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Administration of Justice in Pre-British India

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Abstract – the very article aims at Administration of justice in pre-British India in political context. Societies in ancient India were governed by 'moral law': it was not 'law' as we understand it today, since it did not owe its origin to the command of any sovereign, nor was there- any habit of obedience to a determinate person. In ancient India, 'law' was that which was believed to have been ordained by a Divine Author. It was more like what the Romans called jus receptum-law by acceptance. In ancient India, the principal source of 'law' (in this sense) was the smritis. 'Smriti' meant literally 'that which was remembered': the recollections handed down by the rishis (or sages of antiquity), of the precepts of God.

Keywords: Justice, Administration, Laws, Politically, Provincial, Sovereign. etc.

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The rishis (known as 'smritikars') compiled the metrical smritis at different times and in different parts of the vast expanse of territory called 'Bharat'. But in so doing they did not exercise any temporal power, nor did they owe their position to any sovereign. The authority of their legal injunctions was derived partly from the reverence in which they were held, and partly by the belief that what they laid down was agreeable to good conscience. The smritikars did not arrogate to themselves the position of lawmakers, they claimed only to be exponents of divine precepts of law and compilers of the traditions handed down over generations. Changes were affected over time by a slow process of recognition of particular usages as of binding efficacy. The smritis, also known as the Dharmashastras (literally, the strings or threads of the rules of Dharma), were a compendium of principles for the regulation of human conduct. Composite in their character, they were a blend of religious, moral and social duties. There were a large number of smritis? (which also included commentaries and digests), but the principal smritis were three in number. First and foremost in rank of authority was the code or institutes of Manu-the Manusmriti. compiled somewhere between 200 Be and AD 100. Then came the code or institutes of Yajnavalkya (the Yajnavalkya smritis, compiled between AD 200 and AD 300), the Mitakshara being the leading commentary on this code. Next came the code or institutes of Narada (compiled around AD 200). If the smritis constituted the foundation of the written text of the 'law', the 'sadachar' (or approved usage) supplied the unwritten customary practices of the people of Bharat.

The unique and pre-eminent Position of the Manusmriti is apparent from its opening lines:

[Unto] Manu, blissfully seated with his mind abstracted from the world of the senses, came the great sages. Having worshipped him they, conformably to reason and propriety, interrogated him ... 3

And Manu answered the sages: his answers became an authoritative reservoir of law, a systematic and cogent collection of rules in simple language, of easy comprehension. They recast in convenient and accessible form the entire traditional law. All the Dharmashastras, right down from the Rig Vedic age, copiously refer to the opinions of Manu-the primeval legislator. Later texts repeatedly affirm that the authority of the precepts contained in the Manusmriti is beyond dispute-a fact acknowledged in decisions of courts as well."

Manu's code is divided into twelve chapters, and in the eighth chapter there are stated rules 011 eighteen subjects of law, which include both civil and criminal law. Sir William Jones, who came to India in 1774 as one of the first judges of the Supreme Court of Judicature of Bengal, learnt Sanskrit and undertook an authoritative translation of the Manusmriti. In the preface to the translated work (published in 1794), this is what he wrote:

The style of it [of the Manusmriti] has a certain austere majesty that sounds like the language of legislation and exhorts a respectful awe; the sentiments of independence on all beings but God, and the harsh admonitions even to kings are truly noble...

The code of Yajnavalkya was founded on the Manusmriti, but the treatment was more logical and synthesized-s-particularly on the question of women-their right to inheritance, their right to hold property arid the like. Yajnavalkya, though a follower of conventional conservatism, was decidedly more liberal than Manu: possibly because of the then-

pervading influence of the teachings of the Buddha. There are a number of verses in the code of Yajnavalkya that bear testimony to the fact that the law of procedure and the law of evidence to be followed in civil disputes had made considerable progress. According to Yajnavalkya, the cause of a judicial proceeding arose when any right of a person was infringed, or any wrong was done to him by another in contravention of.the smritis or customary law.

