dismissed at the very threshold. According to the four learned Judges, Art. 21 is 1ndia's rule of law and no rule of law exists separately in India. In other words, they came to a conclusion that the rule of law itself stood suspended during the "Emergency".

The lone dissenting voice that was heard in the precincts of the apex court was that of Justice Khanna. He took the view that the rule of law exists in India even apart from Art. 21. In his words, "Even in the absence of Art. 21 in the Constitution, the state has got no power to deprive a person of his life or liberty without the authority of the law."

Learned scholars all over the world showered admiration and praise for the bold stance taken by Justice Khanna. Perhaps the best tribute to this lone dissenting voice came from the New York Times, which wrote : "Surely, a statue would be erected to him in an Indian city."

Fortunately for the country, this storm died down when the Forty-fourth Amendment of the Constitution laid downthat the right to life and personal liberty cannot be suspended by the executive even during an emergency.

However, Khanna J. had to pay a price for his bold dissent. When he was the senior-most Judge of the Supreme Court and would, in normal circumstances, have become the Chief Justice Itof India, he was superseded, and his junior, Justice Beg, was made the Chief Justice. A frustrat resigned from the Supreme Court. ed Khanna J. immediately

SEPARATION OF POWERS

The Doctrine of separation of powers was originated by **Aristotle** and later developed by **Locke.**

It was given a base and made popular by French Jurist, **Motesquieu**

According to Montesquieu there are three organs of the Government:-

1. Legislature
2. Executive
3. Judiciary

The function of the Legislature to make law, while Executive is to execute law and Judiciary is to enforce and interpret law.

The three traditional organs of the government are the legislature, the executive and the judiciary. The doctrine of separation of powers maintains that the powers and functions of the three organs should be kept separate and must be exercised only by the respective organs. Thus, the legislature must only legislate — and not exercise any executive or judicial powers .Likewise, the executive must only administer — and not legislate or adjudicate. Similarly, the judiciary must only adjudicate — and not exercise any legislative or executive powers.

This is, however, quite a simplistic view of the theory.

According to **Wade and Phillips**, the theory has three manifestations, namely,-

Firstly, it means that one organ of the government must not discharge the functions of the other two. A Minister, for instance, should not have any judicial powers.

Secondly, one organ of the Government must not interfere with the other two in respect of the discharge of their respective functions. For example, the executive should not interfere with the judiciary, which must be left to function independently.

Lastly, the same person should not belong to two or more organs of Government. A Judge, for instance, should not also be a Member of Parliament.

Although this doctrine is as old as Plato and Aristotle, it was made popular in the 16th and 17th centuries by the French philosopher, John Bodin and the British politician Locke. However, it was **Montesquieu**, the French scholar,

who re-formulated the doctrine in a systematic and scientific form in his book **Espirit des Lois (The Spirit of laws)** in 1748.

In the words of Montesquieu, if the legislative and executive powers are united in the same person or the same body, there can be no liberty. Again, there would be no liberty if the judicial power is not separated from the legislative or the executive. If such power is joined with legislative - the life and liberty of the citizen would be exposed to arbitrary control. If it is joined with the executive, the judge behave with violence and oppression.

Historically speaking, Montesquieu was prompted to pursue this theory when he saw the autocratic monarchy that prevailed in France during the reign of Louis XIV. When he looked around him, he found that, in the reign of this Monarch, the subjects enjoyed neither rights nor liberties, as Louis XIV himself exercised all possible powers — executive, legislative and judicial. Montesquieu's greatest inspiration was the functioning of the English Constitution in the earlier part of the 18th Century, and he came to the conclusion — rightly or wrongly —that the liberty of the English citizen was the result of the total separation of powers in England.

Montesquieu's doctrine had a tremendous impact on the development of administrative law all over the world. His doctrine can be said to be the foundation-stone of the American Constitution.

In USA, **Madison** observed that the accumulation of legislative, executive and judicial powers in the same hands would be "the very definition of tyranny". **Blackstone** observed that if all the three functions were to be vested in one person, that would result in tyranny.

The Constituent Assembly of France also declared that there would be nothing like a Constitution in a country if the doctrine of separation of powers was not an Integral part thereof.

The doctrine as prevalent In England

Although Montesquieu drew all his inspiration from England, it cannot be said that the English Constitution has accepted the doctrine of separation of powers in a strict sense. Thus, although the Lord Chancellor is the head of the judiciary, he is also the Chairman of the House of Lords and a member of the executive. Judges in England perform executive functions in matters of trust and supervision of wards of court; they also exercise legislative functions when

they frame rules for the working of the courts. Likewise, members of the British cabinet are also members of the legislature and are responsible to the legislature. Again, when the House of Commons punishes a person for a breach of its privilege, the legislative body exercises judicial powers.

The doctrine as prevalent in USA

The founding fathers of the American Constitution considered the doctrine of separation of powers as the heart of their Constitution.

Art. I of the Constitution vests legislative powers in the Congress,

Art. II vests executive powers in the President of USA,

whilst Art. III confers judicial powers on the Supreme Court and other courts.

The President is not a member of the Congress and his tenure does not depend on the confidence reposed by the Congress in him. By adopting a clever system of checks and balances, the Constitution of USA seeks to ensure that each organ of the government can exercise only its own powers and functions.

However, with the passage of time, a strict adherence to the doctrine has become almost impossible today. When the US President sends "messages" to the Congress, he actually interferes with the legislature. When he exercises a right of veto, he is once again interfering with the legislature. Since the Congress is vested with the power of impeachment, it is clear that the legislature also exercises judicial powers. So also, the Congress has in fact delegated many legislative powers to various administrative agencies, which are part of the executive. Interestingly, there is not a single pronouncement of the Supreme Court of USA, declaring that the combination of two or more functions in the same organ of the government is unconstitutional in America.

The doctrine as prevalent in India

A casual reader of the Constitution of India might jump to the conclusion that the doctrine of separation of powers has been fully incorporated in the Indian Constitution, as executive powers are vested in the President and the Council of Ministers, legislative powers in Parliament and the State Legislatures, whereas the Supreme Court, the High Courts and other Courts discharge judicial functions.

However, a more careful study of the Constitution will show that this doctrine has not quite been accepted by-the founding fathers of the Constitution. This becomes clear if one considers the following provisions of the Indian Constitution:

• The President enjoys wide legislative powers. He can issue Ordinances when Parliament is not in session. He can also make laws for a State when the State Legislature is not in session.

• The President exercises judicial functions when he decides disputes relating to disqualifications of Members of Parliament or the age of a Judge of the Supreme Court or a High Court.

• The President of India and the Governors of States are empowered to grant pardon to persons convicted by the judiciary.

• The Ministers are a part of the Legislature — and also responsible to it.

• Parliament discharges judicial functions when it decides the question of breach of its privileges — and punishes a person for such a breach.

• In the case of impeachment of a Judge one House frames the charges and the other House investigates such charges and decides whether he is, in fact, guilty or not — which is clearly a judicial function.

• High Courts have supervisory powers over all subordinate courts and can transfer cases from one court to Such functions are evident no another. y t judicial in nature.

• High Courts also frame R procedure uses regulating their own , and in doing so, discharge a legislative function.

Perhaps the only extent to which the doctrine has been incorporated in the Indian Constitution is that, in India, the judiciary is totally independent, that is, free from any interference from the executive or the legislature. This, is the most beneficial manifestation of the doctrine of separation of powers in India.

Thus the Indian the Constitution cannot be said that the doctrine applies in its strictest sense in the Indian legal system.

Concluding remarks

The greatest benefit of doctrine is that it ensures that each organ of the government functions independently and without any influence or interference from the other two.. However important and useful this doctrine may be in theory, its practical application has often posed serious problems.

The theory of strict sera of powers s often criticised on the following grounds:

1. Montesquieu drew inspiration for his theory from the English Constitution. However, at no time in the history Of England has that county adopted the doctrine in its strict sense. In fact, it would be far

from the truth to say that England was the classic home of separation of powers. As the Donoghmore Committee observed. 'Montesquieu looked across foggy England from his sunny vineyard in Paris — and completely misunderstood what he saw!'

2. Secondly, the doctrine goes on presumption that the three functions of government are independent of, and distinguishable from, one another. In fact however it is not possible to draw thin demarcating lines between them and assign each to a water-tight compartment. As observed b." President Woodrow Wilson. the government of a country is not a machine. but a Iiving thing whose life is dependent on a mutual co-operation between the three organs.

