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LORD MACAULAY'S LEGISLATIVE MINUTES

LORD MACAULAY'S LEGISLATIVE MINUTES

SELECTED

WITH A HISTORICAL INTRODUCTION BY

C. D. DHARKER

INDIAN BRANCH

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TO THE MEMORY OF
MY TWO GRANDFATHERS
THE LATE SIRDAR R. N. AMBEGAOKER
AND
THE LATE V. S. DHARKER
WHO GENEROUSLY FINANCED MY EDUCATION IN ENGLAND
AND THUS ENABLED ME
TO OFFER THIS BOOK TO THE PUBLIC

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E.I.C.C.	... *East India Company's Charters, Treaties and Grants*
C.D.	... *Court of Directors*
I.L.C.	... *India Legislative Consultations*
Negotiation Papers	... *Papers respecting the Negotiation with His Majesty's Ministers on the Subject of the East India Company Charter of 1833*
P.P.	... *Parliamentary Papers*

The full titles of all works referred to in the footnotes are given in the Bibliography (Appendix IV, p. 307).

The Minutes themselves (pp. 145–291) are published with the permission of the Legislative Department, Government of India.

ERRATUM

p. 41, n. 3. *For* Boucher *read* Boulger

PART I

INTRODUCTION

I

LEGISLATIVE MACHINERY OF THE COMPANY BEFORE 1833

It is interesting to note that the early charters of the East India Company grant them the power of making laws and enforcing them. The grant for making laws is nothing out of the ordinary; for it is 'modelled on the powers of making by-laws commonly exercised by ordinary municipal and commercial corporations'.[1] The judicial and punitive powers are to my mind more important and were conceded to the Company because of the great distance between England and India. It would have been impossible, otherwise, to conduct the business of the Company or to keep in order and discipline the men who made it. The powers of legislation granted by these early charters are rudimentary and restricted, and would have been quite forgotten had the Company remained a mere trading company. But history sometimes is stranger than fiction: a trading company rose to be the 'Company Sirkar', and these ordinary privileges now wear the halo of historical grandeur as the origins of the Anglo-Indian Codes.

Elizabeth's charter, which set up the East India Company, in 1601 granted permission 'unto the said Governor and Company of merchants of London, trading into the East Indies . . . from time to time to assemble themselves . . . during the said term of fifteen years, within our dominions or elsewhere, and there to hold Court for the said Company, and affairs thereof; and that also it shall and may be lawful to and for them, or the more part of them, being so assembled, and to make, ordain and constitute such and so many reasonable laws, constitutions, orders and ordinances, for the good government of the said Company, and of all factors, masters, mariners, and other officers, employed or to be employed in any of their voyages, and for the better advancement and continuance of the said trade and traffic . . . and at their pleasure to revoke or alter the same or any of them, as

occasion shall require; and that the said Governor and Company shall and may lawfully impose, ordain, limit and provide such pains, punishments, and penalties by imprisonment of body, or by fines or amerciaments, or by all or any of them, upon and against all offenders, contrary to such laws, constitutions, orders or ordinances . . . so always as the said laws, orders, constitutions, ordinances, imprisonments, fines and amerciaments be reasonable and not contrary or repugnant to the laws, statutes, or customs of this our realm'.[1]

I have quoted this legislative provision of the first charter nearly in full, because the charters which follow it in frequent succession faithfully follow its wording with but the immaterial addition of an occasional phrase. Till 1726, for a century and a quarter, there was hardly any change in the Company's legislative powers. They could make laws and frame constitutions for the good government of the Company and its servants with a view to the better advancement of their trade. In 1726, however, this traditional recital underwent a change. For the first time the men on the spot got some powers to legislate. 'It shall and may be lawful', recites the charter of that year, 'to and for the Governors, or Presidents and Councils, of the several towns and factories of Madraspatnam, Bombay and Fort William in Bengal . . . to make, constitute and ordain, by-laws, rules, and ordinances for the good government and regulation of the several corporations, hereby erected, and of the inhabitants of the several towns, places and factories . . . and to impose pains and penalties upon all persons offending against the same, or any of them'.[2] The provisos were that such by-laws or penalties were not to be repugnant to the law of the English realm and were not to have the force of law, unless 'approved and confirmed by order, in writing, of the Court of Directors'.

The language, in this connexion, of the charter of George II granted in the year 1753 is exactly similar. These two charters are known as judicial charters, because they set up a definite judicial machinery at the three principal stations of the Company, and have bearing on the introduction of English criminal law into India. But they have also a legislative significance of their

[1] *E.I.C.C.*, 1774, pp. 14–15. [2] Ibid., pp. 394–5.

own. They lead to the first grant of separate legislative powers to the Governor and Council of the three presidencies.

But were these powers of legislation ever used? There is no information available that the three presidencies laid down any rules under the authority of these charters. There seems to have been little need indeed for new regulations in that early period; for whatever justice was administered was according to English law, occasionally tempered by local custom and usage when Indians were concerned. It is only when the Company became territorial sovereigns, when they found themselves the rulers of people who had systems of law of their own—systems of law which had not only the vagueness but also the sanctity of religion—that the Governments of the Company in India found it necessary to make laws in order to adapt themselves to their new role. They had to see that they did not unnecessarily hurt the religious susceptibilities of the people, or in cherishing them lose the common sense of law. Under the laws of Manu, a Brahmin criminal went off scot-free, while the pariah suffered a heavy punishment for a minor offence. The Muslim law did not allow the evidence of the infidel. Could such anomalies, which the selfishness of a ruling class created long ago and which now were revolting to the ordinary sense of justice, be suffered to continue for all time? On the other hand, the people had their laws and honourable customs of marriage, of inheritance, of common family holdings which they cherished most devoutly and which it would have been rash to set aside.

Thoughts like these must have passed through the minds of the authorities, when the Mogul Emperor appointed the Company his Dewan in Bengal, and especially when the Court of Directors resolved to take up the full duties of the Dewan in 1771. Till that year the Company only partially exercised the rights of their office by 'superintending the collection and disposal of the revenues'.[1] But when they resolved to administer civil justice to the people, for that was the other function of the Dewan, there came the necessity of making provision for incorporating the Hindu and Muslim laws in their system, and for improving such parts of them as clashed with its ordinary principles.

To do this was to legislate; and the Government of Warren

[1] Cowell: *History and Constitution of the Courts and Legislative Authorities in India*, 1905, p. 26.

Hastings issued a series of regulations in 1772, establishing courts of justice, both civil and criminal, 'throughout the lower provinces of Bengal, with certain definite rules of procedure and law'.[1] This was an important measure which not only established courts of law with a procedure of their own, but also introduced new systems of law in them. Article XXIII lays down 'that in all suits regarding inheritance, marriage, caste, and other religious usages or institutions, the laws of the Koran, with respect to Mohammedans, and those of the Shaster with respect to Gentoo [Hindu], shall be invariably adhered to; on all such occasions the Maulavies or Brahmins shall respectively attend to expound the law, and they shall sign the report, and assist in passing the decree'.[2]

It is doubtful under what authority this legislation was issued. The powers of legislation which the charters granted to the Company from time to time had never been intended to authorize the President in Council to establish courts of law in the mofussil and lay down new rules of procedure and law. The authors of *The Imperial Gazetteer* try to simplify matters by saying that the 'series of instructions were promulgated as the basis of administration; but in making these the Company acted, not under the authority of the British Crown, but as agents to the Mogul Emperor at Delhi'.[3] The Dewan could administer civil justice, indeed, but could he issue new rules of procedure and law? Again, the regulations under review establish not only courts of civil justice but of criminal justice as well; and surely the duties of the Dewan never extended to the administration of criminal justice? To my mind there is no constitutional authority for issuing the instructions of 1772. Undoubtedly in excess of the powers which the charters granted to the Company, they even supersede the bounds which the Dewani imposed upon it.

The explanation lies only in the necessity for establishing a regular system of administration; and Warren Hastings adopted the same course again in 1780, when he issued regulations for the administration of justice, embodying the rules of 1772, and organizing revenue and judicial courts. In one sense, the regula-

[1] Cowell, op. cit., p. 83.

[2] Archbold: *Outline of Indian Constitutional History*, 1926, p. 58.

[3] *Imperial Gazetteer of India*, Vol. IV, p. 127.

tions of 1780 could have no force in law, because according to a provision of the Regulating Act, they were not registered in the Supreme Court.

The Regulating Act, which came into force in 1773, is silent about the instructions of 1772. Strictly speaking, Parliament could not interfere in those affairs of the Company which it managed as the Dewan of the Mogul, unless the King of England himself chose to be the Emperor's agent in Bengal. The Act is far from being liberal in conferring new powers of legislation on the Governments in India. It ignores the powers of either Bombay or Madras, while in Bengal, where it makes some changes, the changes are known rather for the restrictions they impose than for the privileges they grant. The Governor-General in Council could make 'rules, ordinances and regulations for the good order and civil government of the Company's settlement at Fort William', and other factories and places subordinate thereto, provided the laws were just and reasonable and 'not repugnant to the laws of the realm'.[1] The Act also provides pains and penalties in the usual manner.

These powers of legislation are hardly an advance on what the charter of 1753 granted. The main difference is the transfer of veto from the Court of Directors in London to the Supreme Court at Calcutta. The Act laid down that no regulation could 'be valid or of any force or effect' unless registered and published in that court, which was to be established by a Royal Charter. Appeals could be lodged against such regulations either in India or in England, and the King in Council could set aside and repeal them if necessary. Copies of regulations were to be sent to one of the Secretaries of State and if His Majesty did not disallow them within two years, were to have full force.[2] But the outstanding change is the establishment of the Supreme Court and the share apportioned to it in the machinery of law making.

It would be out of place to describe here the many unpleasant incidents which followed the establishment of the Supreme Court at Calcutta, and its struggle with the Government of the Company. It may, however, be observed that the Regulating Act, which assigned to the new court the function of watch-dog over

[1] 13 Geo. III, c. 63. [2] Ibid.

the Government of Bengal, is a curious bundle of contradictions and required years of unpleasant experience and an amending Act to undo. In trying to create checks and balances, it only fomented quarrels between Court and Council, and within the Council itself. The intention of the Regulating Act is excellent, and does honour to the just spirit of those who propounded it. It was to check the arbitrary powers of the Government, and to safeguard the interests of the people from their undue exercise; but though the end was admirable, the means were doubtful. The authority of the Supreme Court, which Parliament never clearly defined, spread like a spot of ink on blotting paper, until the Government, like the blotting paper, was seriously in danger of not functioning.

Under this Act the Government of Bengal passed no regulations relating to the town of Calcutta.[1] There was too much rivalry between Court and Council to further an activity which required generous understanding between the two. And it was all to the good that the Government did not submit their regulations to the Supreme Court. Instead of conciliating their differences this might have only intensified them; and the embarrassing incidents which annoyed the Government of Bombay at a later period would only have occurred earlier at Calcutta.

But the struggle could not go on for ever. Parliament passed an Act in 1781 'to explain and amend' the Regulating Act which badly needed both; and to define the jurisdiction of the Supreme Court and also to indemnify the Government of Bengal for 'the undue resistance made to the process of the Supreme Court'.[2] The preamble sums up the broad aim and purpose of the Act. After dwelling on the embarrassment of the Government and the apprehensions of the people owing to the doubtful intent and meaning of the Regulating Act, it goes on to say that 'whereas it is expedient that the lawful Government of the provinces of Bengal, Bihar and Orissa should be supported, that the revenues thereof should be collected with certainty and that the inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights and privileges . . . the Governor-

[1] The Government issued regulations for the provincial courts and council without a reference to the Supreme Court.

[2] 21 Geo. III, c. 70.

General of Bengal and Council, shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal,' for any act or order on their part done 'in their public capacity'.[1]

Various clauses followed, strengthening the authority of the Government and limiting that of the Supreme Court. Then comes the most important clause for the subject under review, which gives to the Governor-General and Council power and authority 'to frame regulations for the provincial Courts and Councils' without a reference to the Supreme Court. The Government indeed had to transmit all regulations within six months of their issue to the Court of Directors and to one of the principal Secretaries of State. The King in Council could disallow and amend them. The Government were thus freed from the trammels of the Supreme Court.

Some authorities seem doubtful whether such regulations as the Governor-General and Council issued without a reference to the Supreme Court were binding on that Court.[2] To my mind, the question of an obligation on the part of the Court to interpret the declared will of the Government could hardly arise under the new plan. The aim of the Act is to establish a separation in judicial administration so complete that the King's Court could hardly interfere with the other. The appeals from the mofussil courts lay in the Governor-General and Council. The Supreme Court had its jurisdiction within the limits of Calcutta. The law it administered was mainly English law. When it had to determine suits between two Indians on questions such as inheritance and succession to lands, they were to be determined according to Indian laws and usages, and when the laws and usages clashed, by those of the defendant. In order to make this possible, the Act empowered the Court 'to frame such process, and make such rules and orders for the execution thereof, in suits civil or criminal against the natives of Bengal, Bihar and Orissa, as may accommodate the same to the religion and manners of such natives, so far as the same may consist with the due execution of the laws and attainment of justice'.[3] Such rules were to be forthwith transmitted to one of the Secretaries of State, to be 'laid before

[1] 21 Geo. III, c. 70. [2] See Cowell: op. cit., p. 84; and Ilbert: op. cit., p. 59.
[3] 21 Geo. III, c. 70.

His Majesty for his royal approbation, correction or refusal'.[1] In this manner the Court had the independent power of framing rules of procedure for the examination of Indians in suits arising in Calcutta. The question, therefore, of whether the rules made by the Governor-General and Council were binding on the Court could not possibly arise.[2]

By the Act of 1781, Parliament asserts, though indirectly, sovereignty over the administration of Bengal. It faces the problem with prudence and, unlike the Act it amended, recognizes the real position of the Company's Government. I have already stated that legally Parliament could not interfere in those affairs of the Company which it managed on behalf of the Mogul Emperor. The Regulating Act, largely influenced by Clive, tacitly accepts this theory. But Parliament could not logically claim sovereignty over some affairs of the Company and yet give it a free hand in others. That is why the Act of 1781, empowering the Governor-General and Council to frame regulations for provincial courts and council, a sphere of activity which theoretically originated in the *firman* of the Mogul, marks a real advance on the Regulating Act. It even gives authority to the King in Council to disallow or amend such regulations, thus in effect declaring the power of the Crown over the territories held by the Company.

When the Act of 1781 came into force, the position of the Governments of the Company, as far as their power to make laws was concerned, was this: The Governments of Madras and Bombay could make by-laws for the presidency towns and factories under the Charter of 1753. The Regulating Act empowered the Government in Bengal to frame regulations for Calcutta and its dependent factories. But the regulations so framed were to have no force in law unless registered in the Supreme Court. The Amending Act empowered them to frame regulations for provincial courts and councils without a reference to the Supreme Court. Thus, as far as Calcutta was concerned, the Act left the legislative veto of the Supreme Court untouched. The veto, however, was a

[1] 21 Geo. III, c. 70.

[2] The question may have arisen after 1813, when by the Charter Act of that year an appeal was allowed to British Europeans from the mofussil courts to the Supreme Court. But it was laid down in the same Act that the Supreme Court was to follow the procedure of the original courts.

dead letter because the legislative activity of the Government was mainly concerned with the conduct and procedure of mofussil courts; and those courts were now directly under the supervision and control of the Government of Fort William.

Early in 1781, that Government issued another series of regulations for Adalat Courts under the guidance of Sir Elijah Impey. Those regulations may be said to have the authority of the Amending Act of 1781. There is, however, a doubt that the Code of 1781 and its revised and amended version of 1793 are in excess of the power which the Act really conveyed.[1] The vague generality of the Act, and the recognition of that power by Parliament in 1797, may be responsible for this opinion. It is also true that the Act of 1781 does not give any authority to enact the regulations into a Code as does the Act of 1797.

The Act of 1797[2] is an important Act in many ways. In framing it Parliament for the first time provided a regular system for giving authenticity and publicity to such regulations as affected the rights, persons and property of the inhabitants of Bengal. It enjoined on the Governor-General and Council to prefix to the regulations the grounds why they were necessary. They had then to be registered in the judicial department in order to give them authenticity. Such sets of regulations then had to be formed into a regular Code and printed and translated into the languages of the country. The regulations again were solely to bind the mofussil courts in their decisions. In this manner the Act made a threefold provision for such regulations as the Governor-General might issue. By making it necessary for the Governor-General and Council to register them in the judicial department it provided a manner of authenticating them 'so that', as the Act states, 'so wise and salutary a provision should be strictly observed, and that it should not be in the power of the Governor-General in Council to neglect or dispense with the same'. By making it necessary for the mofussil courts to follow those regulations closely in making their decisions, it gives them sole authority in mofussil courts. And by making it necessary for the Governor-General in Council to formulate them into Codes, and to print and publish them in the languages of the country, it makes provi-

[1] Cowell: op. cit., p. 86.

[2] 37 Geo. III, c. 142.

sion for acquainting the people, as far as was possible at that time, with the laws which were to govern them.

In 1800, Parliament extended these powers of legislation to Madras.[1] As in Bengal, political events made such a grant inevitable. The Governor and Council at Fort St George could frame regulations for the provincial courts and councils within their territories in the same manner as the Government at Fort William in Bengal. It is surprising that the same powers were not extended to Bombay as well. The Act of 1807,[2] however, did away with this anomaly by giving to the Governor of Bombay in Council the same powers which the Governments of Fort William and Fort St George exercised. To introduce uniformity in the system of making laws in the three presidencies, it substituted the registration of regulations in the newly constituted Supreme Court at Madras, and in the Recorder's Court at Bombay, for the written approval of the Court of Directors required under the Charter of 1753. There is hardly any doubt that the provisions of the important Act of 1797 were also binding on the two subordinate presidencies.

Thus, at the close of 1807, a uniform system of legislation prevailed in the three presidencies. Each presidency was self-contained as far as making laws was concerned. Each could issue regulations for its principal town and dependent factories provided they were duly registered in the Supreme Court.[3] Each could frame regulations for provincial courts and councils, formulate them into regular Codes, print and publish them in the languages of the country. Under the authority of this arrangement came into being the three presidency regulations: the Bengal Code of 1793, the Madras regulations and the Bombay regulations which Mountstuart Elphinstone codified in 1827.[4]

I cannot close this brief survey of the development of the legislative powers of the East India Company before the Charter Act of 1833, without making a reference to the tardiness of the English Parliament in granting powers of legislation to the Governments in India. Royal Charters gave them powers at a

[1] 40 Geo. III, c. 79. [2] 47 Geo. III, c. 68.

[3] The Supreme Court was established in Bombay in 1823. Till that date, therefore, regulations binding on the town of Bombay and its factories had to be registered in the Recorder's Court. [4] Cowell: op. cit., pp. 95-6.

time when they hardly needed them, but when the time came for making such powers essential for the effective execution of their function, parliamentary authority was slow in forthcoming. Small wonder then that the enactment of Codes preceded legal authority. I believe Parliament never realized the supreme necessity of the Governments in India which could do nothing better than act in anticipation of that slow-moving authority at Westminster. The whole course of unauthorized regulations proves that Governments based upon conquest cannot always move on constitutional lines and that political expediency holds the field.

II

THE CHARTER ACT OF 1833 AND THE INDIAN LEGISLATIVE COUNCIL

I HAVE shown above how the three presidencies came to have identical and separate powers of legislation within their territories. Madras and Bombay though admittedly subordinate could pass regulations independently of Calcutta. They were, however, required to send a copy of each of their regulations to the Governor-General in Council, though not necessarily for his approval.[1] This was significant because for many years, and definitely after the enactment of the Regulating Act and notably Pitt's India Act, the centre of political gravity had been shifting towards Calcutta. The Government at that centre controlled the political relations of the Company with other Indian powers. In matters of revenue, which were second in importance only to such political relations, Calcutta was gaining control over the other two presidencies.

And the consummation of that steady process came in 1833 when, by the Act passed in that year, Parliament centralized the authority of the Government of India. The whole civil and military government of all the territories and revenues in India was placed under the superintendence, direction and control of the Government of India.[2] The power of making laws was also centralized in the Supreme Government. The process was natural; for the greater part of the Indian peninsula and even the territory beyond it was directly under the Company: and the authorities at home were naturally looking forward to the time when they could see order and system introduced into the administration of British India. The aim of the Charter Act was the prospective introduction of a general system of justice and order, and a code of laws common as far as possible to the whole people of India.[3] Just as there had been one single authority shaping the foreign policy of the country and guiding its revenue

[1] See Cowell: op. cit., p. 97. [2] 3 and 4 Wil. IV, c. 85.

[3] See the comment of the Board of Directors in a dispatch accompanying the Act, 10 December 1834, para 4.

system, so also it was equally necessary, now that the Governments in India were no longer isolated units but parts of a whole, to organize and develop its internal administration on a comparatively uniform basis. To achieve it was to co-ordinate the function of legislation in the Supreme Government.

This old system was doomed to failure not only by the tide of centralization which was coming in, but by the defects inherent in itself. It was creating diversity in a sphere where uniformity would have been the better principle. Diverse laws had grown under it. The system was a curious mosaic of laws, foreign and indigenous, English statute law introduced by the charter of George I and applicable to the presidency towns, English Acts regarding India passed after 1726, and then the cumbrous regulations of the local Governments of Bengal, Madras and Bombay, some technically requiring registration in the Supreme Court, others issued on the authority of the Governor and Council.[1] To Macaulay whose mind was full of historical analogies, the system resembled the jumble of laws in Europe after the fall of the Roman Empire: 'As there were in Europe then, so there are in India now, several systems of law widely differing from each other, but co-existing and co-equal. The indigenous population has its own laws. Each of the successive race of conquerors has brought with it its own peculiar jurisprudence: the Mussulman his Koran and the innumerable commentators on the Koran; the Englishman his Statute Book and his Term Reports. As there were established in Italy, at one and the same time, the Roman law, the Lombard law, the Ripurian law, the Bavarian law, and the Salic law, so we have now in our Eastern Empire Hindu law, Mohammedan law, Parsee law, English law, perpetually mingling with each other and disturbing each other, varying with the person, varying with the place. In one and the same cause the process and pleadings are in the fashion of one nation, the judgement is according to the laws of another. An issue is evolved according to the rules of Westminster, and decided according to those of Benares. The only Mohammedan book in the nature of a Code is the Koran; the only Hindu book, the Institutes. Everybody who knows those books knows that they provide for a very small part of the

[1] See *Hansard*, 1833, XVIII, p. 729.

cases which must arise in every community. All beyond them is comment and tradition.'[1]

The result was confusion; for in the opinion of the judges of the Supreme Court not even the law officers could be 'expected to have so comprehensive and clear a view of the Indian system, as to know readily and familiarly the bearings of each part of it on the rest'. Charles Grant, who quoted this opinion in his speech in the Commons, briefly and pithily pointed out the result of this medley in what he called the three leading defects in the frame of the Indian constitution: 'The first was in the nature of laws; the second was the ill-defined authority and power from which these various laws and regulations emanated; and the third was the anomalous and sometimes conflicting judicature by which the laws were administered.'[2] In short the defects were in the authority for making laws, in the laws themselves and in their administration. To get rid of these defects, it was first necessary to appoint a commission in order to systematize existing laws and make them uniform as far as possible, to inquire into the working of law courts and make them more effective. Secondly, it was necessary to establish a powerful central machinery in order to give effect to the recommendations of the commission and also to make laws in future for the whole of India.

The Court of Directors did not think it possible to introduce uniformity into Indian law. The different systems of castes and of religious tenets of a vast population were obstacles in carrying out that desirable end.[3] Some members of the body strongly opposed any reform in the legislative or judicial machinery of the Company for in their opinion none was necessary. Was not there a Parliament at Westminster to regulate the jurisdiction of the Supreme Court and to keep Europeans in check if they should oppress the Indian? One director even declared that Indians enjoyed 'a system of protection for person and property, their rights, their religions and even their prejudices, better suited to them, and less encumbered with technicalities and expenses than the inhabitants of any part of the known world'.[4] Another saw in the appointment of the Law Commission a design to introduce

[1] Macaulay: *Speeches*, 1886, p. 75. [2] *Hansard*, 1833, XVIII, p. 728.
[3] See *Negotiation Papers*, 1833, p. 306.
[4] Ibid., p. 361. See *Dissent of Richard Jenkins*, 5 July 1833.

English law into India and, thoroughly convinced of that fact, went to the length of warning the authorities in the words of a writer on Muslim law: 'You cannot change the law of the country for that of another, even for a better, without offering great violence to the people, to the people of India of all others.'[1]

Those who objected in this manner to the institution of a Law Commission and to the reform of the existing machinery for law making would have left the presidency Governments to legislate in the old manner. In their opinion local Governments were the best judges to determine the needs of the community. This was in every way true; for laws should always be adapted to the needs of a particular society. But in stressing this obvious truth, those speakers lost sight of the principle which the authorities had in mind. By centralizing legislative authority they did not want to clothe India in drab uniformity regardless of local colour or needs. The principle was simply this: 'Uniformity where you can have it; diversity where you must have it; but in all cases certainty.'[2] Their whole aim was to systematize law, for it was ridiculous to say it was perfect. It was not to introduce English law into the Indian system, for if it were it would have been easier to do it in England instead of entrusting the Government of India with large powers for that object. If any additional proof were required to show the absurdity of the statement, I need only quote that provision of the Act which instructs the Law Commission to report from time to time upon the subject of its inquiry and suggest alterations in courts of law and police establishments and judicial procedure, 'due regard being had to the distinction of castes, differences of religion, and the manners and opinions prevailing among different races and in different parts of the said territories.'[3]

There was another reason for concentrating the powers of legislation in the Government of India, and giving them effect even before the Law Commission had been set to work. The work of the Commission was expected to take time; and it was desirable that before it evolved one common system for India, the Government should make approximations to that result on the

[1] *Negotiation Papers*, 1833, p. 472. See paper by H. St George Tucker, 12 August 1833.

[2] Macaulay: *Speeches*, 1886, p. 76.

[3] 3 and 4 Wil. IV, c. 85.

advice of the commissioners, should make experiments on their suggestions and see if they would work, 'thus facilitating as well as accelerating the introduction of the system in question.'[1]

But the most effective reason for creating a powerful central machinery in India was that the Act opened wide 'the doors of British India for British subjects of European birth'.[2] With some qualifications they were allowed to go into the mofussil and even to acquire and hold land. It was likely that these new settlers might consider themselves a privileged class. They might oppress Indians and injure their religious feelings and sacred traditions. Parliament therefore thought it necessary to protect Indians 'from insult and outrage in their persons, religions and opinions'[3] by arming the Government of India with power to deal with these new settlers 'not merely in extreme cases, and by a transcendental act of authority, but in the current and ordinary exercise of its functions, and through the medium of laws carefully made and promptly and impartially administered'.[4] Further it was also necessary to centralize these powers, for if they were left to the presidency Governments different laws would be made and administered to a community closely bound by ties of blood and race and language and by the sympathy which is created in a foreign land.

The legislative provisions of the Charter Act, therefore, are formulated for the prospective work of systematizing law and were immediately enforced in order to stem the evils and inconveniences which the free admission of Europeans in the interior might have produced. Broadly speaking the Act worked on three principles. It created a real Indian Legislative Council; secondly, it invested the Acts passed by this body with new power and dignity; and lastly it made provision for the appointment of a Law Commission to advise the Council on matters of law and to organize scattered laws and regulations into a general system of Codes.

The distinction I made between the Indian Legislative Council and the executive was not in relation to the personnel of the bodies but to the functions which the different names assigned to them. At that early period the personnel could hardly be different. Only

[1] *C.D.*, 10 December 1834, para 8.
[2] Ibid., para 9.
[3] 3 and 4 Wil. IV, c. 85.
[4] *C.D.*, 10 December 1834, para 9.

one member was added to the new Council who was not to be in the service of the Company and who was entirely to devote himself to the principle and practice of legislation. The significance of the Act lay in definitely assigning the function of legislation to the executive and making it powerful and able to perform that function. It was armed with powers to repeal or to amend laws, to make laws for all persons whether British or Indian, foreigners or others, and for all courts of justice, whether established by His Majesty's charter or otherwise, for all servants of the Company within the dominions of princes and States in alliance with the Company. To these sweeping powers there were naturally some checks. The Governor-General in Council obviously could not alter the provisions of the Act of 1833. He could alter or change neither the Mutiny Acts applicable to officers and soldiers in the service of the king or the Company nor any Act of Parliament passed after 1833, affecting the Company, its territories or its peoples. Likewise he could not legislate in a manner which might 'affect any prerogative of the Crown or the authority of Parliament or the constitution or rights of the Company, or any part of the unwritten laws or constitution of the United Kingdom . . . whereupon may depend the allegiance of any person to the Crown over any part of the said territories'.[1]

Thus the Acts of the new Council were invested with a new power and dignity. It is significant that the rules laid down by the Governor-General in Council after 1833 are known as the Acts of the Government of India as distinguished from 'the regulations' of the older system. They were now to have 'the same force and effect within and without the said territories as any Act of Parliament'. All courts of justice whatsoever within those territories were bound to take notice of them as of public Acts of Parliament. It was no longer necessary to register or publish them in any court of law. Indeed the Act wiped out the last vestiges of that power of the Supreme Court, which while proceeding to preserve the dignity of law in the interests of the people only became their terror and certainly embarrassed the Government. True it is that this old power of the Court had been confined since 1781 only to the presidency towns, but none could say when it would quicken in the hands of conjuring lawyers who were

[1] 3 and 4 Wil. IV, c. 85.

coming to India in large numbers. In the presidency towns, indeed, it was a rival to the Government though it hardly had the opportunity to measure swords with it. If registration was a bad principle for mofussil legislation, it could not be good in presidency towns and the English legislature acted wisely though tardily in removing this bar to the freedom of the Government to make laws for the town and the country.

With the disappearance of the Supreme Court from the legislative activity of the State, enters the Law Member as a colleague of the Governor-General in Council. But, as the Directors pointed out, he was not to be a substitute for the Court.[1] Indeed he was just an ordinary member of the Council and though he was to devote himself entirely to legislation, his concurrence was not essential to making a law good. He could not legally sit and vote at the meetings of the Executive Council. The idea was, I think, that he was expected to put himself heart and soul into the work of legislation not fettered by any political considerations of war and peace and frontier policies. But indirectly it made his position subordinate to the other councillors; for though he could sit at the ordinary meetings of the Executive Council he was there on sufferance and could not influence its decision by means of his vote.[2]

The legislative provisions of the Charter Act fall roughly into two groups. I have dealt with the first which brings into being new bodies and new powers, so creating a new legislative machinery. The second, which is in the form of recommendations, instructs the new Council to issue commissions to persons approved of by the home authorities and to be styled the Indian Law Commissioners. They were to inquire into the jurisdiction, powers and the rules of courts of justice and police establishments, and all existing forms of judicial procedure; into the nature and operation of all laws, whether civil or criminal, written or customary, prevailing in any part of the Company's territories and affecting all

[1] *C.D.*, 10 December 1834, pp. 20–23.

[2] The Directors in their dispatch (10 December 1834, para 23) instructed the Governor-General in Council that the Executive Council should avail themselves of the advice of the Law Member at executive meetings and Lord Macaulay helped them in their deliberations. Indeed, as the Directors observe, an intimate knowledge of what passed in the Council was essential to carrying out the function of legislation.

peoples whether European or Indian. They were also to make reports on the subject of their inquiry and suggest alterations in the establishment of police and law courts, in the forms of judicial procedure and law, always paying due regard to the social manners and religious opinions of the different peoples of India.

Under this second group also falls the project which Parliament wanted the Government of India to undertake, namely the abolition of Indian slavery. The project was to be treated with great caution. The Council was to consider means of mitigating slavery and of ameliorating the condition of slaves, and of stamping out the evil altogether whenever it was practicable and safe. But the Council was not to promulgate or put in force such Acts without a reference to the Directors at home and without obtaining the consent of Parliament.

This provision reflects the humanitarian and liberal tone of the whole charter which itself was the product of the age of Wilberforce. It is often called the Liberal Charter mainly because it first enunciated that principle of associating the Indian with the government of his country which twenty-five years later was set out in the proclamation of the Queen. It could more fittingly be described as the Legislative Charter for while the association of Indians in the government of their country was the expression of an ideal, the legislative provisions of the Act mark the starting-point of that uniform system of law and justice which are among the highest contributions of England to India.

III

THE NEW TECHNIQUE OF LAW MAKING

It was proposed in the Act of 1833 that the Court of Directors should lay down rules of procedure for the new Council which, when approved by the Board of Commissioners, were to have the force of the Act itself. The rules were to cover the modes of promulgation and authentication of any laws or regulations which the Governor-General in Council might issue from time to time.[1] The Court of Directors, in their dispatch accompanying the Charter Act, referred to this clause, but instead of drafting rules at Leadenhall Street they instructed the Government of India on what lines the work should be performed at Calcutta.[2]

The task therefore fell to Macaulay who, after some controversy, was able to bring round his colleagues to adopt his proposals. An Act was passed making the Government *Gazette* good evidence of the passing of an Act by the Governor-General of India in Council.[3] By this single measure Macaulay provided for a mode of authentication and promulgation of legislative enactments.

The proceedings of the Council were to be regulated by the standing orders of the Council,[4] determining the stages through which a law ought to go before being finally enacted. When he drafted them, Macaulay evidently had the instructions of the Directors before him. These instructions were mainly based on the principle that a legislature should never be guilty of rash and thoughtless legislation. At home a project before it ripened into a finished piece of legislation went through a severe test of publicity and an elaborate process which gave every opportunity for criticism and inquiry. But in India things were different. There was no public opinion and no public organ to voice the opinion of those whom a law most nearly touched. The Council was a close oligarchy, able to make any law it chose, and so more open to the risk of initiating rash and thoughtless legislation. 'Therefore',

[1] 3 and 4 Wil. IV, c. 85.
[2] *C.D.*, 10 December 1834, paras 13–18.
[3] Act X of 1835.
[4] See Appendix II.

said the Directors, 'you should by positive rules provide that every project or proposal of a law should travel through a defined succession of stages in Council, before it is finally adopted; that at each stage it shall be amply discussed; and that the intervals of discussion shall be such as to allow to each member of Council, adequate opportunity of reflection and inquiry.'[1] The Council of course was to reserve to itself the power of acting speedily under emergency.

The standing orders, therefore, were based on these principles; but in the hands of Macaulay they gained an originality of their own. By leaving a margin of six weeks between the initiation of a law and its final enactment, they gave an opportunity to the Council to revise its opinion regarding a particular law. But that was not all. The interval between the publication of a draft Act and its final enactment was supposed also to give individuals and public bodies an opportunity to represent to the Government in what way it was defective and to suggest suitable amendments. A long period was necessary for with the crude state of the dak Calcutta was still far away from either Madras or Bombay. Later on I shall discuss why the Indian community did not participate in the work of legislation.[2] But though it remained aloof, the Council derived great benefit from the experience of many public departments of the four Governments of India. Time and again, the Sadar courts of Bengal, Madras, Bombay and Agra, in addition to proposing new laws, threw in useful suggestions regarding laws proposed. Occasionally even old servants of the Company related their personal experiences to the Government in their individual capacities. The European community also freely availed itself of this opportunity of making representations to the Government, sometimes through petitions but mostly through criticism in the press.