The Code of Narada (a compilation) has come down to us in its original pristine form-it begins with an introduction, and the treatment of the subject is in two parts: the first part deals with the judicature, and the second enumerates and discusses with clarity the eighteen titles of legal subjects contained in the Manusmriti. The merit of this smriti is that it states the law in a straightforward manner, in a logical sequence which is readily assimilated, and in a style which is both clear and attractive. Some of the topics of law dealt with by Narada are inheritance, ownership, property, gifts, and partnership. The Naradasmriti lays down a series of rules relating to pleading, evidence of witnesses and procedure. One of its most striking features is that it is the first of the Dharmashastras to accept and record the principle that king-made laws (legislation) override the rules of law laid down in the smritis.

The smritis (or Dharmashastras) did not visualize an ordered legal , but they did conceptualize an aspiration- ‘nyaya'- which we now call 'justice'. Some commentators said that 'nyaya', literally meaning natural Equity or Reason, was recognized by the smritis as applicable to cases not covered by the written law, as well as where two smritis differed.' Yajnavalkya had a great sense of justice, and ordained that' 'where two smritis disagree, that which follows equity guided by the people of old should prevail'. But others insisted upon Equity and Reason as the determining factor in all cases. In the smriti of Brihaspati, it was written that 'no decision should be made exclusively according to the letter of the Dhannashastra for, in a decision devoid of "yukti" (i.e., Reason or Equity), failure of justice occurs"." It was Brihaspati who perfected the doctrine about invoking Equity even against written law. The concept of justice in the Manusmriti is stated in four or five stanzas, the sternest of which is the following:

Justice, being violated, destroys; Justice, being preserved, preserves; Therefore justice must not be violated; Lest violated justice destroy us.

Whether this concept of justice was applied when administering the law is uncertain. European scholars had claimed that the law of the Dharmashastras did not represent a fixed set of rules that were in fact administered in Bharat. Brahminical India (they said) had not passed beyond the stage which occurs in the history of all the families of mankind-the stage at which a rule of law is not yet discriminated from a rule of religion. This was the view expressed by Sir HenryMaine in his classic work Ancient law, first published in 186U But in 1878, another Oriental scholar John D. Mayne, called into question th~ correctness of Sir Henry's thesis. John Mayne propounded the theory that the law of the Dharmashastras was based upon immemorial custom and had an existence prior to and independent of Brahminism, and that it only got modified and altered by Brahmin writers 'so as to further the special objects of religion or policy favoured by Brahminism'.

In what passed for law in pre-British India, there was an underlying concept of justice, but as to whether it supplemented the law, or could also supplant it, was a matter on which scholars differed.

Much of ancient Indian law is lost in the mists of antiquity. The chance discovery in 1909 of an authentic text of the Arthashastra of Kautilya emphasized the difficulty of stating anything with certainty about the distant past. Kautilya wrote this work somewhere around 300 Be. The Arthashastra thus predated the Manusmriti-it was written at the time of powerful wan'ior-emperors like Chandragupta Maurya. The accession of Chandragupta Maurya, reckoned anywhere between 325-21 Be, is a significant landmark in Indian history because it inaugurated the first Indian empire. The Maurya dynasty (which included Emperor Ashoka) was to rule the entire subcontinent, except the areas south of Mysore and substantial parts of present-day Afghanistan, under a centralized imperial system. After the death of Ashoka, political decline set in, and half a century later the empire was reduced to only a part of the Ganges valley.

In 185 Be, the last of the Mauryas was assassinated by his Brahmin commander-inchief Pushyamitra, who founded the Sunga dynasty. The Arthashastra, in substance, embodies the imperial code of law of the Maurya kings (who reigned from 325-185 Be); the Dharmashastras, on the other hand, were based on the psyche of a Hindu nation established with the Brahmin empire of the Sunga dynasty (founded in 185 Be). The difference between the Arthashastra and Dharmashastras has been explained on the theory that the Arthashastra was dealing with secular law and approached the consideration of relevant questions from a purely secular point of view, whereas the Dharmashastras considered the same problems from an ethical, religious, or moral point of view, and gave effect to the notions on which the Hindu soc,ial structure was based. It was widely ~eheved that the Arthashastra had progressed Independently of the Dharmashastras until the Manusmriti was composed, and that subsequent to the Manusmriti, the Arthashastra ceased to function separately: people (Hindus) in ancient India began to take their law from the smritis and the commentaries on them.