3. In actual practice, it is extremely difficult to apply the doctrine in its strict sense. If the legislature's function is restricted to legislation, it would have no power to punish persons for contempt or a breach of privilege nor would it be able to delegate its rule-making power an executive authority (which may have a great amount of expertise in that particular field).
4. Montesquieu had advocated this theory mainly from the angle of ensuring that the freedoms and liberties of the subjects of a country are not trampled upon. However, a mere mechanical division of powers and functions between the three organs of government cannot achieve this end. What is really required to attain this goal is the prevalence of the rule of law, coupled with a strong and independent judiciary. -Eternal vigilance on the part of the citizens is the ultimate guarantee of freedom.
5. Lastly, a modern state is a welfare state, which tries to solve complex socio-economic problems of its citizens. If the doctrine were to be applied in a strict sense, the working of the government would become difficult. As observed by Prof. Friedman, strict separation of powers is "a theoretical absurdity and a practical impossibility'.

   Despite all this criticism, it is also not possible to abandon the doctrine altogether — because that would tantamount to accepting the opposite doctrine, namely, the doctrine of integration of powers, and that would lead to a disaster. The pitfalls of the theory become evident only when one looks at it in its strictest sense. It cannot be denied that the doctrine of separation of Powers is necessary in modern times, though in a relative, and not in an absolute, sense.

VII. COURTS SYSTEM UNDER THE CONSTITUTION OF INDIA

A. SUPREME COURT

1. Appointment of Judges
2. Qualification of Judges
3. Jurisdiction and powers of the Supreme Court

B. HIGH COURTS

1. Appointment of Judges
2. Qualification of Judges
3. Jurisdiction and Powers of Judges

C. WRITS

1. Habeas Corpus
2. Mandamus
3. Certiorari
4. Prohibition
5. Quo Warranto
6. General principles of adjudication

D. SUBORDINATE COURTS

Introduction:-

The government consist of 3 organ i.e the legislature, the executive and the judiciary It is the function of the legislature to make the laws, which are enforced by the executive and adjudicated upon by the judiciary.

The success of any democracy can largely be measured by the strength and independence of its judiciary.

In India, the judiciary consists of the Supreme Court, the apex court, (that is, the highest court of the country), followed by High Courts at the state level, with several other courts constituting what is sometimes referred to as the "lower judiciary". This Chapter is discussed under the following three heads:

A. The Supreme Court of India

B. The High Courts

C. The Attorney-General of India**.**

A. THE SUPREME COURT OF INDIA

The Supreme Court of India is based in New Delhi, and consists of the Chief Justice of India and upto thirty other Judges, all appointed by the President of India. This number can, however, be increased by Parliament. The appointment of these Judges are made by the President by warrant under his hand and seal, after consulting such

of the Judges of the Supreme Court and the High Court as he deems fit. When appointing any Judge of the Supreme Court, except the Chief Justice, the President must always consult the Chief Justice. A Judge of the Supreme Court holds office until he attains the age of 65 years. If a question arises as to the age of a Supreme Court Judge, the same is to be determined by such authority and in such manner as Parliament may by law provide.

The salaries and allowances of the Supreme Court Judges are fixed by the Constitution (Second Schedule) and cannot be altered or varied to their disadvantage (that is, reduced) after appointment

. To be qualified to be appointed as a Judge of the Supreme Court, a person must be a citizen of India and –

-- must have served as a Judge of one or more High Courts for at least 5 years; or - must have been in practice as an Advocate of one or more High Courts for at least 10 years;

or

- must be, in the opinion of the President of India, a distinguished jurist.

if, at any time, there is no quorum to hold or continue any session of the Supreme Court, the President of India can appoint a High Court Judge as an ad hoc Judge of the Supreme Court for such time as may be necessary. Likewise, a retired Judge of the Supreme Court can also be called upon by the President to officiate as a Judge of the Supreme Court. Before taking office, every Judge must make and subscribe before the President, an oath or affirmation in the prescribed form. A Judge of the Supreme Court can resign from his office by a writing under his hand, addressed to the President of India.

Latest developments in the matter of appointment of judges

Parliament has recently passed the Judicial Appointments Commission Bill, 2013, under which a statutory commission called the Judicial Appointments Commission has been constituted to recommend appointments and transfers of Judges of the Supreme Court and the High Courts. This Commission consists of the following six members: - the Chief Justice of India (as the Chairman of the Commission); - two other senior-most Judges of the Supreme Court; - the Union Law Minister; and

- two eminent persons appointed by a cc:Mogi/in/ consisting of the Prime Minister, the Chief Justice of India and the Leader of the Opposition in the Lok Sabha.

In order to give effect to the above, Parliament has also passed the Constitution (One Hundred and twentieth) Amendment Bill, 2013, which will come into effect after it is ratified by the legislatures of at least half the number of states in the country, as required by Art. 368 of the Constitution.

Removal of Judge Impeachment

A Judge of the Supreme Court can be removed from office by a process called impeachment. Firstly, a Judge can be removed only on the ground of proved misbehaviour or incapacity. Secondly, both Houses of Parliament must pass a resolution to that effect by a majority of the total membership of the House and a majority of at least two-thirds of the members of that House present and voting. Thirdly, the President must thereafter pass an order for his removal. (Art. 124) The only instance of an attempted impeachment of a Supreme Court Judge is that of Justice Ramaswamy on the ground of the ostentatious expenditure on his official residence when he was the Chief Justice of the High Court of Punjab and Haryana. His impeachment motion fell through in the Lok Sabha because 205 MPs belonging to the ruling Congress party and their allies abstained from voting. Justice Ramaswamy, however, tendered his resignation soon thereafter. (Attempted impeachments of two other High Court Judges is discussed later in this Chapter.)

Independence of the judiciary

A Constitution framed after the federal model contains a scheme of distribution of powers between the union and the states, and the ultimate custadLan and guardian of the Constitution is the judiciary. Additionally, the Supreme Court is also the highest court of appeal in the country. Being the apex court, there are no appeals against its orders. Moreover, it is also entrusted with the function of protecting fundamental rights under Art. 32 of the Constitution. In view of these important functions discharged by It, the Independence of the Supreme Court — and the judiciary in general — assumes the greatest Importance. The framers of the Constitution tried their best to secure the independence of the Judiciary in India by various measures. Whilst providing for necessary safeguards in this regard, they drew inspiration from various other Constitutions and in particular, the American, British and Swiss Constitutions. The following are the safeguards contained in the Constitution which are aimed at securing the Independence of the judiciary in India.

(1) Appointment

The appointment of the Supreme Court and High Court Judges has rightly been taken away from the realm of pure politics. Their appointment is made by the President of India after consulting such of the Judges of the Supreme Court and the High Courts as the

President may deem necessary. Executive influence in the matter of appointment of these Judges is thus sought to be minimized, if not totally excluded.

(2) Emoluments

The salaries and allowances of the Judges have been fixed by the Constitution — and these cannot be altered or varied to their disadvantage (that is, reduced) after appointment. A sense of financial security and independence is thus sought to be provided to those occupying high judicial posts in the country. However, if a Proclamation of Emergency is in operation, the President does have the power to reduce such salaries and allowances under Art. 360 of the Constitution.

(3) Expenses

charged to the Consolidated Fund of India The salaries and allowances of Judges, as well as the administrative expenses of-the Supreme Court, are to be paid out of the Consolidated Fund of India. Thus, such expenses are not put to the vote of Parliament.

(4) Prohibition on practice after retirement

After retirement, a Judge of the Supreme Court cannot plead or act in any court or other authority in India (Art. 124). Likewise, after retirement, a permanent Judge of a High Court cannot plead in any court except in the Supreme Court or any other High Court (Art. 220).

(5) No discussion in the legislature

The conduct of Supreme Court or High Court Judges cannot be discussed in Parliament or in the State legislature — except when a Judge is sought to be impeached. This adds to the freedom and independence of the Judges.

(6) Impeachment

A Judge of the Supreme Court or a High Court can be removed from office only for proved misbehaviour or incapacity, by initiating impeachment proceedings against him.

(7) Contempt of court proceedings

The Supreme Court and the High Courts are courts of record and can impose fine and imprisonment for contempt of their authority and disobedience of their orders. (A court of record is a court whose acts and proceedings are preserved for perpetual memory and testimony.)

(8) Appointment of officers and servants of the court The officers and servants of the court are appointed by the Chief Justice and such other Judges or officers as the Chief Justice may direct. The independence of such persons is sought to be secured as they are not appointed by the government; nor are they under its control or influence.

Jurisdiction of the Supreme Court

The Supreme Court of India exercises four types of jurisdiction, namely, -

1. Writ jurisdiction
2. Original jurisdiction
3. Appellate jurisdiction
4. Consultative jurisdiction.

1. Writ Jurisdiction

Any person whose fundamental rights are violated can move the Supreme Court for the enforcement of such rights, Under Article 32 of the Constitution, the apex court has the power to issue directions or writa. Including writs in the nature of habeas corpus, mandamus, prohibition, certiorari and quo warranto — whichever may be appropriate — for the enforcement of fundamental rights.