The Council considered these opinions and new suggestions. In this way it could pass a law after mature deliberation and in the light of the administrative experience of public servants and others interested in legislative measures. This procedure naturally raised the question of amendments. The Council, after considering the views of those who approached it, was often able to improve a draft Act. But a question then arose: Should the

[1] *C.D.*, 10 December 1834, paras 16 and 18. [2] See below, pp. 33–39.

amendment go through the process of publication and reconsideration after six weeks, or should it be passed forthwith on the authority of the Governor-General in Council? Macaulay rightly thought that there were amendments *and* amendments. Some were only rectifying verbal errors or trivial faults of omission which, though necessary, could easily be adopted as laws without being submitted again to a lengthy process. There were other drafts, however, which were so modified in the light of new information that it was necessary to treat them as new drafts by republishing and reconsidering them at the end of another six weeks before finally enacting them. Broadly speaking, an amendment was to be treated as a new project if it in any way changed the spirit of the original. In illustrating the difference between the merits of an amendment, Macaulay took the example of the Press Regulation. 'Take for example', said he, 'our Press Regulation. A few words have been omitted by the inadvertence either of the transcriber or of the printer. They are words which it will be necessary to insert when we consider the draft. But there cannot possibly be any difference of opinion about the propriety of inserting them. I see no objection in making an amendment of this sort off-hand, and instantly proceeding to pass the law. But an amendment might be proposed of a very different kind. Suppose that it were proposed to add a clause authorizing the Governments of the subordinate presidencies to seize all presses and types, which they might suspect to have been employed for purposes of sedition and calumny. The whole nature of the Act would be changed. It would be a new law as different from the law which we submitted a month ago to the public as that law from the regulation of 1824.'[1]

Macaulay was right as far as his simple illustration went. But what of the many amendments which were on the borderline and which it was difficult to fit into either category? Macaulay himself was conscious of the difficulty of drawing the line. He therefore left it to the Council to decide whether an amendment should go through the general process of enactment or whether it should be passed off-hand.

The second object of Macaulay's standing orders was to

[1] See Minutes, No. 2; 28 May 1835.

ensure a hearing to every member of the Council. To secure this Macaulay prepared certain rules.[1] A single member could call for an adjournment for a period of at least a week if he represented that 'any amendment which may have been made appeared to him to require larger consideration'. He could demand the reasons of his collegues in writing for ordering a law to be published or for passing or finally rejecting it.

Prinsep, a member of the Council, criticized these rules. 'The draft', he said, 'seems to have been framed on the principle that but for some fixed rules there would be wanting proper courtesy and consideration towards individual members of the Council or towards a minority.'[2] During Macaulay's term of office, controversies were scarcely so acute as to require the exercise of these rules. But that fact hardly supported Prinsep's contention. The personnel of the Council was not divided through any serious difference of opinion. But Macaulay had a vivid recollection of the factions in the Council of Warren Hastings, to which the new Council had a curious resemblance. In the executive, the Governor-General could overrule his colleagues. But not so in the Legislative Council. The Governor-General's favourite measures might be thrown out. 'Law after law may be passed in defiance of his opposition', because decision legally went by a majority vote. Macaulay therefore thought it necessary to provide in express words for the protection of a minority in the Council. Social rules of courtesy and good manners were not enough. 'In Mr Hastings's time,' said Macaulay, 'there were two parties, each of which alternately had a majority. What courtesy, what consideration, did either party, when it was uppermost, show to the minority? Did not Mr Hastings and Sir Philip Francis give each other the lie on the records of the Council? Did they not actually fight a duel in consequence of their political disputes? If Mr Hastings, among whose many eminent qualities equanimity and self-government were not the least conspicuous, could suffer himself to be excited into offering to one of his colleagues an insult only to be expiated by blood, can it be thought that the mere feeling of personal courtesy which may exist between the members of the Council is a sufficient guarantee to the public that

[1] See Appendix II, Rules 5–7 and 9.

[2] See Minutes, No. 4; 13 June 1835.

the majority will always consider attentively and impartially all the objections of the minority?'[1]

That is why Macaulay put forward his plan of supporting the minority in the Council when it upheld the more reasonable view. A member standing alone could require his colleagues to put their reasons on paper for the information of the authorities at home, so that if it appeared that reason had been borne down by mere numbers, the evil might be remedied.

The third principle was that the Government should reserve to itself 'the power of acting with promptitude in great emergencies'. The standing orders empower the Council to suspend in great emergencies those rules which enforce the general process of enactment. But in order to prevent abuse of this power Macaulay laid down that the rules could only be suspended by a unanimous decision of the Council. It was also necessary to record the reasons explaining why the Council took that unusual step. To my mind the phrase 'great emergencies' is inappropriate. In my review of the day-to-day sittings of the Legislative Council, I find hardly one first-class emergency in which the Council had to act on the spur of the moment.[2] Momentous decisions were perhaps taken in the sittings of the Executive Council. But the Legislative Council often suspended rules and adopted legislative measures without the intervening period of six weeks because so lengthy a process was unnecessary, and not because a crisis demanded prompt action. It was not necessary, for example, to publish and consider a law for a long time when what it provided was only the continuation of an old expired law,[3] the expediency of which was never in doubt. There might be laws, again, like the regulations for the Calcutta police, which could conveniently be adopted after an interval of a fortnight instead of six weeks.

The standing orders provided rules of procedure for the Council. Act X of 1835 provided for the modes of authentication and promulgation. It made appearance in the Government *Gazette* good evidence of an Act having been passed by the Governor-General in Council. Prinsep again objected to this idea on the

[1] See Minutes, No. 4; 13 June 1835.

[2] True, in the standing orders, the phrase was not used but Macaulay used it in explaining them. See Minutes, No. 2; 28 May 1835.

[3] Act IV of 1836 which was passed off-hand.

feeble ground that this mode would make the *Gazette* bulky. Macaulay assured him that while he was in office, his Acts would never swell the *Gazette*. But Prinsep had another plan. He thought that the proper mode of authentication and promulgation would be achieved by appointing a government printer on the analogy of the king's printer in England. Beyond that analogy there was hardly any advantage in this plan. On the other hand, it was calculated to create embarrassment in courts of law, as Macaulay suggested. Through the appointment of a government printer, a law could be authentic only by bearing the seal and signature of the printer. But a printer was liable to dismissal, and his dismissal and the appointment of another in his place could only be proved from a reference to the Government *Gazette*. So ultimately the *Gazette* would have to be referred to, not to prove the authenticity of an Act but to prove what official was authorized to print it.

Unlike Lord Cornwallis, Macaulay did not lay down any definite rules for the construction of laws. He did not make the title and preamble the hall-mark of legislative enactment as Cornwallis did.[1] He dropped both. To an old servant of the Company like Prinsep this appeared as departure from a tradition which was dear to him because it was old. It was unfortunate that Prinsep thought both title and preamble equally essential to legislation and advocated their retention and that Macaulay considered neither useful and abolished both. Prinsep was right when he considered the title a good guide to the subject treated by an Act. Macaulay was right in considering the preamble a mere ambiguous form which hardly served its main purpose of explaining why a particular piece of legislation was considered necessary. Here he was following Bentham who described the preamble as the 'excrescence growing out of the head of a section'.[2] At the same time Macaulay admitted that in its true spirit a preamble was essential to a legislative enactment; but it was extremely difficult to draft a really good preamble explaining the reasons why a law was expedient. The Council might be unanimous in voting for a law, but there might not be a similar consensus of opinion in giving reasons for its expediency. Macaulay with his admirable illustrative method observed: 'Suppose that a legisla-

[1] Reg. XLI of 1793.

[2] Bentham: *Works*, Vol. III, p. 249n.

ture is called upon . . . to decide the question whether a marriage between uncle and niece should under any circumstances be authorized by law. It is easily conceivable that all the members might vote for positively prohibiting such marriages yet that every vote might be determined by quite a different line of argument. One member might think that such unions were forbidden by nature. Another thinks this opinion quite unphilosophical, but conceives that the Levitical law is in such matters of eternal and universal obligation. A third considers the doctrine as childish superstition, but thinks that if such near relations were allowed to look on each other in the light of lovers, either the freedom of intercourse between them must be greatly restricted or that boundless licentiousness would be the consequence. A fourth is not struck by any of these objections. He thinks that under some restrictions such marriages might be tolerated as they were in some of the greatest civilized nations of antiquity and as they still are in some Catholic countries. But he thinks that the public feeling is so strong on the other side that the legislature cannot prudently outrage that feeling. All these legislators agree in their vote. They differ fundamentally as to the grounds of it. There is not the smallest difficulty in drawing the enactment, but which of them is to draw the preamble?'[1]

And out of this difficulty of framing a really good preamble came the mere form, which without serving its true purpose of explaining why a law was considered expedient, increased the bulk and clouded 'the sense of what', according to Macaulay, 'ought to be of all compositions the most concise and the most lucid'. But while all this could be said of the preamble as a form, the title could not likewise be condemned. Even Bentham, who was so keen on getting rid of superficialities in the construction of laws, recommended titles to clauses of deeds as conducive to clearness.[2] The arguments used against them were that titles were unnecessary when it was the ultimate intention of the Government

[1] See Minutes, No. 1; 11 May 1835.

[2] 'Lay gents, I flatter myself, see a convenience in it. Besides the clearness and promptitude it gives to conception, it performs the function of a macadamizing hammer, in breaking the aggregate mass; so many topics, so many denominations; so many denominations, so many sentences.' Bentham: *Works*, Vol. V. p. 394. See also Ilbert: *Legislative Methods and Forms*, pp. 75–76.

to codify law and arrange it under different suitable chapters and headings. But why should there be a lack of system in the transitional period? And would not the title of Acts serve as a useful guide in the work of codification? The other argument was that it was impossible to describe in a few words the subject-matter of a voluminous Act containing numerous clauses. If all the clauses referred to one subject, I see no reason why it could not be described. If they referred to more than one, then surely the law-maker tried to cram several Acts into one?

In abandoning both the forms altogether, Macaulay was somewhat dogmatic. These forms were not necessary for the authentication of an Act. But they were often useful and it was hardly good policy to make them taboo for all time. Henry Shakespear, a prominent member of Council, was convinced that but for the dignified preamble which accompanied it, the regulation prohibiting suttee would not have been so completely successful. 'In promulgating the leading grounds', said Shakespear, 'of that humane and most just measure, thousands were apprised for the first time on the best possible authority that the observance of the cruel rite was not enjoined by their religion, and were emboldened to join in advocating its abolition. I am pursuaded that the bare declaration of the will of Government on that occasion in the mode now adopted, would not have had the same salutary effect.'[1] Shakespear exaggerated the usefulness of the preamble. But it is entirely true that a preamble of that kind adds to the dignity of law and appeals to the imagination of a people, especially if it reveals solicitude for them. The suttee regulation was a success because general public opinion itself never insisted on the performance of the rite. The courage of Lord William Bentinck consisted in taking the initiative. The preamble must have at the same time satisfied the conscience of the people who in their ignorance sublimated a dreadful practice into a religious rite.

The Bombay Government on one occasion criticized Macaulay's concise style of legislation. They wanted to pass an Act declaring the permanent lien of Government on land in order that they might claim arrears on a piece of land from the owner. There were obvious objections to such an Act. It was the invariable

[1] *I.L.C.*, 3 April 1837, No. 24, para 6.

custom of the country that lands were liable for escheat for past arrears despite any change in the ownership. To declare this old principle in a brand-new law 'would seem to imply that doubts had been entertained where none ought to be admitted'. It might again have created suspicion in the people that the Government were going to exercise their right in all its rigour. The Governor of Bombay in Council admitted 'that if an insulated law of the sort proposed were to pass, these consequences are not impossible: but he may perhaps be allowed to express a doubt whether this is not in some degree owing to the concise style of legislation adopted by the Council of India, a style which, excellent as it is for many purposes, seems subject to this inconvenience—that it affords no room for explaining the circumstances which may have led to any particular enactment. Such explanation, when required, it is the proper function of a preamble to afford'.[1]

Macaulay later made it his practice to publish the resolution of the Council along with the Act, the resolution fully explaining the reasons why a law was considered expedient. The method was adopted in controversial or important questions. It was certainly an improvement on the preamble because it served the purpose of the preamble without imposing on itself its rigid form. Again it was not incorporated in the Act itself as the preamble was, and hence it did not affect the admirable brevity of Acts.

The standing orders and the Act cited created rules of procedure for the Council and prescribed modes of authentication and only partial promulgation, for printing acts in the Government *Gazette* was hardly a measure of complete promulgation. Promulgation really means making the public know what the new Acts are, to spread broadcast knowledge of legislative measures. To achieve this end Lord Cornwallis in his regulations laid down the rule that all Acts were to be translated into the languages of the country.[2] These translations were calculated to bring government Acts nearer to the generality of the people. When he initiated these preliminary measures, Macaulay did not lay down any specific rules about the translation of Acts. He probably wanted to evolve a new system of disseminating the knowledge of new Acts among Indians. The Supreme Government consulted

[1] *I.L.C.*, 20 March 1837, No. 1, para 13.

[2] Reg. XLI of 1793.

the Governments of Bengal, Madras, Bombay and Agra as to how they planned to achieve this end. The Government of Fort St George recommended a plan which they proposed to follow within their territories. Their collectors and judges put up a notice that copies of Acts in English or the language of the country could be had at the trifling charge of two annas per half-sheet of print. They were to be sold by stamp-vendors. But this would hardly have made the populace any the wiser. Their attention was, therefore, to be called by beating the tom-tom. As soon as they received translations of every new regulation, the collectors and judges and through them the tahsildars and district munsiffs were to explain its provisions to the inhabitants at their several stations, and were to display a copy of it in some conspicuous part of their offices.[1] The Bombay Government had a somewhat different plan. In addition to cheap translations they proposed that new Acts which specially affected the Indian community were to be publicly read on a fixed day and hour, for which at least three days' notice was to be given, in courts of all grades from the highest Sadar Adalat down to the munsiff's court, and also in the same manner in the cutcherry of every revenue officer, high and low. Acts were also to be exhibited at every court and revenue cutcherry as they were in Madras. To ensure the working of this system the Government proposed a careful mode of supervision. Half-yearly reports were to be made to the registrar of the Sadar Adalat, who in his turn was to report every omission to the judges for taking notice of default.[2] Neither the Governments of Bengal nor Agra made any contributions of note to these suggestions. The former Government was not certain in what languages the Acts would be required to be translated in order to reach Indians in different places. They suggested that at first an edition should be issued in every language which people commonly used in writing to each other. The languages roughly were English, Persian, Bengali, Hindi and Oriya—perhaps even Burmese. The editions which were most in demand would give a clue as to the languages into which the Acts were to be translated.[3]

The Supreme Government received these suggestions late in the year 1835. But they issued no instructions till the middle of

[1] *I.L.C.*, 2 November 1835, No. 5. [2] Ibid., No. 7. [3] Ibid., No. 4.

1837. They left to the discretion of the Governments of Fort St George and Bombay the promulgation of legislative enactments in their territories. They issued instructions to Bengal and Agra, however, which show that they based their plan on some of the suggestions of Fort St George. They recommended, for example, the sale of cheap translations at all revenue and judicial establishments and through stamp-vendors. The languages were Persian, Hindi and Bengali.[1] They did not propose to make use of the tom-tom to solve the problem of making the people know the legislative measures of the Council.

It must be said that after such great labours the Council failed to produce a convenient mode of disseminating knowledge of public Acts among Indians. The modes proposed by Madras and Bombay were superior to those recommended for Bengal and Agra, and were more likely to bring the Acts nearer to the people and to create in them a new interest in the reforms of the Government. The problem was indeed difficult because people suffered from lack of education, but none the less important because people must know the laws which are to govern them.

[1] *I.L.C.*, 8 May 1837, No. 1.

IV

LEGISLATION AND PUBLIC OPINION

WHILE controversy was raging round the question of the form and construction of laws, whether preamble and title were necessary or whether the proper mode of promulgating Acts was through the *Gazette*, Ross, a member of Council, introduced a new idea into the discussion. It is unfortunate that men of great experience steadfastly cling to what is old and are fearful of change. Ross's experience, on the other hand, made him concentrate his mind on the defects of the old system and to direct his energy to getting rid of them.

The new idea he introduced was the proposal to lay down a rule in the standing orders, providing for the enunciation of the principles and reasons on which new laws were based. The proposer of a new law was to add notes explaining every provision of the law. These notes were to be published along with Acts. The idea was to enable the public to judge for itself the merits of the reasons on which laws were based, and unnecessary criticism of Acts might also be saved if people knew exactly what made the Government undertake a piece of legislation. Ross also wanted to publish the minutes recorded by the members of Council. This method, he thought, would give to the Indian community the same opportunity as given in England by publishing the speeches delivered in the Houses of Parliament. There might be objections to publishing the records of the Executive Council. But Ross could find hardly any objection to publishing the minutes recorded on questions of legislation.

Macaulay was rather struck by this idea because it was his wish to let the public know the reasons which prompted a piece of legislation, and also because Ross quoted Bentham in support of his proposition. In his 'codification proposal' Bentham said that a Code of laws should be headed by a rationale or indication of the reasons on which the different sections were mainly based. Apart from the solicitude which the system implied for the opinion of the people, Bentham found in it several advantages to law and administrators of law.

The public, thought Bentham, would understand the laws

better when the marginal notes interpreted for them the terms of an Act. The people would also think highly of a Government which did not secretly enact public laws. The judges also would find their task of interpretation easier when they were furnished with 'a set of authoritative instructions in which they would find all the considerations capable of affording grounds for their decisions'. The legislator would also find in them a useful guide. The law itself would be stable, for it would not be tampered with, unless the set of reasons which brought it into being had ceased to hold good. The method would also check useless and arbitrary legislation.[1]

Macaulay's views were in complete sympathy with this idea. It seemed to him in the interests of both the British in India and the Indians that laws made by the Government should go before the public accompanied by some explanation. In India, thought Macaulay, this was more necessary than in any other country. In India the press was free, while the Government was despotic. In countries under a despotic Government the press is generally gagged and there is hardly any criticism. In free countries the press is free and criticism abundant, but the legislators can always answer public criticism and vindicate their laws in popular assemblies. 'If the emperor of Russia', said Macaulay, using his illustrative method, 'puts forth an ukase, no Russian writes about it except to defend it. If an English or French minister brings forward a law, he has an opportunity of arguing for it in Parliament or in the Chambers, and his arguments are read by hundreds of thousands within a few hours after they have been uttered. We are perhaps the only rulers in the world who are mute on political questions, while all our subjects are unmuzzled. Our laws are the only laws which are exposed naked and undefended to the attacks of a free press.'[2]

In laying stress on the hostility of a free press, Macaulay missed the spirit of Ross's suggestions. The press in India of a hundred years ago was mainly in European hands. What Ross had in mind was to inform Indian public opinion, whatever it was, of what was happening at the Council table. The point in publishing the relevant records of the Legislative Council was not as a Government plea for their measures, but as a form of putting

[1] See *Works*, Vol. IV, pp. 538-9. [2] See Minutes, No. 1; 11 May 1835.

trust in the people and dispelling their suspicions and fears by emphasizing the good which Government was then doing. It was said that Indians suffered from political apathy. If that was true, I think it would have been good policy for British statesmen to win their sympathy by a more friendly attitude. But unfortunately, while they did much good, they had too much of the Victorian father in them to come near the people.

Anyway Macaulay did not see his way to publish the legislative minutes of the Council. Lord William Bentinck, it seems, when he was Governor-General, was against that course on the ground that it would expose to the public eye the dissensions within the Council. Macaulay himself feared that a new feeling might creep into the Council room, 'the vanity, the jealousy, the morbid irritability of professed authors engaged in a hot competition with each other for the favour of the public'.[1] Here again Macaulay was wrong. Why should members of Council vie with each other to win public applause when they were responsible to authorities at home and not to the people of India? It must be borne in mind that Macaulay often wrote words which would have been truer of England than of India. And it would have been always within the power of the Government to withhold such minutes as were likely to bring their serious differences of opinion into the open. The main object of publishing the minutes was to explain legislative measures in a spirit of friendly association with the people.

Macaulay was disappointed by the political apathy of the people. One reason for this might have been that the Council received but few representations from Indians during his term of office. That the people suffered from apathy is certain. But there were also other reasons why they could not interest themselves in the work of legislation. While the Acts of Government were translated into the languages of the country, the draft Acts were only published in English. Had they been translated into the languages of the country, I feel sure that there would have been a response from those interested in legislative measures. I will give one instance. The Indian bankers of Calcutta applied to the Accountant-General for information regarding the new Currency Acts, the drafts of which had been published. The

[1] See Minutes, No. 1; 11 May 1835.

Accountant-General requested the Government to supply him with translated versions of draft Acts in order to satisfy the inquiry of the bankers.[1] The Government in their reply said that it was unnecessary to translate draft Acts. 'It cannot be difficult', they said, 'for you in the present instance to satisfy inquirers as to the general nature and object of the new coinage law and if individuals require minute information as to the provisions of any proposed enactment, it will be easy for them to procure a correct version in any of the native languages at their own cost.'[2] I think it would have been easier to publish a few copies of the draft Act in Bengali. It would have satisfied the bankers and would have saved the Accountant-General the time and trouble taken to satisfy their individual inquiries.

It would have been a good rule indeed to translate at least such draft Acts as were likely to interest Indians, whose experience also would have been of some use to the Government. Unfortunately the question was never discussed in the Council. Judging from the earlier minutes of Macaulay, I am persuaded that he would have liked to consult Indian opinion on matters of legislation. But the opinion of the Council leaves no doubt that they did not think it worth their while to hear what Indians had to say on their legislative projects. In a letter to the Government of Bengal on the best method of disseminating knowledge of legislative Acts, the Governor-General in Council said: 'It would seem also advisable that the drafts of Acts should be made known to the native community before they are passed into law by which means the Governor-General in Council doubts not that many valuable suggestions might be offered to Government; but his Lordship in Council apprehends that this object could not be attained except by the sacrifice of much time, for it is obvious that the ordinary period of six weeks notice would be far from sufficient for this purpose. There may besides be other objections in the present state of society to invite the opinions of the entire native community of the legislative projects of Government.'[3] So suggestions were ignored on the ground that they would cause delay. In my review of the legislative proceedings of the Council, I have come across several draft Acts which were not passed at the end of six

[1] *I.L.C.*, 3 August 1835, No. 23. [2] Ibid., No. 24.
[3] Ibid., 8 May 1837, No 1.

weeks because the subjects they treated were too controversial or important to be hastily passed into law. Even if the Government had been disposed to invite the opinion of the entire Indian population, it would not have been possible to secure it, because the general public was too unaccustomed to political questions to interest themselves in legislation. Only a few interested persons would have approached this Legislative Council; but it was bad policy, if nothing else, to close the door on the very persons who could have contributed new experience to the wisdom of the Council.

If it was the policy of the Government not to consult Indian opinion, I really wonder what members of Council meant by 'the public' and 'public opinion'. Did they mean the minority represented by the European community? It indeed called itself the only public on several occasions, and when Government went against its wishes it deprecated the attitude of the Government as flouting public opinion. Macaulay, however, was clear on this point and spared none of those who imagined themselves the only public. 'The political phraseology of the English in India', said he, 'is the same with the political phraseology of our countrymen at home; but it is never to be forgotten that the same words stand for very different things at London and at Calcutta. We hear much about public opinion, the love of liberty, the influence of the press. But we must remember that public opinion means the opinion of five hundred persons who have no interest, feeling or taste in common with the fifty millions among whom they live; that the love of liberty means the strong objection which the five hundred feel to every measure which can prevent them from acting as they choose towards the fifty millions, that the press is altogether supported by the five hundred, and has no motive to plead the cause of the fifty millions.'[1]

These words show that Macaulay had a clear notion of what he meant by the public. The Council as a whole shows by its measures that violent protests by a single community were not to be mistaken for genuine public protests. During the period of my survey, the Council indeed stood more often than not for the fifty millions against the five hundred. What prevented it then from taking Indians into its confidence and winning their sympathy and trust, none can say.

[1] See Trevelyan: *Life and Letters of Lord Macaulay*, pp. 287 ff.

Macaulay once turned down the proposal of the Government of Bombay in deference to local public opinion. The Government wanted to repair the walls of Kaira, and invited subscriptions for the work. The people refused on the ground that there was no precedent to justify such a measure. The Government therefore proposed to tax them. Macaulay laid down the principle 'that the people of a place are better judges than the Government can be whether it is worth their while to submit to a local tax for a purely local object'. The walls, said the Bombay Government, were required for the protection of the people. But Macaulay thought that the people were the best judges of this. 'They know', he continued, 'the extent of the advantage and they know also the extent of their means. Protection and accommodation may be bought too dear. Whether they would in any particular case be bought too dear or not is a question on which I would sooner take the opinion of the interested parties than that of the most enlightened and benevolent Government that ever existed.'[1] If the Bombay Government thought that the repairs were necessary for 'general purposes'—for the collection of revenue or from a military point of view—then Macaulay would have agreed to the repairs from the revenues of the presidency and not from a forced subscription from the residents of Kaira. But the case here was quite clear: 'If these walls are of use to the State, let the State keep them up. If they are of use to none but the people of Kaira, undoubtedly none but the people of Kaira ought to pay for repairing them, but then none but the people of Kaira ought to decide whether they shall be repaired or not.'[2] In those days when municipalities did not exist, it must have been very difficult to decide such questions of local taxation; but Macaulay's solution on the basis of a principle is certainly reasonable.

It would not have been possible in the India of a hundred years ago, to extend to the whole of India this principle that the people of a place are the best judges to decide what laws should govern them. But it would have been possible to consider the views of the public on legislative projects. The only important occasion when a representation had been made by Indians was when the lawyers of Calcutta and their friends made persistent efforts to extend the jurisdiction of the Supreme Court to the suburbs of

[1] See Minutes, No. 7; 16 January 1836. [2] Ibid.

Calcutta. The representations were signed by between four and six hundred Indians. The Government, it is true, was in no mood to extend the jurisdiction of the Supreme Court. But supposing for a moment that they had been so disposed, would not these representations have revealed to them at first hand the drawbacks of an institution they were trying to promote? And after considering these representations, it is quite likely that Government might have seen reason to abandon their plan.

This seems on the face of it a simple matter. But to my mind consulting public opinion, especially in matters which affected Indians themselves, would have produced excellent results. The Council would have benefited by the experience of Indians. The Government would have known and would have learnt to respect the likes and dislikes of the people. For what is public opinion after all but the likes and dislikes of great bodies of men? The Government would have enlisted the sympathy and co-operation of the people, for in the field of legislation, at least, Government could display great victories of peace—the creation of a better judicial system and an equalizing and unifying law. In a recent novel, a writer on Indian questions[1] has described the average British standpoint of 'look-what-we-have-done' as humbug. It would not have been so if while the good was being done, Indians had been associated with it; and thus impressed, a false belief would never have grown up that British rule in India was only for pillage and plunder.

[1] Edward Thompson: *A Farewell to India.*

V

THE FREEDOM OF THE PRESS

ONE of the most important Acts passed during the time when Macaulay was Law Member freed the Indian press.[1] Before his time in Bengal and Bombay there were certain restrictions on the press. In the presidency of Fort St George, however, there was no legal restriction on printing and publication so that it was difficult 'to bring the fact of printing and publication home' to anyone who chose to engage in those activities.[2] In Bengal printing presses could not be established without a licence and there were restraints on the circulation of printed books and papers. In Bombay the Government had passed in 1825 a regulation 'for preventing the mischief arising from the printing and publishing of newspapers and periodicals and other books and papers by persons unknown'.[3] Two years later that Government passed another regulation similar in tone to the regulation binding on Bengal. These regulations though seldom used in practice might at any time restrict the establishment of printing presses and suppress any printed matter which was obnoxious to Government.

There was thus a curious divergence in law within the three presidencies regarding the control of the press. 'While the inhabitants of one province', wrote Macaulay, 'are complaining of the tyrannical restrictions which our laws impose on the press, the inhabitants of another province suffer from the irresponsible licentiousness of the press. The editor of a newspaper at Calcutta must have a licence from the Government. The editor of a newspaper at Madras may excite his fellow subjects to the most criminal enterprises, or may destroy the peace and honour of private families, with small risk of being convicted before any legal tribunal.'[4]

It must be understood, however, that these were only surmises, for the editor in Calcutta did not labour under a real grievance. Though the law laid down restrictions on his activity, the law was hardly enforced against offending editors. Its enforcement

[1] Act XI of 1835.
[2] *P.P.* (c. 2078), 1878, lvii, pp. 1–2.
[3] See Act XI of 1835.
[4] See Minutes, No. 8; 16 April 1835.

really depended on the character and personality of the head of the administration. If he was a John Adam,[1] too sensitive to put up with criticism, it was enforced to the letter. If he was a Lord William Bentinck the regulations were not put into use. But there it was, a sheathed sword to be drawn against those who crossed the bounds—a power whose customary slumber alone was the publisher's opportunity.

It is interesting to note that Lord William Bentinck, who was too broad-minded to use that power and withdraw the licence of a newspaper for attacking Government and its officials, thought that the press laws of Bengal were 'good material' to draw on in an emergency. Prinsep thought that Bentinck therefore did 'not deprive his successors of the means of controlling the press if they should be disposed to use it'.[2] Under his administration he gave the press complete liberty. For two years it poured a flood of abuse on his measure for reducing batta; and it does honour to his character and his liberal principles that the violent criticism of the press made him neither falter in his position nor curb the activity of the press. Nothing could have been easier for him. With the press laws of 1823, he could with a single stroke of the pen have gagged his militant critics. But 'he knew of no subject which the press might not freely discuss'.[3] The biographer of Lord Metcalfe, Lord William's successor, has shown that during his term of office the press with one single exception was unchecked. And that exception only proved that he was not shaken in his liberal principles. When the Court of Directors finally settled the batta controversy, Lord William saw that criticism of him had had its day, and that it would be transferred to the Court of Directors. He therefore put a stop to it under the authority of the Bengal laws, as an act of graceful loyalty to his masters at home.

But that was the only time when, during his whole term of

[1] John Adam had deported Buckingham, an editor of Calcutta; but it was found that an Indian who was made a nominal editor of a paper could not be so deported. The Bengal Press Regulations, therefore, were the result. See Kaye: *Life of Lord Metcalfe*, Vol. II, pp. 138–9. See also Arbuthnot: *Maj.-Gen. Sir Thomas Munro*, Vol. I, p. clxxx.

[2] *P.P.* (c. 2078), 1878, lvii, pp. 3–4.

[3] Boucher: *Lord William Bentinck*, p. 59.

office, Lord William Bentinck enforced the press regulations, and towards the close of his regime he returned a favourable answer to the petition of Europeans in Calcutta. For most of the time the regulations were honoured more in the breach than in the observance. This fact formed the backbone of the arguments of Sir Charles Metcalfe and Macaulay and such of their colleagues as supported them in revoking the regulations, which had fallen into disuse and which paraded themselves as a species of oppression which Government never thought of exercising. In the polished phrase of Macaulay it was 'keeping the offensive form and ceremonial of despotism before the eyes of those whom we nevertheless permit to enjoy the substance of freedom'. The European community in Calcutta had represented to Government in strong terms the disability which they suffered from under the existence of the press laws. Macaulay thought that they would have shown 'a better judgement if they had been content with their practical liberty, and had reserved their murmurs for practical grievances'. But, concluded Macaulay, 'the question for us is not what they ought to do, but what we ought to do; not whether it be wise in them to complain when they suffer no injury, but whether it be wise in us to incur odium unaccompanied by the smallest accession of security or of power'; for, he said: 'It is universally allowed that the licensing system, as at present administered, does not keep any man who can buy a press from publishing the bitterest and the most sarcastic reflections on any public measure or any public functionary.'[1]

Macaulay's standpoint was a revolt against the injustice which the press laws had inflicted on Government. They required from the publisher 'licence to print'—the very sound of which was hateful to the ears of Englishmen in every part of the globe. And for what? For no real protection of their dignity as the Supreme Government but only to bring on them the reproach of tyranny and to proclaim to the world that they were despots. It was unbearable. Macaulay understood that restraint on political discussion could be a wise policy though he himself was doubtful about its wisdom. But the question before him was not whether it should be followed. 'The question before us', he said, 'is not whether the press shall be free, but whether being free, it shall

[1] See Minutes, No. 8; 16 April 1835.

be called free.' And he could not understand when to all practical purposes it was free why that indulgence should be disguised under the mere form of a tyrannical law.

This formed the main argument of Macaulay's sincere plea for the removal of the press restrictions. But did that removal bind subsequent Governments or restrict them to adopt 'the sharp, prompt and decisive measures' under an extreme emergency? It was said that such an emergency might arise. To this Macaulay had a ready answer: 'When we consider', said he, 'with what vast powers, extending over all classes of peoples, Parliament has armed the Governor-General in Council, and in extreme cases the Governor-General alone, we shall probably be inclined to allow little weight to this argument. It seems to be acknowledged that licences to print ought not to be refused or withdrawn except under very peculiar circumstances, and if peculiar circumstances should arise, there will not be the smallest difficulty in providing measures adapted to the exigency. No Government in the world is better provided with the means of meeting extraordinary dangers by extraordinary precautions. Five persons, who may be brought together in half an hour, whose deliberations are secret, who are not shocked by any of those forms which elsewhere delay legislative measures, can, in a single sitting, make a law for stopping every press in India.'[1]

This statement shows Macaulay's approach towards the question of a free press. His political training and his personal views were not likely to make him believe in restrictions on the press. In the India of his time he did not find any need for restrictions and he found the press free in spite of them. Then why keep those restrictions which did nothing better than bring obloquy on the method of government? If an extreme emergency arose, when a free press would be a danger to the State, machinery could in no time be set to work to restrict its activities. This attitude of Macaulay's mind shows that his proposal to remove the restrictions on the press was provisional. It cannot be said from his few writings that his faith in a free press for India was as complete as Sir Charles Metcalfe's.

Sir Charles Metcalfe had an unshakable faith in the freedom of the press, and his Indian career shows his consistent policy

[1] See Minutes, No. 8; 16 April 1835.

regarding it. It was most fitting that under his provisional Government was passed the crowning act of his policy. In his liberal principles he was more consistent than even Lord William Bentinck. He had protested against Lord William's enforcement of the old press laws of Bengal on the one occasion when he thought it necessary to restrict the press. On that occasion Metcalfe recorded his opinion that the violent criticism of the batta policy of the Government did less harm than good. He thought that it 'afforded a vent for the expression of the feelings which a most unpopular measure excited'. His views on the freedom of the press are well set out in his minute. 'For if there were danger', said he, 'to the State either way, there would be more I should think in suppressing the publication of opinions than in keeping the valve open, by which bad humours might evaporate. To prevent men from thinking and feeling is impossible; and I believe it to be wiser to let them give vent to their temporary anger in anonymous letters in the newspapers, the writers of which letters remain unknown, than to make that anger permanent, by forcing them to smother it within their own breasts, ever ready to burst out.'[1]

It is necessary to discuss here the views Sir Thomas Munro expressed on this subject especially because they differ from those expressed by Macaulay and Metcalfe. Munro believed in restricting the press. It was not to be allowed to attack 'the character of Government and its officers and the religions'[2] of India. It was therefore not to treat political and religious questions of the day, not to question the policy of the Government or to dispute religious tenets. Munro assigned for his point of view an excellent reason. If free discussion was allowed on political questions, he thought, the different organs of the press would vie with each other in pouring ridicule on the policy of the Government and directing personal attacks on its officials. For, said Munro, 'the newspaper which censures most freely public men and measures, and which is most personal in its attacks, will have the greatest sale'. The pressmen therefore would live by abusing the Government, which would thereby suffer a loss of prestige.

The main point of Munro's arguments was that a free press was incompatible with the dominion of strangers. 'For what',

[1] Kaye, op. cit., Vol. II, pp. 142–3

[2] Arbuthnot, op. cit., Vol. II, pp. 287–8.

said he, 'is the first duty of a press? It is to deliver the country from a foreign yoke; and to sacrifice to this one great object every meaner consideration; and if we make the press really free to the natives as well as to Europeans, it must inevitably yield to this result.'[1] Munro feared that a free press would carry disaffection into the army, that under a free press there would be mutiny, supported by the masses.[2] I am not competent to hold with Elphinstone the view that Munro's statement was a prophecy in the light of subsequent events,[3] but there is one convincing conclusion from Munro's thoughtful review. It is that a free press under a despotic Government gives power without responsibility; a state of affairs which is dangerous to any State at all times.

