DEVELOPMENT OF JUDICIAL SYSTEM IN INDIA

UNDER THE EAST INDIA COMPANY FROM 1833 TO 1858

RAMESH CHANDRA SRIVASTAVA

FOREWORD BY M. C. SETALVAD

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DEVELOPMENT OF JUDICIAL SYSTEM IN INDIA UNDER THE EAST INDIA COMPANY

To
My Mother and Father

Foreword

WHEN I was invited to write a foreword to this thesis, now being published in book form, I readily accepted the invitation, having been previously concerned with tracing the development of the Common Law in India, including the building up of the system of judicial administration, which is perhaps our most valuable heritage from the British. Having read the thesis, I feel happy that I accepted the invitation.

Legal research is yet to find its foothold in India. Compared with some of the Universities in the United States, our Universities have lagged far behind. Happily, the Law Institute at Delhi has done some useful work in this direction. I therefore welcome this publication as a valuable contribution to legal research relating to an important period.

What strikes one about the book is the remarkable wealth of material which the author has examined for the purpose of building his narrative. Further, the material has been used under appropriate heads and utilised fully in support of the inferences drawn by the author.

When I started glancing at the book dealing with the period from 1833 to 1858, I thought I was venturing into an antiquarian field which may not interest me. On the contrary, the various chapters gripped me with absorbing interest.

The controversy of the greater employment of Indians in the services which continued throughout the occupation by the British of this country stares us in the face in this very early period also. Clause 87 of the Charter Act of 1833 is said to contain a specific recognition of the right of the Indians : "That no Native of the said Territories, nor any natural born Subject of His Majesty

resident therein, shall, by reason only of his Religion, Place of Birth, Descent, Colour, or any of them, be disabled from holding any Place, Office or Employment under the said Company." Notwithstanding, however, these eloquent words, the increase of Indians in judicial employment was slow and tardy and was resisted by the Englishmen resident in India.

The Chapter dealing with the Chief Law Officers of the Company makes interesting reading. We find existing, in those early years, the familiar offices of the Legal Remembrancer, the Advocate-General, the Registrar, the Company's Solicitor and the Standing Counsel.

The Chapter on Inter-State Law makes useful reading. It shows attempts to solve difficult questions of International Law arising out of the attempts of criminals to escape from one jurisdiction to another at a period of time when so many jurisdictions existed in the territory of India. Of particular interest are the revised set of rules promulgated by the Madras Government for the observance by Magistrates of Districts bordering on the territories of the Nizam.

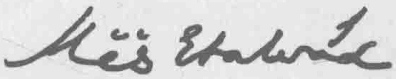
Not without some relevance to our present day language-controversies is the Chapter on the question of Court language in those days. Persian having entrenched itself as the court language for a long time, it was with difficulty that the efforts to displace it materialised by the enactment of Act XXIX of 1837, which "empowered the Governor-General to dispense with any Regulation which enjoined the use of the Persian language to Judicial and Revenue proceedings and to prescribe the use of any other language and character he deemed fit." Notwithstanding the opposition to the change, reports from certain parts of the country showed that the change from Persian to Hindustani as the Court language had met with great success. Though a number of local languages held the field in subordinate courts, the preponderance of English judges and English barristers in the superior courts gradually brought into vogue the use of English as the language of courts.

The Chapter dealing with the Law Commissions and codification of Law is of great interest. Macaulay's valiant efforts to compile a draft of the Indian Penal Code, the delays of which he and his colleagues were accused, and, ultimately, the submission

of the Draft Penal Code by him on the 14th of October, 1837, are depicted in great detail and in a manner which holds our interest. We also have in brief in the same Chapter the story of the preparation and enactment of the Codes of Criminal and Civil Procedure. The author aptly concludes the Chapter by the observation that "the codification of law was an epoch-making event in the history of Indian judicial system. About three decades of sustained labour and planned work by some of the best British legal minds, which constituted the Law Commissions and the Indian Legislative Council, crystallised in the formation of the Indian Penal Code and the Codes of Criminal and Civil Procedure."

The Chapter dealing with the Indian Bar traces with characteristic lucidity its rise since Regulation VII of 1793, which "was the first attempt to regularise the institution of vakils in India." It is not surprising that some difficulties which still beset the Bar were noticed in those early days and attempts were made to grapple with them.