2. Original jurisdiction

The original jurisdiction of the Supreme Court extends to disputes between the Government of India and one or more States and disputes between two or more States, Insofar as the dispute involves any question of law or fact on which the existence or extent of any legal right depends. (Art. 131) As stated above, the Supremo Court also exercises original Jurisdiction when it issues writs for the enforcement or fundamental rights under Art. 32 of the Constitution of India.

3. Appellate Jurisdiction

(a) Appeals in constitutional cases

An appeal lies to the Supreme Court from any judgment, decree or final order of a High Court if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. (Art. 132)

(b) Appeals in civil cases Under Art. 133, an appeal lies to the Supreme Court from any judgment, decree or final order of a High Court, if the High Court certifies:

- that the case involves a substantial question of law of

general importance; and

- that, in the opinion of the High Court, such a question

needs to be decided by the Supreme Court. (c) Appeals in criminal matters Under Art. 134 of the Constitution, an appeal lies to the Supreme Court from any judgment, decree or final order of a High Court in a criminal proceeding if: the High Court, when deciding an appeal, has reversed an order of acquittal passed by a lower court and sentenced the accused to death; or the High Court has withdrawn for trial by itself, any case pending in a lower court and has sentenced the accused to death; or

- the High Court has certified that the case is a fit one for appeal to the Supreme Court.

Special leave to appeal

Notwithstanding the above provisions, the Supreme Court has the power, under Art. 136 of the Constitution, to grant special leave to appeal from any judgment, decree, sentence, determination or order passed by any court or tribunal in India. Petitions filed under Art. 136 are sometimes referred to as `special leave petitions" or SLPs. However, this discretionary power conferred on the Supreme Court is to be exercised sparingly and in exceptional cases only.

4. **Consultative jurisdiction**

Consultative or advisory jurisdiction has also been conferred on the apex court by Art. 143 of the Constitution. This Article provides that, if at any time, it appears to the President of India that a question of law or fact has arisen — or is likely to arise — and the same is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court on such a question, he may refer it to the Supreme Court which may, after such hearing as it thinks fit, give its opinion in the matter to the President. Any bench hearing such a question must consist of a minimum of five Judges o' the Supreme Court. A few instances where the Supreme Court's advisory opinion was sought and given are:

- In Re. Delhi Laws Act (1951)
• In the matter of the Kerala Education Bill (1958)
- In Re Indo-Pakistan Agreement (1960).

As seen above, Art. 143 provides that, in such cases, the Supreme Court may give its opinion to the President. The use of the word "may" clearly shows that no obligation is cast on the Supreme Court to grve its opinion en every rnetlw reierred to It by the President of India. Thus. when the President referred a highly controversial question to

the Supremo Cowl for ill opinion, namely, whether there was any temple of other Hindu religious structure at the sits where a maipd was demolished at Ayodhya. the Supreme Court refused to answer the question, dubbing it as *superfluous and unnecessary',

Court of Record and power to punish for contempt

Under Art 129 of the Constitution, the Supreme Court is a court of record (that Is, a court whose orders and judgments are proservOd on a permanent ba) and has nil the powers of such a court, including the power to punish for contempt of its authority.

The binding force of ludgmenta of the Supreme Court :

The doctrine of stare (Socials under Art 141

Judicial precedents have either a binding or a persuasive efficacy. Thus, a judgment of the Swarm Court has binding efficacy on the Bombay High Court. whereas a judgment of the Kerala High Court has only persuasive efficacy on the Bombay High Court.

Art 141 of the Constitution lays down that the law declared by the Supreme Court Is binding on all courts within the territory of India. This Article thus reiterates the theory of binding force of precedents (stare decisis) and gives the doctrine a constitutional sanction.

The theory of the binding force of precedents (discussed in another Chapter in this book) Is firmly established in Indian as well as English law. The theory brings about uniformity and certainty In the law. If the decisions of the Supreme Court were not to be binding on all other courts, every court in India deciding the same point of law in another case would be free and all-round confusion. to give a contrary ruling — which would result in utter chaos

Thus, all decisions of the Supreme Court are binding on all other courts — and it is quite immaterial that the conclusion arrived at In a majority decision of that court was arrived at by different Judges on different grounds or by different processes of tOn011ilifj, (Ramesh V. Union of India, AIR 990 SC 560)

) A High Court cannot refuse to follow it decision of the Supreme Court on the ground that the upromo Coin I did not consider a particular point when handing down its lodgment. 11 Is not only a matter of discipline which all High Gown have to follow, but they are also bound by the constitutional mandato contained In Art. 141 of the Constitution. (S. S. Kumar v. Jvdeoshan, AIR 2002 SC 661)

The Patna High Court has ruled that an interim order of the Supremo Court cannot be called "the law declared by the Supreme Court", and is therefore not within the ambit of Art. 141. (MGM Medical College v, State of Bihar, AIR 1994 Pat. 22)

Obiter dicta of the Supreme Court (that is, things which are said by the way and which do not form part of the ratio decidendi of the case) do not have any binding force — although they deserve the greatest respect, having come from the highest court of the country.

Although Art. 141 of the Constitution uses the expression "binding on all courts" and although this oxprossion is wide enough to cover the Supreme Court also, it has boon held — and rightly so — that the oxprossion does not cover the Supreme Court itself. (Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1955 SC 661) In fact, it would general° a groat amount of hardship if the highest court of the land wore to be bound by its earlier decisions. Even the House of Lords is now at liberty to depart from its earlier decisions.

B. THE HIGH COURTS

Each State in India has a High Court, and a provision Is also made in the Constitution for a common High Court for two States, as for instance, the High Court of Punjab and Haryana. Judges of the High Court are appointed by the President of India by warrant under his hand and seal, after consultations with the Chief Justice of India, the Governor of the State and the Chief Justice of the High Court.

A Judge of a High Court holds office until he attains the age of 62 years. He may, by writing under his hand, addressed to the President of India, resign from his office. If a question arises as regards the age of a Judge of a High court, the question is to be decided by the President of India, after consultations with the Chief Justice of India. The decision of the President is final in the matter.

Overruling an earlier (1981) decision (S. P Gupta v. Union of India, AIR 1982 SC 149), the Supreme Court has held (in 1994) that fixation of the number of Judges of a High Court is a matter which can come before the courts. However, when reviewing the strength of Judges of a particular High Court, the opinions of the Chief Justice of India and the Chief Justice of that High Court must carry a lot of weight. (Supreme Court Advocates-on-Record Asso. v. Union of India, AIR 1994 SC 268)

A person is qualified to be appointed as a Judge of a High Court if he is a citizen of India and - has been an Advocate of one or more High Courts for at least 10 years;

or

- has held a judicial office in India for at least 10 years.

A High Court Judge must, before he enters upon his office, make and subscribe before the Governor of the State, an oath or affirmation in the prescribed form. The salaries and allowances of High Court Judges are fixed under the Constitution — and cannot be varied to their disadvantage (that is, reduced) after appointment.

A Judge of a High Court can be removed in exactly the same manner as a Judge of the Supreme Court . Two High Court Judges have been involved in impeachment proceedings in the past, namely Justice Soumitra Sen of the Calcutta High Court and Justice Dinakaran of the Sikkim High Court. Both of them, however, submitted their resignations before the impeachment proceedings could be completed.

If a person has been apermanent Judge of a High Court, he cannot plead or act before any court or authority in . India. except the Supreme Court and other High Courts (that is, all High Courts except the High Court/s where he was a Judge).

Art. 222 of the Constitution empowers the President of India to transfer a Judge from one High Court to another. However, this must be done in consultation with the Chief Justice of India; also, the Judge so transferred must be given an additional compensatory allowance.

The Supreme Court has observed that Art. 222 cannot be interpreted to mean that a Judge of a High Court cannot be transferred to another High Court without his consent. (Union of India v. Sankalchand, AIR 1997 SC 2328)

In S. P Gupta v. Union of India (AIR 1982 SC 149), the transfer of the Chief Justice of the Patna High Court to the Madras High Court was challenged before the Supreme Court. Although the court, by a majority, upheld the transfer, it also cautioned that this power of transfer should not be used for any oblique purpose — as for instance, for punishing a Judge who does not favour the government in his judgments.

Powers of the High Court Every High Court is a court of record, that is, a court whose acts and proceedings are preserved for perpetual memory and testimony. The powers of a High Court can be summarised as under:

1. Power to issue writs (Art. 226)

2. Power of superintendence (Art. 227)

3. Power to withdraw cases (Art. 228)

4. Power to appoint officers and servants of the High Court (Art. 229)

5. Power to control subordinate courts (Art. 235)

1. **Power to issue writs (Art. 226)**
   Art. 226 of the Constitution empowers the High Court to issue to any person or authority, including the Government, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, certiorari, prohibition and quo warranto for the enforcement of any fundamental right or for any other purpose.