There was one more point of divergence between Metcalfe's and Munro's points of view on the freedom of the press. In his answer to the address he received from the public of Calcutta, Metcalfe expressed the opinion that a free press would increase the knowledge of the people. Munro on the other hand held the view that restrictions on the press would not hinder the progress of knowledge among Indians. 'It will rather insure it', he said, 'by leaving it to follow its natural course and protecting it against military violence and anarchy.' Munro thought that a free press would try to precipitate change which if necessary ought to be gradual so that the people might improve without suffering from occasional shocks.

It must be clearly understood that Munro's doubts and fears were directed to the spread of the 'vernacular' press as opposed to the English for which he entertained some regard. But he generalized his views because he thought that no distinction could be made on the basis of English and Indian languages. If freedom was granted to the one, it could not be withheld from the other. This point is interesting because it was stressed at the Council table when Macaulay drafted the Free Press Bill. Prinsep was for keeping a watchful eye on the growth of the vernacular press, for he said that it was no use Government trying to wrestle with it when it grew into a formidable giant. He generally believed 'in the dictum ascribed to one of the warmest advocates of the peoples' rights. . . . When you have a free press on board of

[1] Arbuthnot: op. cit., Vol. II, pp. 287–8.
[2] Ibid., pp. 290–4.
[3] Ibid., Vol. I, p. clxxxv.

a man-of-war, then you may think of giving one to India.'[1] But Macaulay's assertion that Government could always adopt extreme measures in emergencies allayed Prinsep's fears. Colonel Morison, however, proposed the addition of an express clause in the Act that 'Government would retain the power of instantly repressing any publication if it should at any time appear to risk the safety of the State'. Such a clause was redundant, for the Government which could make the press free could also impose checks upon it.

So the Act was passed. 'It enacted that the printer and publisher of all periodical works, within the Company's territories, containing public news, or comments on public news, should appear before the magistrates of the jurisdiction in which it would be published, and declare when it was to be printed and published. Every book or paper was thenceforth to bear the name of the printer and publisher. Every person having a printing press on his premises was to make declaration thereof, and for all violations of the provisions of the Act, penalties of fine and imprisonment were decreed.' The Act thus removed the restrictions on the press in Bengal and Bombay and put an end to the extreme freedom of the press in Madras.

It is not very easy to form conclusions from these divergent views. Metcalfe's views do credit to his liberal disposition. But in the unfolding of events Munro's views appear to be more sound. It would be a good principle that the freedom of the press should go hand in hand with the freedom of political institutions.

[1] *P.P.* (c. 2078), 1878, lvii, pp. 3–4.

VI

'THE BLACK ACT' AND ITS SEQUEL

LIKE the Act making the Indian press free, Act XI of 1836, popularly known as 'the Black Act', was a most important measure in the history of Indian legislation; and it gained in importance because of the opposition it encountered. The Act can be divided into two parts. The first annulled the provision in the Charter Act of 1813, which allowed a British suitor an appeal to the Supreme Court in suits where Indians generally were entitled to appeal to the Sadar Dewani Adalat. The second part did not except any person 'by reason of place of birth or by reason of descent' from the jurisdiction of the civil courts of the Company, barring the munsiff's court. The criticism against the Act was mainly levelled against disallowing appeals from the mofussil to the Supreme Court. But the two parts are closely knit by the principle which inspired them. It was to weed out privilege and to introduce uniformity in the dispensation of justice.

The special appeal to the Supreme Court was provided in the same Act, which made British settlers in the mofussil amenable to the higher civil courts of the Company, the courts of the zillah and city judge. This provision was to all practical purposes a dead letter. It was of very little use to the British settlers in the mofussil for whom it was made. They scarcely appealed to the King's Court in Calcutta. Indeed the Chief Justice told Macaulay that he hardly remembered one appeal being entered against the judgement of a mofussil court. And for three and twenty years since the privilege of appeal was granted, only two appeals were on record. The settlers set no value on it. Macaulay wrote that 'in 1826 indeed, some of them actually begged to be deprived of it in a large class of cases. They petitioned to be made subject to the jurisdiction of the Sadar Amins, and stated that, unless this were done, they should in petty cases be left without any prospect of redress. In petitioning to be made subject to the jurisdiction of the Sadar Amins, they were in fact . . . petitioning to be deprived to a considerable extent of their right

of appeal to the Supreme Court.'[1] This opinion of the British community did not change even after ten years. In the cold season of 1835, Macaulay received a deputation of indigo planters on the subject. When he mentioned the appeal to the Supreme Court, they replied that they did not value it in the least.

Thus if it was a privilege at all it was not enjoyed or cherished by those for whom it was meant. It was Macaulay's plan, and the policy of the Government of which he was a member, to weed out privilege and to make an end of even the semblance of partiality in the dispensation of justice. 'The principle', said Macaulay, 'on which we proceeded was that the system ought, as far as possible, to be uniform, that no distinction ought to be made between one class of people and another, except in cases where it could be clearly made out that such a distinction was necessary to the pure and efficient administration of justice.'[2] As a privilege, therefore, Macaulay would have done away with it even if British settlers had taken advantage of it. As none of them valued it, Macaulay had hardly any scruples in getting rid of a senseless privilege.

And other principles were involved in its continuance. Its psychological effect, though not visibly bad on the Indian community, was definitely so on the English. The language used by the Calcutta petitioners showed that they were convinced that they had a right to privilege in India. Nothing could be better for preventing the two communities from working together in a spirit of good will and harmony. But apart from these general evils, the privilege of appeal to the Supreme Court had a lowering effect on the courts of the Company. As Macaulay said, it was an effort to 'cry down the Company's courts. We proclaim to the Indian people that there are two sorts of justice, a coarse one which we think good enough for them, and another of superior quality which we keep for ourselves. If we take pains to show that we distrust our highest courts, how can we expect that the natives of the country will place confidence in them?'[3]

The repeal was thus in every way essential and justified. It found favour with the majority of the British settlers in the interior of India; for while an outcry was raised against it in Calcutta, not a finger was lifted either in the Bengal mofussil or

[1] See Minutes, No. 10; 28 March 1836. [2] Ibid. [3] Ibid.

in the presidencies of Madras and Bombay. The disadvantages, if any, were magnified out of all proportion by the ingenuity of Calcutta lawyers. Macaulay on the other hand stoutly defended the Government's position.

What were the main arguments of the lawyers, which had at least a semblance of reason? They said that as British-born subjects of His Majesty they were entitled to their birthright, 'the enjoyment of the protection of British laws and institutions', that just as the Hindus were protected by the Hindu law, and the Mussalmans by the Mohammedan, the English should likewise enjoy the benefit of English law.[1] Macaulay could not understand why the memorialists should claim English law as their birthright. It was likely that there were Scotsmen amongst them. 'There are', wrote Macaulay, 'in the island of Great Britain, two systems of law widely and fundamentally differing from each other. The law administered by the Sadar Dewani Adalat hardly differs more from the law of England than the law of England from the law of Scotland. His Lordship in Council finds some difficulty in understanding how a Scotchman who at home never lived under the English law and whose ancestors have never lived under the English law can by visiting India be "entitled as his birthright" to live under that law, nor can His Lordship in Council perceive any reason for giving the protection of English law to the English which is not equally a reason for giving the protection of Scotch law to the Scotch.'[2]

And how could an appeal to the Supreme Court give to the English the protection of their laws? A judicial appeal is essentially an appeal from one tribunal to another, not from one body of law to another body of law. The Court sitting in appeal had to administer the same law which the lower court in the mofussil administered. If not, it would be a new judicial proceeding altogether and the delay, expense and labour involved in the original court would be truly wasted. In an appeal, therefore, from the mofussil courts, the Sadar Dewani Adalat would administer the same law which the Supreme Court had to administer. It stood to reason that the Sadar Dewani Adalat could

[1] See *I.L.C.*, 28 March 1836, No. 9, 'A memorial to Government from the British inhabitants of Bengal'.

[2] See Minutes, No. 9; 21 March 1836.

interpret that law far better than the king's judges could, because the Sadar judges were more familiar with it. The Charter Act of 1813, again, directed the king's judges to follow the practice of the Sadar courts in examining appeals from the mofussil. The king's judges, in short, were required to learn a procedure with which the Sadar judges were better acquainted. It would not be unnatural, therefore, if the Supreme Court found it necessary to approach the Sadar Dewani Adalat itself for information and guidance. It was likely that points might arise which required a sound knowledge of English law. But in most points it would be easier for a Sadar judge to master a point in English law than for a king's judge to master a point in Hindu or Muslim law. Thus from every consideration, the presumption was more in favour of the Sadar than the king's judges in their ability to examine appeals from the lower courts of the Company.

It was further urged by the memorialists that the courts of the Company were venal and corrupt. All the more reason, said Macaulay, that appeals from them should lie in the Sadar Dewani Adalat rather than in the Supreme Court. 'That court', said Macaulay, meaning the Sadar Dewani Adalat, 'is generally composed of gentlemen who have themselves administered justice in the mofussil, who know the forms which corruption ordinarily takes in this country, who must necessarily be better acquainted with the abuses of the native courts than any man can possibly be whose life has been chiefly passed in England and whose Indian experience is confined to Calcutta.'[1] It was the duty of that court to supervise their proceedings and to bring the unworthy to book. How would that be possible if the appeals under the new system lay directly with the Supreme Court—'a tribunal', said Macaulay, 'which possesses in a far smaller degree both the means of detecting guilt, and the power to punish it'?

I shall have further occasion to examine whether the charge of venality against the courts of the Company was fully justified. But Macaulay took the memorialists at their word and turned the tables on them by an ingenious argument. 'Nothing can be more pernicious or absurd', said he, 'than, because a certain body of functionaries are corrupt, to exempt from their jurisdiction a

[1] See Minutes, No. 9; 21 March 1836.

very small class distinguished by intrepidity, and by hatred of oppression and fraud, accustomed to a pure administration of justice and accustomed also to think little of the frown of power, certain to complain whenever they think themselves wronged and certain to be heard whenever they complain.'[1] If such men were made amenable to the lower courts, naturally they would have a common interest with the Indian in bringing the abuse of the courts to light. Supposing the Indian patiently submitted to these wrongs, the Englishman would make up for that want of energy by rising against the wrongs from which he suffered. 'The more these courts require amendment,' said Macaulay, 'the stronger are the reasons for giving those who have power to produce amendment motives for producing amendment.'[2]

Another contention was that the provisions of the Act should at least be stayed till the new Code, which was being framed, came into operation. The courts of the Company administered, said the memorialists, no one single body of law. They administered the Hindu law and the Muslim law and the regulations of the local Governments. The memorialists, to catch the ear of their community, represented that the moment they were put under the jurisdiction of the lower courts of the Company, justice would be administered to them by the varied principles of Indian law.

Nothing could have been more absurd. True, indeed, that in India there was not one unified system of law. But to conclude, therefore, that persons who were neither Hindus nor Muslims would be forced to obey the principles of the Hindu or Muslim laws was nothing but a travesty of the facts. Suits in which either of these ancient bodies of law was used, were connected mostly with questions of marriage, inheritance and succession. The parties to such suits always belonged to the same class and denomination; and it was, therefore, clear which law was binding on the parties. It was impossible to imagine a suit between a Hindu or Muslim on the one hand and an Englishman on the other, in an issue of marriage, inheritance, or succession. And suppose for a moment the miracle had happened, and there came before the Company's court such an impossible suit, what would happen? The suit would be decided by the rules of 'justice,

[1] See Minutes, No. 12; 3 October 1836. [2] Ibid.

equity and good conscience', and there would hardly be any conflict between different bodies of law. The English settler would not find his marriage lines declared illegal because it was not performed according to the Hindu ceremonies, nor would he be constrained to share his estate with his sister according to a principle in Muslim law.

The memorialists were right when they said that the Principal Sadar Amins and their assistants, the Sadar Amins, were totally unfamiliar with their customs, language and laws. But they forgot that the court of the zillah and city judge was a court of original jurisdiction. The zillah and city judge, who was always an English official of good training and some experience, referred to the lower courts, the Principal Sadar Amin's or Sadar Amin's, suits which he thought they could decide with facility. Such suits would invariably be ordinary suits of contract between an Englishman and an Indian. Suits which the zillah judge thought his lower officials incapable of deciding, he would decide himself. Such suits would be connected with issues of marriage, inheritance or succession, because his assistants could not decide points of English law. The zillah judge or the judges of the highest court of the Company—the Sadar Dewani Adalat—were certainly familiar with ordinary issues of English law and they could always have recourse to the English law officers of Government in deciding difficult points. None could deny that they were familiar with English language and custom. 'Of all the millions who live under this rule,' said Macaulay, 'the English in the mofussil have the least reason to complain. They are of the same race, they speak the same language, they profess the same religion, they have the same laws of inheritance, succession and marriage with the zillah and Sadar judges. If a zillah or Sadar judge can be safely trusted with the interests of Hindus, Mohammedans, Parsees, Jews, Armenians, is it not absurd to say that . . . the only national usages to which he will not allow their due importance are those of his own nation? That the only law of marriage he will treat with contempt is the law on which the legitimacy of his own children depends? That the only law of succession which he will disregard is that law which secures to his own nearest connexions the property which he may leave behind him?'[1]

[1] See Minutes, No. 12; 3 October 1836.

No doubt the judges presiding over the Company's courts were not well versed in English law. It was not their strong point. As Shakespear in his able minute said, they had not the deep learning of the bench, nor did they have in their courts an independent and ingenious bar. But that did not mean, as had been often suggested, that they had no system in their proceedings. On the other hand they were free from the fearful technicalities and intricacies of English law and practice.[1]

The question as to the law by which justice was to be administered to the British-European was fully answered by Macaulay. 'Those who maintain', said he, 'that an English planter carries the substantive civil law of England with him to Tirhut or Cawnpore do not mean that he carries with him the whole common and statute law exactly as it exists in Middlesex. They would admit that the circumstances of this country render it necessary that the English law should be modified by a very large and not very well defined equity. On the other hand, those who do not think that the English law, merely because it is English law, is applicable to an Englishman in the mofussil, would yet admit that in some cases in which Englishmen are concerned the Company's judges whose rule of decision is equity and good conscience would . . . decide according to the principle of English law. I see little difference between English law modified by a large equity so as to suit India and equity frequently recurring for guidance to the English law when it has to deal with Englishmen.'[2]

It was plain that the lawyers had brought up the question of law only to confound the issue. Admitting for a moment that the Company's judges were not learned enough in English law to adjudicate upon the claims of the parties, it was still open to them to contest their claims in the Supreme Court. For where intricate points of English law might arise in suits regarding marriage or divorce or inheritance or succession, the parties would invariably be British-born settlers. And the Supreme Court had an original and concurrent jurisdiction in every suit where the parties to it were British-born subjects of the king. In suits of divorce, the Supreme Court had exclusive jurisdiction. If the parties had no faith in the courts of the Company, they were free

[1] See Shakespear's minute: *I.L.C.*, 28 March 1836, No. 12.

[2] See Minutes, No. 12; 3 October 1836.

to settle their claims in the King's Court; and then the question of the quality of the courts of the Company, and the law which they administered, could hardly arise.

On the day of the enactment of this important piece of legislation, the Council considered a petition from an English barrister.[1] The petition in substance was an earnest appeal to Lord Auckland to rise superior to his clique of councillors who were attracted to the mofussil courts because they were mostly servants of the Company. The Governor-General was asked to use his emergency powers because the measure of the Council was calculated to endanger the peace and safety of the Indian Empire! Ridiculous as this was, the petitioner had one argument which, though grossly exaggerated, had in it some amount of truth. The judges of the Sadar Dewani Adalat, he said, were less independent than the king's judges. In suits where the interests of the Company clashed with those of private individuals, the judges were liable to a bias in favour of the Company. He showed that in 1824 a judge of the Company had been suspended by reason of a judicial opinion which was supposed to have lowered the credit of the Company's securities. 'My Lord,' said the petitioner giving a subtle retort to the contention of the Government that the Company's judges were not inferior to the king's 'for the Company judges to do justice under the circumstances in which they are placed in questions in any way affecting the Company's interests, they not only must be superior to the king's judges, but superior to human nature.' Macaulay's answer to this contention was characteristic; he admitted that the judges were dependent on the Government and also that a dependent judiciary was an evil. But, asked Macaulay, 'on what ground is it, we are to make a distinction between the Englishman and the native? On what ground are we to say that an inferior kind of justice such as can be procured from dependent judges is good enough for a hundred millions of our fellow creatures, but that we must have a purer sort for a handful of our countrymen?'[2]

But the contention of the memorialists went much further than making a reference to the evil of dependent judges. They said or at least implied that as the Company was a commercial

[1] See petition by Charles Thackeray: *I.L.C.*, 9 May 1836, No. 8.

[2] See Minutes, No. 12; 3 October 1836.

body it was naturally jealous of British settlers who were carrying on a flourishing trade. How could the courts of the Company administer unsullied justice to their rivals? The argument was absurd, for, as Macaulay said: 'It is impossible that any rational person can be so prejudiced against the Company and its servants as really to believe that having given up all connexion with trade, they are still jealous of all other traders.' On the other hand they would welcome in their dominions any class of people which was 'likely to make those dominions more flourishing by carrying thither the arts and industry of Europe'.[1]

The lawyer to whose petition I have made special reference demanded that Government postpone the Act till a complete Code was promulgated; or, if the Government were in a hurry, to give to the British community time to wind up their affairs and book their passages home. The Government could not postpone a measure which was enjoined upon them by the Charter Act and which they themselves thought most reasonable and which received the confident support of every place in India except Calcutta. The Act which opened the door for the British settler instructed the Government to keep him in check lest he oppress the Indian; it also introduced the principle of uniformity in laws and government in British India.[2] Regarding the apprehension that the enactment would deter Englishmen from settling in India, the words of Mill in his evidence before the Select Committee were most appropriate. He was asked if the total abolition of the King's Courts would prevent Europeans from settling in the mofussil. 'By no means', said Mill. 'I think the same motives which carry them into the interior now as far as their objects are honest and justifiable would carry them still; and if they go there for the gain of misconduct and oppression it is very much to be desired that they should not go at all.'[3]

Like the orator he was, Macaulay took his cue from the insinuation that the Government of the Company was jealous of British traders, and delivered a passage which sums up the policy of the Government in words full of dignity: 'There is a jealousy, widely different from the old commercial jealousy, of which the Company is invidiously and unfoundedly accused by the peti-

[1] See Minutes, No. 12; 3 October 1836.
[2] 3 and 4 Wil. IV, c. 85.
[3] See Minutes, No. 12; 3 October 1836.

tioners—a jealousy which it is their duty and that of all who are in authority under them to entertain. That jealousy is—not the jealousy of a merchant afraid of being undersold, but the jealousy of a ruler afraid that the subjects for whose well-being he is answerable, should be pillaged and oppressed.'[1]

As a rule it is hardly good practice to impute to men motives for adopting a particular line of thought; but the opposition against the Act was so peculiar that Macaulay was justified in stooping to it. The Act was an interpretation of the will of Parliament expressed in the Charter Act of 1833. It was unanimously supported by the Governor-General of India in Council. It was warmly received by the Governments of Madras, Bombay[2] and Agra. It was fully three months before the public and yet not one representation was addressed to the Government requesting them not to proceed with it. Whatever opposition came, came only from Calcutta, from people who were least affected by the operation of the Act. It was, therefore, not difficult to see that the opposition came from persons who had a vested interest in the Supreme Court. True, the lawyers of Calcutta hardly derived any profit from the appeal to the Supreme Court. As I have shown, there had been only two appeals from the mofussil to that Court in three-and-twenty years. But the lawyers perhaps had expectations; they thought that with the growth of the English population in the mofussil, as a result of the 'open door' policy of the Charter Act, appeals might increase in number and thereby their practices. While they entertained high hopes of extending the jurisdiction of the Supreme Court, the Act came to them as a bad omen by closing the career

[1] See Minutes, No. 12; 3 October 1836.

[2] The opinion of the Government of Bombay is interesting: 'The Right Honble the Governor in Council hails with delight the appearance of these two Acts, which, however opposed to the miserable remnant of the low national pride and prejudices formerly characteristic of British subjects in this country, are entirely consonant with the liberal and enlightened principles recognized and consecrated in the new Charter Act. The Governor in Council presumes to express a hope that the clamour, violent from its shallowness, excited among some persons of Calcutta, will not prevent the early and plenary adoption of laws, secure of commanding the ultimate gratitude of the whole people of India and the cordial approbation of all the friends of humanity and good government throughout the world.'—*I.L.C.*, 28 March 1836, No. 5.

of that Court as a Court of Appeal from the mofussil. Little wonder then that their disappointment brought about this bitter attack.

Without entering into the passions of that controversy, it could be shown how very expedient the measure was. It must have, I believe, improved the morale of the lower judicial establishment of the Company. It must have led to the detection of corruption, if there was any, in its lower orders; for the Amins were made responsible to the higher courts of the Company and not to a court which was poles apart from them in its method of administering justice and which could hardly exercise any effective supervision over them. The British suitor set no value on it. The Indian suitor must have felt relieved because it removed the fear of his having to contest an appeal in the Supreme Court. This fear was not imaginary. Fighting an appeal in the Supreme Court was a terribly expensive proposition. It was not unlikely that the Indian who had won his cause in the mofussil would forego his victory rather than submit to the threat of being dragged into the King's Court. There was some truth in what Macaulay said: 'To give to every English defendant in every civil cause a right to bring the native plaintiff before the Supreme Court is to give every dishonest Englishman an immunity against almost all civil prosecution.'[1] Macaulay gave an illustration to show how Act XI of 1836 made that impossible. 'Till the passing of Act XI of 1836,' said he, 'an Englishman at Agra or Benares who owed a small debt to a native, who had beaten a native, who had come with a body of bludgeon-men and ploughed up a native's land, if sued by the injured party for damages, was able to drag that party before the Supreme Court; a court which in one most important point, the character of the judges, stands as high as any court can stand, but which in every other respect, I believe to be the worst court in India, the most dilatory, and the most ruinously expensive.'[2]

The Act was passed, and the cry of opposition was quieted only to break out in a minor key whenever a similar measure was undertaken. Nearly fifty years had elapsed when its faint echo, now almost dying in men's memory, was caught by a later generation in the early eighteen-eighties and repeated with such force

[1] See Minutes, No. 12; 3 October 1836. [2] Ibid.

and rancour that it almost drowned the clamour of 1836. I am referring to the opposition to the Ilbert Bill. The Black Act in 1836 and the Ilbert Bill in 1884 are so alike in the inspiration which created them, and in the opposition they met, that I may be excused for making a passing reference to a measure which does not really fall within my purview. A survey of the two projects brings home to the mind some striking likenesses and contrasts in the features of the two. Macaulay's Act gave civil jurisdiction to the Company's courts over European British subjects. The Ilbert Bill proposed to give criminal jurisdiction to Indian judges in the interior over British Europeans.

The Ilbert Bill had a long history behind it. It is interesting to know that Macaulay left an opinion on record that the principle which he applied to civil courts should be extended to criminal courts as well. When he passed his famous Act, he was not sure whether he had fully realized the will of Parliament in granting only civil jurisdiction to the Company's courts. 'The intention of Parliament, I firmly believe,' said Macaulay, 'was that British-born settlers should be placed, with as little delay as possible, under the jurisdiction of the Company's courts. My only doubt is whether we have fully acted up to the intentions of the legislature. For it is my persuasion that Parliament intended British settlers in the mofussil to be made subject to the criminal as well as the civil jurisdiction of the Company's courts.'[1]

A few years later in 1843, the Indian Law Commissioners submitted proposals regarding the jurisdiction of the criminal courts in the interior, but after being considered by the Supreme Court, they slumbered for some six years more. In 1849, Drinkwater Bethune, the Law Member of Council, drafted a bill, with the full consent of Lord Dalhousie, 'which proposed to make all persons amenable to the criminal jurisdiction of the Company's magistrates or courts outside the presidency towns, subject only to the reservation that no such magistrates or courts should have power to pass a sentence of death on any of Her Majesty's subjects born in England, or on the children of such subjects.' The Bill was not intended to give exclusive jurisdiction to Justices of the Peace over British Europeans. The Bill, however, was

[1] See Minutes, No. 12; 3 October 1836.

opposed, and surely with some reason. There was not a little difference between the Company's courts in the interior and the King's Courts. The former administered a criminal law, based largely on the principles of Muslim criminal law and occasionally modified by the regulations of the Company and by the decisions of Sadar judges. It would have been unfair, therefore, to a British European to be made amenable to laws which were foreign to him. It was at least fair to defer the project till India had a Code of criminal procedure inspired by European thought. Dalhousie recognized the force of this argument, but being convinced that the principle of uniformity must also be applied to the administration of criminal justice he pressed for the early completion of the Indian Penal Code.

Just before the Mutiny the Law Commissioners presented to the Government the draft of a Criminal Procedure Code. It contained an important provision. It was to be enacted that 'no person whatever shall by reason of place of birth or by reason of descent be in any criminal procedure whatever excepted from the jurisdiction of any of the criminal courts'.[1] This principle was as broad and sound as Macaulay's. It extended to criminal courts what he applied to the civil courts of the Company. If carried out, it would have made British Europeans amenable to the mofussil courts. The Commissioners, however, proposed to give to the High Courts and sessions courts, jurisdiction over certain sets of suits. Amongst them were to be those against public servants of a certain standing. This was obviously a weak point in the proposals of the Commissioners, and was attacked also in the Legislative Council. In 1857, Sir Barnes Peacock, the Law Member of Council, in introducing the Bill followed Macaulay's line of thought and said 'he could not understand on what grounds it could be contended that any one class of persons should be exempt from the jurisdiction of any one of the courts of the country'.[2]

But while the Code was before the Council, the Indian Mutiny swept over the country. Sir Barnes, when the terrible event was still fresh in his mind, changed the liberal tone of his first speech. 'The Code as it was finally passed in 1861 left matters relating to the jurisdiction over European British subjects very much as they were before, except that it restricted the jurisdiction then exercised

[1] *P.P.* (c. 3877), 1884, lx, p. 109. [2] Ibid.

in certain cases over European British subjects in the interior by native magistrates and others, not being Justices of the Peace.'[1]

In 1858, the Company ceased to be a political power, and the Government of India was placed directly under the English Crown. The two sets of courts ceased to exist with the setting up of the High Courts and the two bodies of law with the enactment of the Criminal Procedure Code in 1861. The problem now was far simpler. Within a few years of the enactment of the Code, a few amendments were proposed. Considering therefore that it was still possible to improve it, it was again referred to the Law Commissioners in England in 1869. They agreed with their predecessors in India that European British subjects should be brought within the jurisdiction of the criminal courts in the interior.

But Sir James Stephen, the Law Member of Council, revised the Code again in 1870 and in the same year introduced a measure which became law in 1872. The Bill was most unfortunate for it introduced the principle of racial disability in the jurisdiction of the courts in the interior.[2] Till that year, the question was whether the courts in the interior were to be given the same jurisdiction as those in the presidency towns. The question was now settled, but courts which were presided over by Indian judges were debarred from trying British Europeans in criminal suits. That was an invidious distinction which, apart from the derogatory disability it imposed on Indian officials trusted with high office and invested with full judicial dignity, detracted from the efficiency of judicial administration in the interior. The anomaly in the judicial service of British India was forcibly brought to the notice of the Government of Bengal by Behari Lal Gupta of the Bengal Civil Service early in 1882. He suffered from this unfair distinction because 'while officiating as presidency magistrate he had under the law as it [stood] full power over European British subjects, even in comparatively serious cases, and exercised these with satisfaction to the local Government and the public. On his removal to a more responsible post in the interior, he ceased to be qualified to deal with even the most trivial cases affecting Europeans.'[3] Behari Lal Gupta in his note did not mention this personal disability (thrust on him by the honour of

[1] *P.P.* (c. 3877), 1884, lx, p. 109.
[2] Ibid., p. 111.
[3] Op. cit. (c. 3572), 1833, li, p. 3.

a more responsible office) because he rightly thought that his arguments would lose their force and value if repeated by an interested party. 'My only sentiment on the subject', he, however, solicited, 'is that if you do entrust us with the responsible office of a district magistrate, or of a sessions judge, do not cripple us in our powers.'[1]

None could deny the justice of the plea and Sir Ashley Eden, the Lieutenant-Governor of Bengal, put the matter before Lord Ripon's Government. They also were convinced that this serious anomaly in the judicial service ought to be removed. They sounded local official opinion in different parts of India. The Governments of all provinces, with the single exception of the Commissioner of Coorg, were decidedly in favour of that view. A letter was addressed to the Secretary of State for India who after considering all the details of the problem gave his full consent to the reform which the Government of India proposed to introduce.[2]

The reform as originally proposed was 'that all district magistrates and sessions judges should be vested with criminal jurisdiction over British Europeans', in virtue of their office; and that, by a definite provision in the law for that purpose, local Governments should be empowered 'to confer these powers outside the presidency towns upon those members (*a*) of the covenanted civil service, (*b*) of the native civil service constituted under the statutory rules, and (*c*) of the non-Regulation Commissions, who (were) already exercising first-class magisterial powers and (were) in their opinion, fit to be entrusted with these further powers'. These proposals if carried out were calculated to 'remove from the law all distinctions based merely on the race of the judge'.[3]

The opposition to this just measure, and the racial conflict to which it gave rise, is a sad incident in modern Indian history. The opposition to Macaulay's measure was by no means less bitter; but it had lost its sting because everyone knew that it came from

[1] *P.P.* (c. 3572), 1833, li, p. 3. Note by Gupta, p. 8.

[2] Ibid., p. 22. Sir Henry Maine who was a member of the India Council anticipated a 'European explosion'. He wrote a minute for moderating the proposals of the Government of India which did not reach the Viceroy. See Wolf: *Life of Lord Ripon*, Vol. II, pp. 379-81.

[3] Ibid.

a class of people in Calcutta whose interest in the Act went only as far as it affected the Supreme Court, which gave them their means of livelihood. The background, therefore, of their lofty claims of birthrights and legal precedents was miserable and undignified.

But, however undignified their motives, the opponents in 1836 had reasons enough to make at least a plausible case. Not so the opponents in the early eighteen-eighties. They based their arguments on racial considerations in their worst form. The lawyers of Calcutta, unsupported as they were from other parts of India, could raise a storm because in 1836 the issue was mainly between the Company's courts and the King's courts. The procedure and law were different in both. The lawyers lent all their weight to the support of the King's as opposed to the Company's courts. When there was an institution in India specially catering for European British subjects, it stood to reason that they should fight for it and protest against the least interference. As it was they did not fight for it in a body, perhaps because they did not think it was worth fighting for. Thus the lawyers of Calcutta with their interested clamour did not succeed in their efforts.

But in 1883 even the issue on which a plausible case could have been made in 1836 did not exist. There were not two sets of institutions. There were not two bodies of law. Law was codified and made uniform as far as possible. What differences remained were mainly in the personal laws of Hindus, Muslims, Parsees and Englishmen. The only legal argument, as far as I can see, was regarding this personal law. They said that it was a part of their personal law that an Englishman should be tried by an Englishman. Where could authority be found for this strange claim? Even the fiction of legal precedent would not do, for in the presidency towns Indian magistrates had criminal jurisdiction over British Europeans. But when Indians went into the interior on a more responsible post, their jurisdiction was limited to the trial of their own countrymen, while their subordinates, because they happened to be British Europeans, had more extended jurisdiction.

Sir Courtenay Ilbert in a memorable speech[1] to the Legislative

[1] Speech to the Legislative Council, 4 January 1884. See *P.P.* (c. 3877), 1884, lx, pp. 103–15.

Council, spoke strongly against this unjust anomaly. To him it was hardly in keeping with the principles of British rule and contained the seeds of future trouble. It was against the liberal principles laid down in the Charter Act of 1833 and the Queen's Proclamation of 1858. But, besides being a departure from that sound policy, it was likely to reproduce administrative inconveniences when the number of Indian judges increased in the judicial service. It cast a stigma on their character and ability: indeed the opponents to the measure freely assailed both. But surely an official who was trusted to administer a whole district could administer impartial justice to a few British Europeans! And in the presidency towns he administered justice to the satisfaction of both his superiors and the public. The idea that such a responsible officer, the moment he went into the interior, should become so obsessed with racial prejudice as to forget his responsibility and integrity, showed nothing but the racial prejudice of those who opposed the reform.

It is not pleasant to examine the arguments of those who in the heat of the moment were obviously swayed by passion and had lost their balance. But it is true that though different parts of the country showed different shades of opinion, that of the unofficial members of the British European community was united in its opposition. In this it also received some support from home.

In 1836, Indians did not join in the controversy of the time, but in 1883 it was different. The publication of the Ilbert Bill brought to the Government messages of congratulation from every part of the country. British Europeans in their haste stated that Indians did not care for the reform. The challenge was accepted with surprising zest. Public meetings were held all over the country. Petitions poured into Calcutta from every part of India expressing full sympathy with the Government's project of reform and soliciting the Governor-General in Council to proceed with the good work. The measure awakened for the first time a national interest and was fought as a national issue. It is true that some leading organs of Indian opinion descended to the level of Calcutta oratory. But on the whole the issue was clear, they rallied round the Government in support of a measure which aimed at the removal of an invidious distinction.

The Government paused to take stock of the fury their

measure had roused. They delayed; and the inevitable followed—a compromise. As a sop to the British European community, they declared that a British European convict could demand a mixed jury in his trial.[1] Though it was not the realization of an ideal, the compromise was the best measure in the circumstances. It at least removed from the Statute Book a legalized rebuke to the character of Indians and made them feel that they were not aliens in their own land.

Would it not have been better, however, resolutely to have passed the measure as it originally stood, or if a compromise had to be made, to extend the right of trial by jury to all British subjects, both Indian and European, as the Maharaja of Darbhanga suggested?[2] Such an action would have fully justified the proud words of Ilbert when he spoke to the Legislative Council in answer to the insane argument that British prestige would suffer if Indian judges were allowed to try British Europeans. 'This is not the time', said Ilbert on that occasion, 'nor the place for discussing the *arcana imperii*, and I do not propose to inquire in what sense it is true that British supremacy in India was obtained by or rests on the sword. I believe that in a far truer sense our empire is an empire of law. The secret of our strength in India, it has been well said, is that we have endeavoured truly and indifferently to do justice, according to the best of our skill and understanding, to all sorts and conditions of men. It is not on the enjoyment of legal privileges that British authority in India rests; it is not by the removal of such privileges that British authority will be affected. What will affect it', he truly said in the end, 'will be anything which weakens the conviction that we are resolved and able to administer equal and impartial justice for the benefit of, and against, all classes of Her Majesty's subjects.'[3]

[1] Act III of 1884.

[2] *P.P.* (c. 3877), 1884, lx, pp. 154-5. Speech to the Legislative Council by the Maharaja of Darbhanga.

[3] Ibid., p. 115.

VII

THE SUPREME COURT AT CALCUTTA

In my opening chapters, I have occasionally referred to the Supreme Court. The Regulating Act established it at Calcutta with the power of vetoing government regulations. The Act of 1781 curtailed that power, but still left it as a sullen rival to the Government, and the Charter Act of 1833 brought it under the control of Government. After many long years, the Court was reduced from an institution entirely independent of Government, laying down its own rules of procedure and even giving validity to government legislation, to a subordinate institution in the scheme of the State. Being established by Royal Charter, Government could not alter its function as a King's Court. But under the Charter Act Government could make laws and regulations for it and even define its jurisdiction.[1] The Court could no longer control the legislative activity of Government, either in the presidency towns or in mofussil stations subject to them. The scales had at last completely turned against the Supreme Court. While in former times the Court was not only independent of Government but could even question the legality of their regulations, now the Supreme Court itself was subject to them.