I have referred to but a few of the many topics of interest which are to be found in the book. I congratulate the author on his deep study and labour, and commend the book to the reader.



(M. C. SETALVAD)

Preface

CONTEMPORARY Indian judicial set-up is largely a legacy of British rule : its foundations go back to the days of the East India Company. However, it is regrettable that details of the early judicial organisation have not been fully studied. The present work is an attempt at making a detailed and analytical study of the foundations of our judicial system.

It goes to the credit of the British that they devoted considerable attention to the establishment of a stable judicial system even in the midst of wars and unsettled political situation. A study of the judicial reforms and innovations of the East India Company would vindicate this assertion.

A number of works on the growth and development of Indian judiciary have been published, but there still remains considerable scope for the study of its origins. In the present work a comprehensive study of the subject based mainly on original and contemporary sources from the National Archives of India has been made. The period from 1833 to 1858 has been studied in detail, since the infra-structure of the British Indian judicial system was laid during this time.

A systematic account of the data collected has been incorporated, and special aspects, like the Inter-State Law, the question of Court Language, the emergence of the Indian Bar, have been studied in depth for the first time.

The source material for the present work has been the original and unpublished records of the Government of India, Parliamentary Proceedings, Judicial Correspondence, Official Reports and Compilations and all other relevant documented evidence.

This work was completed under the supervision of my teacher, the late Dr. Nandalal Chatterji, Professor and Head of the Department of History, Lucknow University. I owe a deep sense of gratitude to my guide and mentor not only for the very valuable suggestions he made during the work in progress, but also for the pains he took, despite his failing health, to read the typescript and suggest improvements.

I am grateful to Mr. M. C. Setalvad who, in the midst of his busy professional life, could find time to write the foreword. I offer my sincere thanks to Mr. C. K. Daphtary, former Attorney-General of India, and Mr. Justice Jagdish Sahai of the Allahabad High Court for going through the typescript and recording their valuable opinions.

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Abbreviations

Bengal Regulations	The Regulations and Laws enacted by the Governor-General-in-Council for the Civil Government of the whole of the territories under the Presidency of Fort William in Bengal
Clarke ; Bombay Regulations	The regulations of the Government of Bombay compiled by Richard Clarke
Clarke ; Madras Regulations	The Regulations of the Government of Fort St. George compiled by Richard Clarke
Firminger ; Vol.	The Fifth Report from the Select Committee of the House of Commons on the affairs of the East India Company, 28th July, 1812 compiled by Firminger, Volume
Harrington's Analysis, Vol.	An elementary Analysis of the Laws and Regulations enacted by the Governor-General-in-Council for the Civil Government of the British Territories under that Presidency, prepared by J. H. Harrington, Volume
Home ; Judl. Cons. No.	Government of India Proceedings ; Home Department ; Judicial Branch Consultation Number
Judl. Letter to Court	Judicial General Letter to the Court of Directors written by the Government of India
Judl. Letter from Court	Judicial General Letter to the Government of India written by the Court of Directors
Judl. Letter to Secy. of State	Judicial General Letter to The Secretary of State for India written by the Government of India
Judl. Letter from Secy. of State	Judicial General Letter written to the Government of India by the Secretary of State for India
Leg. Cons. No.	Government of India ; Legislative Department Proceedings Consultation Number
Theobald ; Vol.	The Legislative Acts of the Governor-General of India in-Council compiled by William Theobald, Volume Number

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1

Introduction

THE administration of justice in British India during the days of the East India Company was seldom free from confusion. Practically all the important Governors-General were busy in their own various ways, and in their anxiety for the expansion of British territories in India they hardly had time to evolve a regular or definite administrative pattern. Cornwallis, however, stands out as an exception in this respect, as is borne out by his Code of 1793. Nevertheless, his treatment of the judicial system was a mere palliative and it failed to effect a permanent cure of the malady. Besides, having been brought up in an aristocratic family, he did not have the necessary vision to appreciate the real problems of the teeming millions of the country. His system was "entirely founded upon European notions of justice and European forms of practice."[1] He also suffered from a sense of racial superiority, as was reflected in his policy of excluding Indians from the judicial administration of the country. The result was that his system could not stand the test of time, and very soon its defects and anomalies became glaringly obvious.