The Supreme Court has observed that the power conferred on the High Courts by Art, 226 In meant to onforco lho rule Ofl of law and to ensure that the Stato and othor statutory authorities act In accordance with the law. (K. S. Bholr v. State of Maharashtra, AIR 2002 SC 444)

This power of the High Court Is similar to the power of the Supreme Court to issue writs under Art. 32 32 the Constitution. However, whoroas the right under Art. falls under Part III of the Constitution, and Is therefore a fundamental right, the provisions of Art. 226 do not fall under Part III. Moreover, whereas Art. 32 speaks of enforcement of fundamental rights, under Art. 226, High Courts can issue writs to enforce fundamental rights and for any other purpose.

2. **<u>Power of superintendence (Art. 227)</u>**
   Under Art. 227, every High Court has the power of superintendence over all courts and tribunals throughout the territories where the High Court exercisesJurisdiction. In furtherance of this power, a High Court may —

   • call for returns from such subordinate courts;
   • make and issue general rules andprescribe forms for regulating the practice and proceedings of such courts;
   • prescribe forms In which books, entries and accounts are to be kept by the officers of such courts; and
   • settle th© Table of Fees to be allowed to the Sheriff and all officers and clerks of such courts, as als advocates and pleaders also to attorney, practising in such courts.
3. **<u>Power to withdraw cases (Art. 228)</u>**
   Art. 228 provides that if a High Court is satisfied that a case which is pending Ina subordinate court involves a substantial question of law

w ich has to be determined for disposing of the case, It, may either dispose withdraw the case from the subordinate court and determine such quest' e th of law and returnH question of law, to go h ed scopauosr tseeot ono f that tthhhaeet

4, power to appoint officers and servants of tho High Court (Art. 229)

Art. 229 gives powor to the Chief Justice of a 1-11011 Court or such other Judge or officer of tho loll Court as the Chief Justice may direct, to appoint officers and sorvants of the High Court. The conditions of service of such officers and servants are to be governed by rules made by the Chief Justice of the High Court or by some other Judge or officer authorizod by the Chief Justice to make such rules.

5. **Power to control subordinate courts (Art. 235)**
   Every High Court exercises control over district courts and courts subordinate thereto, including over matters such as posting, promotion and leave of persons belonging to the judicial service of the State and holding any post inferior to that of a District Judge.

C. THE ATTORNEY-GENERAL OF INDIA

Art. 76 of the Constitution empowers the President of India to appoint a person who is qualified to be appointed as a Judge of the Supreme Court to be the Attorney-General for India. The qualifications for his appointment are the same as those laid down in Art. 124 for the appointment of a Judge of the Supreme Court, namely,

-- He should be a citizen of India.

AND –

He must have been for at least five years, a Judge of a High Court or of two or more High Courts in succession.

OR - He must have been, for at least ten years, an advocate of a High Court or of two or more High Courts in succession.

c He Is, In the opinion of the President, a distinguished jurist.

His main duty Is to give advice to the Government of India upon such legal matters and to perform such other duties of a legal character, as may be n9ferrecl or asskined to him by the President of India. He also has to discharge the functions conferred on him by the Constitution.

Under Rules made by the President of India, the Attorney-General has to advise the Government of India on legal matters and also appear on behalf

of the Government in cases before the Supreme Court and the High Courts, when called upon to do so. He must also represent the Government of India in any reference made by the President to the Supreme Court under Art. 143 of the Constitution.

The Attorney-General has a right of audience in all courts in India. As the head of the Indian bar, he is entitled to precedence in all courts in the country. He also has the right to speak in, and otherwise take part in the proceedings in Parliament or any Committee thereof of which he may be named a Member. He is not, however, entitled to vote. (Art. 88)

THE ADVOCATES ACT, 1961

On the report of the "All India Bar Committee", the Government of India enacted the Advocates Act, 1961. The President signed on it on 19th May, 1961. This Act has been in force in entire India. The preamble of the Act says that it is "an Act to amend and consolidate the law relating to legal practitioners and to provide for the constitution of Bar Councils and an All India Bar". It repealed the Indian Bar Councils Act, 1926, the Legal Practitioners Ad, 1879, the Legal Practitioners (Women) Act, 1923, the Legal Practitioners (Fees) Act, 1926, and all other laws on the subject. The Act has undergone several amendments since its enactment in 1961 to bring changes with the changing times and to solve the practical problems.

The Act of 1961 brought revolutionary changes in legal problems in India. The Advocates Act, 1961, contains 60 sections in all set out in 7 Chapters. Chapter 1 deals with preliminary issues such as short title, extent and commencement and definitions. Chapter 2 deals with the Bar Councils and contains Sections 3 to 15. Chapter 3 deals with the admission and enrolment of advocates and contains Sections 16 to 28. Chapter 4 deals with right to practice and contains Sections 29 to 34. Chapter 5 deals with conduct of advocates and contains Sections 35 to 44. Chapter 6 contains miscellaneous issues and contains Sections 45 to 52. Chapter 7 deals with the temporary and transitional provisions and contains Sections 53 to 60.

Under **Section 2** of the act the word **“Advocate”** means an advocate entered in any Roll under the provisions of the Act.

The term “legal practioner” means an Advocate or Vakil of any High Court, Pleader, Mukhtar or revenue agent.

Admission and Enrolment of Advocates

Persons who may be admitted as Advocates

According to **Section 24** of the Advocates Act, 1961, a person shall be qualified to be admitted as an advocate on a State roll, if he fulfills the following conditions, namely—

(a) he is a citizen of India. However, a national of any other country may be admitted as an advocate on a state roll, if citizen of India, duly qualified, and permitted to practice law in that other country;

(b) he has completed the age of twenty-one years;

(c) he has obtained a degree in law; Foreign Law Degree can also be recognised by the Bar Council of India for this purpose;

(d) he fulfills such other conditions as may be specified in the rules made by the State Bar Council;

(e) he has paid, in respect of the enrolment, stamp duty, if any, chargeable under the Indian Stamp Act, 1899, and an enrolment fee payable to the State Bar Council of six hundred rupees and to the Bar Council of India, one hundred and fifty rupees by way of a bank draft drawn in favour of that Council.

The privilege of enrolment as an advocate has also been extended to the earlier Vakils. Pleaders and Mukhtars and to some other specified conditions. The right to practice as an advocate is a statutory right but not a fundamental or absolute right.

Disqualification for Enrolment

According to **Section 24-A** of the Advocates Act, 1961, no person shall be admitted as an advocate on a State roll—

(a) if he is convicted of an offence involving moral turpitude.

(b) if he is convicted of an offence under the provision of the Untouchability (Offences) Act, 1955.

(c) if he is dismissed or removed from employment or office under the State on any charge involving moral turpitude.

However, these provisions do not apply to a person who having been found guilty, is dealt with under the provision of the Probation of Offenders Act, 1958.

As per Section 25 of the Advocates Act, 1961, an application for admission as an advocate shall be made in the prescribed form to the State Bar Council within whose jurisdiction the applicant propose to practice.

Senior and Other Advocates

Prior to the Advocates Act, 1961, there were six different classes of legal practitioners, namely Barristers, Attorneys, Advocates, Vakils, Mukhtars an.' Revenue Agents. The Advocates Act, 1961, abolished the different classes of legal practitioners. Hereinafter, there is only one class of legal practitioners known as 'Advocates'. There is a uniform qualification for the appointment of advocates. However, a slight distinction between senior advocates and other advocates has been maintained in this Act.

According to **Section 16** of the Advocate Act, there shall be two classes of Advocates, namely, senior advocates and other advocates. An advocate may, with his consent, be designated as senior advocate if the Supreme Court or a High Court is of opinion that by virtue of his ability, standing at the Bar or special knowledge of experience in law he is deserving of such distinction.

Senior advocates shall, in the matter of their practice, be subject to such restrictions as the Bar Council of India may, in the interest of the legal profession, prescribe. An advocate of the Supreme Court who was a senior advocate of the Court immediately before the appointed day shall, for the purposes of this section, be deemed to be a senior advocate.

Designating an advocate as 'a Senior Advocate' means recognition of his professional skill, long standing in the Bar experience and services rendered to the society. An advocate can be called as 'Senior Advocate' on the basis of his ability, his long standing at the Bar, his special knowledge or experience in law, and confirmation by the Supreme Court or High Court.