To some extent the Court as constituted by the Act of 1833 came up to the ideal of an independent judiciary. The Court was independent of the executive because the judges were appointed by the king and were irremovable by the Government of India. It was entirely separate from the Government for it was the King's Court, while the Government was the East India Company. It no longer controlled the legislature as formerly.[2]

When transferred from the political arena of Calcutta, the Court lost power but not prestige. The cause of rivalry being removed, the Supreme Court and the Supreme Government came closer together and even helped each other in a spirit of good will and co-operation. This was possible because of the personnel of the two bodies. Macaulay's friendship with Sir Benjamin Malkin,

[1] 3 and 4 Wil. IV, c. 85.

[2] See H. J. Laski: *A Grammar of Politics*, pp. 85 and 129.

the personality of the Chief Justice, Sir Edward Ryan, and Macaulay's agreement with him on many points, contributed to that sympathy. Macaulay, moreover, did not want to enter into any controversy with the Court while the Penal Code was in preparation. He expressed this view when the Supreme Court proposed reduction in their establishment. Macaulay thought that the reduction was not carried far enough, but he found the judges firm. 'I find', said he, 'that the distinguished persons whom I have mentioned, and who, I am certain, have nothing but the public interest in view, entertain a strong opinion that such an arrangement is necessary to the efficiency of the establishment over which they preside. I do not think that it would be wise, for the sake of a few thousand rupees a year, to risk the dissolution of that close alliance which at present exists between the Government of India and His Majesty's judges, an alliance which, while the Code is in preparation, I think is of the highest importance to maintain.'[1]

This 'close alliance' bore fruit in a couple of Acts and some interesting discussions on matters of legislation. The Law Commission was also in close touch with the king's judges regarding their work of codification and also such plans as remodelling the constitution, jurisdiction and practice of the Courts of Requests.[2] This spirit of co-operation was evident, for example, when the judges approached the Legislative Council for the continuance of the statute providing for the relief of insolvent debtors in the East Indies. The Act was due to expire in the course of a few days, causing much inconvenience to the public. The judges awaited its renewal by Parliament, but, failing that, applied to the Council which treated it as a matter of emergency and passed it forthwith.[3]

The Council and the Court had a most interesting discussion on the subject of transportation and the commutation of sentences, especially of capital sentences. With the exception of Sir J. P. Grant, who by his opinions I believe belonged to the old school of thought, the king's judges applied to the Council to fix a place for transporting criminals. By an Act passed in the reign of George IV, it was left to the Court to decide the place of transportation which was not to be New South Wales or any island adjacent to it when the criminals were East Indians, not born of European parents.[4]

[1] See Minutes, No. 15; *I.L.C.*, 23 January 1837.
[2] Ibid., No. 13; 1 February 1836. [3] Act IV of 1836. [4] 9 Geo. IV, c. 74.

(I wonder if this is the origin of the idea which is so rigorously pursued in the maintenance of a 'white Australia' policy?) The Government proposed Van Diemen's Land and the judges concurred. They took the opportunity of suggesting that a change was essential in the Act of George IV. The judges of the Supreme Court by that Act could commute a death sentence to a sentence of transportation only. The judges thought that in many convictions the better alternative would be a sentence of imprisonment with hard labour. The trials of European soldiers, specially, convinced the Court that they committed capital offences 'with the express design of being transported'. Transportation had been 'an inducement to the commission of crime instead of a prevention'.[1]

The judges felt the necessity of mitigating the rigour of the law. The Court unfortunately had no power to do this except by commuting the death sentence into one of transportation. But how could this power be vested in any authority in India? The power to grant pardon was the prerogative of the king and commutation of a sentence passed by a court of law was only a variation of that prerogative.[2] By the Act of 1833 the Supreme Government were forbidden to touch the king's prerogative[3] and the judges therefore thought that the Council *per se* could not legally commute the death sentence. They had a remedy, however: the Supreme Court could 'recommend a convicted prisoner to mercy, causing such offenders to be kept in strict custody or deliver him or her out to sufficient mainprize or bail, as the circumstances shall seem to require'. The judges suggested that an Act might be promulgated empowering them to discharge a prisoner recommended for mercy 'on his own recognizance, in cases where it should seem expedient'.[4]

Macaulay put these suggestions into a draft Act providing that the Supreme Courts at the three centres could sentence any person convicted of murder to transportation or imprisonment with the consent of the Governor-General of India in Council and could substitute hard labour for the usual sentence of transportation. It was also made lawful for the King's Courts to set at liberty on his own recognizance any person recommended by them for the

[1] *I.L.C.*, 16 November 1835, No. 2; also 14 December 1835, No. 1.
[2] Ibid., 14 December 1835, No. 1.
[3] 3 and 4 Wil. IV, c. 85.
[4] *I.L.C.*, 14 December 1835, No. 1.

king's pardon—'provided always that no such permission shall be given without the consent of the Governor-General of India in Council'.[1]

The draft was sent to the Court in case they wanted to amend it. The Chief Justice and Sir Benjamin Malkin approved of it;[2] but Sir J. P. Grant thought it most inexpedient. In a separate letter to the Government[3] he criticized the proposed Act, clause by clause, and showed how deficient it was in principle and treatment. He thought that the draft if enacted would lead to the elimination of the sentence of death. 'Where', he asked, 'is it expected that a judge may be found whose temerity shall so far outrun his discretion and humanity as that he shall consent to charge his conscience with the weight of deciding when a crime shall be visited by death which the legislature has declared may be adequately punished by imprisonment?'[4] The learned judge was perhaps right because he set great store on the death penalty. He thought the peace of society and lives of men were in danger if murder was not punished by death.

It will be out of place to discuss here the inadequacy of the death penalty in securing either social peace or human life. What appeared most objectionable to Sir J. P. Grant in the draft Act was that it required the consent of the Governor-General in Council to a decision of the Court. Consent to the sentence of a court of law, thought the judge, could be given in two ways. Either by joining in pronouncing it, which could only be done by a lawfully constituted court of law or by a judge, or by a person who had the prerogative of pardon. 'I cannot see', Sir J. P. Grant concluded, 'how the Governor-General of India can lawfully act in either of these ways, nor how the Legislative Council of India can lawfully clothe him with either of these characters.'[5] The Supreme Court could commute death penalties to transportation as the law then stood. The proposed Act made this privilege of the Court rest on the pleasure of the Governor-General in Council. Sir J. P. Grant was doubtful of the legality of this course. The Government were intruding on the sacred ground of the king's prerogative which no court or council could alter. The Act of 1833 conferred on the Government the power to

[1] *I.L.C.*, 14 December, 1835, No. 1.
[2] Ibid., 1 February 1836, No. 2. [3] Ibid. [4] Ibid. [5] Ibid.

make regulations for the King's Courts but not to encroach on the king's prerogative by becoming a party to their decisions.

Through his able exposition Sir J. P. Grant won his point. Macaulay dropped his proposal and after over a year an Act was issued empowering the King's Courts to set at liberty 'on his own recognizance' any convict recommended for the king's pardon.[1] The proviso requiring the consent of Government was not inserted.

The delicate question of the king's prerogative was often cropping up and causing no small embarrassment to the Government. It was so vague and undefined that the Government did not know, in many cases, whether they were standing by their own rights or trespassing on the king's prerogative. They did not know whether they could grant patents to protect new inventions[2] or whether aliens could hold property in India. And the Supreme Court not wrongly took upon itself the task of vigilantly watching over the Government lest they should touch the king's prerogative.

The question whether aliens could hold land in India was full of implications. Under Regulation XXXVIII of 1793, the Governor-General in Council could allow Europeans to purchase and hold land 'out of the limits of Calcutta'. Under the new Charter Act of 1833, the right to hold land was conceded only to the natural born subjects of His Majesty the King. This question therefore arose: Could the licence issued by the Governor-General under the Regulation of 1793, authorizing an alien to purchase land outside the limits of Calcutta, 'confer a valid title upon such party as against the Government or the Crown'?[3] The Advocate-General, John Pearson, was consulted. He was strongly of the opinion that the Regulation of 1793, under which the Governor-General in Council had been in the habit of permitting foreigners to hold land in the mofussil, was good in law because by the Act of Parliament the Regulation had the force of law. Even in the absence of such law, the Governor-General in Council could authorize foreigners to hold lands, as this power was given 'as an incident to the government which had been committed to them'.

[1] Act VII of 1837.

[2] Individuals often applied to the Government for patents which legal opinion declared the Government could not grant.

[3] *I.L.C.*, 25 July 1836, No. 5.

All the functions of government were committed to the East India Company; and this power was naturally implied in those functions.

But the question took on an altogether different complexion when the Supreme Court gave their judgement on the case of General Martin's will. The General was born in France. He owned houses in Calcutta and land in the mofussil. 'The Court', wrote the Advocate-General, 'in its decree has directed the former to be kept apart for a claim on behalf of the Crown and the latter also to be kept by itself as not passing by his will.'[1] The judgement was based on the principle that foreigners were not entitled to hold lands in India whether within the limits of Calcutta or outside it, because the sovereignty of the Crown extended over the territories of India.[2]

Here was a conflict between two principles: The one held by the King's Court that the Crown claimed sovereignty over Indian territories; the other held by the Advocate-General that, though the claim was indisputable, the Government of India could allocate land to foreigners as the functions of government were committed to their care. The question was all the more difficult because, as Lord Auckland said, 'the law and the relations in which India has stood towards the Crown have been involved in much obscurity'.[3]

The decree of the Supreme Court on General Martin's will had an important repercussion. The Armenians in Calcutta, described by the Governor-General as a highly respectable body, took fright. Most of them had no real cause to fear the decision of the Court, because all those who held land when the British acquired sovereignty in India were British subjects. Persons in that community not entitled to the rights of a British subject were comparatively few. The Government assured them that they would refer the matter home and that the judgement of the Supreme Court did not in any way affect their claim to hold land in India.[4]

But though the Armenians had no cause to take fright, the decision of the Supreme Court materially affected foreign interests. 'The tenure', said Lord Auckland, 'of a very large share of property held by Europeans in India is impaired by the late decision. The changes in the possession of property have of late years been most extensive, and whereas it has been once held by a foreigner or by a partnership in which a foreigner (e.g. a native of Serampore) has had a share, the title has ceased to be a good legal title or at

[1] *I.L.C.*, 25 July 1836, No. 5. [2] Ibid. [3] Ibid., No. 6. [4] Ibid.

least is questionable.'[1] The judgement affected Government because they themselves were often parties to such transactions. Within a few days of the time when the question was being discussed, the Government had sold a silk factory to a Spaniard, Larneletta.[2] Lord Auckland, therefore, with the consent of his Council, proposed to refer the matter home with a view to securing an Act of Parliament on the subject. Such differences of opinion did not however spoil the good relations of the Court and the Council. As the law then stood, the Court was perfectly justified in taking the action it took, and though it was opposed to the interests of the Government, the Council made use of the opportunity, by referring the matter home, to try to clear up the obscurity of the law.

It was Macaulay's idea to make the most of the close alliance between the Court and the Council by introducing reforms into the procedure of the Supreme Court. There was a twofold advantage in such a course. A reform in the procedure of the Supreme Court was in itself necessary; and such a reform in the Court's procedure could be tried as an experiment which if successful could be introduced into the judicial system of the Company on a larger scale. 'There are some reforms', said Macaulay, 'so important that, however strong may be the general reasonings by which they are recommended, it is desirable that we should try them on a small scale and watch their effect before we introduce them into the laws under which a hundred millions of people are to live.'[3] So he hoped to use the Supreme Court as an experimenting ground for the reorganization of the judicial establishment of the Company.

The reforms which he devised were by no means elaborate. The Supreme Court was a Court of Equity as well as of common law. But it was far more important as a Court of Equity because large property was often at stake in suits of equity coming before it. The usual proceeding in a suit of equity was that questions were framed and written depositions were taken in answer to them. The Court then decided the question at issue from these depositions. This procedure was dilatory and highly expensive and Macaulay wanted to substitute viva voce examination in place of the Court's elaborate procedure. He summed up the defects of the existing system in a characteristic manner. 'It is of all modes the

[1] *I.L.C.*, 25 July 1836, No. 6. [2] Ibid., No. 5.
[3] See Minutes, No 14; 16 May 1836.

most dilatory, the most expensive, and the most unsatisfactory. A question which would be settled by viva voce testimony in a minute may occupy lawyers, solicitors and officers during a year. A question which might be settled by viva voce evidence without the cost of an anna may cause an outlay which shall ruin a respectable family. I know from unquestionable authority that in a late suit in equity a portion of the depositions which was altogether immaterial to the case cost the enormous sum of five thousand rupees.'[1] And after all this expense and delay, the Court still often could not get hold of the real facts. It then acted in its other capacity as a court at common law, summoned witnesses and examined them orally. 'In this way', said Macaulay again, 'a question with respect to which written questions and written answers have been accumulating during a year is sometimes settled in an hour.'[2] From this Macaulay naturally concluded that all the initial expense and delay would have been spared if the Court had adopted this simple procedure straight away.

The proposal was warmly supported by Macaulay's colleagues. He had already sounded the opinion of the judges in informal discussions with them and they also were in favour of introducing viva voce examination in suits of equity. They, however, pointed out to the Government the unfruitful labours of the Chancery Commissioners in England on similar questions. The Commissioners could not devise any plan for taking evidence in the Court of Chancery which might remedy the glaring defects 'without producing results more injurious to the suitor'[3] than those found in the existing system. To Macaulay, however, the analogy between the Supreme Court and the Court of Chancery was itself defective. 'The jurisdiction of the Court of Chancery', said Macaulay, 'extends equally over all England; and witnesses cannot without the greatest inconvenience be summoned from Cornwall and Northumberland to appear in Westminster Hall. But the interests which are under the protection of the Supreme Court are to a great extent concentrated at Calcutta, and in the majority of suits instituted in that Court. All the evidence is within two or three miles of the judges. Here, therefore, there is no excuse for following the more tedious, the more costly and the more unsatisfactory mode of procedure.'[4]

[1] See Minutes, No. 14; 16 May 1836. [2] Ibid.
[3] *I.L.C.*, 13 June 1836, No. 2, para 5. [4] See Minutes, No. 14; 16 May 1836.

Lord Auckland had, however, one doubt. He stretched his imagination and asked what would happen when the Courts of Equity in India ceased to be for the narrow confines of Calcutta alone and had a more extended jurisdiction. Would not those problems which appeared real to the Chancery Commissioners in England be magnified in India?[1] Lord Auckland's criticism was sound if the amalgamation of the King's Courts with the courts of the Company was in immediate prospect. But considering that the Supreme Court continued to be a Court of Equity for Calcutta for some twenty-five years more, it was not necessary to continue with it the two evils of the Supreme Court—dilatoriness and high expense. Therefore it was decided on all hands to refer the matter to the Law Commissioners with a view to drafting an Act in consultation with the king's judges, with whom the matter I believe slumbered for many years.

In the preceding chapter, I have shown how Act XI of 1836 put an end to the Supreme Court as a Court of Appeal from the mofussil. The storm thus raised against it had scarcely blown over when the Government received a number of petitions, mainly from the English community, praying the Government to extend the jurisdiction of the Court to the suburbs of Calcutta.[2] The request was not made singly. Coupled with it was a demand for the extension of trial by jury to civil suits in the Supreme Court and the so-called 'revival' of the court of quarter-sessions for the town of Calcutta.

The demand for trial by jury was not a new idea. The British inhabitants of Calcutta had agitated for it not long after the institution of the Supreme Court. The judges of that Court had declared in 1779 that 'except in criminal cases they had no authority to try by jury'.[3] Petitions were immediately made to the Supreme Court and to Parliament without much effect. These petitions came purely from the English community in Calcutta. But in 1832 a petition was sent to Parliament by British and other inhabitants of Calcutta, numbering over three thousand persons.[4] Whether it was because of that widespread interest in trial by jury in civil suits or as a result of the reforming zeal of Lord William Bentinck, a regulation was passed in 1832 as an experimental measure introducing trial by jury in the judicial establishments of the Company.

[1] *I.L.C.*, 30 May 1836, No. 7.
[2] Ibid., Nos. 11–15.
[3] Ibid., No. 11.
[4] Ibid., No. 12.

The movement also favoured the introduction of the jury system in the Supreme Court where the British Trade Association of Calcutta thought that such a reform was most essential.[1] The great body of witnesses in the Supreme Court were Indians. The judges could not assess the real value of evidence because they rarely mixed with Indians and knew neither their language nor their customs. The connecting link between the judges and Indians coming before them was really the jury which, according to the Association, was intimately conversant with the language, thoughts and customs of Indians. The Association further thought that perjury would be considerably checked by the examination and cross-examination of witnesses before juries. The Governor-General himself had a great opinion of trial by jury: 'I have learnt', said he, 'to have confidence in its results, and I feel that the calling in of the aid of the respectable part of the community, and connecting it with the administration of law, would tend at once to raise the character of the people and to give them a confidence in legal decisions.'[2] But there were also objections to trial by jury in India. 'I admit', continued Lord Auckland, 'that when the population is limited, when all parties are known to all judges, when the alleged facts of important cases are fairly known, and in some degree prejudiced, the introduction of jury-trial may be pregnant with danger, and I should, therefore, in India, unwillingly see it partially and inconsiderately attempted.'[3]

So the idea was set aside despite the Government's appreciation of the attachment of the petitioners to one of the most valued institutions of England. There were evident objections to extending the system of trial by jury to civil suits. The Supreme Courts were courts of original jurisdiction; and Ross, who closely followed Bentham, thought that trial by jury in courts of original jurisdiction was attended with great disadvantages. A jury, to ensure always an honest decision, ought to be chosen by lot from a numerous body of persons qualified to serve on it and must decide on matters of fact at a single sitting. But in India the number of civil suits was large and that of persons qualified to be jurors small. Naturally it would have caused no end of inconvenience to that small body if it were called in every other time to serve as jurors. But that was hardly the main objection.

[1] *I.L.C.*, 30 May 1836, No. 15. [2] Ibid. [3] Ibid.

The introduction of trial by jury in courts like the Supreme Court in civil suits was likely to be a bar to a thorough investigation of causes coming before them. Moreover, an original suit could only be rightly decided after a complete investigation of its merits, after all the evidence had been well sifted. In civil suits naturally the documentary evidence was always very important and it was necessary for a good decision that no part of it should be overlooked. The judge, therefore, must exercise close supervision at all stages of the trial and see that all possible evidence had been collected and brought before the Court.

But it was more than impossible that all this laborious process could be gone through in a single day. It would take many days and very likely many weeks. And it would be unfair to the jurors and to the ends of justice to make them sit in court for more than a day. Thus Ross held that the introduction of trial by jury was only possible in appellate courts where the jury could pronounce its verdict on matters of fact after the preliminary investigation had been well conducted by the court of original jurisdiction.[1]

The petitioners thought that it was possible to increase the number of persons able to serve on the jury by extending the jurisdiction of the Supreme Court to the suburbs of Calcutta. By this they calculated that juries could be empanelled from a body of three to four thousand persons. Considering that the Supreme Court examined about a hundred and fifty civil cases every year, the jurors would not be overtaxed in performing their duties.[2]

The suburbs of Calcutta were not to be brought within the jurisdiction of the Supreme Court only with a view to ensuring a steady and adequate supply of persons qualified to serve as jurors. The petitioners demanded it because they believed that the jurisdiction of the Court as defined by an old proclamation badly needed revision.[3] Over forty years had elapsed since the jurisdiction of the Court had been defined. Since that time old Calcutta and its environs had changed. Suburbs had grown up closely allied with the city. The petitioners showed that such had been the increase of the city and its population that outskirts which had been wild jungle forty years before had become densely inhabited. The suburbs of Howrah, Kidderpore, Entally and

[1] See *I.L.C.*, 30 May 1836, No. 18: minute by Ross. [2] Ibid., No. 15.
[3] It was issued in 1794.

Cossipore were inhabited by Europeans and East Indians in numbers greater than in Calcutta itself. The chief European factories which formerly had offices in the city were situated in the suburbs. Nearly all the population, therefore, living outside Calcutta earned its livelihood in the city. The growth of these suburbs, therefore, produced the anomaly that persons who worked and earned their living in Calcutta were amenable to laws different from those of the city simply because they happened to sleep outside its jurisdiction. They transacted their business in the city, made their contracts and obtained their credit and employment there, and yet were outside its laws.[1] It was reasonable, therefore, that when the interests of the suburbs were so closely associated with those of the city they should not lie within two different jurisdictions but should be governed by a more consistent and uniform plan.

The petitioners had presented a good case and here they did not lack the support of even old Acts of Parliament. By the Charter Act of 1793, the Governor-General in Council was empowered to define the limits of the town of Calcutta but he had no authority to extend them. The error was found out, it seems, after over twenty years, when by an Act of George III in 1815, special provision was made empowering the presidency Governments to extend the limits of Calcutta, Madras and Bombay because the growth of population made such a change expedient.[2] It was also laid down that the Governments could extend the limits of the presidency towns on future occasions.

It seems, however, that the Governments did not make use of their power. In 1836, it was not possible that an extension of the Supreme Court's jurisdiction would be favoured by the Council. The Governor-General and all members of Council without exception were opposed to the principle of the Court's extension. The Council was aiming at the introduction of a uniformity in law which they thought would answer the purpose of the petitions and accomplish their principle. An extension of the Supreme Court's jurisdiction at such a time would merely have been an intermediate step, not leading indeed to the purpose in hand but only disturbing 'the rights and habits of a numerous population' and forcing 'new expenses upon them, against the wishes of many amongst them'

[1] *I.L.C.*, 30 May 1836, No. 15. [2] 55 Geo. III, c. 84.

and subjecting them 'to a jurisdiction, to which they are not accustomed, and the advantages of which they would not appreciate'.[1]

The hands of the Government were strengthened by two successive petitions addressed by Indians residing in the suburbs of Calcutta.[2] They looked with great apprehension on the effort to extend the jurisdiction of the Court, expressing their complete satisfaction with courts of the Company and praying that they might not be subjected to a highly expensive and dilatory court. They said that rich persons owning lakhs of rupees had been ruined and driven to fly to Serampore and other places where they were secure from the Court's jurisdiction. They represented how a suit in equity for Rs. 45,000 had involved a total cost of about Rs. 25,000 including the charges of counsel and attorneys. And after all this money and time had been spent the suit might still be left in the balance. In their own words they earnestly prayed Lord Auckland 'to extricate' them 'from the approaching affliction'.[3]

Unlike these two demands, however, the third demand for an intermediate court like the old court of quarter-sessions for the trial of minor offences and misdemeanours committed within Calcutta was not waived aside as inexpedient. There was a real need for it. Since the time it fell into disuse, the Supreme Court, as the petitioners expressed it, had been 'occupied with matters greatly beneath its dignity'.[4] The court was also encumbered with increased work. A partial remedy was secured by increasing the power of the magistrates and thus transferring some of the causes to be examined by them. There were many drawbacks, however, in this system. An eminent barrister who was himself a magistrate said in 1826 that in order that the Supreme Court might not be overwhelmed with suits that came under its jurisdiction, and often to avoid the trouble of commitment, the magistrates were in the habit of punishing an accused person for a lower offence than that of which he was really guilty. 'Thus a burglary was reduced to petty larceny, and the knowingly receiving of stolen goods to having the goods in possession without being able to give a satisfactory account of them.'[5]

[1] *I.L.C.*, 30 May 1836, No. 19: Governor-General's minute.
[2] Ibid., No. 17; and 13 June 1836, No. 10. [3] Ibid., 13 June 1836, No. 10.
[4] Ibid., No. 11. [5] Ibid., No. 21: Shakespear's minute.

This really amounted to conniving at crime and punishing it inadequately. The remedy was the creation of an intermediate court of quarter-sessions. The Trade Association found the necessity of this Court of Appeal all the greater because by an Act of the Legislative Council, a single magistrate could sit in judgement over suits where English law required two. The petitioners wrote that when they considered 'that by the 9th Section of the Indian Criminal Act (9 Geo. IV, c. 76) two J.P.s may commit to hard labour for a twelvemonth, and also inflict two public whippings, they cannot but consider that the alteration of the English Act of Parliament and the vesting of such power in one individual has a nearer relation to the spirit which prevails in governing India under Muslim rather than under British rule'.[1] The Association found fault with some members of the magistracy who did not understand the language of the country, though it was one necessary qualification of a magistrate. They therefore recommended the appointment of a sufficient number of honorary magistrates. Shakespear reminded the Council, however, that this experiment had been tried and found wanting. In 1819-20 about twenty respectable men were made honorary magistrates, but they were not free from their private occupations for two consecutive days and were therefore unable to decide matters of any importance which necessarily took more than a day. When they, therefore, sat in judgement once a fortnight, they had to settle disputes on matters like the conservancy of the town. Tired in six months of such uninteresting work, they had given up attending the courts for good.[2] The Council, however, took no immediate steps to constitute the court of quarter-sessions. The matter was forwarded to the Law Commission for further consideration.

The course of events I have related in this chapter justifies the assertion of the judges of the Supreme Court, that much good would be the result of bringing the functions of Government under one control. The second conclusion which is obvious is that the Indian community in Calcutta did not favour the Supreme Court and even dreaded it. It is necessary to remember these two points when studying the Supreme Court at Madras and Bombay.

[1] *I.L.C.*, 30 May 1836, No. 15. [2] Ibid., No. 21.

VIII

THE SUPREME COURT AT MADRAS AND BOMBAY

In the last chapter, I have shown with what fear and anxiety the Indians in the neighbourhood of Calcutta regarded the attempt to extend the jurisdiction of the Supreme Court. Exactly opposite were the sentiments of two petitions addressed to Parliament by the Indian inhabitants of Bombay early in 1831. Unlike the Bengalis, they did not dwell on the abuses of the Supreme Court or on its dilatory and expensive procedure. On the other hand, they warmly praised the Court's impartiality in judgement and their great solicitude for the people. 'At Calcutta, Madras and Bombay', wrote the petitioners, 'are the most numerous assemblages of the natives of India, and of foreign countries in Asia; they are of every variety of religion, (caste) and sect; diversified in sacred rites and observances, and in social manners and usages. The Supreme Courts of Judicature, when they have jurisdiction over the matter to be tried, whether civil or criminal, have also power to summon witnesses, and to execute all their orders and judgements, whether by arrest of the person or by seizure and sale of property, throughout the whole of the territories under the presidencies at which those Courts are respectively established. Those Courts in the execution of their processes and orders, have always been scrupulously observant of the religious doctrines, rites and observances, and of the manners and usages of the natives. The experience of more than half a century at Calcutta, and of more than a quarter of a century at Madras and Bombay, has proved that life, property, character and personal liberty, can be protected by His Majesty's courts of justice, without violation of the religions, manners and usages of the natives.'[1]

This is an extraordinary statement in face of the adverse opinion of Calcutta on the Supreme Court. There is no evidence to show that Madras opinion was favourable to the Court. Macaulay believed that at Madras the Supreme Court had 'fulfilled

[1] *P.P.* (65/320 A), pp. 534-5.

its mission' and 'done its work' by beggaring 'every rich native within its jurisdiction' and was 'inactive for want of somebody to ruin'.[1] If Macaulay's assertion was true, there is hardly any reason to believe that opinion at Madras could have been very different from that of Calcutta. Replying to a question before the Select Committee, David Hill, of the Madras Civil Service,[2] said that in Madras not many people knew about the Supreme Court, beyond the presidency town; 'but where they do', said he, 'I imagine they look on it with terror, as an unseen instrument likely to involve them in ruin'.[3]

But though Bombay could not agree with the opinion of either Calcutta or Madras, the petition referred to above may be taken as a good indication of the Court's popularity in the island of Bombay. It was signed by over four thousand persons described as 'respectable inhabitants of Bombay of every religion', many of whom were personally known to Major-General Sir Lionel Smith, who was an important witness before the Select Committee. Sir Lionel bore testimony to the partiality of the island of Bombay for the King's Court.[4]

What was the cause of this peculiar partiality in Bombay for the Supreme Court, which though satisfying the needs of the towns of Calcutta and Madras was never regarded by them with attachment and which certainly was unwelcome to persons outside its jurisdiction? In trying to explain it, it is necessary to leave much to speculation and surmise. For how else can one explain the psychology of men and assign set reasons for their likes and dislikes? There is one significant and striking fact, however, in the petition of the Bombay inhabitants to Parliament. It seems clear from it that they had a tendency to compare the Company's Government with that of the king and Parliament in England. The tone of their petition is unmistakable in its feeling of thankfulness for whatever Parliament had done for the people, how it had established independent courts in the three presidencies to protect their religions, opinions and persons, and to dispense

[1] See Minutes, No. 12; *I.L.C.*, 3 October 1836, No. 5.

[2] David Hill was Chief Secretary to the Government of Fort St George for a good many years.

[3] *P.P.* (735-iv) xii, pp. 363-4.

[4] See Major-General Sir Lionel Smith's evidence in *P.P.* (65/320 A), pp. 537-53.

justice with a detachment which preserved their self-respect and entity. But while warmly praising Parliament in this manner, there was a tendency to condemn the Company's Government, especially for establishing provincial courts which 'stamped upon the natives of India the character of a conquered, distinct and degraded people'.[1] The provincial courts were accused of being inefficient; the judges were said to be wanting in the knowledge required to dispense justice. Nor was this all; the judges were accused of imprisoning people falsely, without cause or proper trial.

It is not difficult to explain why this difference between the Government in England and that of the Company struck the people. Since its establishment in Bombay in 1823, the Supreme Court had had recurring troubles with Government, so much so that the Court had taken upon itself the task of a party in opposition. The last important struggle the Court had had with the Council was during the time when Sir John Malcolm was Governor of Bombay. It will be out of place to go into the details of that struggle but it is necessary to note that the Court had issued a writ of habeas corpus commanding a boy named Moru Raghunath, resident in Poona, to be brought to Bombay. The boy was a distant relation of the Peshwa and was under the protection of Government. In another case the Court had by a similar process released and brought to Bombay a person sentenced to two years' imprisonment by the criminal judge at Thana.[2] By means of a most ingenious argument, it had stretched its limited jurisdiction to other parts of the presidency, at least in proceedings not requiring the help of a jury. But the Court had more than a match in the person of Sir John Malcolm. He was not going to give in. He was going to see who was 'superior in the Deccan'—the King's Court or the Government. He gave orders not to make any returns to writs issued by the Supreme Court outside its proper jurisdiction. The Governor in Council addressed a letter to the judges informing them of his intention and requesting them not to proceed with their legal course which was obstructing the function of civil government and thwarting the State policy. The letter incensed Sir John Grant, one of the judges on the bench. He saw in it

[1] *P.P.* (56/320 A), p. 536.

[2] See Kaye: *Life of Malcolm*, Vol. II, p. 513n.

a threat to the proceedings of the King's Court and an attempt to seduce him from his high duty to suit the convenience of the Government and to make him forget his sacred oath and allegiance. Grant not only wrote along these lines to the Government, but in open court delivered a speech in similar terms. He spoke of the insult the Government had hurled at the Court in addressing a threatening letter brought by a common servant. It was their duty to submit a humble petition to the Court. 'Within these walls', said Grant, 'we own no equal, and no superior but God and the King. The East India Company, therefore, and all those who govern their possessions, however absolute over those whom they consider their subjects, must be told as they have been told ten thousand times before, that in this Court they are entitled to no more precedency and favour than the lowest suitor in it.'[1] To Grant the Government's letter read like a threat of coercion, but he remained undaunted. 'Private ease and comfort', said he, 'have never been of any consideration with me; but, as in the moral conduct of public men it may be laid down as a golden rule that nothing can be given in exchange for an honourable reputation, the public shall find me at my post, and although I cannot argue with those whose strongest argument consists in physical force, I will resist with the utmost of my ability any attempt to dictate to my conscience or to control my public functions.'[2]

I need not go into the details of the struggle that followed: of Sir John Malcolm's strong attitude, of the Court's forceful though unsuccessful attempts to secure returns to their writs, of the refusal of the judge to sit in Court and the Governor's counter-stroke in promising to protect the persons and property of the inhabitants of Bombay, and finally of Lord Ellenborough's letter to Malcolm supporting him in his policy.[3] What seems to me important is that the whole struggle, and especially the attitude of the judge, was calculated to bring the Government of the Company into contempt and to convince the public who were very interested that while the judges of the Supreme Court were trying to administer justice in a lofty spirit of detachment, the Government were only trying to hinder them in their high duty.

[1] See Kaye: op. cit., p. 508. [2] Ibid., p. 518.

[3] Sir John Grant, with admirable frankness, acknowledged afterwards that he misinterpreted Malcolm's letter. See Kaye: op. cit., p. 540 and note.

There is hardly any doubt that people were interested in the struggle. It was a superb sensation, and like all sensations must have attracted a good many people. Malcolm himself told the story of the editor of a vernacular newspaper who was requested not to give publicity to the disputes between Court and Council, and especially not to publish translations of charges from the bench which Malcolm thought were likely to lower the Government in the eyes of the people. 'The man was very civil', wrote Malcolm, 'but plainly stated that the articles to which I objected increased the sale of his paper, that his only object of inserting them was pecuniary profit; and if Government gave him as much, or a little more, than he gained, that they should not be inserted.'[1] Indeed people took so much interest in the struggle that a Brahmin amused Malcolm by comparing it to the Maratha factions between Raghoba and the Bar Bhai. 'I must,' wrote Malcolm to Lord William Bentinck, 'I suppose, stand for Raghoba, and the Bar Bhai for the twelve judges.'[2] Another Brahmin calmly inquired of the Governor, when the case was before the Privy Council, which authority would be established finally over the country, that of the Government or that of the Supreme Court.[3]

The struggle thus developed in the people an inclination to compare the Government of the Company with that of the king to the disadvantage of the former. Moreover a mysterious glamour attached to the latter. The Supreme Court represented the king, but that was not its only qualification for popular affection. It was so independent, so solicitous for the welfare of the people and always ready to rescue them from the fetters of arbitrary or even false imprisonment. Such must have been the sentiments of the people of Bombay when they drafted the petition to Parliament, exalting the Supreme Court and condemning the Company's mofussil courts. They were impressed with the writ of habeas corpus, that wonder-working charm in Latin, which instantly set at liberty prisoners condemned to a long term in gaol by what were thought to be wrongful judgements. That small order represented an authority at once higher and more just than the Company's Government, and made a great appeal to the imagination of the people. When there was an idea in the air

[1] Malcolm: *The Government of India*, p. 138.

[2] Kaye: op. cit., pp. 512–3. [3] Malcolm: op. cit., Appendix C, p. 150.

that the provincial courts were guilty of false imprisonment, many must have thought that an extension of the jurisdiction of the Supreme Court would save them from arbitrary punishment.

I have so far tried to solve the riddle why Bombay, unlike Calcutta and Madras, had a great regard for the King's Court. The attitude of the Court during the period of my survey was not likely to lessen that regard. From 1817 down to the time when its legislative powers ceased,[1] the Government of Bombay had passed certain Acts levying taxes on the island of Bombay. These Acts were not registered in the Supreme Court as the Government evidently had classed them as 'Revenue Acts' in which, by Pitt's Amending Act, the Supreme Court had no jurisdiction.[2] The Government seems to have had no trouble in enforcing the Acts and collecting the revenue till the year 1832. When in that year a suit came before it, the Supreme Court promptly declared that the regulation in question[3] had no validity in law as it was not duly registered in the Court. The judges declared that 'a local assessment for a peculiar purpose' is not 'revenue' as that word is to be understood in Act XXI of Geo. III.[4] Thus all Acts levying taxes for particular purposes had no force in law unless they were registered in the Court. This decision of the Court was not without its effect. The court of petty sessions found it difficult to collect house-tax on shops and stalls, which it was authorized to realize by a government regulation of 1827. Some of the inhabitants of Bombay showed an inclination to refuse paying taxes imposed by that regulation.[5]

The Government were nonplussed. The Advocate-General was consulted. He gave as his opinion that registration of the Act in the Supreme Court was necessary.[6] Sutherland, a member of the Council and also the chief judge of the Bombay Sadar Dewani Adalat, said that it was no use trying to support the Acts against the declared will of the king's judges. A remedy must be found to

[1] 3 & 4 Wil. IV, c. 85. [2] 21 Geo. III, c. 70.