The Arthashastra was written when Bharat was politically and administratively unified, probably for the

first, and definitely for the last time before the British conquest. There was a consolidation of power in the hands of the emperors, whose writ extended almost throughout the land. Kautilya gives a vivid description of the 'King's courts of justice'. There was a court for the 'sangraha', which was for a group of ten villages; there was a court for the 'dronamukha', which was for a group of four hundred villages; and there was a court for the 'sthaniya', which was for a . group of eight hundred villages; and above them all was a court presided over by the 'King's judges'. (The 'King' was not the ruler of a large state, but only the head of an autonomous clan.) Though a network of 'King's courts' had been so established, the local jurisdiction had not disappeared. In ancient India, the bulk, if not the whole administration of justice, was carried out in popular assemblies known as the 'sabha' or 'samiti'. These were deliberative bodies assembled for discussing public business, and also served as a forum for the purpose of judging the cases which were brought before them. There is no reliable history of any territorial kingdoms which flourished before the establishment of the empire of the Mauryas, with its strong central govemment and duly constituted courts of law.

The functioning of the legal system in British India and its transition into independent India Immediately before the advent and rise of British power in India, the administration of justice in northern India was in the hands of courts established by the emperors, with ruling chiefs owning real or pretended allegiance to them. The Mughals effectively ruled India from 1526 to 1761. Then their power wanedthe writ of the last Mughal emperor, Bahadur Shah II (1837-57), did not extend much beyond the ramparts of Delhi. Petty chieftains and big zamindars also had courts exercising both civil and criminal jurisdiction within their respective territories. It was in these courts that the origin of the legal profession in India can be traced. There was a class of persons called 'vakils' who represented clients more as agents for their principals than as lawyers, their services being made available to litigants in these indigenous courts.

In the days of the Mughals, the establishment of the East India Company (c.1600) had been exclusively commercial, and the Company was chiefly concerned with the management of its own factory at Calcutta, exercising jurisdiction and power over Englishmen residing in what were known as the 'East Indies'. After the battles of Plassey (in 1757) and of Buxar (in 1764), Lord Clive acquired from the Mughal emperor the diwani of Bengal, Bihar and Orissa, and thereafter, the Company assumed far greater territorial responsibilities. Originally, the civil and judicial administration of these tenitories was managed through Indian diwans, but shortly after the arrival of Warren Hastings in 1772, the civil and judicial administration of territories outside the town of Calcutta was undertaken by the East India Company itself.

For civil justice, provincial civil courts styled 'rnofussil dewanny adawlats' were established in each collectorate, with a superior ci vil court of appeal at Calcutta called the 'sudder dewanny adawlat'. For criminal justice, criminal courts styled 'foujdary adawlats' were also established in each district, with a superior criminal court called the 'sudder nizamat adawlat'. These courts were run by the Company, by authority of the Mughal emperor. The language of these courts was Persian. In those days, courts of the English king could not be established, since in the eyes of law, the status of the East India Company was that of a zamindar (and later of a diwan), operating under Mughal suzerainty, however nominal or effete that suzerainty may have been. The earliest power emanating from the British Crown for the administration of justice in India dates as far back as the reign of James I, who by a charter granted in 1622, authotized the East India Company 'to chastise and correct all English persons residing in the East Indies and committing any misdemeanour either with martial law or otherwise'. By a later charter dated 3 April 1661, issued in the reign of Charles II, power was given to the Governor and councils of the several places in India then belonging to the Company 'to judge all persons belonging to the said Governor and council, or that should live under them, in all causes, whether civil or criminal, according to the laws of the Kingdom and to execute judgment accordingly'. The words 'all persons' used in that charter were wide enough to also include non-Europeans who lived within the factories of the Company, and the expression 'according to the laws of the Kingdom' meant English law.

At the time of the marriage of King Charles II with Infanta Catherine of Braganza in June 1661, the king of Portugal made a present of the island of Bombay to the British Crown. By a charter dated 27 March 1669, King Charles II transferred the island to the East India Company, who thereupon became 'the absolute lords and proprietors of the port and island', and that too for the rent of £10 per annum! Ever smce then, justice was administered in the island of Bombay under the authority of the Crown of England, and not under the authority or jurisdiction derived from the Mughal court. The position was, however, different in Bengal. It was only in 1694 that the Company established by purchase a settlement in Calcutta, with the consent of the nawab of Bengal, the Company thus acquiring the status of a zamindar.