The Act recognises only one single class of practitioners, namely: advocates. According to the **Section 30** of the Advocates Act, 1961, advocate whose name is entered in the State roll shall be entitled as of right to practice throughout the territories to which the Act extends; in all Courts including the Supreme Court; before any Tribunal or person legally authorised to take evidence and before any other authority or person before whom such advocate is by or under any law for the time being in force entitled to practise.

Bar Councils

Bar Council of India

The Act established an All India Bar Council for the first time According to **Section 4** of the Advocates Act, 1961, there shall be a Bar Council of India consisting of the Attorney-General of India and the Solicitor-General of India as the ex-officio members of the Bar Council of India. Besides, it has one member elected by each State Bar Council from among it members. The Council elects its own Chairman and Vice-Chairman.

The Bar Council, as per **Section 7** of the Act, has been entrusted with the following functions:

a) To lay down standards of professional conduct and etiquette for advocates;
b) To lay down the procedure to be followed by its disciplinary committee and the disciplinary committee of each State Bar Council;
c) To safeguard the rights, privileges and interest of advocates;
d) To promote and support law reform;
e) To deal with and dispose of any matter arising under this Act, which may be referred to it by a State Bar Council;

f) To exercise general supervision and control over State Bar Councils;
g) To promote legal education and to lay down standards of such education in consultation with the universities in India imparting such education and the State Bar Councils;
h) To recognise universities whose degree in law shall be a qualification for enrolment as an advocate and for that purpose to visit and inspect universities; (i) To conduct seminars and organise talks on legal topics by eminent jurists and publish journals and papers of legal interest;
i) To organise legal aid to the poor in the prescribed manner;
j) To recognise on a reciprocal basis foreign qualification in law obtained outside India for the purpose of admission as an advocate under this Act;
k) To manage and invest the funds of the Bar Council;
l) To provide for the election of its members;
m) To perform all other functions conferred on it by or under this Act;
n) To do all other things necessary for discharging the aforesaid functions.

Section 5 of the Act says that every Bar Council shall be a body corporate having perpetual succession and a common seal, with power to acquire and hold property, both movable and immovable, and to contract, and may by the name by which it known, sue and be sued.

State Bar Councils .

Constitution:-

As per **Section 3** of the Advocates Act, 1961, each state has a Bar Council. It is an autonomous body. The Advocate-General of the State is its ex-officio member, and there are 15 to 25 elected advocates. These members are to be elected for a period of five years in accordance with the system of proportional representation by means of single transferable vote from amongst advocates on the roll of the State Bar Council.

The State Bar Council has power to elect its own Chairman and a Vice-Chairman.

Functions

According to **Section 6** of the Advocates Act, 1961, the functions of State Bar Council are :

(a) To admit persons as advocates on its roll;

(b) To prepare and maintain such roll;

(c) To entertain and determine cases of misconduct against advocates on its rolls;

(d) To safeguard the rights, privileges and interests of advocates on its roll;

(e) To promote the growth of Bar Associations for the purpose of effective implementation of the welfare schemes;

(f) To promote and support law reform;

(g) To conduct seminars and publish journals and papers of legal interest;
(h) To organise legal aid to the poor in the prescribed manner;

(i) To manage and invest the funds of the Bar Council;

(j) To provide for the election of its members;

(k) To visit and inspect universities;

(1) To perform all other functions conferred on it by and under this Act.

Every State Bar Council prepares and maintains a roll of advocates and an authenticated copy of the roll is to be sent to the Bar Council of India. An application for admission as an advocate is made to the State Bar Council within whose jurisdiction the applicant proposes to practise. A State Bar Council has an Enrolment Committee consisting of three members elected by the Council from amongst its members. The Enrolment Committee has to dispose of applications for admission. Where the Enrolment Committee

proposes to refuse any such application, it has to refer the same for opinion to the Bar Council of India.

The finances of the Bar Councils are essentially met out of the enrolment fees of the advocates. Twenty per cent of the fees realised are paid by each State Bar Council to the Bar Council of India. Besides, the Bar Council may receive donations and grants.

The Bar Councils can frame rules for carrying out their functions and purposes. The rules made by the State Bar Council have to be approved by the Bar Council of India. The Central Government has been given an overriding power of making rules on any matter.

Thus, admission, practice, ethics, privileges, regulation, discipline and improvement of the profession are now all in the hands of the profession itself. The legal profession has achieved its long cherished object of having a unified autonomous Bar on an All India basis.

Disciplinary Powers Over Advocates

An important function entrusted to the Bar Councils is the task of maintaining discipline among 1961, makes it clear that an advocate the advocates **Section 35** of the Advocates Act makes it clear that an advocate may be punished for professional misconduct.

Some examples of misconduct be of advocates are :

(i) Discourteous behaviour towards the Bench;
(ii) (Use of hot words or epithets or disrespectful, derogatory or threatening language in the Court;
(iii) Exhibiting ill temper which has the effect of overbearing the Court;
(iv) Involvement in moral turpitude; e (v) Defrauding or cheating the party;
(v) Failing to file a case after accepting a brief and fee plus expenses; and
(vi) Engaging in a business of profit making.

A function of the State Bar Council is "to entertain and determine cases of misconduct against advocates on its roll". As per Section 9 of the Act, a Bar Council shall constitute one or more disciplinary committees, each of which shall consist of three persons of whom two shall be persons elected by the Council from amongst its members and the other shall be a person coopted by the Council from amongst advocates who possess the qualifications specified and who are not members of the Council, and the senior-most advocate amongst the member of a disciplinary committee shall be the Chairman thereof. This arrangement has been made because Bar Council are large bodies and, a such, cannot discharge effectively the disciplinary powers.

A complaint of professional or other misconduct is referred by the State Bar Council to its Disciplinary Committee. The Committee then fixes a date for the hearing of the case and shall cause a notice thereof to be given to the advocate concerned and to the Advocate-General of the State.

The disciplinary committee of the State Bar Council after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following orders, namely—
(a) dismiss the complaint or, where the proceedings were initiated at the - instance of the State Bar Council, direct that the proceeding be filed; r (b) reprimand the advocate;
(c) suspend the advocate from practice for such period as it may deem fit; ,
(d) remove the name of the advocate from the State roll of advocates;

Where an advocate is suspended from practice under clause (c) of . sub-section (3), he shall, during the period of suspension, be debarred from practising in any Court or before any authority or person in India.

Within 60 days of the order, an appeal can be preferred to the Bar Council of India. The Disciplinary Committee of the Bar Council of India would hear the appeal and pass such orders as it deems fit. Against this order, a further appeal lies to the Supreme Court within 60 days of the passing of the order.

The disciplinary committee of the Bar Council of India may, either of its own motion or by any person interested withdraw for inquiry before itself any proceedings for disciplinary action against any advocate before the disciplinary committee of any State Bar Council and dispose of the same.

The disciplinary committee of Bar Council shall have same powers as are vested in a Civil Court under the Code of Civil Procedure,1908, in respect the following matters, namely —

(a) summoning and enforcing the attendance of any document

(b) requiring discovery and production of any document

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copies thereof from any court or office

(e) issuing commissions for the examination of witnesses or documents

((f) any other matter which may be prescribed

Provided that no such disciplinary committee shall have the right to require the attendance of-

-(a) any presiding officer of a Court except with the previous sanction of the High Court to which such Court is subordinate;

(b)any officer of a Revenue Court except with the previous sanction of the State Government.

All proceedings before a disciplinary committee of a Bar Council shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code, and every such disciplinary

committee shall he deemed to be a Civil Court for the purposes of Sections 480, 482 and 489 01 the Code of Criminal Procedure, 1898. Besides, the disciplinary committee may send to any Civil Court any summons or process, and the Civil Court would (let as if it were its own. The disciplinary committee of a Bar Council, •tto !Roth or otherwise, has a right to review its own decision within 60 days 01 the order, but no such order of review of the disciplinary committee of a State Bar Council has any effect without the approval of the Bar Council of India.

Notwithstanding the absence of the Chairman or any member ol disciplinary committee on a date fixed for the hearing of a case before it, the disciplinary committee may, if it so thinks fit hold or continue the proceedings on the date so fixed and no such proceedings and no order made by the disciplinary committee in any such proceedings shall be invalid merely by reason of the absence of the Chairman or member thereof on any such date.

Section 36-B of the Advocates Act, 1961, provides that the disciplinary committee of a State Bar Council shall dispose of the complaint received hy it under Section 35 expeditiously and in each case the proceedings skill concluded within a period of one year from the date of the receipt ()yin' complaint or the date of initiation of the proceedings at the instance of the Bar Council as the case may be, failing which such proceedings shall stand i transferred to the Bar Council of India which may dispose of the same as if t were a proceeding withdrawn for inquiry under sub-section 36. Section 43 of the .Advocates Act, 1961, enables a Bar Council to make an ordr as to costs in respect of proceedings before.