[3] Regulation XIX of 1827: Rules for the collection of the tax called market fees on shops and stalls, on music, and on the erection of wedding shades and other places of public amusement.

[4] Clerk of the court of petty sessions to the Chief Secretary, Bombay Government, 4 September 1835. See *I.L.C.*, 1 February 1836, No. 16.

[5] *I.L.C.*, 1 February 1836, No. 15.

[6] Ibid., No. 16. Advocate-General to the Government of Bombay, 24 July 1835.

legalize the Acts declared illegal. Two courses might be suggested to the Indian Legislative Council, empowered by the new Act to legislate for the town of Bombay as well as for the Supreme Court. They were either to pass new Acts authorizing the Government of Bombay to collect the taxes under unregistered Acts, or to pass an Act of Indemnity and declare that the laws in question were valid.[1] The papers were sent to the Legislative Council early in 1836.

Immediately after the papers had been sent, the Bombay Government considered a petition[2] from wheel-tax farmers which gave added point to their request. Sorabji Framji and Company had been authorized to collect a tax on vehicles in Bombay by two regulations of 1827.[3] In March 1835 they seized the horse of one Palanji Dhanji in order to realize the small sum of Rs. 12 overdue from him as the tax on his phaeton. The horse was sold and after deducting the tax the balance was offered to Dhanji who refused it and filed a suit against the farmers in the Supreme Court. The farmers petitioned the Government that they should be defended by the law officers. The Government refused for the simple reason that they could not properly defend the case. The farmers had to fend for themselves. As was expected they lost the case, and had to pay damages to the amount of Rs. 350 and full costs on both sides amounting to Rs. 1,600.

Before the Court decided the case, the attorney of the firm consulted Le Mesurier, the Advocate-General, for his opinion on the matter. The Advocate-General made no secret of his view. He declared that in addition to the unjustifiable seizure of the horse for a trifling sum, the action could not be defended because the regulation under which the tax was collected was invalid. The farmers ended their petition by saying that they owed the Government a sum of about Rs. 11,000, which their attorneys advised them to decline to pay unless they were protected by Government in the exercise of their functions.[4]

Unlike the law officer, the collector of land-revenue in a report he made on the question wrote: 'But the farmers should not be allowed to suppose or to believe that Government entertains any

[1] *I.L.C.*, 1 February 1836, No. 16. Sutherland's minute, 31 July 1835.
[2] Ibid., 15 February 1836, No. 5. Petition, 19 December 1835.
[3] *Bombay Code Regulations*, XIX and XXXII of 1827.
[4] *I.L.C.*, 15 February 1836, No. 5.

doubts as to the legality of this tax.'[1] The collector did not understand why the law officers could not see their way to defend the farmers. He suggested that the farmers should be promised every reasonable help from the Government in their collection of taxes. It was necessary on the other hand that the farmers should be more careful in their methods. They should not enforce dues on vehicles which were out of use, and should on no account seize property in excess of their claim. The Government for their part should not be very strict in realizing every rupee of the contract.

It did not, of course, need this case to convince the Government of India of the necessity for passing an Act to relieve the embarrassment of the Bombay Government. Even before the Council had heard of it, they had published a draft Act on the day the papers from Bombay were placed on the table. The draft proposed to declare 'that the legality of acts done and levies made' under certain regulations (which were quoted[2]) of the Bombay Code, should not be questioned by any court of law whatever, and 'that for the future the provisions or regulations' passed in the year 1827, 'shall constitute the law for the collection of several taxes therein enumerated and for all purposes for which they were passed'. After the interval of six weeks the draft was duly passed.[3]

The question was thus closed, and by an Act of the Legislative Council the Supreme Court of Bombay was debarred from questioning the validity of the specified unregistered Acts of the Bombay Code. If the Government were a little inconvenienced, they had themselves to blame, for as soon as they found that the legality of their Acts was questioned they should have followed the process which they followed in the end.

One of the problems confronting the Government of Fort St George concerned the power of the justice in session to levy and collect assessment in order to provide Madras with such municipal amenities as the paving and lighting of streets. This power was vested in them by an Act of George III in 1793.[4] The method

[1] *I.L.C.*, 15 February 1836, No. 5. See the report by the collector of land-revenue, Bombay, 9 December 1836.

[2] Regulations III and IV of 1817; VII of 1818; IV of 1821; XIX, XX and XXI of 1827; XV of 1828; XX of 1830; II and III of 1831; I and X of 1833.

[3] Act VII of 1836.

[4] See Dodwell: *Report on Madras Records*, pp. 60, 61.

of assessment, however, had given rise to many disputes between the Government and the justices, the most definite cause of which was the claim of the justices to tax certain privileged persons. These were the vatandars and mirasdars of villages lying on the outskirts of the town of Madras but within the jurisdiction of the Supreme Court. They had been exempted from taxation for many centuries, not only under the Hindus and the Muslims but also under the British. In 1810, the justices intimated their intention of cancelling their privileges and of collecting assessment from them, but on receiving a petition from the interested parties the Government intervened in their favour with success. Ten years later, Government again had to persuade the justices not to tax the mirasdars.[1]

In 1822, Sir Thomas Munro wrote an important minute on the anomaly of the power of the justices in levying taxes independently of the Government. He feared that discontent might result from the action of the justices in forcing taxation from 'all such Brahmins, priests and other privileged persons as from the usage of the country are exempted from such taxes'. Munro, who set great store by these privileges, strongly defended them for political reasons, and recommended that the power of levying assessment should be transferred from the justices in session to the Government. The authorities at home, he rightly thought, excluded the Government from exercising any authority over assessment, because they perhaps thought that the justices had more sympathy with the people and would work in their interests. But nothing, according to Munro, was more incorrect. The justices were far removed from the people. They had no common sympathy with them and did not even understand them. Therefore, thought Munro, the Government should be entrusted with 'the direction of the assessment or at all events the power of modifying or remitting it whenever it is apprehended that it might excite disaffection or outrage'.[2] As it was, the justices had the power to discard privilege and create disaffection in the people; and the Government, who had nothing to do with it, would have to pay for the rashness of others.

For a good many years the justices did not raise the subject again. In 1836, however, they intimated that they thought of taxing the mirasdars of villages falling within the jurisdiction of

[1] *I.L.C.*, 15 July 1836, No. 11. See a petition of vatandars and mirasdars to Lord Auckland, 23 June 1836. [2] Ibid., 25 July 1836, No. 10.

the Supreme Court. Government were confronted again with the old problem. They again submitted Sir Thomas Munro's minute to which I have referred. The papers also included a petition from the mirasdars addressed to Lord Auckland begging him to maintain their privileges and put an end to the recurring cause of vexation.[1] The Government of Fort St George at last succeeded in their efforts. Macaulay immediately published a draft Act which conceded their claim. The justices were no longer to levy any assessment without the consent of Government, which had also the power to exempt any district from payment of the assessment. It was duly enacted on 7 November 1836.[2] Thus was removed an anomaly which, as Sir Thomas Munro pointed out, permitted the justices to tax the people without the knowledge of Government.

This triumph of the Government of Fort St George over the justices in session does not really fall within the limits of this chapter which deals with the relations of that Government with the Supreme Court. I took the opportunity of recounting it here because the justices in session, though they had no connexion whatsoever with the Supreme Court, resembled it in their relations with the Government. That is why Munro speaks in the same breath of the justices in session and of the Supreme Court.

On 14 November 1836, the Council received a petition[3] from a zemindar subject to the Government of Fort St George and a letter[4] from that Government. I shall first relate the story of the zemindar as he gave it in his petition.

Valangapuli Tevan[5] was hereditary zemindar of Chokampatti in the district of Tinnevelly. He was a big zemindar paying annually over Rs. 25,000 as tax on his lands. He paid his land-tax regularly until 1830. Then, as the zemindar stated, he suffered great loss owing to want of rain during successive years. Southern India was faced with famine and he was unable to collect rent from his ryots with which to pay his dues in 1831. The collector of Tinnevelly immediately put the estate under an Amin of Government in order to collect the dues. By 1832, these amounted to nearly Rs. 33,000 in spite of the fact that the estate was then under Government superintendence. When the collector of the district

[1] *I.L.C.*, 25 July 1836, No. 11.
[2] Act XXVIII of 1836.
[3] *I.L.C.*, 14 November 1836, No. 6.
[4] Ibid., No. 12.
[5] See *Gazetteer of the Tinnevelly District.*

was changed the zemindar presented a petition to the new collector in the hope of regaining control of his lands and of obtaining a reasonable period of time in which to settle his arrears. He was encouraged to do this by the success of the zemindars of Uttumalai and Chennagiri who were placed in the same position as he was and whose arrears exceeded two lakhs of rupees. The collector replied that on giving security his lands would be restored to him. He offered persons of unexceptionable security, but not one was accepted. The zemindar explained that this was the result of misrepresentations made by an intriguing writer and Naib Shirastedar in the collector's office known as the Mudali. As the zemindar stated, he was his avowed enemy and would have stopped at nothing to poison the ears of the collector against the zemindar. Again the collector of the district was changed, and again Valangapuli sent in a petition. It never reached the collector because it was intercepted by the Mudali. The next petition, therefore, was sent direct to the collector. An agreement was reached regarding the payment but suddenly the collector changed his mind and issued instead an order, that the zemindar must pay his arrears, amounting to nearly Rs. 74,000, before 23 December 1834, on pain of his lands being sold. It was hard on him to be ordered to pay such a vast sum; but still he might have found it possible by arranging a loan. He was not given the time, however, for on 8 December he was suddenly ordered to be present at the collector's office. While on his way to the office, his palanquin was attacked by several peons headed by the Naib Shirastedar. He was ordered out of his palanquin and subjected to gross insult. He was then imprisoned without trial or conviction. During his imprisonment, his land was put up for sale and bought by Government for the small sum of Rs. 8,000. He presented a petition from the Tinnevelly gaol to the court of circuit for the Southern Division asking why he had been interned. In due course he received a reply. The first judge on circuit found in the proceedings before him nothing against the zemindar to justify his being put into prison without the benefit of a trial. He therefore concluded that the Government must possess further evidence on which they had authorized the magistrate to imprison him.

I shall now touch upon the 'reason of State' for which Government had arrested the zemindar and transported him to

the fortress of Gooty, about 400 miles away from the Tinnevelly gaol in which he was originally lodged. There is every reason to believe that the Tevan was a true specimen of the turbulent zemindars who gave no end of trouble to Government. Perhaps he was worse than most, for though paying his dues regularly to Government till the year 1830, it was alleged that he often indulged in crimes of robbery and raised fraudulent claims to land by the removal of boundary stones. In spite of all this, it was not possible to convict him in a court of law, for it was alleged that he suppressed evidence against himself by bribery and even violence. Thus, it seems, Valangapuli Tevan pursued this course of wild buccaneering for many years with impunity: as far back as 1825, the collector of Tinnevelly was reporting suitable opportunities for Government to put him into prison. Since then magistrates and collectors had urged Government to place him under arrest as it was not possible to convict him by the ordinary course of law. In March 1834, the Fouzdari Adalat described him as a 'notoriously bad and dangerous character'. The second judge on circuit, described him as 'thoroughly depraved and good for nothing'.

The Government of Fort St George, therefore, imprisoned the zemindar on the recommendation of their district officers and the Fouzdari Adalat. He was arrested by order of Government, but it is doubtful under what authority. When, in August 1835, he was removed to the fortress of Gooty, a regular warrant of commitment was issued as required by the terms of Regulation II of 1819. For eight months, therefore, his imprisonment was not justified even by the terms of the regulation under which he was supposed to be interned.[1] This neglect on the part of the Government was noticed by the Legislative Council.

It would not do justice to the character of the zemindar to say that once in prison he remained quiet. He sent petitions to the Governor in Council, protesting against his arbitrary incarceration and pleading for release on grounds of failing health. The Chief Secretary to the Government, on the other hand, ordered his solicitors not to hold any further communication on the subject. His resources with Government being at an end Valangapuli next turned his eyes to the King's Court in Madras, and applied on 19 August 1836 for a writ of habeas corpus to be

[1] Regulation II of 1819 of Madras required a regular warrant of commitment.

issued to Captain Craig who was in charge of the fortress and who being a British European was said to be within the jurisdiction of the Supreme Court. The Court did not issue the writ in the first instance but granted a rule *nisi* why a writ should not be issued. In the meanwhile however Captain Craig was replaced by Lieutenant Yarde. A new rule *nisi* was therefore granted, and the cause if any was to be shown on 3 October 1836.[1]

It is interesting to note that the Court did not directly issue a writ commanding Yarde to bring Valangapuli Tevan to Madras. The Chief Justice, who was alone on the bench, was too cautious to take such decided steps as had been taken by Sir John Grant of Bombay. He only granted a rule to show cause why such a writ should not be issued. And it is doubtful whether he would even have granted the rule if the applicant had made it clear that he was in custody 'under a special order of Government founded on an express regulation'. The Advocate-General was sure that the Court could not then interfere with the orders of Government, for he said: 'The Court has no jurisdiction to judge of the right or wrong of the provincial regulations, or the expediency or legality of Acts, done actually in conformity with them. To hold otherwise would be in my opinion to surrender both the legislative and executive functions of Government to the discretionary control of the Supreme Court.' But the legal advisers of the zemindar were too ingenious to give away their position by a simple statement of facts. They avoided a direct reference to the order under which the zemindar was arrested and to the regulation on which the order itself was based. If they mentioned Regulation II of 1819, it was only to condemn its legal qualities, and to labour the obvious point that it was repugnant to the laws of the English realm. What they represented to the Court was that the zemindar found himself in custody in consequence of the proceedings in the magistrate's court at Tinnevelly. The object of this representation was plain. In a cause[2] tried before the Supreme Court, a legal precedent had been established that the Court had 'jurisdiction over a question, whether proceedings under court martial regulations were regular or irregular, sufficiently prompt or otherwise, right or wrong according to the rules for administering

[1] *I.L.C.*, 14 November 1836, No. 13: Advocate-General (Madras) to Chief Secretary, Fort St George.

[2] Subbaraya's case.

justice, under such court martial jurisdiction exercised in the provinces'.[1] To make assurance double sure, it was represented that the officer in charge of the fortress of Gooty where the zemindar was confined was a British European and so came within the jurisdiction of the Supreme Court.

The legal ingenuity of the zemindar's advisers was so far successful. On 3 October, the Court met to consider the zemindar's petition. George Norton, the Advocate-General, appeared before the Court to represent Government. He had his plan ready. He was not going to enter into a legal discussion as to why the writ should not be issued in favour of the zemindar, whether he had a right to it or whether the Court had the jurisdiction to award it. He had in his pocket an affidavit signed by the Chief Secretary to Government, that the zemindar was in custody under the order of the Governor in Council in conformity with Regulation II of 1819, that the zemindar was still in custody under the charge of the magistrate of Bellary in virtue of such a warrant and that Lieut. Yarde in commanding the sepoys who kept guard over the prisoner acted under the orders and on the responsibility of the magistrate.

Norton submitted these papers to the Court, stated how the petitioner had misrepresented his case and ably expounded the point of view of the Government that the Supreme Court had no jurisdiction to examine the executive acts of Government done in conformity with Government regulations. How could the Supreme Court interfere in Acts of State, when it had no jurisdiction to examine either the legal quality of a provincial regulation or the particular order of the executive based upon its authority? The law officer did not appear in Court to justify either the regulation or the arrest. 'To do that', said he, 'it would be requisite to lay before the Court all the causes and grounds of the enactment, which had been considered by the Government enacting it. The same course would have to be pursued in explaining the propriety or expediency of the act of the present Government under it. That was impossible to be done with just effect by the present course—and the judgement of these matters was with the Government itself, and not with the Court. If these subjects were to be discussed, and received before the Court, they ought to have the same means of considering and deciding on them as Government itself; and

[1] *I.L.C.*, 14 November 1836, No. 13.

both the legislative and executive functions of Government would in such case be transferred to the Supreme Court.'[1]

The zemindar's counsel in his plea for the issuing of the writ had to content himself mainly with irrelevancies, when he found the ground on which he had so ingeniously built cut from under his very feet. He again dwelt on the regulation as repugnant to the law of the English constitution, a regulation which gave power to Government without responsibility, and made individuals subject not to the law but the will of Government. He referred to the restricted powers of legislation of Government before the Charter Act of 1833; but in choosing his instances, he was careful to select only those which were binding on the presidency town, and which required registration in the Supreme Court. The Chief Justice noticed this defect in counsel's argument; and the Advocate-General put in a few remarks explaining 'the difference between the *limited* authority to pass the presidency regulations, and the *plenary* authority to legislate for the provinces'.[2]

The Chief Justice sitting alone found it hard to decide upon these intricate matters of jurisdiction. He lamented the absence of any definite enactment defining it. He found the warrant of commitment in order and declared that he could not adjudge the legal quality of a regulation, which had been for seventeen years on the Statute Book and which could only be reversed by another enactment. He suggested in the end that the question of jurisdiction could be decided by appeals to the Privy Council. This general statement was interpreted by some local newspapers and by the zemindar as recommending him to appeal from the Court's judgement to the Privy Council.

The judge discharged the rule *nisi*; and an important legal point was settled, though not decisively: that the Supreme Court could not examine the legality of provincial regulations or the expediency of Government Acts based upon them. The Government of Fort St George took this opportunity of renewing the old claim that the jurisdiction of the Supreme Court should be limited and defined by law in order to settle once for all any doubts on the subject. It was Sir Thomas Munro's idea[3] that

[1] *I.L.C.*, 23 January 1837, No. 103. [2] Ibid.

[3] Ibid., 14 November 1836, No. 12, para 5, Government of Fort St George's communication.

the jurisdiction should be limited and clearly defined and that it should have no power to question Government acts. This was essential, he argued, for the good government of the country and the security of revenue collection. Left as it was, it would often lead to the breakdown of the Government, and the conflict of jurisdiction would lower their authority. The Government, therefore, proposed that an enactment should be passed 'excluding from the jurisdiction of the Court all acts done by Government as a Government, and making such acts cognizable only by the superior authorities in England and further to prohibit the Supreme Court from issuing any process in the interior having for its ulterior object the investigation of the official acts of public officers, who are already amenable to the local tribunals.'[1] Nor was this all; the Government also suggested that the proposed enactment should cover the principle 'that the laws and regulations of Government should be judicially noticed in the Supreme Court without being specially pleaded',[2] and should have the same force in the territories of the presidency as public statutes in England.

These considerations did not weigh much with the Legislative Council. Sound as they were by themselves, they lost their force when mixed up with the particulars of the zemindar's imprisonment. The Supreme Court had not claimed the contested jurisdiction. The point whether a writ of habeas corpus should be issued or not was discussed only in the ordinary course of justice; and it went against the principle of Lord Auckland's Council to adopt any measure of interference with that course.[3] It might be said here in support of the principle of the Government of Fort St George that it was necessary to define the jurisdiction of the Court not only to save embarrassment to Government and conflict between the two, but also to save worry and expense to those individuals who under the mistaken idea that the Court had extensive jurisdiction filed suits which brought them nothing but expense.[4]

But while it was necessary to define the jurisdiction of the Supreme Court in terms of an enactment, the Government of Fort St George were most unfortunate in the illustration they chose to support their argument. The arbitrary imprisonment

[1] *I.L.C.*, 14 November 1836, No. 12, para 5.
[2] Ibid., para 6.
[3] Ibid., No. 14, para 2.
[4] Ibid., 23 January 1837, No. 103.

of the Tevan never appealed to the Legislative Council. His petition provoked them to inquiry and to examine the terms of the regulation under which he was interned. The question of the jurisdiction of the Supreme Court lost its point in the Council's admirable zeal to see that the terms of a local regulation were not stretched to suit the convenience of Government. Madras Regulation II of 1819 put them in mind of Bengal Regulation III of 1818.[1] They were analogous in principle and in their objects. They were not, as the Governor-General in Council declared, 'intended to meet direct breaches of the law, nor defective evidence, nor irreclaimable depravity, nor acts of individual atrocity, but cases of machination and disaffection, backed by political influence, dangerous to all constitutional authority, formidable to the general peace or to the political relations of Government.'[2]

Could any of these charges be levelled against the Tevan? Here was a man who might have been a robber chieftain, fraudulent, dangerous and good for nothing; but how could his depravity or crime justify Government in their headlong course of loosing against him all the force of an extreme measure calculated to check political unrest? The Government of Fort St George were wrong in arresting a man simply because the ordinary course of law was no match for his intrigue. Governments can make or unmake laws but cannot tamper with them. The one justification for the Government's action was that the confiscation of the zemindar's lands in lieu of his long-standing arrears was likely to incite him to revolt. They therefore acted in anticipation of a crime which could have been punished under that very regulation. Laws, however, are not for the prevention, but for the punishment of crimes.

Government's action was unjustifiable, and with admirable loyalty to the principle of justice and the spirit of law the Legislative Council recommended that the prisoner should be released. They did not, however, want the zemindar to consider his release a personal triumph over the Government. In releasing him, he was to be given 'a warning of the consequences of his violent and turbulent disposition', and to be required to furnish 'such security for good conduct as may fairly be demanded from him

[1] *I.L.C.*, 23 January 1837, Nos. 107 and 108. Governor-General's and Shakespear's minutes. [2] Ibid., No. 109, para 6.

with reference to his ability and present condition in life'.[1] The Council had no desire to interfere with any measures of the local Government, adopted under laws in force in Madras for the security of public revenue. But, they added, considering the utter insolvency of the zemindar, any 'further coercive measures towards him with a view to the realization of any arrears which may be due from the estate and for which his landed property had already been sold would have the appearance of undue severity'.[2]

I have so far described the relations of the Governments of Madras and Bombay with the Supreme Court. There is a moral to that conflict. The Courts, whether at Madras or Bombay, took a severely legal attitude in all questions which came before them. Their one aim was to uphold the majesty of law with an independence which cared little for the prestige or embarrassments of Governments; and who can deny them the credit for their independence in judgement and their intrepidity in its execution? If their judgements in any way threatened the breakdown of Government, it was not their fault. Their duty was to do justice and they did it well. True, in their zeal they may have overdone their part. They may have encroached upon the functions of Government when the terms of Pitt's Amending Act seem to have allocated the jurisdiction of the presidency towns to the Supreme Court and of the provinces to the courts of the Company. But the law could have been clearer. A law to be effective cannot afford to leave any loopholes, for an ingenious bar ruthlessly takes advantage of them; and when a court of law finds that a legal point is immersed in doubt, it is bound to give the weaker side the benefit of the doubt.

And it must be borne in mind that the independence of the Supreme Court was at once its merit and its weakness. For how could two rival bodies accommodate themselves in the scheme of the State, especially when one of them was a despotic Government following the tradition of eastern ideas of rule, and the other a legal institution western to the core in its spirit of liberty and its equalizing forces? Sir John Malcolm during his conflict with the Supreme Court declared that he was going to see who was master in the Deccan. That challenge was not one-sided. The Supreme

[1] *I.L.C.*, 23 January 1837, No 109, para 8. [2] Ibid., 3 April 1837, No. 36.

Court declared that within its four walls they owed allegiance to none but God and the King. Thus there was a perpetual state of rivalry, of challenge; of fear on the one side that the Court would extend its power without the ambit of its jurisdiction and distrust on the other that Government's brute force would maul their fine sense of justice. It was a hopeless state of affairs, possible only if all considerations of Government's prestige could be sunk in a glorious rule of law. But that is an ideal which even the freest of constitutions has not yet achieved.

In the beginning I alluded to one of the main reasons for establishing the Supreme Court in India.[1] It was admirable and does credit to its authors; but the Supreme Court, as a rival institution to Government, failed. What then could have been the alternative? The question suggests itself and I may be excused for indulging in the construction of imaginary institutions. One of the substitutes which I believe would have served the main purpose of the Supreme Court was to post Parliamentary envoys of high standing at the different seats of Government in India. These high and independent functionaries might be compared today to the representative Commissioners of the League of Nations in mandated territories. For what was the delegation of the Government of India to the East India Company if not a form of mandate from the King in Parliament? These envoys were in no way to obstruct the course of Government, but were to report home on their affairs at convenient intervals. They were to receive representations from the people and could require Government to submit reasons in writing for having adopted a line of conduct in public affairs. Such a system of Parliamentary envoys would never have brought the Government into open ridicule. It would only have formed a step in an appeal to higher authority. It would have operated as a moderating influence on the counsels of Government; for while acting as an effective check on the spot it would never have presented even the semblance of rivalry and never have embarrassed the Government. In a word, though not faultless, it would have been a better institution than the King's Court.

[1] See above, p. 6.

IX

MACAULAY'S PROJECT FOR THE REFORM OF MOFUSSIL COURTS

Soon after he took charge of his office, Macaulay turned his attention to the administration of civil justice in the mofussil. He found there 'a judicial hierarchy of four orders'. Lowest of all were the munsiffs, then came the Sadar Amins, over them the Principal Sadar Amins, and at the head were the zillah and city judges. If minor differences in the designation of the lower orders were disregarded, the judicial establishment of one presidency could hardly be distinguished from another.[1]

There were certain broad principles underlying the judicial establishment in the provinces. It was, firstly, a civil judicial establishment distinct from the executive. Secondly, the jurisdiction of each court was elaborately based on the value of the amount in dispute; and, lastly, the lower courts were presided over by Indian and the higher by European judges. These facts and principles represented a definite stage in the chequered history of the provincial courts.

The first principle did not develop by a steady process, fashioned by a consistent policy. It stumbled into being by a series of experiments almost contrary in their principles, expressing themselves sometimes in the union of the judiciary and the executive, and sometimes in their separation. Warren Hastings[2] started his work of organizing the provincial courts by uniting the two functions. The plan was based on the principle which underlay the old courts of Bengal—of combining a single and undivided power in the executive head.[3] But Warren Hastings drifted from his original purpose and with the collaboration of Impey, whom he appointed to the bench of the Sadar Dewani Adalat—an appointment which promised to create sympathy between the King's and

[1] There was no such functionary as the Principal Sadar Amin in Madras. In Bombay, the Principal Sadar Amin and the Sadar Amin were called the Principal and the Junior Native Commissioner respectively. See *I.L.C.*, 28 March 1836, No. 4, para 4, and No. 5, para 3.

[2] For provincial courts under Warren Hastings, see Appendix III, Charts I and II.

[3] See Archbold: *Outlines of Indian Constitutional History*, p. 52.

the Company's courts—he fashioned a system of courts distinct from the executive. But scarcely six years had elapsed when Lord Cornwallis veered round to the older plan. Considering how great a value he put on the administration of justice, this incongruity in his policy can only be explained by his anxiety to reduce the charges of government. After six more years he elaborated a great system of separate judicial institutions which was the true origin of the provincial courts found in Macaulay's time.[1]

By his plan Lord Cornwallis established an elaborate chain of courts in which the lower were courts of original jurisdiction. The higher could examine appeals and also suits in the first instance. The jurisdiction of each court was based on the money-value of the disputes. This principle, though not very sound, had been maintained by those who were at the head of affairs in India after Cornwallis. If they made any changes, it was only to raise the money-value of the jurisdiction of each court. Lord William Bentinck's Government issued a regulation in 1831 which is important here because it was the basis of discussion by Macaulay and his colleagues.[2]

Regulation V of 1831 struck the death-knell of the provincial Courts of Appeal by giving to the zillah and city judges primary jurisdiction in suits exceeding Rs. 5,000 in value and by allowing a direct appeal from them to the Sadar Dewani Adalat. This regulation also made provision for the appointment of a Principal Sadar Amin. Considering that the provincial Courts of Appeal were not abolished till 1833, there were in 1831 not less than five grades of courts in the mofussil. The lowest was the munsiff's court which had original jurisdiction in suits not exceeding Rs. 300 in value. An appeal lay from these to the zillah and city judge. Then came the Sadar Amin's court which could try original suits up to Rs. 1,000 in value referred to them by the zillah or city judge. An appeal lay to him and his decision was final. Next in grade were the newly-appointed Principal Sadar Amins who could try original suits referred to them by the zillah or city judges not exceeding Rs. 5,000. From the decision of the Principal Sadar Amin a regular appeal lay to the city or zillah court and a special appeal to the Sadar Dewani Adalat. I have already

[1] See Appendix III, Chart III. [2] Ibid., Chart IV.

mentioned the jurisdiction of the zillah and city judge. It is not difficult to see that the pressure of work on that judge must have been great. He had not only primary jurisdiction in suits exceeding Rs. 5,000—a task which had devolved upon him from the provincial Courts of Appeal: he also had to examine appeals from the courts of the munsiff, the Sadar Amin and the Principal Sadar Amin. In order to relieve him of this pressure, however, provision was made in the regulation that subject to obtaining permission from the Sadar Dewani Adalat, he could refer some suits in appeal to the court of the Principal Sadar Amin. The 'Register's' courts were also abolished by the same regulation. The suits pending in those courts were transferred to the Sadar Amins or the Principal Sadar Amins according to the value of the amount in dispute.

In 1833, the provincial Courts of Appeal were finally abolished. Original suits pending in those courts were transferred to the city and zillah judges and all appeals whether regular, special or summary were to be examined by the Sadar Dewani Adalat.[1] To relieve the increased pressure additional zillah and city judges were appointed.[2]

From the tenor of these regulations it was obvious that the value of the sum in dispute decided in which court it was to be settled. But the point then arose as to who should decide the question of value. The plaintiff might pitch his demand too high. To settle this question of value an elaborate procedure was devised in order that the suit might be examined by the proper court. An appeal was allowed to either of the parties against that decision. In short, as Macaulay said, two lawsuits were made out of one. Macaulay could not understand how the question of value could be examined without deciding that of right. On the top of all these incongruities came the principle that the judge who decided the question of right was not bound by the decision of value. I cannot do better than explain this by quoting an illustration of Macaulay's. 'I suppose', said he, 'the following case to occur: A plaintiff wishes to have his cause tried by the Sadar Amin rather than the munsiff. He therefore states his demand high. The defendant, wishing to go before the munsiff, denies the

[1] Regulation II of 1833.

[2] Regulation VII of 1833. See Morley: *Administration of Justice in British India*, pp. 66–8.

correctness of the valuation. The preliminary investigation takes place. It is decided that the plaintiff has valued his demand correctly. The question of right is then tried by the Sadar Amin. He decides for the plaintiff, but gives him damages so small that the munsiff would have been competent to award those damages. Here we have legal decision against legal decision. We have a judicial decree which bears on its very face evidence that it was pronounced by a court not authorized to take cognizance of the cause.'[1]

Macaulay took the opportunity of criticizing this system when there came before the Legislative Council in the middle of 1835 what were known as Millett's regulations. Millett was the secretary of the Indian Law Commission. To him was assigned the task of consolidating the regulations relating to the constitution, the jurisdiction and the procedure of the civil court in the old presidency of Bengal. It was not original work. It was the consolidation of judicial regulations with a few minor amendments of the existing system. Its aim was not therefore to reform the law, but to do the preliminary spadework for its ultimate reform. A part of that work dealt with the constitution and jurisdiction of the civil courts of the Company in the mofussil; and Macaulay in reviewing it suggested extensive changes in them.

Macaulay thought that the system was dilatory and expensive, for the party who could afford to hold on could contest the question of value before the question of right was taken up. He was against the very principle which made this possible and could not understand why there should be different grades of courts to try suits according to the amount in dispute. If the importance and intricacy of a suit depended on the magnitude of the amount in dispute, there would be some justification for having different grades of courts to try suits varying in intricacy and importance. But the amount in dispute was no criterion of its intricacy. Causes in which Rs. 5,000 were at stake were by no means more difficult to try than causes in which a lesser sum was involved. 'The largeness of the sum at stake', Macaulay said, 'has no more connexion with the difficulty of trying the cause than the largeness of the sum at stake on a game at cards has to do with the chances of the game.'[2] As a matter of common experience, on the other hand, disputes involving great sums of money are easier to

[1] See Minutes, No. 16; 25 June 1835.

[2] See Minutes, No. 17.

settle, for there the witnesses are better informed and the agreements are drawn up in accordance with established forms.

In this way Macaulay disposed of the suggestion that the quantity at issue decided its intricacy. But was it a test of its importance? The importance of the quantity is always relative to the means of the person who contests or defends it. As Macaulay said in one of his minutes: 'The real measure of the importance of a cause evidently is the quantity of pain and pleasure which the decision produces. And the quantity of pain and pleasure produced by the decision depends not on the absolute magnitude of the sum at stake; but on the magnitude of the sum compared with the means of the parties. A hundred rupees may be more to a clerk than a thousand rupees to a writer in the Company's service, or than ten thousand rupees to a member of Council. There are no doubt sums so small that they would be trifling to anybody, and sums so large that they would be important to anybody. But in the vast majority of cases the demand is important or unimportant according to the circumstances of the individual. It is generally such as would ruin a ryot would be little if at all felt by a wealthy man and would give different degrees of inconvenience to the intermediate classes.'[1]

Macaulay thus conclusively proved that a suit involving a large sum of money need not be tried by a better judge than one involving a smaller. For the latter was neither less difficult nor less important than the former. He thought that the system was 'a great injustice to the poor, who in every society are also the many, and who in every society, even under the best institutions which human skill and benevolence can devise, must from the very nature of things always encounter the rich at a disadvantage before any tribunals'.[2] Against the simple truth of this statement T. C. Robertson, a member of the Council, urged that though as a general rule a judicial decision is important to either of the parties in proportion to their means and not to the sums at stake, there are certain suits in which this does not hold good. The case of a peasant cheated out of his field by a wrong decision is not so disastrous in its consequences as a case where a zemindar is done out of his rights of succession, because

[1] See Minutes, No. 16; 25 June 1835. [2] Ibid.

the latter may reduce a whole district to distress.[1] This opinion does not seem to me very sound because both the examples cited are examples of gross injustice. As for the contention that the transfer of the zemindari to another person might reduce a whole district to distress, it might be that the new zemindar was a better man and a better administrator. Robertson's argument was beside the point. Prinsep, however, who was a firm believer in the older system, met Macaulay's argument by stating that the amount involved in a suit was a good criterion of its intricacy and importance. As an illustration he referred to the complicated suits in equity involving many issues of fact and law which could only be settled by competent judges.[2]

But in spite of all these arguments Macaulay's statement was sound and conclusive. In assailing the monetary limit on jurisdiction he was in fact criticizing the elaborate system of courts which Cornwallis had established. A monetary limit on jurisdiction was really the saving grace of that system; for if every court could take cognizance of any class of suits, there would be as many appeals as there were courts above the one in which the cause was first tried because if appeals were not allowed to every court but the lowest there would be no need for such an elaborate gradation. Macaulay's criticism was preliminary to his vast and comprehensive scheme for the reorganization of the judicial establishment in the provinces.