By a chatter granted by King George I on 24 September 1726, courts of record (in the name of Mayor's Courts) were established in Madras, Bombay and Calcutta. The Mayor's Courts were 'to try, hear and determine all civil suits, actions and pleas,

between party and party, that shall or may arise, or happen or that have already arisen, or happened' within the said three towns or within any of the factories subordinate thereto. The proceedings in the Mayor's Courts had to be instituted 'upon complaint to be made, in writing, to the said court by, for, or on behalf of any person or persons against any other person or persons whatsoever, then residing or being, or who at the time when such cause of action did or shall accrue, did or shall reside, or be within the said territories'. The Court was required to 'give judgment and sentence according to justice and right', that is to say, according to English common law and rules of equity. The procedure was an adaptation of the English procedure, and the language of the Mayor's Courts was English.

There was no specific provision in this charter laying down any particular qualification to be possessed by persons who would be entitled to act or plead as legal practitioners for suitors in these COUltS. Presumably, it was left to be regulated by the rules of practice which the courts were authorized to frame.

In 1746, Madras was captured by the French and the Mayor's Court at Madras ceased to exist, but after the peace treaty of Aix-La Chappelle (of 1749), Madras was restored to the East India Company. The Company then surrendered the chatter of 1726, and George II granted to the Company a fresh chatter dated 8 January 1755. By this charter, the King's Courts (Mayor's Courts) were reestablished in the three settlements with the arne jurisdictions and powers as in the charter of 1726, except that the Mayor's Courts were enjoined not to try suits or actions among the Indians unless both parties by consent ubmitted their disputes for determination to [he Mayor's Courts. These courts, which derived their jurisdictions and power directly from the British sovereign, were very favourably regarded by the Indians, who frequently resorted to them.

With the decline of Mughal rule, the eighteenth century saw the consolidation of permanent British settlements in Bombay, Calcutta and Madras. Royal charters of that period (1726- 1862) had set up in each of these towns what came to be called the King's Courts (later known as Mayor's Courts). These courts functioned upto 1774 and were replaced by the Supreme Courts of Judicature-established for the Presidencies of Calcutta, Bombay and Madras, British power having extended beyond the settlement towns. Each of these courts were set up by 'letters patent' -the earliest being in the then capital city of Calcutta with Sir Elijah Impey as the first Chief Justice of the Supreme Court of Judicature at Fort William in Bengal. (His flattering and somewhat overpowering portrait in oils, still in a remarkable state of preservation, hangs to this day in the court of the Chief Justice of the High Court of Calcutta.) The Royal Courts, established in Madras and Bombay (in 1727 and 1753), were superseded by Recorders' Courts, which in tum were replaced in Madras (in 1801) and in Bombay (in 1823) by Supreme Courts of Judicature with powers similar to those possessed by the Supreme Court at Calcutta. The subordinate courts in each of the presidencies were varied and went by different names-they were compendiously referred to as the 'Company's Courts'.

A notable feature of the British-Indian judicial system before 1862 was the existence of two parallel systems of courts-the Supreme Courts in the Presidency towns, and the adalats in the areas known as 'rnofussil' ,8 outside the Presidency towns. Many points of difference existed between the two systems. The Presidency towns were founded by the B ri tish and were sought to be gi ven a distinctive British character from the very beginning. The judicial system there, as in the case with all other activities, was developed primarily to cater to the needs of the Englishmen residing there and, therefore, the judicial system was a replica of the English system. On the other hand, in the mofussil [Owns, the preponderant population was Indian, and the British administrators (Warren Ha tings in particular) realized that it would not mark if an alien system was foisted upon (hem. Therefore, attempts were made to develop a simple judicial system designed to meet the needs of the people by administering the indigenous laws of the Hindus and Muslims. The adalat system maintained this trait throughout the course of its existence. The disparate judicial systems in the Presidency towns and the mofussil areas continued till 1862, when they were unified through the establishment of the high courts. The high courts are the precursor of the modem system of law and justice in India.