HISTORY OF LEGAL PROFESSION

1. Legal profession in Pre-British India

a) The legal profession in pre-British India was not at all organised. Actually, the legal profession as it exists today was created and developed during British period.
b) During the Hindu Period, there were local courts which derived their authority from the king. As the king was considered to be the fountain-head of justice, the king's court was superior to all other courts and was the highest court of appeal. When hearing and deciding cases, the king was advised by his Councillor,although such advice was not binding on him. The profession of lawyers, as it exists today, was practically non-existent.
c) During the Moghul period also, the king was regarded as the highest judge and the keeper of God's conscience. There was, however, no organised legal profession. Some wealthy zamindars also had their own courts, exercising civil and criminal jurisdiction. The Courts were guided by Quran,Sunna,Ijna etc.
d) Thus, before the British period, the legal professions were not organized. There was no provision for the legal training. Although there existed a class of persons called vakils, they were not educated in law, and acted more like agents than as lawyers.

2. Law Practitioners in the Mayor's Court of 1726

a) Before 1726, the judicial administration was not of high order mainly because the Judges were not lawyers but laymen and did not have sufficient knowledge. They use to decide cases according to their own sense of justice. As a result uncertainty prevailed in the judicial administration.
b) After the entry of the East India Company into India, until 1683, judges of the local courts continued to be lay persons with insufficient knowledge of law. An attempt was made by the Charter of 1683 to provide that only lawyers could be appointed as judges. This Charter provided that the chief judge of the Admiralty Court (who was referred to as the Judge-Advocate) was to be an expert in civil law. Although initially, civil lawyers were appointed as judges, later on, the East India Company was quite reluctant to send English lawyers to India, and lay persons were appointed as judges.
c) The Mayor's Courts were to follow well-defined procedures based on English laws.The Charterdidnot,however,makeanyprovision for legal training or for professional lawyers, and the judicial administration in India continued to remain in the hands of non-professional persons.
d) In 1753, a new Charter was issued to rectify certain defects in the earlier Charter of 1726. However, the position under the Charter of 1753 was no better. Even this Charter did not introduce the concept of professional judges. Nor did it make any provision for legal training. Persons practising in the Mayor's Courts were devoid of any legal training and a basic knowledge of the law. Interestingly, it is a

matter of record that some of these so-called 'lawyers' were in fact dismissed servants of the East India Company.

3. Legal Profession under Charter of 1774

a) The Regulating Act,1773, empowered the British Crown to establish a Supreme Court by issuing a Charter. Accordingly, under the Charter of 1774, a Supreme Court was established at Calcutta. It was at this time that the first concrete step was taken to organise the legal profession in India. Under Clause 11 of this Charier, the Supreme Court was authorised to recognise such Advocates and Attorneys "as it deemed fit". The Court was also empowered to disbar any such Advocate or Attorney for a "reasonable cause". Thus, the only persons entitled to practise before this court were Advocates and Attorneys.

b) The same position continued when Supreme Courts were established in Bombay and Madras. Thus, the only persons entitled to practise in all the three Supreme Courts were British barristers, advocates and solicitors. Indians had no right to appear before these courts.

4. Legal Profession in the Company's Courts and Legal Practitioners Act, 1853.

a) Before the rise of the British Power in India the administration of justice in the Northern India was in the hands of the courts established by the Moghul emperor.

b) Until 1793, the state of the legal profession in the adalats of the East India Company was deplorable. Vakils with little or no knowledge of the law practised in these adalats, but they charged exorbitant fees. In turn, the vakils were subject to harassment — and even extortion — by the ministerial officers of the courts. It was to remedy this unsatisfactory state of affairs that the Regulation VII of 1793 was passed.

c) The Regulation of 1793 sought to organise and strengthen the legal profession in India in the best public interest. It recognised that lawyers served as trustees of clients and that it was their duty to assist the courts in the administrationof justice. The Regulationsought to establish the practice of law as a regular profession and empowered the Sardar Diwani Adalat to enrol pleaders and also to fix their fees, which were payable only after the decision of the court. A pleader could not demand fees — or any other consideration in cash or kind — in excess of the prescribed fee's, and if he did so, his name could be struck off. Thus, the theory of freedom of contract between the vakil and his client in the matter of fees was not recognised..

d) Regulation, only Hindus and Muslims could be admitted as vakils. This restriction was, however, removed by later Regulations, and still later, litigants were also given the freedom to settle the professional fees with their vakils.

e) The next significant landmark was the passing of the Legal Practitioners Act, 1846, which can be considered to be the first all-India lawrelating to pleaders in the

mofussilareas. This Act is regarded as "the first Charter of the legal profession' and under it, every Barrister enrolled in any of Her Majesty's Courts in India was eligible to plead in the Sardar Adalats. The office of a pleader was thrown open to any person of any nationality or religion, so long as he was duly certified to be of good character and was qualified for this office.

f) Thereafter, under the Legal Practitioners Act, 1853, Attorneys on the roll of any of Her Majesty's Supreme Courts were entitled to appear in any of the Company's Sardar Adalats. In other words, whilst Barristers and Attorneys could plead in the Company's Adalats, Indianlegalpractitioners were kept out of all the three Supreme Courts. The Act also did away with the system of compulsoryattendance by pleaders, and a pleader was no longer required to notify the court about his inability to attend to a matter on a particular day.

5. High Courts Act, 1861 and enrolment of Advocates under letters Patent Issued.

6. Legal Practitioner's Act, 1879 and Report of Indian Bar Committee, 1923

a) The Legal Practitioners Act, 1879 brought all the six grades of legal practitioners under one system. Under this Act, an advocate enrolled on the roll of any High Court could practice in that High Court and all courts subordinate to it. He could practise in any other court in British India also, except a High Court on whose roll he was not enrolled (unless he did so with the permission of such a High Court, which permission was often denied) girl students far outnumber the boys in several law colleges in the country.

b) In 1923, the Government of India appointed a Committee under the chairmanship of 'Sir Edward Chamier (the Chamier Committee) to suggest appropriate reforms. In its Report, the Chamier Committee stated that it felt staggered by the variety of legal practitioners entitled to practise in the High Court and subordinate courts. According to the Committee, the ideal to be kept in view would be the ultimate disappearance of different grades of legal practitioners, and in course of time, there should emerg'e a single grade of legal practitioners entitled to practise in all courts. The Committee also proposed the establishment o2f an all-India Bar Council to regulate matters such as the qualification and admission of proper persons to be advocates, legal education and matters relating to discipline and professional conduct of advocates.

7. Indian Bar Council Act 1926 and All India Bar Committee 1951.

It was to give effect to the above recommendations that the Indian Bar Councils Act, 1926 was passed. The Act sought to establish a separate Bar Council for each High Court, which would have the power to make rules inter alia for the following matters:

- the rights and duties of the advocates of the High Court and their discipline and professional conduct;

- the giving of facilities for legal education and training, and the holding and conduct of examinations by the Bar Council.

The Act also achieved a degree of unification of the Bar by unifying two grades of practitioners, vakils and pleaders, by merging them into one class of 'advocates'. Under S. 8 of the Act, no person could practise in the High Court unless his name was entered in the roll of Advocates maintained under the Act. Attorneys of the High Court were, however, exempted from being entered on this roll. .A duty was imposed on the Bar Councils to decide all matters concerning legal education, qualifications for enrolment, discipline and general control of the profession. The High Court was also authorised to reprimand, suspend or debar from practice, any advocate of the High Court whom it found guilty of professional or other misconduct.

Although this Act was a definite improvement on the pre-existing position of the Bar in India, it failed to satisfy the Indian legal profession, which felt that the Bar Councils were given unreal and ineffective powers — which in fact were closely controlled by the High Courts. As observed by one native lawyer, "We have been asking for substance. In answer, we are given a sham and a shadow." The aspirations of Indian lawyers to have an autonomous and unified Bar had to wait for more than three decades, when the Indian Parliament enacted the Bar Council Act, 1961.

8. Advocates Act of 1961.

9. Law Reporting in India.

10. LAW REPORTING IN INDIA

JUDICIAL PRECEDENTS

The word 'precede' signifies something that has gone before. The expression 'judicial precedent refers to previous decisions of superior courts.

The doctrine of stare decisis (embodied in Art. (141 of the Constitution of India) lays down that a previous decision of a superior court on a point of law is binding on, and is to be followed by, all inferior courts.

The theory of the binding force of precedents is firmly established in English law. In the words of Salmond, a judicial precedent in England speaks with authority. It is not merely evidence of law, but a source of it, and the courts are bound to follow the law that is so established.