Having shown that it was impossible to classify suits as difficult and important on the one hand and easy and less important on the other, Macaulay drew the logical conclusion that there was no necessity for grading the provincial judges according to their knowledge and ability. His plan therefore was to fashion a simple system of courts out of the elaborate plan of Lord Cornwallis and his successors. He would keep the zillah and city judge's court as the principal court of the district and abolish altogether the office of the Principal Sadar Amin. The centre of this simple system was to move round the court of the Sadar Amin. His was to be the principal court trying in the first instance all classes of suits. The munsiff was not to have an independent court of his own. He was to work as the assistant of the Sadar Amin trying on his behalf such suits as the Sadar Amin might refer to him with the consent of the parties. In examining these suits the munsiff was to enjoy

[1] *I.L.C.*, 3 April 1837, No. 25, para 29. [2] Ibid., No. 19, para 4.

the full authority and power of his superior. Appeals from him were to lie direct to the zillah and city judges.

This function which Macaulay wanted to assign to the munsiff resembles that of the 'Register' attached to the zillah court under the Cornwallis plan,[1] only the munsiff here was entrusted with more power. His decision when once the suit was sent to him for trial was not to be subject to the revision of his superior as the 'Register's' was. Macaulay thought that the munsiff in this way would profit by his judicial experience and be trained for a high post. The consent of the parties which was to be required by the Sadar Amin in referring suits to his assistant was meant to indicate to the authorities which of their munsiffs enjoyed the confidence of suitors; for it was said that, as a rule, munsiffs did not enjoy it. They were too ill-paid and poor to be honest. Under the new plan their salaries were to be increased so that if they enjoyed the confidence of their superiors and of suitors, they had the pleasant prospect of becoming Sadar Amins.

In the middle of June 1835, when Macaulay first unfolded his plan, he assigned to the munsiff another function. Like the first, it was meant to relieve the Sadar Amin of some of his excessive duties. He wanted to assign to the munsiff the office that in England might be termed the Master in Equity. He was to preside at the pleading and frame the issues in order to make the task of the Sadar Amin easier. This, according to Macaulay, was not a difficult duty to perform. 'I would assign this business', said Macaulay, 'to the munsiff, whom I suppose to be a functionary of less knowledge and experience than the Sadar Amin, because it is business in which it is not very easy to go far wrong and in which it is quite impossible to go fatally wrong. The object of pleading is to ascertain not what is the truth but what the parties affirm to be the truth. It is evident that the duty of superintending this process may be respectably performed by any man of ordinary sense. It will be scarcely possible for him to act partially or corruptly without being detected. By transacting this business, the munsiff will relieve his principal from a most extensive and laborious duty; and will acquire, with little or no risk to the interests of suitors, those habits of judicial investigation which may fit him for higher posts.'[2]

[1] See Appendix III, Chart III. [2] See Minutes, No. 16; 25 June 1835.

It is interesting to note that this plan which Macaulay formulated nearly a hundred years ago was recently advocated by a British judge in his suggestions for extensive reform in the civil judical procedure of England.[1] But the plan was too novel to commend itself to Macaulay's colleagues. It is also doubtful how the system would have suited Macaulay's times. Framing the issues of a suit, thought Prinsep, was the most material function in the course of a trial, and if wrongly done would cause no end of trouble to the parties.[2] Macaulay seeing that his suggestion did not find favour with his colleagues dropped this particular plan during the two years that the whole project of judicial reform was under discussion. A year later he wrote: 'I rather underrated the difficulty and importance of the duties of the functionary who is to superintend the pleadings and to frame the issue. I am now disposed to entrust that part of the business, not to a subordinate officer, but to the judge who is to try the cause.'

Macaulay's plan, therefore, was to have one principal set of courts to try all classes of suits in the first instance. To safeguard against error he would allow appeals to the zillah and city judge, which was to be a district Court of Appeal presided over by a single European judge. The chief objection to this plan was that it was expensive for it was based on increasing the number of Sadar Amins who cost more than munsiffs. There were, under the old plan, 52 Sadar Amins and 520 munsiffs in the presidencies of Bengal and Agra.[3] If Sadar Amins had replaced the munsiffs wholesale, the expenses would have been increased by well over Rs. 10 lakhs. Prinsep was an apologist for the Cornwallis plan and he stoutly opposed Macaulay in his project of reform; but no argument from this opposition was stronger and more conclusive than the threat of additional expense.

The question of additional expense defeated Macaulay's scheme for a simple and effective judicial establishment; but the question of improving the status of the judges presiding over the lower courts of the Company could not be shelved for ever. These officials were mainly Indians. Their limited jurisdiction varied according to their grades. They could not take cognizance of

[1] Letter from Herbert Hart, K.C. to *The Times*, 8 November 1930; and the leader.

[2] *I.L.C.*, 3 April 1837, No. 19, para 4.

[3] Ibid., No. 20, para 3. See Ross's minutes.

suits in which British Europeans were concerned. They were ill-paid and lacked those prospects of rising to high office and honour which keep a public servant on his guard and make him do his duty with energy and ability. They also lacked the means of keeping up the dignity of their office; and it is not surprising that they, and especially the munsiffs, did not find favour with Indian suitors. In India a public officer was honoured not only because of the power he wielded and the integrity or intelligence with which he used it, but also because of the way he carried himself in private life, the way he dressed and kept his house. How could a munsiff on a bare hundred rupees support himself and his family, pay for his establishment, and in addition make that display which was expected of him?

It will not be out of place here to examine the charge so often made against the official integrity of the Indian personnel of the judicial establishment of the Company. Their insufficient salaries left people to imagine that the judges profited by bribes from dishonest suitors. At least this possibility suggested itself to the minds of persons who could see nothing but chicanery and corruption in the lower grades of the judicial establishment of the Company and inability and want of legal knowledge in the higher. But were they really as venal as represented? And even if they were, did they have the opportunity of accepting bribes? 'I for one', said Shakespear whose place at the council table was preceded by long and eminent judicial service, 'do not believe that a subordinate officer of a mofussil court has the power in one case in a thousand to influence a decision in the slightest degree.'[1] But what was said against them in 1800 was still believed to be true in 1836. The judicial service during those years had gone through experiment and reform, and yet the lower orders were still said to be corrupt and, as Shakespear said, the word was passed from one person to another until mere repetition made it appear true. None stopped to consider what was the greatest evidence in their favour: that there were few judicial charges against them and still fewer convictions. It was sad indeed that the great bulk and very foundation of the judicial service—persons who lived without ostentation

[1] *I.L.C.*, 28 March 1836, No. 12. See note on para 6.

and died without accumulating wealth—should be left to the taunts and calumny of every passing stranger.[1]

This sad position appears still worse when it is considered that the Sadar judges, as the heads of the judicial establishment of the Company, not only did not make the least attempt to stand up for their rank and file but evinced complete lack of faith and trust in the highest class of Indian judges. Under the Regulation of 1831, the Principal Sadar Amins could try suits involving sums up to Rs. 5,000. In 1835 Millett in his draft regulations proposed to extend their jurisdiction to include suits up to £5,000, over which amount an appeal lay to the King in Council. The judges did not object to this extension;[2] and yet in 1837, when the Legislative Council proposed that suits of any amount might be referable to the Principal Sadar Amins, a proposal which was very much like Millett's but without its awkward criterion, the judges wrote to Government that they would not advise the passing of the Act as the official integrity of the Indian judges was not very high.[3] This was nothing short of an indictment of the character of Indian judges and their standard of public morality. And yet no fault was found with the Principal Sadar Amins regarding their official duties. For five years these Indian judges were entrusted with suits involving considerable amounts, 'and considering all things,' said one of the judges who in company with the members of Council differed from the general verdict on the Sadar judges, 'the result of the experiment has proved that the trust has not been betrayed by them. Few cases of corrupt conduct have been brought to light, and as far as I can learn from reports and judge from cases which have come before me in appeal, the majority of their decisions would not suffer by comparison with those of our own service. If therefore', concluded the learned judge, 'we have hitherto had reason to be satisfied, we cannot surely be justified in anticipating the evils contemplated.'[4] Shakespear had long made up his mind, 'partly', as he said, 'by the necessity of the case, and partly because I do not entertain an unfavourable opinion of the native character, that we must confine offices of high trust to our native subjects, and having arrived at that conviction, I deprecate a half and half confidence which leaves the mind dissatisfied with its own decision, suspecting the native

[1] *I.L.C.*, 3 October 1836, No. 1. [2] Ibid., 31 July 1837, No. 6.
[3] Ibid., No. 1. [4] Ibid.: Hutchinson's minute, 18 April 1837.

functionary while it affects to trust him, and looking forward to the detection of his dishonesty as a confirmation of its own prescience'.[1]

Macaulay adopted his usual course of taking his opponents at their word and then rebutting their arguments. Admitted that the public morality of Indians was not very high, how were they to help it? They could not improve the character of a nation in a single day. Could they replace the Indian by the European? The State could not bear the expense of maintaining a European establishment. They must therefore make use of the material they had. The Sadar courts decided suits involving life and death, on the testimony of Indians; what then prevented them from allowing Indian judges trying suits over Rs. 5,000? They had tried suits below that amount with ability and satisfaction to the public; and those suits formed the major portion of those instituted in courts of law. Macaulay reduced the argument of the Sadar judges to a ridiculous absurdity. 'The argument of the Sadar court', said he, 'when reduced to plain language is this: The native judges are bad and corrupt. Therefore leave to them more than nine hundred and ninety-nine cases in a thousand. Leave to them all the cases of the poor and almost all the cases in which the middle classes are concerned. Leave to them a power which enables them to reduce unjustly to hopeless poverty every inhabitant of the Empire, except perhaps a twenty-thousandth part of the population. Reserve all your care and scrupulosity for the interest of that twenty-thousandth part.'[2]

Like the clever debator he was, Macaulay reversed the position of the judges of the Sadar Dewani Adalat by using their own words, and in words which do him and his colleagues full justice he said: 'I regret that there should be abuses in our courts of justice. But while such abuses exist, I think it desirable that all classes should suffer from them alike. Then they will be exposed, and I trust speedily reformed. But what the Sadar judges propose is to exempt from the suffering caused by these abuses—not the class of people who are likely to suffer most severely, but the class of people who, when they do suffer, are likely to complain most loudly. This is certainly a very convenient course for a Government which thinks only of its own quiet and is quite willing that the people should be wretched

[1] *I.L.C.*, 31 July 1837, No. 6. [2] See Minutes, No. 19; 15 May 1837.

as long as their wretchedness does not show itself in murmurs. But it is a course altogether unworthy of a Government which proposes to have the welfare of its subjects in view.'[1]

With such advocacy the Act could not fail to pass; and late in 1837 it was duly enacted.[2] It was important in more ways than one. It was one of the last of Macaulay's Acts regarding the constitution and jurisdiction of the Company's courts. It again brought to fruition, though in a small measure, some of his favourite ideas. The Act dealt mainly with the extension of the jurisdiction of the Principal Sadar Amins, and incidentally of their subordinates. Under the authority of the Act they could set aside the summary decisions of collectors. Principal Sadar Amins were authorized to take cognizance of suits involving any amount referred to them by zillah or city judges. In suits exceeding Rs. 5,000, an appeal lay direct from them to the Sadar Dewani Adalat. There were also many other minor clauses; but the most important result was the increased powers of the Principal Sadar Amins which to some extent at least justified their curious designation.

I have referred earlier to the famous Act which removed from the lower courts of the Company that disability which forbade their trying British Europeans. This desirable step not only removed an anomaly from the statute-book but raised the status of the lower courts of the Company. It must be noted however that the munsiffs were excluded from this act of grace, not because they bore too keen a racial prejudice against the British Europeans to do them justice or had an itching palm which their white suitors could not tolerate, but because it was likely that their new suitors might browbeat them into giving them more than justice. That was one of the points in not allowing Indian judges to try British Europeans. By Act XI of 1836, therefore, the Sadar Amin and his principal were given cognizance of suits in which British Europeans were parties. A year later when an Act[3] was passed permitting any subject of His Majesty to acquire and hold lands in India, Shakespear again opened the subject by urging the Council to allow munsiffs to try suits in which British Europeans were concerned. His reasoning was that unless this was done British Europeans would not derive the benefit of the summary process for the recovery of arrears of rent, or for the restraint of property or crops. As this process lay

[1] See Minutes, No. 19; 15 May 1837. [2] Act XXV of 1837. [3] IV of 1837.

in the munsiff, banning him from trying those suits would only cause serious inconvenience to British Europeans. He therefore recommended the extension of the terms of Act XI of 1836 to the munsiff's court.[1] But Macaulay objected to this suggestion. A year before the Council had excluded the munsiff and it was too much to expect that the reasons which told against him had completely disappeared in less than a year to justify this sudden change of policy. 'We were of opinion last year', said Macaulay, 'that the munsiffs were generally too poor to be proof against temptation and that an English litigant would generally be able to offer temptation. We shut the Englishman out of the munsiff's court, not because we thought that the Englishman would have harder measure than the native in that court, but because we thought it but too probable that the Englishman would obtain more than justice.'[2] The position of the munsiff had not so changed in one year as to justify the extension of his jurisdiction.

Macaulay's criticism of the munsiff's court was Ross's cue to emphasize the need for abolishing the office of the low-paid munsiff. He took the opportunity of suggesting a scheme of judicial organization which may be quoted with advantage.

'I. That in every district or division of a zillah in which there is at present a munsiff's court, except the district in which the court of the zillah judge is held, there be established instead of the munsiff's court, a Sadar Amin's court, with original jurisdiction in all civil cases in which the party sued resides or the property sued for is situated in the district; and that the Sadar Amin or judge of such district court be allowed a personal salary of Rs. 300 p.m. and an adequate allowance for the establishment of his court.

'II. That in the Sadar district or division of a zillah, i.e. the district in which the court of the zillah judge is held, there be established a Principal Sadar Amin's court with original jurisdiction in all civil cases in which the party sued resides or the property sued for is situated in the Sadar district; and in all civil causes for all amounts not less than Rs. 5,000 in which the party sued resides or the property sued for is situated within the limits of the zillah and that the Principal Sadar Amin or judge of such Sadar district court be allowed a personal salary of Rs. 600 p.m. and an adequate allowance for the establishment of his court.

[1] *I.L.C.*, 31 July 1837, No. 23: Shakespear's minute. [2] See Minutes, No. 18.

'III. That an appeal from the decision of a Sadar Amin or Principal Sadar Amin in every case in which the amount in dispute is less than Rs. 5,000 lie to the zillah judge and that all appeals preferred to the zillah judge be tried and decided by him, and be not referable to a Sadar Amin or Principal Sadar Amin.

'IV. That an appeal from the decision of a Sadar Amin in every case in which the amount in dispute is not less than Rs. 5,000 be direct to the Sadar Dewani Adalat; and that the latter court be empowered to admit an appeal from the decision of the zillah judge on an appeal preferred to him, in every case in which there may appear to be ground for an appeal.'[1]

I have quoted this scheme in full not because I think it is perfect but because it shows the trend of the discussion at the council table. The replacement of the munsiff by the Sadar Amin, however essential to the improvement of the standard of judges, was too expensive to be seriously considered. It was however felt on all sides that the one way of improving the standard of justice was to increase the salary of the judges, thus making it worth while for the better classes to seek preferment on the Company's bench. It was necessary, in the second place, to open out avenues of promotion to merit and industry. Thirdly, it was necessary to extend the jurisdiction of the lower courts and not make it depend on a superficial monetary qualification and to introduce that superficial qualification into appellate courts, not because it was good but because it acted as a safety-valve against too many appeals.

While the low salary of the munsiff was too notorious to to be ignored, the salaries of other judges also had to be considered, the more so since it was proposed to extend the jurisdiction of the Principal Sadar Amin. It was essential to increase their emoluments 'to secure efficiency combined with integrity'.[2] Macaulay also proposed to provide for a superior class of Principal Sadar Amins who were to form a fourth of the total number[3] receiving the handsome increase of Rs. 200 over the usual salary paid to those officials. On the recommendation of Lord Auckland, a superior class of munsiffs was created, a fourth of whom were to receive the addition of Rs. 50 over their usual

[1] *I.L.C.*, 31 July 1837, No. 24. [2] Ibid., No. 30, para 3.

[3] In the presidency of Bengal there were 52 Principal Sadar Amins.

pay. Macaulay, though in favour of the superior Principal Sadar Amin, was opposed to the superior munsiff. In this he was not illogical. The Principal Sadar Amin had no prospect of further promotion. The creation of a superior grade was therefore likely to serve as an incentive to more meritorious service and to create healthy competition in winning one of the thirteen coveted places. On the other hand a munsiff by dint of energy and ability could always hope to be a Sadar Amin. But Macaulay overlooked the fact that there were many munsiffs and few Sadar Amins and that this debarred 'the most meritorious servants from any but a very distant and uncertain chance of advancement'.[1] The Sadar Amins were in a more favourable position. The rules regarding their promotion to the office of Principal presented an adequate hope of reward. Apart from the increase in the personal salaries of these officials it was proposed to provide for a general increase in their establishment allowances.[2] These changes in the financial position of the judges of the lower courts were notified to the public in a resolution 'that their income had been proportionately raised in order to provide every possible security for the upright and important administration of justice'.

Some persons were so fascinated by the idea of increasing efficiency with emoluments that they recommended a salary of Rs. 1,000 or Rs. 1,200 a month for the Principal Sadar Amin. Macaulay opposed this. 'It is perfectly true', said he, 'as the Sadar court say, that a needy class of magistrates are very likely to be corrupt. But it is equally true that when a magistrate receives pay which enables him to live in credit and comfort according to the notions of the class to which he belongs, the heaping of additional wealth upon him has no tendency to make him more honest. To take the illustration with which

[1] *I.L.C.*, 31 July 1837, No. 27. See the resolution of the Legislative Council.

[2]

Status	Revised scale p.m. in establishment allowances	Former scale
Munsiff	Rs. 40	Rs. 10
Sadar Amin	Rs. 80	Rs. 50
Principal Sadar Amin... ...	Rs. 150	Rs. 100

the Sadar court furnish me: The covenanted servants of the Company are now liberally paid, and their integrity presents a most gratifying contrast to the rapacity of their predecessors seventy years ago. But I do not believe that if the pay of the civil service were tripled, the increase would produce any improvement whatever. Five hundred rupees a month is more to a native than two thousand rupees a month to an Englishman. A native with five hundred rupees a month will not be corrupt from the pressure of want. And neither five hundred rupees a month, nor five thousand, nor all the treasure of Sadat Ali will satisfy the cravings of avarice.'[1] But Macaulay saw another objection in fixing the salaries of the Principal Sadar Amins at Rs. 1,000 or Rs. 1,200. 'The point at which I would aim', he said, 'would be to fix those salaries high enough to be an object to respectable natives; but not high enough to be an object to European adventurers who have any interest. A thousand or twelve hundred rupees a month would be an object quite sufficient to bring such adventurers to India in swarms with recommendations which it would be very unpleasant to the dispensers of patronage in this country to treat with neglect. The evils which such a state of things would produce require no illustration.'[2]

Macaulay had cause for his apprehensions. Just before the Act[3] was passed making British Europeans amenable to the lower courts of the Company, the Legislative Council enacted that no person by place of birth or race be ineligible for the office of munsiff, Sadar Amin or Principal Sadar Amin. Till the year 1836 there was a tacit understanding that those offices were reserved for Indians. The Act now made it possible for any person of whatever race or colour to hold them—at least in law. This was in keeping with the principle that public offices should not be filled on grounds of colour and race, and that the law, with that detached purity which becomes it, should be purged of every wrong principle.

While these questions of judicial reform were being considered a proposal came from Lord Auckland which provoked discussion and comment. This was to assign to the Superintendent of Police the function of 'observing the system of business in a judge's court'. The Sadar court had recommended the necessity of sending frequent deputations for local inquiry. Government

[1] See Minutes, No. 19; 15 May 1837. [2] Ibid. [3] Act XI of 1836.

had recently appointed a judge of the Sadar court to conduct a local inquiry in the district of Hooghly. But there were obvious objections to such a course. It was inconvenient to depute a judge of the Sadar Dewani Adalat to a district far away from Calcutta. The judge's office should be fixed in one place. It therefore occurred to the Governor-General that the Superintendent of Police who had to tour round the presidency, visiting district after district, would be the proper person to undertake a local inquiry. His high office and standing would also be an asset in conducting it.[1] But this work was likely to give the police official a control, indirect though it might be, over the civil courts. Shakespear and Ross were against the proposal and Macaulay summed up their views, in a characteristic manner, on the indiscreet shuffling of differing offices. 'The division of official labour in India', said Macaulay, 'is at present exceedingly defective. It ought to be one of our chief objects to correct this great vice of the existing system. By giving to a Superintendent of Police any control over the courts of justice, we should, I conceive, render the system more objectionable than it is now. I cannot perceive the smallest connexion between the duties of a Superintendent of Police and those of a functionary employed to watch over the administration of justice. The talents, the turn of mind, the knowledge, the experience which the situations require are altogether different. A man may be an excellent Superintendent of Police without the sort of ability which a judge ought to possess, without the temper which is befitting in a judge, without even a smattering of the Hindu or Mohammedan laws of marriage and succession, without having ever read the rules of procedure contained in the Company's Regulations. The functions of a Superintendent of Police have as little to do with the business of the civil courts as with the business of the Salt Departments or the Surveyor-General's office.'[2]

Lord Auckland had not made it clear whether the Superintendent's influence was to be confined to civil courts. Macaulay, however, stated that if the influence was to be extended to all courts of the Company, whether civil or criminal, his objection would be more intense. A police official's control over civil courts would be an inconvenient division of labour. 'But', said Macaulay, 'to give

[1] *I.L.C.*, 31 July 1837, No. 26. Governor-General's minute (12 June 1837).
[2] See Minutes, No. 27; 10 July 1837.

to such a functionary any control over the criminal courts would be to invert the relation in which the tribunals and the police ought to stand to each other. The Superintendent of Police will, in criminal cases, be in some sense a party. It is evidently his interest that the prisoners who are by his instrumentality brought before the courts of justice should be convicted. If of a hundred thugs, who are by his means brought to trial, ninety are convicted, his official character is raised. If ninety are acquitted his official character will suffer. There are therefore the same objections to putting the criminal courts under his control, which there would be to putting the Court of King's Bench under the control of the Attorney-General or the Court of Exchequer under the control of the Commissioners of Excise.'[1]

Macaulay agreed with Ross that the Superintendent of Police was at liberty to bring to the notice of Government any defects he might notice in the administration of justice. But that privilege he enjoyed with every public servant and with every member of the community. He need not therefore be put in the position of controlling courts which in reality ought to control him.

I shall conclude this chapter with a reference to Macaulay's earnest plea to abolish the practice of levying taxes on the institution of suits. In this, as on many questions of jurisprudence, his inspiration was Bentham. But in meeting the arguments on which the law taxes were defended in India, Macaulay displayed a vigour and originality which if contributing nothing to the protest of Bentham certainly strengthened it.[2]

[1] See Minutes, No. 27; 10 July 1837.

[2] 'When a *tax* has been called a *tax*, *John Bull* has now and then been heard to grumble. Call the tax a *fee*, he is satisfied: so as the contribution be but imposed by the men by whom it is pocketed, pocketed by the men by whom it is imposed, *Blackstone's* motto is *John Bull's*—"*everything is as it should be*". But, if the imposers are judges, and the persons on whom it is imposed are those children of affliction called *suitors*—patients with emptiness in their pockets, and perpetual blisters on their mind—then it is that he is not barely *contented*, he is *delighted*: he cries "*litigation is checked*": some men not being able, others not willing, to see, that in this way, wherever there exists a man, rich as well as wicked enough to purchase the power of oppression thus offered him for sale, it is only the honest and injured litigant, or he who, if the ability were left him, would be litigant, that is thus *checked*, and that the dishonest litigant is instigated, supported, armed, by this most mischievous of all taxes: every fee exacted from the other side being an instrument of oppression put into his hands.'—Bentham: *Works*, Vol. V, pp. 160–1.

A tax which according to Macaulay was an evil could be defended on two grounds: as a mode of prohibition or a source of revenue. The law tax in India was defended on both, though a greater stress was laid on the ground that it prohibited litigation.[1] What was litigation? To Macaulay it was just an appeal to the courts of law. It was bad only if the laws and courts were bad, and was even good if the law and the administration of justice were good. 'If what the courts administer be injustice,' he said, 'these taxes are defensible or are objectionable only as being far too low. They ought to be raised till they amount to a prohibitory duty; or rather the courts ought to be shut up, and the whole expense of our judicial establishments saved to the State. But if what the courts administer be justice, is justice a thing which the Government ought to grudge to the people? If it be good that there should be laws, if it be good that men should have recourse to the laws, if in proportion as recourse to the laws is made difficult, men must either suffer wrongs without redress, or redress their wrongs by the strong hand; if in the happiest and most enlightened societies, when all that wisdom and benevolence can do to improve jurisprudence has been done, the great mass of the people must still have some difficulty in recurring to the laws, is it fit that a Government should, of set purpose, add to that difficulty? I am utterly unable to find any reason for taxing litigation which would not be a reason for prohibiting litigation altogether.'[2]

Macaulay's simple definition of litigation does not mean that he approved of the evil of 'frivolous and vexatious actions' which constitute litigation in the popular sense of the term. But for that he was not going to blame the people and call them litigious. If the people were litigious, not they but the Government were to blame for not adopting the true remedy against the evil. What was the most effective remedy against vexatious actions? Like most of Macaulay's remedies it was simple and true but none the less not easy to put into practice. 'The real way to prevent unjust suits', he said, 'is to take care that there shall be just decisions. No man goes to law except from the hope of succeeding. No man hopes to succeed in a bad cause unless he has reason to believe that it will be determined according to bad laws or by bad judges.

[1] Regulation XXXVIII of 1795. [2] See Minutes, No. 16; 25 June 1835.

Dishonest suits will never be common unless the public entertains an unfavourable opinion of the administration of justice. And the public will never long entertain such an opinion without good reason. If the subject were not one which most deeply concerned the welfare of the people, there could be no better object of ridicule than a Government which constitutes its courts of law in such a manner as to give fraud an advantage over honesty, and then fines every man who goes to such infamous places.'[1]

The preamble of the regulation which instituted the law taxes made the remarkable assertion that they were intended to drive away the unjust suitor from the courts. No argument could have been more absurd, for it was against all experience and against the acknowledged principle of jurisprudence. How could a law discriminate between an unjust and a just suitor, discourage the former and encourage the latter to resort to courts of law? It was impossible. A law which precluded the vexatious from taking their claims to court also precluded just and needy claimants; more so perhaps, because the latter go to court to gain from the court's decree the power to right their wrongs, which they may not have the money to buy. Thus, in Bentham's words, the tax was a tax on distress.

Macaulay was right when he said that the institution fee was not the right remedy against frivolous charges because such a fee does not make 'the pleadings clearer, nor the law plainer, nor the corrupt judge purer, nor the stupid judge wiser'.[2] The fees made no just division between honest plaintiffs and dishonest plaintiffs, but an unjust and faulty division between poor plaintiffs and rich plaintiffs. No doubt fees would exclude unjust claimants who had no money to institute an action; but it would not exclude the unjust who had. But what was most unjust was that fees excluded the poor and just claimant, the very class that needs strongest support from the State. Macaulay was told that the well-known arguments against law taxes did not hold good in India—that in this country it was necessary to prevent the poor from harassing the rich. Naturally, he could not understand why the relations between rich and poor should differ in India. 'Make your legal proceedings', said he, 'as simple, as cheap, as expeditious as you can, the rich man must still have an advantage

[1] See Minutes, No. 16; 25 June 1835. [2] Ibid.

over the poor man. To diminish that advantage is one of the chief ends which a legislator should propose to himself. It is an end which we cannot hope to attain completely. But every approximation is something. To take the directly opposite course, to frame laws avowedly for the purpose of making justice absolutely inaccessible to those to whom at least it is accessible only with difficulty, is a policy which I find it hard to reconcile with what I know of the abilities and benevolence of those who defend it.'[1]

Macaulay was not quoting a book of theory against people who could boast of long administrative experience. When he landed in India, he went straight to Ootacamund to see Lord William Bentinck whose Council was then busy discussing the administration of the kingdom of Mysore. Macaulay, alone of the Council, stoutly opposed the levy of law taxes in that State. Even a man with the breadth of view of Colonel Morison thought that 'unless some such check were provided, all the rich would be laid under contribution by swarms of needy prosecutors'.[2] Macaulay knew that he was backing a hopeless cause, but a dispatch from the Court of Directors prohibiting the levy of law taxes in Mysore put an end to the controversy. The experiment was tried and justified Macaulay's point of view. 'The letters of the Commission', wrote Macaulay, 'contain no trace of any such evils. Colonel Morison, with the candour which was to be expected from him, has informed me that the private accounts which he has received from that part of India lead him to believe that the experiment has turned out well, and that his apprehensions were groundless.'[3]

To obviate any fiscal objections to his scheme, Macaulay suggested that if the Government could not afford to lose the fees collected on instituting suits, the fees should be levied not on the plaintiff but on the losing party. This would act also as a check against vexatious charges; the unjust claimant would be made to suffer in the end, and the just claimant would not be frightened out of the court of justice by the spectre of the law tax. Macaulay was willing to make some exceptions. The losing party might be honest. He might go to the courts only because the obscurity of law made him consider that he was in the right. It would be

[1] See Minutes, No. 16; 25 June 1835. [2] Ibid. [3] Ibid.

unjust to make him suffer for the law's defect. The zillah judge, according to Macaulay's plan, was therefore to remit fines where honesty paid toll for the obscurity of the law.

Macaulay's opponents based their arguments on the assumption that in India the people were addicted to litigation and that the poor classes especially were in the habit of harassing the rich by making them submit to the inconveniences of lawsuits. It would be difficult to ascertain how far it is true that Indians are litigious or how they compare with other countries in that direction. Litigation is the price of civilized institutions. It is a form of quarrelsomeness and if that is a trait of a national character it is better that people should fight their quarrels within the walls of a court rather than outside in the street, with legal argument rather than with brickbats.

It is only fair, moreover, that the elaborate system of law courts and obscure laws should also receive their share of blame. In India, especially, such a new system suddenly sprung upon the people must have had an unpleasant reaction. In a country where equality was not the ruling principle in life, the poorer classes found in the courts an equalizing ground where the mischievous suitor lowered the pretensions of the merely rich. The whole system of administrative law was new, creating new rights and duties and a class of pleaders to interpret them. The jurisdiction of courts was not well defined and questions of value were contested and recontested before the question of right was taken up. All these considerations had a cumulative effect in increasing the number of pending suits and in strengthening the belief that Indians were litigious. Added to this was the undeniable fact that the Government were trying to work an elaborate system with an insufficient and poorly paid staff. Lord William Bentinck once wrote that the Government were trying to perform their functions with a sixth of the number that was required to do so.[1]

[1] *I.L.C.*, 3 April 1837, No. 21, para 3; enclosure in Ross's minute. 'The weakness of our administration is in great measure from attempting to do with a small number of functionaries the work that to be efficiently performed would require five or six times the number at present employed, and in consequence of this, appropriating among so inadequate an establishment the whole business of the State. Every department is starved and the officers complain of the weight of the duties assigned to them and every branch of the administration is more or less a failure.'

Closely connected with the question of the institution fees was the process under *forma pauperis*. Under that process paupers were not only exempted from fees but also given the help of a vakil. Macaulay thought that the provision was made from a mistaken tenderness for the poor. It was against his principles to grant privileges to any class of people. He would abolish the levy of law taxes on the institution of suits, thus extending the privilege so far enjoyed by the pauper to all classes. Having done that, in the view of all individualists the State was no more bound to find him a vakil when he was in need of legal remedy than to find him a doctor when he was suffering from illness. 'Good legal advice', said Macaulay, 'may be important to a suitor. But surely it is not more important to him than good medical advice to an invalid. And why the State which suffers its poor subjects to die by thousands for want of good physicians should be bound to find them good advocates, I am unable to comprehend.'[1]

It is interesting to note that some of his colleagues used the same argument when opposing Macaulay's scheme for abolishing law taxes. They said that the State was also not bound to provide its subjects with the gratuitous use of its courts of law. Macaulay, however, was not inconsistent in his treatment of the two questions. In his suggestion to abolish the process under *forma pauperis* he was following the philosophy of *laissez-faire*. 'These things', he said, 'always adjust themselves when Governments are wise enough to leave them alone.'[2] Just as doctors attend to poor patients without the expectation of reward other than what they gain from the exercise of benevolence, so perhaps could be found vakils willing to help a poor and honest man out of his distress. But even if humanity was not the vakil's strong point, he might be induced to plead a poor man's cause, if it were sound and honest, on the offchance of winning the pauper's cause and his fees.

[1] See Minutes, No. 16; 25 June 1835. [2] Ibid.

X

MACAULAY'S PROJECT FOR THE REFORM OF JUDICIAL PROCEDURE

WHILE suggesting extensive reforms in the constitution and jurisdiction of the mofussil courts, Macaulay took the opportunity of bringing to light some of the defects in their procedure and of recommending reforms. His project for reform can be grouped under three main heads: reform in the law of appeal, in the law of evidence and in the rules of pleading.

In the preceding section I have already referred to the elaborate system of appeals which was the result of the jurisdiction of the different courts being based on a monetary qualification. Macaulay's project for the reform of the jurisdiction of the courts would have put an end to appeals against decisions on questions of value. Appeals may be classified under two heads: appeals on matters of law and appeals on matters of fact. Regarding the first class of appeals, Macaulay made the following suggestions. Firstly, 'that if the original judgement be affirmed by one Court of Appeal, there shall be no second appeal to a higher judicature, except on the ground of corruption in the lower courts'. Secondly, 'that when the lower court distrusts its own judgement on a point of law, it should be at liberty to send that point of law up for the decision of the next superior court, without any application from the parties'.[1]

Macaulay's suggestion was based on the analogy of the English jury which while fully satisfied regarding questions of fact might be doubtful regarding the legal effects of those facts. In England it was a common practice for the jury 'to return a special verdict in which they set forth the facts, state their uncertainty as to the law and leave their decision to depend on what the judges shall determine respecting the legal question'.[2] A Sadar Amin might encounter the same difficulty. In most causes he was likely to be the best judge on an issue of fact because, himself an Indian, he could measure the proper value of the witnesses he examined. In such a difficulty he was 'to state distinctly the

[1] See Minutes, No. 25; 3 April 1837. [2] Ibid., No. 16; 25 June 1835.

facts as they have been proved, and to send them up to the higher court. The higher court, taking the facts for granted, ought to pronounce upon the law, or to send the legal question, if necessary, to a still higher tribunal'. Macaulay rightly thought that this course would save many an unnecessary appeal, and the expense would come to nothing.