The guiding principle of the early AngloIndian administrators (and judges) was not to interfere with the local laws and practices of the country unless they were iniquitous or unjust. It was this principle that inspired the first charter of the Supreme Court of Calcutta (1774), Clause XVIII of which ordained that 'the Supreme Court should be a court of equity, and shall and may have full power and authority to administer justice, in a summary manner, as nearly as may be, according to the rules and proceedings of our High Court of Chancery in Great Britain'. This clause conferred on the judges of the Supreme Court of Calcutta the power to administer justice and equity. The High Court of Calcutta, (established in 1862) inherited this light from The supreme Court of Calcutta. High Courts established in Bombay and Madras were conferred the same powers, also by Royal Charter.

Accordingly, in British India, when a case was governed by Hindu law, and the shastras did not provide a clear answer, judges assumed athority to decide it on the principles of 'justice, equity and good conscience'. In a celebrated case that went up all the way to the Privy Council, the question at issue was whether a murderer could succeed to the estate of his victim. The High Court in Madras held that the murderer did not have title, and that the uccession to the estate of the victim could not be traced through

him. There being no Hindu law which governed the matter, the judges of the High Court had recourse to the 'principles of equity, justice and good conscience'. Before the Privy Council it was argued that since the parties were Hindus and the matter was governed by Hindu law, no provision being made under that law for disqualifying a murderer from succeeding to the estate of his victim, it must be taken that according to this law he must succeed! But e judicial committee of the Privy Council (all Englishmen) held, in agreement with the High Court, that Hindu law having made no provision on this subject, 'the principles of equity, justice and good conscience' were rightly invoked, and on these principles the murderer would be excluded; they also held that no title could be claimed through the murderer, who had to be treated as nonexistent, and not as one who formed the stock for a fresh line of descent.

Even after 1950, our Supreme court treated as well-established the doctrine that where a question governed by Hindu law was not traceable to any shastric text, the Court had the power 'to decide cases on the basis of justice, equity and good conscience'.

Invoking the principles of justice, equity and good conscience, decisions of the Court became almost indistinguishable from private legislation. The 'vast gaps and interspaces in the substantive law' were filled by English judges in India with the principles of English common law and statute law, with which these English judges were familiar.

A peculiar feature of the legal development in India, for almost two hundred years after the advent of the British, was the endeavour to first create a system of courts without making any attempt to develop a recognizable body of law. It was felt that a well-ordered system of courts could adequately discharge its task of administering 'justice' by somehow finding the law applicable to the cases coming before them. But it was soon realized that there were deficiencies in this method, and conscious efforts were then made to develop a coherent body of law. But it was only after 1833 that courts were replaced by legislatures as the makers of law, and the legal system in India, as we know it, took shape and form. The three Great Codes- the Code of Civil Procedure, 1859, the Indian Penal Code, 1860, and the Code of Criminal Procedure, 1861- laid the foundations for the governance of the country and the administration of justice according to procedure established by law. The Great Codes (with later adaptations) have remained till this day the rudiments of the civil and criminal law in the country. Along with the Indian Contract Act, 1872, the Indian Evidence Act, 1872 and the Transfer of Property Act, 1882, they together form the bedrock of the Indian legal system. There was also a substantial sphere of activity that was governed by personal and customary laws. Large parts of Hindu law were codified only in post-independence Indiav=before that, the law governing family relationships, succession and inheritance, marriage and divorce, guardianship of minors and adoptions, were all determined by the personal laws of the Hindus, and there were different schools of Hindu law in different parts of the country.'? The established courts of British India interpreted the ancient texts and applied the same to the case at hand, and soon built up a vast an·ay of case law summarizing the distilled wisdom of the rishis. It was to this body of judicial decision (more than to the ancient texts) that one turned to in British India when resolving any problem of (the then uncodified) Hindu law.