The authorities in England were also conscious of the fact that there was something wrong with the affairs of the East India Company ; that their system of administration was far from being satisfactory ; that their mode of administering justice was a cause of great dissatisfaction to the Indian people and needed a radical change. The authorities' belief was reinforced by the testimony produced before the British Parliament by various civilians

1. Stated by Robert Rickets before a Select Committee of the House of Lords on 14th May, 1830 ; House of Commons, Vol. No. VI of 1830, Paper No. 646, p. 277.

who had been associated with the Indian administration in different capacities.

Among the major defects in the Indian judicial system, as established by the East India Company, the greatest was that there existed at that time two concurrent and in some instances conflicting systems of judicature—the Company's Courts and the King's or Supreme Courts. This anomaly was pointed out by James Mill to the British Parliament :

> "You have two independent authorities ruling in one and the same country ; two authorities not only from their nature liable to be in frequent collision but which actually have been in frequent collision, and are habitually to a certain extent antagonising instead of cooperating powers."[2]

The mischief arising out of such a system was very clearly pointed out by Sir Charles Metcalfe also in his Minute[3] of February 1829. He said :

> "That part of the system which makes our native subjects, under some circumstances, liable to the jurisdiction of the King's Court ; under some to that of the Company's Court ; and under some to that of both, without regard to residence, or any clearly defined limitations by which our Native subjects can know to what laws or courts they are or are not amenable, is replete with gross injustice and oppression, and is an evil loudly demanding a remedy."[4]

He, therefore, suggested that it was desirable to amalgamate "the King's Courts with the local judicial institutions under a code of laws fitted for local purposes, and calculated to bestow real and equal justice on all classes of subjects under British Dominion in India."[5]

The existence of a multiplicity of regulations in the three Presidencies, besides the system in vogue in the non-regulation Provinces, added to the disuniformity in the judicial set-up. In Bengal justice was administered in accordance with the Bengal Code which was in operation from 1793 to 1834. In the Madras Presidency the proceedings in law courts were conducted according

2. Evidence given by James Mill on 21st Febuary, 1832 ; House of Commons, Vol, No. IX of 1831-32, Paper No. 735I, p. 49.
3. Referred to by Cameron while deposing on 7th June, 1852 before a Select Committee of Parliament ; House of Commons, Vol. No. XXX of 1852-53, Paper No. 41, p. 193.
4. *Ibid.*
5. *Ibid.*

to Madras Regulations which remained in force from 1802 to 1834, while in the Bombay Presidency the revised Bombay Code of 1827 guided the operation of law. The result was that there was no uniformity and justice was administered, to a great extent, differently in the different Provinces.

The introduction of the English law in judicial proceedings only increased the confusion. The judges, while administering justice, forgot that the English law was framed with little regard to Indian conditions and social structure. Very often cases were decided on technical and formal objections without any investigation into the case proper. Thus, the parties who underwent the toil, expense and anxiety of carrying a law suit through different courts of justice were left "precisely in the position in which they were at the commencement of the suit."[6]

It was also not always that convictions were brought home to the offenders indicted in the Supreme Court, for "in no few cases of flaw in an indictment, a hair-breadth short of the legal evidence, making much of legal niceties, impressing technical points of law of England on the minds of jury unaccustomed to hearing, much less comprehending, the force of such legal arguments by the lawyers well paid for their eloquence, combined to secure acquittal of the offenders although there could be no moral doubt of their guilt in circumstantial or strong presumptive evidence in the absence of the direct legal one not generally forthcoming."[7]

Another defect in the system was the exclusion of Indians from higher posts, and although the authorities in England expressed their unequivocal desire to associate them with the administration of justice as extensively as possible, not much was done in this direction. The position, however, slightly improved in the time of Bentinck who adopted a more enlightened policy. During his regime Indians were more trusted than before. They were extensively employed in the judicial organization ; the power and jurisdiction of Indian functionaries were considerably increased ; and a higher cadre of Principal Sadar Ameens was created. This produced a lot of resentment among European

6. Letter No. 957 dated 20th May, 1852 from Registrar, Sadar Diwani Adalat, Bengal to Secretary, Bengal Government ; Home ; Judl. Cons. No. 2 of 9th July, 1852.
7. Minute dated 3rd April, 1855 by M. Cursetjee, Judge, Small Causes Court, Bombay ; Home ; Judl. Cons. No. 9 of 17th October, 1856.

residents who were now settling down in this country in an ever greater number.