He also suggested that appeals on matters of law should be made directly to the highest Court of Appeal of the Company—the Sadar Dewani Adalat. The legal knowledge and learning of the judges of that court would enable them to decide such points of law as were referred to them with promptness and decision. That court was to be relieved entirely of its burdensome duty of deciding appeals on matters of fact. Every judge of the Sadar court was to be given the full judicial power of the court. Each was to be commissioned to examine appeals coming up from a certain number of zillahs. That did not mean that the court as the highest court was to lose its identity in a revival of provincial Courts of Appeal. 'By taking this course', said Macaulay, 'we should have the advantages of what has been quaintly but expressively called "single-seated justice"[1] in the decision of causes, while we should at the same time have at our command the advice of a deliberative body consisting of the first men in the Judicial Department. When Government asks the advice of the Sadar Dewani Adalat, where they are required to report on the expediency of a proposed law or on the merits of a public functionary, they will form a council. When they sit on causes, each will sit separately and act quite independently.'[2]

It is interesting to know that a part of these suggestions bore fruit in a draft Act[3] which proposed to give to every single judge the full powers of the Courts of Appeal—the Sadar Dewani and Sadar Nizamat Adalats—in all the presidencies, with an adequate provision of safeguards. Incidentally this course made the position of the fifth judge in the Bombay Sadar court unnecessary, and it was proposed that he should be dispensed with. The Bombay Government alone of the four Governments raised a dissentient voice, and expressed the opinion that concentration of power in a single judge would be pernicious and unpopular. For, they said,

[1] See Bentham: *Works*, Vol. V, pp. 18-27; arguments for Vol. V, pp. 555-6.
[2] See Minutes, No. 16; 25 June 1835. [3] Not enacted.

people had more confidence in the judgement of more than one judge.[1] Not aware that Macaulay's draft was inspired by a study of Bentham and mistaking it for the common desire of retrenchment, they finally requested the Government not to 'sacrifice justice to revenue'. This attitude annoyed Macaulay. 'I will not now', said he, 'go over all the arguments which may be urged for single judges against a plurality. Those arguments are familiar to all who have studied the general principles of jurisprudence; and they have fully satisfied my own mind. It does not appear from the papers before us that these arguments have been at all considered by the Bombay Government. Not the faintest allusion is made to them. It is taken for granted that two judges will decide better than one, and three better than two. Nor does it appear to have occurred to any of those whose opinions are before us that the scheme which was suggested from hence could possibly have been dictated by other than mere fiscal considerations'.[2]

Macaulay divided appeals on matters of fact into two groups. The first kind of appeal was 'extrinsic to the merits of the suit'.[3] It could happen that a lower court might refuse to hear a claim on the ground that it was not put in within the legal time. That should not preclude the plaintiff from representing to the Court of Appeal any real excuse for his delay. A defendant likewise might appeal against an *ex parte* decision on the ground that the court did not send him a proper notice of the complaint. Either of the parties again could appeal on the ground that the procedure of summoning witnesses was defective and on such other points which had nothing to do with the merits of the suit. It was necessary that appeals should be allowed on such questions. But only one appeal was to be allowed.

The difficulty came when deciding upon the course to be allowed 'with regard to appeals on matter of fact given in evidence at the trial of a cause'.[4] Macaulay was opposed to the principle of the Appeal Court reversing the decision of the lower court, because that course went against the true function of an appeal. 'All appeals', said Macaulay, 'should be from a less competent to a more competent judicature'.[5] But here the original court was

[1] *I.L.C.*, 1 February 1836, No. 9. See Sutherland's minute, 5 November 1835.
[2] See Minutes, No. 20; 11 January 1836.
[3] Ibid., No 25; 3 April 1837.
[4] Ibid.
[5] Ibid.

bound to be more competent than the appellate court because the judge who heard the evidence was better able to assess its value than the judge sitting in appeal, who only read the depositions and gave his judgement from them. No doubt the higher judge might be abler than his subordinate, but the subordinate had the advantage of hearing evidence at first hand. Macaulay thought that even a munsiff could claim this advantage. 'Surely an intelligent munsiff', said he, 'who has himself examined the witnesses, who has noted the tones of their voices and the changes of their countenances, who has observed in one the hesitation of a man conscious of fraud, in another the suspicious fluency of a man who is repeating a tale learned by rote, such a munsiff, I say, is more competent to decide on the truth or falsehood of the story than the most learned and ingenious judge of the Sadar, who has before him only written depositions. Every person accustomed to watch judicial proceedings must often have heard witnesses whose manner convinced him that they were perjuring themselves, yet who said nothing which if taken down by a shorthand writer would enable any judge, who had not been present, to pronounce them unworthy of credit.'[1]

But was there no appeal to be allowed on matter of fact? Macaulay was fearful of the consequences of such a course, but he suggested as a principle that in no suit should the judge in appeal reverse the decision of the original court on a matter of fact. He should examine the depositions and if he found a flaw in the examination of witnesses, or was convinced that justice had not been done, he should himself conduct the inquiry anew or refer it to another Sadar Amin or to the same Sadar Amin, showing him where his error lay, so that he might avoid it in his re-examination.

It must be stated here that Macaulay's argument that the munsiff was a better judge of fact depended on the assumption that his new rules of pleading and evidence were put into practice. The munsiff could only claim the advantage of reading the psychology of men in their expression and voice if the pleadings were to be oral and the parties were to be confronted. Macaulay, while commenting on Millett's regulations, expressed his general opinion on pleading and the law of evidence. He wanted to establish the principle that pleadings should be oral and that except in special cases, the parties should be confronted. In the province of Agra the system of oral

[1] See Minutes, No. 25; 3 April 1837.

pleading was introduced to some extent 'and I have been assured', said Macaulay, 'by gentlemen of the highest reputation in the judicial branch of the service that, in proportion as it has been introduced, the ends of justice have been better promoted'.[1]

The procedure was to be this: The plaintiff was to deliver his written plaint, which might be useful to the defendant in ascertaining the claim made against him, and on a day fixed for the hearing the defendant was to answer the claim. The judge was to hear both the parties, examine them and if necessary allow them to question each other. Thereafter he would draw up the issue and show it to the parties who were competent to alter it in order to ensure that their statements were drawn up to their satisfaction. Remedies were to be provided against either of the parties bringing 'perverse or frivolous objections to prevent the question from being brought to issue'. Macaulay thought that a very little practice would enable the munsiff or Sadar Amin 'to shape the statement of the plaintiff's demand in such a way as to exhibit all that is necessary to constitute a legal claim and no more than is necessary'. The whole could be put on 'a sheet of letter paper', and the statement would help the judge in trying the cause.

One characteristic suggestion was that while the preliminary inquiries were being made—such as the statement of the defendant in answer to the claim or the oral examination of either party by the judge or the questions put by the parties to each other—no vakil was to be allowed to assist the parties. 'The legitimate uses of an advocate', said Macaulay, 'are to examine and cross-examine evidence, to state the effect of evidence, to argue disputable points of law. These are things which the most honest plaintiff or defendant may from want of intelligence, of presence of mind or of legal learning be unable to do for himself. But there is no plaintiff or defendant who cannot tell his own story straightforward and this is all that in the preliminary investigation before the munsiff, it is necessary for him to do. To allow any other person to suggest his answer is to introduce into pleading that systematized and barefaced falsehood which is the worst taint of European jurisprudence.'[2]

According to Macaulay's plan confrontation was to be the general rule. Witnesses were to be summoned from long distances as it was not easy to understand why parties who were directly

[1] See Minutes, No. 16; 25 June 1835. [2] Ibid.

concerned in a suit should be excused from attending the court personally. That did not mean that Macaulay was not ready to make exceptions. Adapting his illustrative method he wrote: 'Distance in a country so extensive and so imperfectly supplied with the means of conveyance will sometimes be an insurmountable difficulty. A matter which came before Council only a few days ago may serve as an instance. The first jeweller in Calcutta supplies some articles of plate to a person at Meerut. The articles are not paid for. It is surely too much to require the jeweller to undertake a journey so long, so expensive, so uncomfortable at certain seasons, and to certain constitutions so dangerous in order to recover a few hundred rupees. In such cases, I would allow the zillah judge to dispense with the general rule; but every such dispensation and the reasons for it should be reported to the court of Sadar Dewani Adalat.'[1] But still the pleadings were to be oral: statements and counter-statements were to be taken from the parties' lips. Macaulay, therefore, was willing to make an exception to the general rule if confrontation meant travelling a long distance for the recovery of a small amount. He was ready to admit some other exceptions as well. 'All respect', said he, 'consistent with public justice ought to be paid to the feelings of the natives of India. If the party cannot come to the munsiff, the munsiff must go to the party; if the party should be a man of high rank the pleadings may take place at his house; if the party should be a woman of respectability she may be examined behind a veil. Persons of the highest dignity are examined thus as witnesses. *A fortiori* there can be no objection to examining them thus when they are parties.'[2]

In writing thus, I do not think Macaulay was trying to harmonize his ideas with the eastern idea of rank and dignity. Somehow this does not sound like Macaulay. But he was so fascinated by the advantages of confrontation that he would rather make the munsiff leave his court and go to the great man's house than see his idea forestalled by a suggestion that the exception should take the form of representations by vakils.

This was an obviously weak point in Macaulay's suggestions and Prinsep,[3] who never tired of joining issue with Macaulay, readily assailed it. He declared that he had never known of peri-

[1] See Minutes, No. 16; 25 June 1835. [2] Ibid.

[3] *I.L.C.*, 3 April 1837, No. 19: Prinsep's minute.

patetic judges dispensing justice from house to house, that a court of law should be fixed at a place which those in need of justice might easily find. True that Macaulay expected but few suits where either of the parties would consider it beneath his dignity to enter a court of law. But if the privilege was once allowed, parties would have been found in large numbers claiming non-appearance in courts as their birthright. With the grant of privilege would grow the instinct of personal dignity as rising superior to that of public institutions. And it was a wrong principle to lower the dignity of public institutions in order to preserve private dignity.

This point appears to me of great importance because it was asserted, and not without cause, that the better class of Indian shunned law courts and was unwilling to stand there as witnesses. Perjury and prevarication, therefore, had become blatant evils in law courts, and giving evidence, which should really be an act of public service towards the attainment of truth, had become a profession for unscrupulous individuals liberally paid by dishonest suitors.[1] When this was the unfortunate state of affairs it would have been unwise, to say the least, to introduce the erroneous principle of exempting men of rank and dignity from appearing in court. A stigma would have been attached to law courts which would have acted as a drag on honest men.

Macaulay suggested that not only the witnesses but the parties to a suit ought to be punished with equal severity for asserting a wilful untruth to the court. 'I am utterly at a loss to understand', said he, 'on what principle we can make a distinction between a witness and a party, on what principle we suffer a party to declare that he does not owe money when he knows that he owes it, while we punish with the utmost rigour any friend who may be induced to deviate from the truth in the party's behalf. Until I see some perfectly new argument against these doctrines, I shall continue to think that no mind not darkened by prejudice and habit can fail to admit their truth.'[2]

Macaulay opened his project of reform in the law of evidence by enunciating the principle that 'all evidence should be taken at

[1] *I.L.C.*, 7 September 1835, No. 11: extract report from the first judge on circuit in the Western Division to Fouzdari Adalat, 21 October 1834. In a suit of forgery, the judge found that witnesses who were guilty of gross prevarication were ready with fifty rupees each for paying fines.

[2] See Minutes, No. 16; 25 June 1835.

what it may be worth, that no consideration which has a tendency to produce conviction in a rational mind should be excluded from the consideration of the tribunals'.[1] From this principle various conclusions followed. Macaulay thought that the evidence of both the plaintiff and the defendant should be admitted in every kind of lawsuit. The parties, better than the witnesses, know the truth. It was the general practice to exclude their evidence because being interested parties it was likely to be biassed. 'But', said Macaulay, 'justice could not be administered in any society for a day without the evidence of partial witnesses. And of all partial witnesses, the parties are least likely to mislead a judge of common discernment because their partiality is known. In criminal cases, the aggrieved party is suffered to give evidence against the aggressor. In cases of life and death, a parent is suffered to give evidence for a child. In an extensive class of civil cases—cases of mercantile account and so forth—it is proposed by this draft to suffer parties to give evidence. And it is utterly impossible to show that they are less likely to falsify in cases of this description than in others.'[2]

Macaulay was for admitting the evidence of convicts. The Government of Fort St George proposed an Act giving power to the magisterial officers of the Thuggee Department to admit approvers and render their evidence valid in order to suppress the abominable practice of the thugs. Shakespear suggested that the Act should be more general as thuggee was not defined as a substantive crime. Macaulay closely followed him in his suggestions and drafted an Act which was duly enacted.[3] It stated in general terms 'that no person shall, by reason of any conviction for any offence whatever, be incompetent to be a witness in any stage of any cause, civil or criminal, before any court in the territories of the East India Company'. In proposing the Act, Macaulay wrote: 'The reasonableness of such an enactment is obvious. Indeed I can conceive nothing more unreasonable than to allow an accomplice who has not been tried to turn king's evidence and yet to refuse to receive his evidence after his conviction till he has either been pardoned or punished. The only object with which we receive evidence is to get at truth; and why a criminal should be less likely to tell truth during the interval between his conviction and the expiration of his imprisonment than on the day before his trial or the day after

[1] See Minutes, No. 16; 25 June 1835. [2] Ibid. [3] XIX of 1837.

he is let out of confinement, it is not very easy to say.'[1] These ideas could not have been inspired but by a study of Bentham.[2]

This Act was necesssary because of the peculiar exigencies of combating thuggee. The Government issued, simultaneously with the Act, instructions to magistrates 'to offer mercy in the name of the Government to any thug in return for his making a full and honest confession which might give additional information about his accomplices'.[3] The offer of mercy did not mean full pardon, for the thugs were too dangerous to let loose on society. It meant, however, a lighter sentence than capital punishment or transportation which were commonly inflicted on thugs charged with murder by a summary trial. The informer, though, was put on regular trial for the comparatively minor offence of belonging to a gang of thugs and condemned to perpetual imprisonment 'with such indulgences in confinement as may be compatible with the safe keeping of the prisoner'.[4] The Act now passed admitting the evidence of convicts would not invalidate his evidence against his accomplices who might be apprehended later. Macaulay derived this idea from the old system of approvement in England where 'it is the common practice for magistrates to hold out hopes of pardon in commutation of punishment to offenders on condition of their giving full and true information against their accomplices. These promises have no legal effect whatever. They cannot be pleaded in a court of justice. But the Government considers its faith as pledged in such cases, and has never, as far as I am aware, failed to redeem the pledge even when the magistrate has acted indiscreetly in giving the assurance'.[5] In their instructions, magistrates were therefore warned that their promise would be the pledge of the Government.

While the evidence of convicts was thus to be allowed, the Government also reaffirmed their right to appeal. The Sadar Fouzdari Adalat of Bombay represented that much of their time was wasted in examining groundless appeals from convicts in gaol.[6] The Government of Bombay, therefore, suggested the

[1] See Minutes, No. 26; no date.

[2] See Bentham: *Works*, Vol. IV, pp. 375-6.

[3] *I.L.C.*, 19 June 1837, No. 16.

[4] Ibid.

[5] See Minutes, No. 26.

[6] This right was conceded under the Bombay Code: Regulation XIII of 1837.

expediency of enacting a law empowering the principal criminal court to penalize convicts for making groundless appeals. The Legislative Council, however, considered the law to be inexpedient. It was to be regretted that the right was abused and the Sadar judges found their time wasted. 'But', wrote the Council, 'every consideration of humanity and justice requires that the most unchecked freedom of complaint should be allowed to persons in the unhappy situations of convicts.'[1]

One of the important questions which Macaulay discussed was: In what language should the judicial proceedings be recorded? This difficult question he thought would be readily answered if his system of oral pleadings was adopted. 'For', said he, 'if the decree is to be framed in conformity with the terms of the issue, and if the issue is to be taken down from the lips of the parties, it seems necessarily to follow that the language which the parties speak must be the language of the record.'[2] He therefore recommended that the principle should be established that whatever was the 'language spoken by the mass of the population of a zillah ought to be the language of the record'.[3] Persian, it was said, was best suited to official business because of its precision and terseness while the Indian languages did not possess those merits. Macaulay thought that according to his plan the pleadings would be oral and the statement of issues would be so short that the defects in Indian languages which Persian lacked would not be noticeable. He also suggested that the record should be translated for the use of a superior court and that provision should be made to give the translation the authority of the original.

Ross suggested that the proceedings in the court of the zillah and city judge should be recorded in English. Metcalfe, while he was the lieutenant of Lord William Bentinck, was of opinion that English should be made the official language of the courts. There was no peculiar virtue in Persian. In India, it was as much a foreign language as English. Metcalfe, however, did not want to precipitate change. 'The present race of native servants', said Metcalfe in 1832, 'must pass away, and be succeeded by another differently educated, before the Persian can be superseded generally in our courts by the English language.'[4] In one

[1] *I.L.C.*, 14 August 1837, No. 12.
[2] See Minutes, No. 16; 25 June 1837.
[3] Ibid.
[4] Kaye: *Papers of Lord Metcalfe*, p. 293.

part of the judicial proceedings English could immediately take the place of Persian. Metcalfe suggested that every written order coming from a European judge ought to be in English. 'He ought to write it with his own hand, and from his own head, in the language in which he can best express himself, which will of course be his own.'[1] For the sake of uniformity in the keeping of records the order might afterwards be translated into Persian.

Macaulay was against continuing Persian as the official language of the record and against introducing English as its substitute. But in doing away with Persian great caution was to be exercised—'a caution which is required at the first introduction of extensive changes, however salutary, in an old and deeply rooted system'.[2] The reasons were evident. A sudden change would produce public inconvenience in many parts of India, and especially 'would reduce many old and useful servants of the public to distress such as no humane Government would willingly cause'.[3]

An Act[4] therefore was passed at the close of 1837 empowering the Governor-General in Council to dispense with the old requirement that the Persian language and script should be used in judicial and revenue proceedings and to delegate these powers to subordinate Governments. By a resolution in Council the powers were delegated to the Governments of Bengal and Agra with a judicious warning against their hasty exercise.

It must be stated in conclusion that only a few of Macaulay's projects—whether for the reform of the mofussil courts or their procedure—matured into legislation. Most of them are among the might-have-beens of history. Their value is none the less great because they reveal Macaulay's approach towards judicial reform and the tendencies at work in the Council of which he was a member. They show that there was a genuine desire to give India a better judicial system in the interest of Indians. And the laws passed, however few, gave concrete proof of those liberal tendencies.

[1] Kaye: *Papers of Lord Metcalfe*, p. 293.
[2] *I.L.C.*, 4 September 1837, No. 15: Resolution of Council.
[3] Ibid.
[4] XXIX of 1837.

XI

THE FIRST LAW MEMBER

THE Law Member of Council, who in the words of Mill was to be 'versed in the philosophy of men and government', had a great function to perform. It was to interpret the principles of the great Charter and Act of 1833; and the mantle fell fittingly on Macaulay. At the time of his departure to India, his talents were just unfolding themselves in the Commons and the library, and it was not unlikely that in a short time he might have risen high in English politics. But the circumstances of his family forced him to go to India and make sure of a competence. The adversity of a great man was the benefit of a nation; and while he laid in India the foundations of her uniform system of laws, he earned for himself the proud qualification of being an eminent jurist.

Macaulay in the early eighteen-thirties was a rising man in the Whig party. In Indian affairs, for which he developed an early interest, he was following the splendid tradition of Burke. His speech in the Lower House, on the East India Bill, though seldom reaching the heights or power of Burke, was obviously cast in the same grand manner. But it was not merely an attempt to emulate Burke nor was it the trick of an orator to win a round of applause. It came from a deep interest in India and her peoples and set forth the principles which moulded his legislation in India and formed the argument of his able minutes at the council table.

The one principle which fascinated him most was that British rule in India should be for the people of India. The system of representative government he thought to be the best for any nation. But in India, its introduction would have been premature. It was 'utterly out of the question' as James Mill replied before the Select Committee. But if it was not possible to introduce the European conception of government into the Indian system, Macaulay would give her the second best: 'a firm and impartial despotism',[1] and 'engraft on despotism those blessings which are the natural fruits of liberty'.[2] He warmly supported the idea of associating the Indian with the service of his country, and

[1] See Minutes, No. 10; no date.

[2] *Speeches*, p. 65.

did not share the fear of those who thought that it would be the end of English rule in India. He resented that fear 'as inconsistent alike with sound policy and sound morality'.[1] Of course the admission of Indians to high office must be gradual even in the interests of India. But when the time came he would not be diverted by the fear of losing India. He would never avert or retard the progress of the people and would even hail it as 'the proudest day in English history'[2] when, trained under the system, they would demand European institutions.

Macaulay carried these liberal principles to India. He abhorred the very idea of Europeans forming themselves into a ruling caste. Had not the unfortunate country suffered enough already from the distinctions and prejudices which the system created? Why then 'inflict on her the curse of a new caste' or 'send her a new breed of Brahmins' treating all her population as pariahs.[3] This argument runs through all his minutes which deal with the demand of privilege by the European community, and especially when the noisy lawyers at Calcutta demanded as their birthright an appeal to the Supreme Court from the mofussil. Macaulay always had an argument ready: a privilege enjoyed by a few individuals in the midst of a vast population is not freedom—it is tyranny.

His firm attitude towards the clique of lawyers at Calcutta is characteristic of his forceful personality. He did not like the distinction which the Charter Act of 1813 made in allowing Europeans a special appeal to the Supreme Court while the Sadar court acted as the final Court of Appeal for the great body of the people. In itself the distinction was paltry and meaningless, but it had 'the semblance of partiality and tyranny'. It supported the notion 'that Englishmen in India have a title to something more than justice'. As a matter of fact the Supreme Court did not administer to them anything more than justice, but, apart from moral implications, it was not good policy to uphold a meaningless privilege which tended to cry down the Sadar courts and to show that Englishmen did not put confidence in them. In the result Indians would learn to look askance at the Sadar and fear that something was wrong. That would only lower the prestige of the highest court of the Company.

[1] *Speeches*, p. 77. [2] Ibid., p. 78. [3] Ibid., p. 73.

This reasonable attitude raised a storm of protest, bitter in its personal attack and even threatening. Some critics compared Macaulay to Lord Strafford,[1] others wanted to lynch him, for he had flouted public opinion. Such people only represented a few hundred Calcutta residents, but they worked themselves into such an agitation that it might well have frightened a smaller man. Macaulay, however, had taken his stand and nothing would move him. It is to his credit that he was loyal to his principles. The storm raised against him in the press was possibly the result of his Press Act; but even when it turned against him, he did not waver in his support of a free press. He belittled the storm as a mere cupful of wind to a weather-beaten sailor in English politics.[2] On the other hand it braced him to see his Act through. He found in the attack an effort to belittle the authority of the Government and to insult the people, for 'the organs of that opposition declared that the English were the conquerors, and the lords of the country. They were the electors of the House of Commons and were not to be bound by the laws made by an inferior authority'. Macaulay could not countenance these arguments which were at variance 'with reason, with justice, with the honour of the British Government, and with the dearest interests of the Indian people'. He declared, in words which do him honour: 'For myself, I can only say that, if the Government is to be conducted on such principles, I am utterly disqualified by all my feelings and opinions from bearing any part in it, and cannot too soon resign my place to some person better fitted to hold it.'[3]

Thus he won through all opposition. But his personality was felt not only outside the Council but also within it. It was the personality of Macaulay, which raised the position of the fourth member of Council and saved the Legislative Council from merging into the executive. Prinsep, a senior member of Council, objected to Macaulay's standing orders of the Legislative Council on the ground that they contained nothing to prevent any external body from approaching the Legislative Council. His own opinion was that the Legislative Council should not hold direct communication with the presidency Governments or other public bodies, for they should not be taught to look up to two masters.

[1] See Trevelyan: op. cit., p. 323. [2] Ibid., p. 328. [3] Ibid., p. 289.

The executive departments should conduct all inquiries and discuss all questions incident to legislation.[1] What was at the back of Prinsep's mind was that if the Legislative Council took upon itself the chastisement of public authorities who neglected its orders, then the executive would lose itself in the Legislative Council. Prinsep exaggerated the distinction but Macaulay was not slow to join issue with him. 'If Mr Prinsep's resolution be adopted', he said in his long argument, 'a draft of a law of the highest importance may be sent to Calcutta by the Governor of Fort St George in Council. The Executive Council may have this draft before them for a considerable time in the Judicial or Financial Department. Long minutes may be recorded on it by the Governor-General and by the three senior members of Council. Fresh information may be called for. Circulars may be sent all over the country. A copious correspondence may take place with the Madras Government. References may be made to the Law Commission and answers received. This may go on for six months. And during all this time, the fourth member of Council, sent to this country expressly for the purpose of legislation, solemnly reminded by the Court in their late dispatch that though all the members of the Council are entitled to propose and discuss laws, his time and faculties are to be peculiarly [devoted] to that department of public business, considered both here and at home as especially responsible for the manner in which the work of legislation is carried on, would have no right to see a single paper or to hear a single discussion, and would certainly be precluded from voting on any question and from recording any opinion.'[2]

Macaulay knew that he was on sufferance in the executive branch of Government and could not influence its decision by his vote. He ended his argument with these words: 'I deny both the expediency and legality of such an arrangement. I deny the expediency of admitting a person to vote on the passing of a law who has not been admitted to take part in all the preceding discussions on it. I deny the legal right of the Council of India to exclude the fourth member of Council while they are deliberating on the draft of a law in the Financial or Judicial Department. I claim for myself and my successors a legal right to record an opinion

[1] *I.L.C.*, 6 July 1835, No. 10. [2] See Minutes, No. 4; 13 June 1835.

and to give a vote not merely on the final passing of a law, but on every question which may arise respecting a law in any of its stages.'[1]

One feels that Macaulay while making this peroration was flinging out an arm in a familiar gesture, as if he was speaking in the House of Commons, and smiling inwardly as he saw in his imagination his wretched adversary scuttling before him. Prinsep did not press his point; he found instead some paltry defects in the standing orders instead of gracefully admitting his defeat. Macaulay's argument was not for the predominance of the Legislative Council over the executive in the Indian Government, for there was little difference between them. His whole stand was made in the interest of the dignity and functions of the Law Member which touched him closely and which he upheld with all the force at his command.

The passage quoted above shows Macaulay in his indignant mood. But that was not his usual method. In general, he explained his views to his colleagues in his minutes, which was the official form current in the Council. He gave beauty and colour even to that dull form of official routine and made it a finished product of art 'with just as much literary ornament as would place his views in a pictorial form before the minds of men whom it was his business to convince'.[2] The storehouse of his mind provided him with parallels from far-off lands of the business he had to perform. He applied general principles to the details of his official work thereby preventing himself from being lost in details. He was new to India. Like some of his colleagues on the Council, he had hardly any experience of Indian administration. He was always conscious of this and tried to make up for it by consultation with the veterans of the Company and by his own ability and ready grasp of affairs. In his controversy with Prinsep, which I have dealt with at some length, he was ready to forego his point if persons more experienced than himself thought that the executive Government would suffer in dignity and prestige if the Legislative Council dealt directly with public bodies. He, however, thought that such a system would only complicate the smooth working of the Legislative Council. He did not like mere forms. 'In no Government', he once said, 'would I sacrifice substantial convenience to forms. Least of all would I make

[1] See Minutes, No. 4; 13 June 1835. [2] Trevelyan: op. cit., p. 282.

such a sacrifice in a Government so new as this, in a Government which owes nothing to ancient associations.'[1] They had to be careful, for while they acted they were creating precedents which would quickly harden into customs.

Macaulay has described the exquisite care which he bestowed upon the Indian Penal Code.[2] He worked for months on several of its chapters, changing their plan ten or twelve times over. The Penal Code was an important work which well deserved that industry; but Macaulay gave the same diligent attention to all drafts of proposed Acts, before passing them into law. The process often took time and must have been annoying, especially to the presidency Governments who proposed new laws. Macaulay, however, erred on the safe side. He guarded against the evil of precipitate legislation. An Act is essentially a general rule, which the executive or the judiciary can readily apply to particular cases coming before them in the ordinary course of their business. If it is to be a good guide, it has to be well thought out and planned. When a law is once made, it is not easy to meddle with it, for meddling with law always detracts from its dignity.

The legislator, therefore, has many points to consider. Among them the most important are those of general policy and those of detail. He has to consider first whether an Act is expedient and after satisfying himself about its expediency to see that its terms are wide enough to cover all cases, real or imaginary, with which it deals. It is interesting to see how Macaulay, with the help of his colleagues in the Council or the Law Commission, decided these important points. Take for instance the motion of certain judicial officers in the Madras presidency who wanted to make the pretence of practising sorcery penal. The object of the proposed Act was to check the practice if possible and to prevent people who considered themselves the victims of sorcery from taking the law into their own hands by savagely attacking persons supposed to practise arts which the law did not punish. The question naturally arose whether such an Act, instead of checking the practice, would not strengthen the belief in the art. This was the opinion of the Madras Sadar court and also of the Government of Madras, but they thought the matter worthy of consideration. The Law Commissioners shared the opinion of the Sadar judges and declared that the law was inex-

[1] See Minutes, No. 4; 13 June 1835. [2] Trevelyan: op. cit., p. 300.

pedient. 'When the people', they said, 'universally believe in the reality of sorcery, if the law punished persons who profess the art, the people must think that the law punished the practice of a real art. It would therefore be hardly possible to prevent them from thinking that the law itself recognized the reality of the art.'[1]

My second instance will show how a slight error in the wording of an Act causes endless trouble to the legislator and anxiety to those who administer it. The Government of Bombay pressed for an Act levying tolls on the Bhore Ghat. The Government of India, after ascertaining that it was essential, passed a draft permitting the Bombay Government to levy such tolls. The toll on palanquins, large and small, was not mentioned and the local Government was unable to make the owners of palanquins pay tolls. It approached the Legislative Council requesting them to make good the omission. But how was that to be done? The Supreme Government rightly pointed out 'the very objectionable appearance which would be presented by the repetition of legislative enactments on a matter of comparatively trifling moment' and considered that 'a trifling loss of revenue was preferable to the promulgation of a distinct Act'.[2]

To appreciate how closely Macaulay examined the expediency of particular legislation, I cannot do better than give another illustration. In the presidency of Madras, children were sometimes murdered for the sake of the ornaments they wore. The local Government, therefore, requested the Council to pass an Act prohibiting the wearing of ornaments by children, the remedy being that the ornaments were to be confiscated on the second apprehension of a child running alone in the streets. Besides some technical defects in the remedy proposed, the Law Commissioners objected to it on 'general arguments of great weight'. 'Generally', said the Commissioners, 'parents will take better care of their own children than police officers will take of them. It is also generally desirable to suffer every person to put his property to the uses and to exhibit it in the manner most pleasing to him. The vanity which leads an Indian parent to adorn his child with a gold bracelet is by no means an useless feeling. It is by feelings of this sort that industry is stimulated, . . . that arts are made to flourish, that societies are raised from

[1] *I.L.C.*, 14 August 1837, No. 13. [2] Ibid., No. 8.

barbarism to civilization. It would be with great reluctance that the Law Commissioners would recommend a law which should prohibit the people of India from displaying their wealth in the manner most agreeable to their tastes and habits.'[1] The Commissioners thought that it would be necessary to pass the law only if it could be shown that a certain custom required the putting of ornaments on children and that the great body of the people were willing to see it abolished though individuals were unable to break through it by themselves.

So, ultimately, the passing of a peculiar local law was to be decided by the opinion of the great body of the people. Macaulay, who was trained in the rising tide of English democracy, laid great store on public opinion. It also fell in with his ideal that British rule should be for the people of India. He left the considerable margin of six weeks between the publication of the draft of a proposed Act and its final enactment, in order to derive advantages 'from consulting public opinion', which Macaulay thought would 'more than compensate for the disadvantages of delay'.[2] Though vehemently opposing the form of preamble to Acts, he admitted that the Government should in some manner or other give to the public the reasons for its legislative measures. His scheme of reform in the judiciary was planned to help the people. He would allow the Europeans free access to the interior of the country so that Indians might benefit by contact with a vigorous and free population. The Europeans were to be made amenable to the courts of the Company, not only to put an end to their privileges but to give them a common interest with Indians to purge those courts of corruption. Indians themselves were too awed by the power of the courts to expose them in their true colours. They were, according to Macaulay, 'timid, weak-spirited, the ready prey of every extortioner, the ready slaves of every tyrant'.[3]

Macaulay had the great fault of passing strictures on matters of which he knew nothing. In his otherwise able minute on education, he ridiculed the ancient literature of India. Here, disregarding Burke's warning, he indicted a whole people in a single sentence. But, as the *Spectator* said of his defect of imputing motives, it was

[1] *I.L.C.*, 14 August 1837, No. 29, para 4.
[2] Minute No. 2; 28 May 1835.
[3] See Minutes, No. 12; 3 October 1836.

'the fault of rectitude'.[1] Perhaps he expected too much from the people and was disappointed. In his Indian career, there were but few representations on behalf of the people whom he had hoped to consult from time to time; and he feelingly referred to this apathy in one of his minutes: 'The phenomenon which strikes an observer lately arrived from England with the greatest surprise and which more than any other damps his hope of being able to serve the people of this country, is their own apathy.'[2]

As the interpreter of the Act of 1833, Macaulay put his heart and soul into the question of judicial reform. But apart from that, he himself set great value on the administration of justice which, according to him, was the end of government. He would spare no expense, though he was hardly unreasonable in his demands on the purse. For, as he said in his powerful language, 'no Government has a moral right to raise twenty crore from a people, and then to tell them that they must put up with injustice because justice costs too much'.[3] Truly speaking, the administration of justice cannot be the sole end of government. The administration of justice, which implies the existence and maintenance of good laws, is one of the ends of good government. But whether one agrees with him or not about the end of government, Macaulay's position is sound. He meant that people should not be denied a good judicial establishment on the ground that it is expensive. It is better to have none at all rather than maintain a useless and corrupt one.

His whole project of judicial reform shows the profound influence of Bentham's legislative principles. As a young man, fresh from Cambridge, Macaulay might have disputed the doctrine of the Utilitarians; but in questions of jurisprudence he held Bentham in great respect, considering it to be rarely safe to dissent from him on such matters. Again, speaking about the law of evidence, he says that it is 'a subject on which, as indeed on most other parts of the philosophy of jurisprudence, it is not easy to add to what has been said by Mr Bentham'.[4] He follows Bentham's principles so faithfully, indeed, that Sir Leslie Stephen considers Macaulay's Penal Code to be 'the first actual attempt to carry out Bentham's favourite

[1] Trevelyan: op. cit., p. 287.
[2] Minute No. 12.
[3] Minute No. 16; 25 June 1835.
[4] Ibid.

schemes under British rule'.[1] And that remark is not unjustified. Whether he is advocating abolishment of the institution fee, or reforming the Indian law of evidence or showing his preference for a single judge over a plurality of judges, and on many other occasions, he was following in the footsteps of Bentham. He had the power and the gift of persuasion to put Bentham's philosophy into practice. But many of his schemes remained for several years in the form of recommendations, because Governments are loath to forsake the beaten path for a new road which costs money in the building.

There was one of Bentham's principles, however, which cost nothing and which Macaulay could not help introducing into the legal system of India. This consisted of making the meaning of his laws clear and precise. The vague preamble was done away with and in its stead came the resolution in felicitous prose explaining fully why a particular piece of legislation was undertaken. The terms of the Acts were neat and precise, avoiding those repetitions which attorneys like to indulge in and which merely make laws ambiguous.

These were some of Macaulay's principles and methods of approach in solving the problems which came before him. He found a people apathetic and inarticulate. He wanted to help them, by giving them better education, better laws formed into a uniform system, and better courts maintaining the spirit of those laws. He wanted to make corruption impossible, to get rid of privilege and to establish in India the principle that all are equal in the eyes of the law. This was an ambitious plan for a single man to achieve during a short term of office, supported though he was by his liberal colleagues at the council table. But Macaulay did his best, and the time he devoted to it indeed formed, in the words of his biographer, 'the most honourable chapter of his life'.[2]

[1] *The English Utilitarians*, Vol. II, p. 36.

[2] Trevelyan: op. cit., p. 282.

PART II

THE MINUTES

I

THE NEW TECHNIQUE OF LAW-MAKING

No. 1: 11 MAY 1835[1]

MR Prinsep's minute raises two questions, a question of law and a question of expediency.

The question of law is whether the rules according to which the Government of Fort William, under the old system, passed regulations for the presidency immediately under its charge be or be not binding on the Legislative Council when enacting laws for the whole Indian Empire.

I do not think that the rules are binding on us. Our legislative power as it seems to me is quite a new creation. The old regulations were mere by-laws. They were of force only in the provinces subject to the presidency of Fort William. They were of no effect against any Act of Parliament. There were classes of people who were not bound to obey them. There were courts which were not found to take notice of them. The Acts which we now pass are of quite a different kind. They are declared by the new Charter to have the full effects of Acts of Parliament. They are laws which extend to all parts of our Indian Empire, which all descriptions of people are bound to obey and which all courts without distinction are bound to administer. I therefore do not conceive that the enactments which prescribed the form of the old regulations can be held to apply to legislative Acts which are altogether of a different kind from those regulations.