Importance of this theory is that:-

it brings about uniformity and certainty in the law.

It also avoids delays and promotes convenience.

In its absence, every court would be free to interpret the law in its own way, resulting in utter chaos and all-round confusion.

If an earlier decision of a superior court was not binding on a lower court, every court deciding similar matters would have to decide the same question again and again.

The theory thus eliminates delay, disorder and conflicts which would result in utter confusion. If decisions of higher courts were not binding, it would be difficult, if not impossible, to regulate one's future conduct, and lawyers would be at a loss when advising their clients on how to manage their affairs in the future.

Under the doctrine of stare decisis (referred to above), decisions of the Supreme Court are binding on all other courts. However, the interesting question that arises is : How are other courts informed about the numerous judgments of the apex court? The answer is simple : By the law reports.

LAW REPORT

It is a compilation of judgments of higher courts published at regular intervals. Each and every case decided by such courts is not reported; only those that involve an important interpretation of the law or which lay down an important or new principle of law find place in such reports.

Law reports are of two kinds:

i).Official law reports and

ii).Private law reports.

Official reports are publications of the government,

whereas private law reports are published by non-governmental publishers.

Thus, the Supreme Court Reports (SCR) form a series of official law reports, published under the authority of the Supreme Court of India, whereas the All India Reports (AIR) is a private publication of the All India Reporter Private Ltd. at Nagpur.

B. LAW REPORTING BEFORE 1875

It was only after Supreme Courts were established in the three Presidency Towns of Bombay, Calcutta and Madras that the system of law reporting began in India.

The earliest compilations were restricted to cases involving personal laws. In 1824, Sir Francis McNaughton published a volume entitled Considerations upon Hindu Law, and in 1825, Sir William McNaughton came out with Dissertations on Mohammedan Law.

Then, in 1829, Clarke published a volume entitled Rules and Orders of the Supreme Court, containing elaborate notes on decided cases. This was followed by several private law reports, of which the most notable were the following: • Bignell's Reports (1830 — 1831)

• Foulton's Reports (1842 — 1844)

• Montriou's Select Cases (1846)

• Boulnoi's Reports (1853 — 1859)

• Gasper's Commercial Cases (1851 — 1860)

• George Taylor's Reports (1847 — 1848)

Some attempts were also made to publish decisions of the Sardar Diwani Adalats and the Sardar Nizamat Adalat. Thus, for instance, seven volumes containing cases decided by the Sardar Diwani Adalats, covering the period 1791 to 1849, were published. From 1845, the decision of these courts were published on a monthly basis and were called the Bengal SDA Reports.

It must be noted that the publication of all such reports was neither systematic nor scientific. Whereas some reports were prepared carefully, others contained neither a statement of facts nor the arguments of the lawyers. This erratic manner of publishing law reports came under strong criticism from Sir James Stephen (see below) and eventually led to the passing of the Indian Law Reports Act, 1875.

C.LAW REPORTING AFTER 1875

The prevailing haphazard system of law reporting in India was severely criticised by Sir James Stephen, the Law Member of the Government of India. He pointed out that the existing law reports were of varying degrees of merit, the quality of reporting was poor and the number of such reports was increasing rapidly. Private law reports made no distinction between cases worth reporting and those which did not merit a place in the reports. He regarded this as a "mischievous state of things", which ought not to be allowed to continue.

Ultimately, to reduce the multiplicity of law reports in India and to improve their quality**, the Indian Law Reports Act was passed in 1875**. This Act is a significant landmark in the history of law reporting in India.

Under this Act, courts were to accept, as citations, only those reports which were published under 'The authority of the Governor-General-in-Council" (which was amended to "the authority of the State Government" after independence). Section 3 of the Act now provides as follows:

"No court shall be bound to hear cited, or shall receive or treat as authority binding on it, the report of any case decided by any of the High Courts other than a report published under the authority of the State Government."

Thus began an official series of law reports known as the Indian Law Reports (ILR). Today, each High Court has its own series of law reports, as for instance, ILR Bombay, ILR Allahabad, and so on.

Although it was envisaged by the above Act that only the ILR series would be accepted by courts in India, in the course of time, several private law reports have sprung up, as for instance, the All India Reports (AIR), the Income-tax Reports (ITR), Supreme Court Cases (SCC), etc., and are freely cited in all

courts. The Fifth Law Commission also examined the system of law reporting in India and was opposed to the creation of a monopoly in favour of any official law report.

Today, a wide variety of law reports are available to everyone: lawyers, law professors, judges, etc. Some like the AIR and SCC publish judgments relating to all fields of law, whereas others like the ITR and the Criminal Law Journal (CU) contain reports of cases relating to specific segments of the law, Most law reports are published on a monthly basis, whereas some others are published every fortnight, as for instance, Unreported Judgments (UJ) — or even on a weekly basis, as for example the SCC in India and the WLR (Weekly Law Reporter) in England.

Due to the universal use of the internet, several courts and tribunals now publish their judgments on their websites, so that judges, lawyers, litigants and all other interested persons can access them at the click of a button. In 1995, the Supreme Court, in collaboration with the National Informatics Centre, launched a website/information system called JUD1S .Judgments Information System). A versatile system of law reports is also now available on a CD ROM, and is called the Supreme Court Case Finder. The latest development is the collaboration between the publishers of SCC with LawNet of the Singapore Academy of Law, whereby subscribers of LawNet all over the world can get access to all cases reported in SCC from 1969 onwards through the website of LawNet.

B. HISTORY OF LEGISLATURE

CODIFICATION

Laws can broadly be divided into

i).Codified and

ii).Uncodified laws.

The word "**codification**" refers to arranging something in a systematic order. When used in a legal sense, the term refers to the process of enacting particular rules of law in a statute or Act passed by the legislature.

The systematic arrangement of the legal provisions, rules and regulations of a country on a specific topic is thus referred to as codification.

Codified law is thus available in the Acts passed in the country, whereas uncodified law has to be painstakingly found in judicial precedents and authoritative text books.

Thus, codification refers to a process by which scattered, non-uniform and often uncertain provisions of law are transformed into a written and systematically arranged code (Act).

Bentham, a strong supporter of codification, once said, "A complete digest as such is the first rule. Whatever is not in the code ought not to be law." Codification thus brings uniformity to the law and avoids, or at least minimizes, confusion and uncertainty.

Thus, for instance, a part of Hindu law is codified for example,

the Hindu Marriage Act, 1955,

the Hindu Succession Act, 1955, etc.) whereas other portions of Hindu law (for instance, the law relating to Hindu joint families, Hindu coparcenaries, partition, etc.) is uncodified.

Likewise, most of Mohammadan law (including the law relating to marriage, divorce, succession, etc.) is uncodified, having its origin in holy scriptures like the Koran.

Various legal systems of the world have resorted to codification of laws for many reasons.

Laws have been codified in India with several objectives in mind, as for instance, the following:

1. To lay down the law in a precise form.

2. To make the laws better known to people at large.

3. To remove the uncertainties and complexities of uncodified law.

4. To assist in the administration of justice.

5. To check the automatic infusion of technical rules of English law into the Indian legal system.

6. To preserve and legalise beneficial customs and usages suited to the people of India and prevailing in the country for long periods of time.

7. To minimize what Bentham calls "the evils of judicial legislation".

History of Codification

Public demand for codified laws can be traced to the dawn of recorded history. The first known codification of laws is generally attributed to Ur-Nammu, the King of Ur in the 25th century B.C.

Ancient Greek and Roman civilizations continued the practice of codification. However, these primitive codes were not very helpful. Often, laws were written in small characters and hung on pillars for the benefit of citizens.

Although Julius Caesar made an attempt at codification, he met with very_liftle success, and was not able to reduce the enormous body of Roman law to a simple, codified form.

In the olden days in India, the absence of codification resulted in uncertainty, incoherence and lack of uniformity resulting from the application of at least five different systems of laws and rules in the country. Firstly, English law (rules of common law as well as English statutes) were often applied to Indian cases. Again, three different sets of regulations, existing separately and independently from one another, prevailed under the governments of Bombay, Madras and Bengal. Lastly, in the absence of specific laws or rules applicable to minority

groups like the Anglo-Indians, Jews and Parsees, the principles flowing from the doctrine of justice, equity and good conscience were applied to these communities.

The historical position in India

The governance of the East India Company was one of a multi-centered authority. With limited powers, it tried to govern and administer justice to a multitude of diverse communities of Indians spread over a vast territory. No wonder such a system was most uncertain, haphazard and chaotic.

The position in India in the 17th, 18th and early 19th centuries was far from satisfactory. Three Presidencies of the Company's government operated under the remote control of the Board of Directors of the Company and the English Parliament. The three Supreme Courts and the Sardar Adalats began to interpret and apply laws, each in its own way, resulting in utter chaos and confusion.