Mahomedan law was-and still is-applied by courts in India to Muslims (persons who profess the religion of Islam), not in all but in some matters only. Since the enactment of the Shariat Act, 1937 (the first codification of Muslim law in India), Muslim personal law has been made applicable in all matters relating to intestate succession, special property of females, marriage, dissolution of marriage, 11 maintenance, dower, guardianship, gifts, trust and trust properties and wakfs: the rule of decision in all such cases, where the parties are Muslims, is the Muslim personal law. The rules of the Mahomedan law of Pre-emption are not directed to be applied to Muslims by legislation-so they are either applied to them or not applied to them according to notions of 'justice, equity and good conscience".12 In all other respects (for example, in matters of civil procedure, criminal law and the law of evidence) Muslims in India (like the Hindus) are governed by the general laws of India.

After the suppression of the Indian Mutiny of 1857. which finally put an end to Mughal rule In India, the Parliament in Great Britain passed the Govemment of India Act, 1858, which authorized the British Crown to take over the administration of all Indian territories from the East India Company. A unified legal system with a tiered pattern of civil and crninal courts was established, which remains unchanged to this day. High courts for each Presiidency, and later for each province, were established under the Indian High Courts Act, 1861. They were enjoined to administer justice (In the absence of statutory law) according to ‘justice, equity and good conscience'. The subordinate judiciary was established, and civil courts were organized in a regular hierarchy in each district- courts of the District Judge, the Additional District Judge, subordinate judges and the munsif. Criminal courts were organized into Courts of Sessions, Presidency Magistrate Courts. and Courts of First, Second and Third Class Magistrates. The high courts were given appellate and supervisory jurisdiction over all civil and criminal courts in the province. Over the high court was the Privy Council (the Judicial Committee of the Privy Council), which sat in England, hearing appeals directly from the decisions of - the Indian high courts until 1937. But after the

British Parliament passed the Government of India Act, 1935 (which came into force from 1 April 1937), an apex court was located in India, and decisions of high courts (after April 1937) were carried to the 'Federal Court of India'. From its decisions, appeals could be carried with leave of their lordships of the Privy Council to the Judicial Committee of the Privy Council. Under the Constitution of India, 1950, which came into effect from 26 January 1950, appeals were no longer taken to the Privy Council, but to a new constitutionally established court-the Supreme Court of India (the Federal Court was abolished).

The British-Indian legal system was left untouched by the Constitution of India, 1950.

Article 372 of the Constitution provided that "all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered, repealed or amended by a competent legislature or other competent authority'. The 'laws in force' included not only tatutory law but personal and customary law, and also 'common law'.

A word about the common law-the English took their law with them wherever they carried their flag-to conquered and newly acquired territories, That was how the British Empire was established and the common law spread, adapting itself to local conditions. When the colonies and dominions severed their political ties Great Britain after 1945, they retained the common law-it formed the basis of the legal systerns of the newly-independent states.

After the end of World War II, there rose, phoenix-like from tbe ashes of what was once the British Empire, a new geopolitical entity called the 'commonwealth of nations', an association of equal and autonomous states whose only remaining links with the mother country were trade, the English language and the common law. This is why forty-nine independent states, including India, are known as the 'common law countries'. Sir Vivien Bose, a distinguished judge of the Supreme Court of India between 1951 and 1958, wrote in an article in the Law Quarterly Review that 'the only certainty about the migration of the common law of England into India is that the English brought it, their judges administered it and that it infiltrated deep into the laws of this country and has, to some extent, moulded its thoughts and customs'. The same was true in the other 'common law countries'.

An interesting anecdote of legal history is that no country which had not at some time or the other been a part of the British Empire has ever voluntarily adopted the common law! After World War I, Japan adopted a new system of 'continental law', in spite of its close commercial links with England and the United States. In 1926, when Turkey decided to replace its antiquated legal system with a modem one, it took its criminal law from the Italian code and its civil law from the Swiss and German codes. The stark fact is that whenever there was a choice between common law and the Roman law (which is the basis of modem continental codes), the decision has always been in favour of Roman law. The main reason was that the Roman law is in the form of a code, and is far more convenient to understand than the common law, the latter being a strange amalgam of case law and sratute law. In fact, the 'common law' is not as much 'law' as it is a unique method of administering justice, a method which lawyers not reared in the system find difficult to comprehend!

The common law is now inextricably intertwined with and has become an integral part of the Indian legal system. As if to emphasize this point, India's first Attorney General. Motilal Setalvad, chose as his subject for the prestigious Hamlyn lecture for 1960 the title 'The Common Law India.

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