The European settlers had hitherto enjoyed a privileged position, and they were not prepared to forego their prerogative and to be put on par with the Indian subjects of the East India Company even in the matter of administration of justice. Consequently, when Act XI of 1836, which sought to place Indians and Europeans on an equal level before law, was passed by the Indian Legislature, they raised a storm of opposition.[8] The arguments they advanced against the passing of this Act were that Indians by nature were unfit to be entrusted with the responsibility of administering justice to Europeans ; that they were cruel by disposition, corrupt and unscrupulous ; that they had neither the aptitude nor necessary training to dispense justice equally and equitably. But Macaulay[9] and his colleagues in the Indian Law Commission stoutly and successfully repudiated these contentions. The Court of Directors also wanted to enlarge the sphere of duty of their Indian functionaries "and to admit them to increased share in the administration of the affairs of the country."[10]

Prejudice against the Indians, however, continued to exist even up to the days of the Mutiny. In the year 1851 a Memorial[11] of some of the landholders, farmers, planters, merchants and others was submitted to the President of the Legislative Council in India against the policy of the Government of India subjecting all inhabitants without regard to caste, colour, or creed to one set of laws uniformly administered by European and Indian functionaries. The Memorialists traced at length the growth of judicial institutions in India under the British rule, and while praising the administration of the East India Company they vehemently criticised the pro-Indian policy of the Government of India. Among other things, they asserted that those who were best acquainted with the "Native society will testify that no improvement

8. The European settlers submitted a number of anti-Indian Memorials to the Government of India against Act XI of 1836 ; House of Commons, Vol. XLI of 1837-38, Paper No. 175.

9. *Ibid* ; Paper No. 275.

10. Quoted by the Government of India in their Judl. Letter to Court No. 5 of 18th September, 1839.

11. Memorial dated 1st February, 1851 ; Home Judl. Cons. No. 5 of 27th March, 1852.

has taken place in the class from which the Native functionaries are yet exclusively taken."[12]

The results of excluding Indians from judicial administration were that in the first instance, the European functionaries were costlier and secondly, they were less efficient. The Europear functionaries, imported freshly from England, and entrusted with the task of presiding over a court of law, had neither the requisite knowledge of the language of the people nor were they conversant with their customs and usages. Thus, an English judge had to be completely dependent on his native *amlas* and, at times, he failed to grasp the correct meaning of the case he was dealing with, and hence was occasionally involved in "doubts, hesitation and perplexity"[13] arising out of conflicting evidence. In fact, it was found that unless a judge was fully conversant with the character and behaviour of the people at large, the discovery of truth was extremely difficult.

> "The number of witnesses and even their general character is of less consequence than an acquaintance with their particular customs and prejudices by which their evidence is likely to be brought to be biased. The European judge can never be so much a master of the language as to follow and detect the minute points by which truth and falsehood are often separated. The voice of a witness, the manner, the mode of expression, the use of words of a less positive though often similar sense, all these must be beyond the reach of an European whose knowledge of Indian language can never extend to such niceties."[14]

The conflicting jurisdiction of the King's Courts and the Company's Courts, the intricate personal laws, the cumbersome procedure of the courts, and the introduction of English law by the judges in their judgements and by the lawyers in their pleadings tended to make Indian judicial system extremely complex and costly. There was an urgent need for greater simplicity and conciseness in the system of judicial procedure. Multitudinous forms, details and inventions only increased the labour of the courts and diminished "their efficiency by creating injurious delays."[15] The

12. *Ibid.*
13. Minute dated 28th July, 1840 by J. Sullivan on the administration of Justice in Madras ; Home ; Judl. Cons. No. 4 of 21st December, 1840.
14. Said by Sir Thomas Munro and referred to by J. Sullivan in his minute quoted above ; *Ibid.*
15. Letter No. 68 dated 7th March, 1836 from Judge, Mirzapur to Registrar, Sadar Diwani Adalat, N.W.P. ; Home; Judl. Cons. No. 116 of 16th October, 1836.