When **the first Law Commission was appointed in 1833, with Lord Macaulay as its Chairman**, the first project referred to it was the codification of criminal law in India. Under the inspired and able guidance of Lord Macaulay, the first draft of the Indian Penal Code was submitted in 1837. Today, the Indian Penal Code (amended from time to time to keep it in tune with changing times) is a unique and unparalleled piece of legislation. The draftsmanship of the Code was so splendid that there was a demand in England that an English Code be drafted in that country, modelled after this Code.

After independence, since the Constitution envisages a neat division of legislative powers between the center and the states, certain statutes like the Indian Penal Code or the Indian Contract Act- apply to the whole country, whereas other Acts are in force only in a particular state, as for instance the Maharashtra Rent Act and the Bombay Stamp Act, both of which are operative only in the state of Maharashtra.

Prior to 1955, almost the entire range of Hindu law was uncodified, having its source in the Vedas, Smrutis, Shrutis, etc. It was only in 1955 and 1956 that Parliament codified most of Hindu personal law in the shape of the Hindu Marriage Act, the Hindu Adoptions and Maintenance Act, the Hindu Minority and Guardianship Act and the Hindu Succession Act.

The reason why most laws were uncodified in the earlier days — especially in a country like India — was that in primitive and ancient societies, law and

religion were blended together. In this scenario, custom had a vital and important role to play, and legislation was often non-existent.

Today, however, times have changed, and legislation has claimed a degree of superiority over other methods of legal evolution, although custom continues to be a subsidiary source of law in countries like India. Today, most of the law of torts is uncodified law, and there have been persistent demands for its codification. It is argued that if this branch of the law is reduced to a single piece of legislation, it would add a great degree of certainty to this branch of the law. The result of litigation would then depend on the provisions of an Act rather than on Judicial decisions, some of which conflict with some others. In fact, a Bill to codify the Indian law of torts had even been drafted — but was never passed by Parliament.

Although there is a lot of truth in such arguments, it must also be kept in mind that, if codified, the law of torts would become extremely rigid and would lose all Its current flexibility. Every time a change in the law becomes necessary, the arduous task of amending that Act would have to be gone through.

Drafting a Code : Contents of a Code

A code is a piece of enacted law on a particular subject, which should be the authoritative, comprehensive and an exclusive source of that law. The technique of drafting the various contents of a Code may be briefly set out as under:

• At the very outset, the Code must briefly state the objects and purpose of that law and whether it is meant to consolidate or amend or repeal the existing law on that subject.

• The title of the Act should then be set out in a manner that is short and simple, but which nevertheless gives a clear indication of the subject-matter of that Act.

• The date from which the Act is to come into force may then be stated in the Act itself or this may be left to the government to decide. Different sections of the same Act may come into force on different dates (as has recently happened in the case of the Companies Act, 2013).

• The Act must specify whether it applies to the whole of India or to a particular State or only to certain parts of the country.

• The Act must contain the definitions of the terms and expressions used in the Act, so that varied interpretations of the same term or expression are avoided.

• The substantive part of the law must then be neatly divided into various topics, each contained preferably in a separate Chapter. Such Chapters should then be divided into sections and sub-sections (wherever necessary).

• Illustrations may be added to clarify and illustrate what is stated In the sections. Explanations, exceptions and provisos may also be inserted at the proper places.

If the Act has repealed any earlier law, this must be stated – generally at the end of the Act.

Merits and demerits of codification

As codified law is to be found in statutes and uncodified law represents precedents or case law, the controversy boils down to 'statutes versus precedents'. The respective merits and demerits of both these important sources of law can be summarised as under.

Merits of codification

In the nineteenth century, Lord Macaulay and Jeremy Bentham were staunch supporters of codification. Criticising the process where judges laid down the law in their judgments, Lord ' Macaulay observed that judge-made law "is a curse and a scandal not to be endured". Bentham was also a strong advocate of codification and is often called "the apostle of codification". It was he who was responsible for the invention of the word 'codification', or at any rate, for its introduction in the English language. In his words, "To be without a code Is to be without justice." Codification, it was said, was indeed the passion of his life. The main advantages of codification are listed below.

1.Form and simplicity

Codification makes the law simple and accessible to everYbody. it is said that statute law is brief and clear, whereas case law is buried from sight and knowledge in the huge, and °f ten complicie—a• mu mass of case law. It is easier for a citizen, I$ argued, to refer to an Act of Parliament rather than get '?st in a maze of case law. As once observed, case law may u.• gold In the mine, but statute law Is the coin of the realm, lady for Immediate use.

2. Easy access

it is argued that precedents are scattered all over time and ;ace_ and often inconvenient to access, whereas codified laws Are More accessible to the common man.

3. Abrogative power

Legislation is both constitutive and abrogative; it can make and unmake law. Precedent, on the other hand, can only make law, that is, it is constitutive only. To take an example, even if a decision of the Full Bench of the Bombay High Court is not a sound decision, in all future cases, Judges of the Bombay High Court will have to follow it — and decide cases in conformity with a decision that is ultimately proved to be a wrong one. It is only when a future litigant takes the matter to the Supreme Court where such a decision is over-ruled, that Judges of the Bombay High Court are liberated from following such an erroneous ruling.

4. Advance declaration

Justice requires that laws be known before they are applied. Codified law is formally declared in the form of an Act, so that all persons are aware of its content. But in the realm of uncodified law, if a new point is to be decided, the courts will make the law and apply it immediately. There can be no advance declaration in such cases.

5. Division of functions

Codification allows an advantageous division of functions, which results in efficiency. The function of the legislature is to make laws, whereas that of the judiciary is to apply the laws. Case-law, however, combines in the same body (namely, the courts), the function of making the law and applying it, which is not always the best formula for efficiency.

6. Provision for future cases

Codified law makes provisions for cases that have not yet arisen, whereas precedent has to wait until a particular set of facts are presented to the court. Codified law proceeds in the direction of certainty, whereas case law is often incomplete, uncertain and unsystematic.

7. Reliability

Codified law is, in many ways, more reliable than the judgment of an individual Judge or even a Bench of Judges. As remarked by the famous jurist, Dr. Sethna, the human mind is not infallible — and a Judge is no exception to this rule. The collective wisdom of the legislature can therefore be regarded as a more reliable means of protecting the subjects of a nation than the fancy of an individual Judge.

8. Impartiality

It is one of the cardinal principles of law that justice should not only be done, but should also be seen to be done. This can be achieved only when there are fixed principles of law, declared in advance, and reduced to writing in the shape of a statute.

9. Protection against arbitrary, biased and dishonest decisions

The existence of fixed and codified principles of law also avoids the dangers of arbitrary, biased and dishonest decisions

Demerits of codification

The main demerits of codification are the following:

1. Little scope for judicial discretion
   Once the law is codified, the courts have no option but to follow the law — even if it results in injustice in a particular case. Uncodified law, however, leaves a great amount of discretion in the hands of the Judge (often referred to as `judicial discretion'), as his hands are not tied down by the water-tight rules contained in an Act.

2. Lack of clarity Very often, codified laws are, couched in legalistic jargon and cumbersome language, which makes little sense to a layman. Case law, on the other hand, is seldom worded in verbose or high-sounding language.

3. Rigidity Codified laws are generally rigid. Uncodified law, on the other hand, exists in the form of precedents. As the facts of any two cases can almost never be exactly the same, the courts have enough scope for doing justice in every individual case.

4.Change

As times change, the laws too require to be modified When an Act needs to be changod, the formal process of amendment of that Mt has to be gone through. A precedent, on the other hand, can be easily over-ruled by a higher court.

5. Inoompleteness

As a legislature cannot anticipate all possible problems and situations that may arise In the future, statutes tend to be incomplete, and when new problems arise, his often difficult for the court to tackle that problem within the framework create by a particular Act. According to Paton, codification purifies

the law at the stage when the law is made and often there is little scope for applying It to now situations.

Re-codification

Often, there are several statutes dealing with the same subject-matter, some recent and others that may be outdated. Sometimes, provisions in one Act appear to conflict with those in another Act on the same subject. In such cases, there is a need to re-codify the law into one consolidatedpiece of legislation and to repeal the other Acts. This is referred to as re codification.

Conclusion

It cannot be denied that codification is replete with manifold benefits. The road to codify laws may be a difficult path, but It is one where the journey is worth the trouble. Today, the law of torts is mostly uncodified. Again, most portions of Mohammadan law and several parts of Hindu law are yet to be codified. The need of the day is a uniform civil code, mandated by the Indian Constitution as a directive principle of state policy — but one where no progress has been seen despite more than six decades of independence.