Nevertheless it is hardly worth while to suffer any doubt to exist when a stroke of the pen will put an end to that doubt. If the Council should be of opinion that the legal argument which Mr Prinsep has stated with great force and clearness is—I will not say sound but—plausible, I should think it desirable to settle the question by a very short legislative provision.

We might at our next meeting pass the following Act which having a preamble and title would on Mr Prinsep's supposition possess all the requisites necessary to give it validity: 'An Act for

[1] *I.L.C.*, 27 July 1835, No. 3.

setting at rest all doubts touching the necessity of titles and preambles in legislation.

'Whereas doubts have arisen touching the necessity of titles and preambles in legislative Acts, be it enacted that no Act heretofore passed or hereafter to be passed by the Governor-General of India in Council shall be held to be invalid by reason of the want of preamble or a title.'

We now come to the question of expediency, which is by far the more important of the two. On this question I altogether differ from Mr Prinsep.

It is desirable undoubtedly that legislators in some way or other give public reasons for their legislative Acts. So great is the respect which all men, even the most powerful, feel for the opinion of their fellow creatures, that I would rather live under a despot who was bound to accompany all his edicts by a statement of the arguments which had induced him to publish them than under a representative body chosen by the most popular mode of election if all the deliberations of that body and all the motives of its decisions were covered with impenetrable secrecy.

But I deny that it is possible for us to prefix to our Acts preambles really setting forth reasons which induce us to pass those Acts. A single lawgiver might indeed prefix his reasons to his decrees, but the case is quite different when the business of legislation is performed by a Council. It constantly happens that we agree as to what ought to be done, while we disagree as to the reasons for doing it. A law may be unanimously adopted, and yet any statements of the arguments for that law may be disapproved by a majority. To give an instance, suppose that a legislature is called upon, as the authors of the Bench Code were called upon, to decide the question whether a marriage between uncle and niece should under any circumstances be authorized by law. It is easily conceivable that all the members might vote for positively prohibiting such marriages yet that every vote might be determined by quite a different line of argument. One member might think that such unions were forbidden by nature. Another thinks this opinion quite unphilosophical, but conceives that the Levitical law is in such matters of eternal and universal obligation. A third considers the doctrine as childish superstition, but thinks that if such near relations were allowed to look on each other in the

light of lovers, either the freedom of intercourse between them must be greatly restricted or that boundless licentiousness would be the consequence. A fourth is not much struck by any of these objections. He thinks that under some restrictions such marriages might be tolerated as they were in some of the great civilized nations of antiquity and as they still are in some Catholic countries. But he thinks that the public feeling is so strong on the other side that the legislature cannot prudently outrage that feeling. All these legislators agree in their vote. They differ fundamentally as to the grounds of it. There is not the smallest difficulty in drawing the enactment, but which of them is to draw the preamble?

The case which I have put is no rare case. It is one, I will venture to say, of daily occurrence in every legislative assembly of the world. I have watched the progress of many important bills through the British Parliament, and I have no hesitation in saying that if it had been necessary to prefix to each of those bills argumentative statements truly setting forth the arguments for what was enacted, none of them could ever have been carried through. The majority which had been unanimous as to the enacting clauses would have been broken into a hundred fragments as soon as it became necessary to discuss the preamble. It is the same here. We were all but unanimous as to the regulation lately published on the subject of the press. But I doubt greatly whether Mr Prinsep would have voted for a preamble such as I would have drawn, and whether I should have voted for a preamble drawn by him.

The consequence has been that both in England and India, the preamble has become a mere form. It is always framed on the principle of satisfying everybody who approves of the enactments to which it is prefixed; and this can only be done by making it altogether vague and unmeaning. It is not the fact that the law quoted by Mr Prinsep has been bona-fide deserved. It is not the fact that 'a preamble has been prefixed to every regulation stating the reasons for its adoption', or, in the words of the Act of Parliament, that the grounds of 'each regulation have been prefixed to it'. For surely by 'reasons' and 'grounds' we are to understand something more than 'Whereas it is expedient that the judicial system of the presidency should be remodelled, be it enacted, etc'. It is to no purpose to make laws ordering us as a

body to give our grounds and reasons. The thing is impossible. As long as men arrive by different trains of reasoning at the same practical conclusions, so long will it be impossible for any Legislative Council to frame preambles which shall contain anything but vague general expressions.

If preambles be useless, I think that they are clearly worse than useless. They swell out our Acts with idle words. They increase the bulk and cloud the sense of what ought to be of all compositions the most concise and the most lucid. I may be thought hypercritical on this subject. But I would resist the very beginning of an evil which has tainted the legislation of every great society. I am firmly convinced that the style of laws is of scarcely less importance than their substance. When we are laying down the rules according to which millions are, at their peril, to shape their actions, we are surely bound to put those rules into such a form that it shall not require any painful effort of attention or any extraordinary quickness of intellect to comprehend them. Why it has been so much the fashion in various parts of the world to darken by gibberish, by tautology, by circumlocution, that meaning which ought to be as transparent as words can make it is a question which I will not here discuss. It is certain that in many countries not one in a thousand of those who are bound under the most severe penalties to obey the laws can read a page of any law without being altogether bewildered by the unnecessary intricacy and the exuberance of the language. The drafts which have lately been sent us from Bombay ought to be a warning to us. It would be easy to condense them into one tenth part of their present extent, and when so condensed they would be infinitely more intelligible to everybody who might have to administer or to obey them.

But while I think preambles useless, and therefore objectionable, I fully agree with Mr Ross, and with that eminent writer whom he has quoted and from whose opinions on a question of jurisprudence it is rarely safe to dissent, in thinking it most desirable that the Government should, in some manner or other, give to the public the reasons for its legislative measures. It seems to me to be for our interest, as well as for the interest of those whom we rule, that our laws should come before the public accompanied by some explanation. The situation of India is very peculiar. It

is perhaps the only country in the world where the press is free while the Government is despotic. In all other despotic States, writers are afraid to criticize public measures with severity. In all other States where free political discussion is allowed, there is some public assembly in which the authors of laws have an opportunity of vindicating those laws. If the emperor of Russia puts forth an ukase, no Russian writes about it except to defend it. If an English or French minister brings forward a law, he has an opportunity of arguing for it in Parliament or in the Chambers, and his arguments are read by hundreds of thousands within a few hours after they have been uttered. We are perhaps the only rulers in the world who are mute on political questions, while all our subjects are unmuzzled. Our laws are the only laws which are exposed naked and undefended to the attacks of a free press.

It is much easier, as usual, to point out the evil than to find the remedy. It is impossible, as I have tried to show, that the Government can give detailed statements of its reasons. It would perpetually happen that members of Council who had voted for a law would strongly object to parts of the manifesto in which the arguments for that law might be set forth. We have a striking instance of this in the proceedings of the British Parliament. Peers, it is well known, have the right of entering protests on the journals of the House. It is curious to see how frequently those who have agreed perfectly as to their votes differ *toto coelo* when they come to record the reasons for their votes. I have just looked at several protests on important questions; and I have not seen one in which all the protesting lords could concur in the statement of reasons. Many of those who subscribe the same protest do so with reservation, e.g. 'Dissenters for the first reason'; 'Dissentient for the third and fifth reasons'; 'for all the reasons except the last'.

The only way to avoid this difficulty is to frame these statements, as preambles have always been framed, in the most general terms. But we may rely on it that, if the terms be general enough to include all the supporters of the measure, they will be too general to serve as an answer to any of its opponents.

The only mode, I must confess, which has yet occurred to me of really setting forth the reasons for our laws is the publication of our minutes on questions of legislation. I feel the force of the

arguments urged by the Governor-General, at one of our late sittings, against such a course. It is certainly an evil that the dissensions which might exist within the Council should be exposed to the public eye. It is to be apprehended also that the effect of exposure would be to exasperate dissension. The passions which are I fear inseparable from public controversy might prove too strong for the restraint either of official or social decorum. A class of feelings hitherto unknown among the members of the Council might arise, the vanity, the jealousy, the morbid irritability of professed authors engaged in a hot competition with each other for the favour of the public. These would indeed be great evils. But whether, great as they are, it might not on the whole be better to incur the risk of them than to leave our measures, unaccompanied by one word of explanation or defence to the mercy of hostile journalists is a question which I would gladly see referred for the consideration of the home authorities.

No. 2: RULES FOR LEGISLATIVE PROCEEDINGS 28 MAY 1835[1]

THE dispatch lately received from the Court of Directors enjoins us to frame rules for our legislative proceedings. The Council of India is a body so widely different from those large deliberative assemblies to which the business of legislation is entrusted in the constitutional Governments of Europe and America that it would be worse than idle to imitate the usages of those assemblies. We must form a system for ourselves.

The general principles on which our rules ought to be framed are sufficiently clear. They are these:

We ought to provide securities against precipitate legislation. We ought to ensure a fair hearing to the minority, however small.

We ought to reserve to ourselves the power in great emergencies of legislating with the utmost promptitude, and yet to put this power under such checks as may render it very difficult for ourselves or our successors to abuse it.

We ought to give to the public an opportunity of expressing its opinion concerning our laws before they are finally passed.

[1] *I.L.C.*, 6 July 1835, No. 8.

There is doubtless great inconvenience in this. At home the substance of a law is known at Glasgow or Dublin within forty-eight hours after the plan has been developed in Parliament. But the Indian Empire is so extensive and the means of communication are so far inferior to those which exist in our own country that an Act cannot be read in the remote provinces till about three weeks after it has been printed at Calcutta. I remember that the Calcutta dak was once nineteen days in reaching Ootacamund. Under the circumstances we must, I am afraid, allow six weeks at least to elapse between the first publication and the final enacting of a law. The advantages which we shall derive from consulting public opinion will, I think, more than compensate for the disadvantages of delay, except in those special cases for which special provision must be made.

The great difficulty which I feel is with respect to amendment. When we reconsider the draft at the end of the six weeks, we shall often find amendments. Now amendments are of very different kinds. Some will be merely verbal. Others will be intended to supply omissions of inadvertence. Others will be more extensive of the general principle of the Act. Others, it is probable, will have been suggested by petitions or by remarks in the public journals. But others may be proposed which have not been in the least anticipated by the public and of which the effect would be altogether to change the character and the spirit of the law.

Take for example our Press Regulation. A few words have been omitted by the inadvertence either of the transcriber or of the printer. They are words which it will be necessary to insert when we reconsider the draft. But there cannot possibly be any difference of opinion about the propriety of inserting them. I see no objection in making an amendment of this sort offhand, and instantly proceeding to pass the law. But an amendment might be proposed of a very different kind. Suppose that it were proposed to add a clause authorizing the Governments of the subordinate presidencies to seize all presses and types, which they might suspect to have been employed for purposes of sedition and calumny. The whole nature of the Act would be changed. It would be a new law as different from the law which we submitted a month ago to the public as that law from the Regulation of 1824.

It is clear then that there are certain amendments with respect to which we ought to repeat all the process of publication, and others which may without impropriety be passed on the instant. It is, however, very difficult, I believe impossible, to draw the line. There are subjects which do not admit of precise definition. To provide that whenever any amendment however trifling, however familiar to the public mind, shall be adopted, another publication and another delay of six weeks shall take place would be monstrous. I have left the power of deciding in each case to the Council, and I have proposed some rules which will to a certain extent prevent the Council from abusing that power. I shall be truly happy to find that any of my colleagues is able to suggest any better device.

PS. I omitted to observe that there are some laws which are intended to have a purely local operation and in which only particular places would take any interest. If these places were very near the seat of Government, it would be unnecessary to allow an interval of six weeks between the publication and passing of the Act. A law, for example, relating merely to the police of Calcutta might without impropriety be enacted within a fortnight after publication. In such a case the Council would feel no scruple about suspending the standing order and would have no difficulty in giving reasons for the suspension.

No. 3: 31 MAY 1835[1]

THE dispatch received from home sets at rest any legal objections raised by Mr Prinsep. The Court of Directors are of opinion that the old Acts of Parliament do not bind the Legislative Council to follow a particular form of legislation. The Chief Justice is also of opinion that neither titles nor preambles are necessary to the validity of our Acts.

[1] *I.L.C.*, 27 July 1835, No. 6.

No. 4: 13 JUNE 1835[1]

I DO not clearly comprehend the objections of Mr Prinsep to the standing orders which I have proposed.

The object of the standing orders is to guard against precipitate legislation, to make it certain that due attention will be paid to the reasonings even of the smallest minority, to give to the public an opportunity of expressing its sentiments concerning the laws which are proposed for its benefit, to reserve at the same time to the legislature the power of acting with promptitude in great emergencies, and to provide such securities as may render it unlikely that this extraordinary power will be resorted to on light occasions. These things seem to me essential to good government. The Court of Directors are evidently of the same opinion. I see in Mr Prinsep's minute no argument which tends to show either that the objects which I have enumerated are not highly important, or that the orders which I have proposed do not, as far as it is possible in a Government like that of India, secure those objects. 'The draft', says Mr Prinsep, 'seems to have been framed on the principle that but for some fixed rules there would be wanting proper courtesy and consideration towards individual members of Council or towards a minority, which is a state of things that I cannot comprehend the necessity of providing for.' Unhappily I believe that there never was a deliberative body in the world, large or small, in which the necessity of providing for such a state of things has not been felt. It is well known that in India Councils have formerly been convulsed by faction. In Mr Hastings's time, there were two parties, each of which alternately had a majority. What courtesy, what consideration, did either party, when it was uppermost, show to the minority? Did not Mr Hastings and Sir Philip Francis give each other the lie on the records of the Council? Did they not actually fight a duel in consequence of their political disputes? If Mr Hastings, among whose many eminent qualities equanimity and self-government were not the least conspicuous, could suffer himself to be excited into offering to one of his colleagues an insult only to be expiated by blood, can it be thought that the mere feeling of personal courtesy which may exist between the members of the Council is a sufficient guarantee to the public

[1] *I.L.C.*, 6 July 1835, No. 11.

that the majority will always consider attentively and impartially all the objections of the minority?

In consequence of what took place under the administration of Mr Hastings, a change was made in the constitution of the Indian Government. Faction was extinguished by the establishment of despotism. The Governor-General was armed with powers so extensive that systematic opposition to him became hopeless. But under the new Act these extraordinary powers of the Governor-General do not extend to legislative questions. The constitution of the Legislative Council is exactly the same as the constitution of the Council of Bengal in the time of Mr Hastings. The Governor-General may be in a minority. His favourite measures may be thrown out. Law after law may be passed in defiance of his opposition. Surely no person acquainted with history or human nature can doubt that in such a body as the Indian legislature factions may be formed, that the minds of the members may become heated in a long course of opposition, that when a party which has long been a minority becomes a majority it may be tempted to abuse its victory. To imagine that the rules of politeness will be sufficient to prevent men from obeying the strongest passions of human nature would in my opinion be most unwise and unsafe.

On these grounds I think it necessary to provide that no member of the Council, even if he should stand alone, shall be borne down by mere numbers, that every member shall have a right to call on those who have outvoted him to record their reasons for the information of those to whom we are accountable, and who, if they see that reason is on the one side and power on the other, have the remedy in their hands.

The standing orders proposed by Mr Prinsep seem to me either unnecessary or most highly objectionable and even illegal.

I can by no means agree with him in thinking it 'the most essential point of all' to lay down rules as to the mode in which drafts of laws are to come before the Council. Whatever is important as to that matter has already been settled by higher authority. The Act of Parliament has provided that the subordinate Governments may propose laws. The Court of Directors, whose instructions on this subject have all the force of Acts of Parliament, have determined that every member of the Council

shall have the right of proposing laws. I see no reason for saying a word on the subject in our standing orders.

Mr Prinsep proposes that all the drafts of laws which are sent up by subordinate Governments shall, before they are laid before the Legislative Council, be considered by the Executive Council in the department to which they belong, that the Executive Council may amend them, that the Executive Council may frame and discuss within itself drafts of laws and then submit them to the Legislative Council, that all correspondence with all subordinate authorities, with the Law Commission and with the local Governments, shall be carried on through the Executive Council only. Now if it be meant merely to put the Executive Council as an organ of communication between the Legislative Council and other authorities, if the consideration of drafts by the Executive Council is to be merely formal, if the letters written on matters connected with legislation by order of the Executive Council are to contain merely what the Legislative Council has directed and if the answers are to be submitted to the Legislative Council for orders, though I think such a system in the highest degree cumbrous and inconvenient, yet if persons more versed in Indian affairs than I am conceive that there is any advantage in it, I will not oppose it. I am at a loss to conceive what benefit it can produce, unless delay, perplexity and the multiplication of unnecessary letters of transmission be benefits.

But I do not understand this to be Mr Prinsep's meaning. I understand him to propose that the Executive Council of India shall be competent to perform all acts incident to legislation except the final passing of a law. I have not the smallest hesitation in saying that this proposition is in the highest degree pernicious and directly opposed to the spirit and letter both of the Act of Parliament and of the instructions of the Court of Directors.

If Mr Prinsep's resolution be adopted, a draft of a law of the highest importance may be sent to Calcutta by the Governor of Fort St George in Council. The Executive Council may have this draft before them for a considerable time in the Judicial or Financial Department. Long minutes may be recorded on it by the Governor-General and by the three senior members of Council. Fresh information may be called for. Circulars may be sent all over the country. A copious correspondence may take place with the

Madras Government. References may be made to the Law Commission and answers received. This may go on for six months. And during all this time, the fourth member of Council, sent to this country expressly for the purpose of legislation, solemnly reminded by the Court in their late dispatch that though all the members of the Council are entitled to propose and discuss laws, his time and faculties are to be peculiarly [devoted] to that department of public business, considered both here and at home as especially responsible for the manner in which the work of legislation is carried on, would have no right to see a single paper or to hear a single discussion, and would certainly be precluded from voting on any question and from recording any opinion.

By the kindness of the late and the present Governor-General and of my colleagues, I have been permitted to see every public document and to assist at every deliberation. But this may not always be the case. A Governor-General may be on bad terms with the fourth member of Council. Such a Governor-General would be borne out by the letter of the Act of Parliament in excluding the fourth member from all knowledge. Mr Prinsep proposes to transfer to the Executive Department half the business of legislation. If this course be adopted, it will be in the power of the Governor-General to oust the fourth member of Council from the greater part of his legislative functions. I deny both the expediency and legality of such an arrangement. I deny the expediency of admitting a person to vote on the passing of a law who has not been admitted to take part in all the preceding discussions on it. I deny the legal right of the Council of India to exclude the fourth member of Council while they are deliberating on the draft of a law in the Financial or Judicial Department. I claim for myself and my successors a legal right to record an opinion and to give a vote not merely on the final passing of a law, but on every question which may arise respecting a law in any of its stages. The Council, I trust, will not decide against this claim without a reference home.

I have done my best to make out the reasons on which Mr Prinsep grounds his propositions. But I am quite at a loss to understand them. He says that the public authorities must not be taught to believe that they have two masters. That question is for a higher authority than ours. Parliament has thought

fit to confide the executive government of India to one body, and the supreme legislative power to another body. If this be an evil, let us apply to the home authorities to rid us of it. Indeed we have already done so. The Council at Ootacamund agreed in recommending to the Court of Directors that proper measures should be taken for removing the restrictions laid on the fourth member of Council. But as the law now stands the Indian Empire has two masters, and we cannot repeal the law. There is a supreme Executive Council and a supreme Legislative Council and, whether this be a convenient arrangement or not, we cannot lawfully transfer the functions of the supreme Legislative Council to the Executive Council.

Mr Prinsep proceeds thus: 'Suppose, too, an order from the Legislative Council should be neglected or disobeyed, whence is the punishment to come? If the Legislative Council were to take the enforcement of its orders on its own hands, it would soon become an Executive Council, and the functions of the different branches of the Government would be confounded.'

The danger then is that the function of the executive and the legislative branches of the Government should be confounded. And the remedy is to jumble them together in inextricable confusion. That the Legislative Council should become an Executive Council would be a frightful evil. But that the Executive Council should become a Legislative Council is no evil at all. And how does Mr Prinsep's proposition meet the difficulty which he has raised? Suppose that his rules are adopted. The Legislative Council wants information on some questions. It applies to the Executive Council. The Executive Council neglects to procure the information. Whence is punishment to come? How is the information to be procured? If the Legislative and Executive Councils differ, this case might easily arise. If on the other hand they always agree, there is an end of the argument about the two masters. The right course seems to me very obvious. When Parliament gave us the power of legislating it gave us also, by necessary implication, all the powers without which it is impossible to legislate well. I see no reason why the Legislative Council may not correspond directly with the subordinate Governments and with the Law Commission, why it may not directly call for information from any public functionary, why it may not if it is

considering a draft of a law on a military or financial subject require the attendance of the military or financial secretary. In no Government would I sacrifice substantial convenience to forms. Least of all would I make such a sacrifice in a Government so new as this, in a Government which owes nothing to ancient associations.

If however it be the opinion of gentlemen more experienced than myself that there would be any advantage in interposing the Executive Council as a mere organ of communication between the legislature and other bodies, though I must own that I do not conceive that the dignity of the Executive Council would be raised by such a course and though I fear that much delay and inconvenience would result from it, I will not press my objections. But in that case it will be fit that the Executive Council should be merely an organ of transmission, that its letters should be mere echoes of the communications made to it by the legislature, and that it should instantly transmit to the legislature every paper relating to legislation which might be sent to any executive department. Thus far I am ready to go. But that the Executive Council should, as Mr Prinsep proposes, take on itself the greater part of the business of legislation would be, I again repeat, a most reprehensible course. It would be in the highest degree inexpedient. It would be a direct violation of the Act of Parliament. It would be a direct violation of the latest orders received from the Court of Directors. Nor would there be, as far as I can perceive, a single compensatory advantage to set off against these objections.

No. 5: 14 JUNE 1835[1]

I AM unable to understand Mr Prinsep's objections to the Act which makes the Government *Gazette* evidence of the fact that a law has been passed by the Council of India. He distinctly allows that such a rule ought to be made. But he maintains that it ought not to be made at this time or in this form. It ought, he conceives, to form part of a great measure, the nature of which he does not explain. He says, indeed, that the great measure ought to 'include rules for all the forms of enactment, authentication

[1] *I.L.C.*, 6 July 1835, No. 3.

and promulgation and for constructing laws'. I cannot but regret that he has not specified the nature of these rules, for I am quite unable to divine what they can be. The mode of enacting laws is settled by Act of Parliament. They are to be enacted by the Governor-General in Council. If the mode of discussing them in Council be meant, that will, I hope, be shortly regulated by our standing orders. As to the constructing of laws, I am really not aware that it is justifiable to lay down any rules for that purpose. We must do our best to make our Acts perspicuous, and the judges must use their common sense. If, however, Mr Prinsep can suggest any rules of construction which may be of use, I shall be most happy to see and to support them. But whatever their value may be, they would be out of place in an Act prescribing what shall be good evidence of the passing of laws. Of the other points which Mr Prinsep mentions, authentication and promulgation, this Act fully provides for them. It will hardly be denied that it provides a mode of authentication. And what does promulgation mean? It means, if I understand its sense, the publication of a law in an authentic form. The publication of a law in the *Gazette* will henceforth be a publication in an authentic form and will, therefore, be a promulgation. What more is necessary I cannot imagine and Mr Prinsep does not explain.

Mr Prinsep objects to passing this Act at this time. It ought not, he says to be passed 'at this time of day, after twenty Acts have been published and promulgated, through the *Gazette* and otherwise, and no one has ever raised a question as to the sufficiency of the authority under which they were published'. Yet Mr Prinsep conceives that when the general measure which he contemplates shall be passed, this rule ought to be a part of it. Now, surely, if we have already deferred it too long, we ought, if we mean to pass it at all, to defer it no longer. Mr Prinsep is for passing it, but for deferring it. Surely, the objection to the time will go on increasing. If it be wrong to pass such an Act 'at this time of day', it will be more wrong two years hence. If it be wrong to pass it when twenty Acts have been promulgated, it will be more wrong to pass it when we have made two hundred Acts. But what is there in the objection? What practical inconvenience arises from our passing the Act now? Will it throw any discredit on the preceding twenty Acts? On the contrary, it secures

them against being questioned in any court. None of them, says Mr Prinsep, has yet been questioned: and hence he infers that this Act is superfluous. I answer that either it is now the law that the *Gazette* should be good evidence of the passing of an Act or it is not the law. If it be the law already, why does Mr Prinsep say that whenever his more extensive measure comes forward this rule would of course form a part of it? If it be not the law, then our Acts, though they have not yet been questioned, may be questioned tomorrow. I can hardly conceive that the legislature could be in a more degrading situation than that in which we should stand if our Acts were questioned before the Supreme Court, and if they were not held to be sufficiently proved.

Mr Prinsep says that the *Gazette* will become under this law 'the only good legal proof of the law's having passed'. This is incorrect. If there be now any other good legal proof that a law has passed, that proof will under the proposed Act retain all its validity. It is proposed to enact that the *Gazette* shall be good evidence, but not that it shall be the only evidence.

Mr Prinsep says that 'everybody will have to depend on the due *preservation of the files of the Gazette* for the means of establishing the fact'. This would be an objection if it were meant that, to the end of time, there should be no authentic copy of a law except that which appeared in one single number of the Government *Gazette*. But of course this is not intended. Parliament has directed us to form the laws of India into a Code. When any extensive portion of the Code has been completed, it will be necessary to consider of some mode of authenticating the volume in which it is printed. But it is unnecessary to stress that point at present. We want to provide [some] mode of authenticating our current legislation—some mode of authenticating those laws which have not been incorporated with the Code. When the Code has been framed and promulgated, it ought to be revised at stated periods. Every law passed since the last revision ought to be inserted; every law repealed since the last revision ought to be struck out; and the Code thus amended ought to be republished. On the day of the republication of the Code, all the *Gazettes* anterior to that day would cease to be evidence. All this, however, must be provided for hereafter. What is at present required is a mode of authenticating Acts which have not been inserted in the

Code; and I see no better mode than publication in the *Gazette*.

There is no analogy between the king's printer in England and the person who prints for the Government here. The king's printer, unless I am much mistaken, holds his office for life by virtue of letters patent under the great seal. He is as well known as the Lord Chancellor or the Chief Justice of the Court of King's Bench. Here the Government employs whom it pleases. It may discard its printer every month and may employ another. On the whole, therefore, I am inclined to think that the *Gazette* is the best organ of promulgation.

I have no fear that our Acts will swell the *Gazette* beyond its proper size. I can at least assure the Council that no efforts of mine shall be wanting to prevent our laws from adding materially to the load of the dak.

No. 6: 21 JUNE 1835[1]

I AM still quite unable to see the force of Mr Prinsep's objections. Some of the measures he recommends ought not, I think, to be adopted at all. Others ought not to be adopted now. None ought to form a part of this Act.

It appears that by 'rules of constructing laws' Mr Prinsep meant rules giving validity to the constructions made by certain courts. When any extensive portion of the Code shall approach completion, it will be necessary to consider that important question. At present I think we had better leave things as they are. If Government think otherwise, I am prepared to suggest a plan. But I certainly should no more think of inserting rules on that subject in the Act now before us than in the press law or the law about indigo planters.

Mr Prinsep is mistaken in imagining that I attribute any magical virtue to the great seal on the parchment. But I conceive that an officer who holds his place for life, whose name everybody is familiar with from the time they first see it in the nursery on the first page of their Bible and Prayer Books, whose dismissal would be known in forty-eight hours in every part of England, differs widely from

[1] *I.L.C.*, 6 July 1835, No. 5.

a printer who may be dismissed any day in the week. There is less chance of abuse, says Mr Prinsep, when an officer is liable to be dismissed. Undoubtedly. But we are not now considering under what arrangement a printer is most likely to print well, [but] under what arrangement his name will best serve to authenticate a public instrument. Now if Mr Prinsep's plan be adopted it will be necessary whenever a copy of an Act is put in evidence to prove, or at least to be prepared to prove, that the person whose name is at its foot was Government printer when he printed it. I will put a case: *A* is made Government printer as Mr Prinsep proposes by notification in the *Gazette* of the 1st of May. On the 1st of June he is dismissed and *B* is appointed. In June an Act is passed, printed by *B* and sent down to the mofussil. At a trial the plaintiff puts the Act in evidence. The defendant denies its validity and produces the *Gazette* of the 1st of May which appointed *A*. Now if the plaintiff be not provided with the *Gazette* of the 1st of June, which superseded *A* and appointed *B*, what follows? The name of the Government printer is the only proof of the Act. The *Gazette* is the only proof of the name of the printer. A *Gazette* is produced from which it appears that in May, *A* was Government printer. No evidence of his removal is produced. What can the court do? They must disallow the Act. What will be the consequence? Plainly this, that every person who means to put an Act in evidence must provide himself with a copy of the *Gazette* containing the appointment of the printer, or every court must keep a file of the *Gazettes* for the purpose of enabling suitors to authenticate all the laws which a long succession of printers have printed.

Therefore, on Mr Prinsep's own showing, we must come to the *Gazette* at last. Why not do so at first? Why make two stages of a proceeding when one is sufficient? The only difference between the two plans is this: that according to the one, the *Gazette* will prove the name of the printer and the name of the printer will prove the Act; and according to the other, the *Gazette* will directly prove the Act. I confess that I think the latter mode decidedly more simple and rational.

II

LEGISLATION AND PUBLIC OPINION

No. 7: 16 JANUARY 1836[1]

I CANNOT give my consent to this regulation. It is diametrically opposed to a principle which, I hope, we shall always bear in mind. That principle is this—that the people of a place are better judges than the Government can be whether it is worth their while to submit to a local tax for a purely local object.

The Bombay Government wishes to repair the walls of Kaira and calls on the inhabitants to subscribe towards the work. The inhabitants refuse. They state, and the statement is not contradicted, that such a proceeding is altogether without precedent and that hitherto when it has been thought by Government to be necessary that the walls of a town should be repaired those walls have been repaired at the expense of the State. The Bombay Government, finding these people quite determined, requests us to pass an Act for taxing them.

'The work', we are told, 'is clearly requisite for the protection and accommodation of the inhabitants; and therefore they ought to bear the expense.' Surely the inhabitants are the best judges of this; and it is admitted that they do not think the protection and accommodation afforded by these walls worth the cost of the repairs. It may well be that the walls afford both protection and accommodation and yet that the inhabitants may be in the right. They know the extent of the advantage and they know also the extent of their means. Protection and accommodation may be bought too dear. Whether they would in any particular case be bought too dear or not is a question on which I would sooner take the opinion of the interested parties than that of the most enlightened and benevolent Government that ever existed.

If the Bombay Government represented to us that these walls were of use for general purposes; that they facilitated the collection of the revenue, that they were of any importance, which however can hardly be conceived, from a military point of view, I should be inclined to pay great respect to that representation. I should then

[1] *I.L.C.*, 18 January 1836, No. 7.

think that the repairs ought to be executed; but that they ought to be executed out of the general revenues of the presidency.

What we are now requested to do is to lay a tax on these people against their own wishes and purely for their own benefit. Whatever we might be inclined to allow to the opinion of the Bombay Government, we can hardly think that it is of more value than the opinion of the inhabitants of Kaira on a question which affects only their own comfort and security.

The case seems to me quite clear. If these walls are of use to the State, let the State keep them up. If they are of use to none but the people of Kaira, undoubtedly none but the people of Kaira ought to pay for repairing them, but then none but the people of Kaira ought to decide whether they shall be repaired or not.

If indeed a majority of the inhabitants were disposed to contribute, I would willingly press an Act to bind the dissenting minority. Even then, however, I should feel great doubt about the expediency of levying the necessary sum in the manner which is now proposed. But it is unnecessary to discuss this matter as it does not appear that any part of the population of Kaira is willing to subscribe. If, under these circumstances, we pass the proposed Act we shall, in my opinion, make a bad law and a bad precedent.

III

THE FREEDOM OF THE PRESS

No. 8: 16 APRIL 1835[1]

IN the accompanying draft of an Act on the subject of the press, I have attempted to embody what at several of our recent meetings appeared to me to be the general sense of the Council. It is difficult to conceive that any measures can be more indefensible than those which I propose to repeal. It has always been the practice of politic rulers to disguise their arbitrary measures under popular forms and names. The conduct of the Indian Government with respect to the press has been altogether at variance with this trite and obvious maxim. The newspapers have for years been allowed as ample a measure of practical liberty as that which they enjoy in England. If any inconveniences arise from the liberty of political discussion, to those inconveniences we are already subject. Yet while our policy is thus liberal and indulgent, we are daily reproached and taunted with the bondage in which we keep the press. A strong feeling on this subject appears to exist throughout the European community here, and the loud complaints which have lately been uttered are likely to produce a considerable effect on the English people who will see at a glance that the law is oppressive, and who will not know how completely it is inoperative. To impose strong restraints on political discussion is an intelligible policy, and may possibly, though I greatly doubt it, be in some countries a wise policy. But this is not the point at issue. The question before us is not whether the press shall be free but whether, being free, it shall be called free. It is surely mere madness in a Government to make itself unpopular for nothing, to be indulgent and yet to disguise its indulgence under such outward forms as bring on it the reproach of tyranny. Yet this is now our policy. We are exposed to all the dangers—dangers, I conceive, greatly overrated—of a free press; and at the same time we contrive to incur all the opprobrium of a censorship. It is universally allowed that the licensing system, as at present administered, does not keep any man who can buy a press from

[1] *P.P.* (c. 2078), 1878, lvii.

publishing the bitterest and the most sarcastic reflections on any public measure or any public functionary. Yet the very words 'licence to print' have a sound hateful to the ears of Englishmen in every part of the globe. It is unnecessary to inquire whether this feeling be reasonable, whether the petitioners who have so strongly pressed this matter on our consideration would not have shown a better judgement if they had been content with their practical liberty, and had reserved their murmurs for practical grievances; the question for us is not what they ought to do, but what we ought to do; not whether it be wise in them to complain when they suffer no injury, but whether it be wise in us to incur odium unaccompanied by the smallest accession of security or of power. One argument only has been urged in defence of the present system. It is admitted that the press of Bengal has long been suffered to enjoy practical liberty, and that nothing but an extreme emergency could justify the Government in curtailing that liberty. But, it is said, such an emergency may arise, and the Government ought to retain in its hands the power of adopting, in that event, the sharp, prompt and decisive measures, which may be necessary for the preservation of the Empire. But when we consider with what vast powers, extending over all classes of peoples, Parliament has armed the Governor-General in Council, and in extreme cases the Governor-General alone, we shall probably be inclined to allow little weight to this argument. It seems to be acknowledged that licences to print ought not to be refused or withdrawn except under very peculiar circumstances, and if peculiar circumstances should arise, there will not be the smallest difficulty in providing measures adapted to the exigency. No Government in the world is better provided with the means of meeting extraordinary dangers by extraordinary precautions. Five persons who may be brought together in half an hour, whose deliberations are secret, who are not shocked by any of those forms which elsewhere delay legislative measures, can, in a single sitting, make a law for stopping every press in India. Possessing as we do the unquestionable power to interfere, whenever the safety of the State may require it, with overwhelming rapidity and energy, we surely ought not in quiet times to be constantly keeping the *offensive form and ceremonial of despotism* before the eyes of those whom we never-

theless permit to enjoy the substance of freedom. It is acknowledged that in reality liberty is and ought to be the general rule, and restraint the rare and temporary exception. Why then should not the form correspond with the reality? Why should our laws be so framed as to make it appear that the ordinary practice is in the highest degree oppressive and that freedom can be enjoyed only by occasional connivance? While this system is established in the presidencies of Fort William and Agra, and in that part of the presidency of Bombay which lies beyond the jurisdiction of the Supreme Court, a system open to objections not less serious, but of a very different kind, prevails throughout the presidency of Fort Saint George. In that part of India every man who chooses is at liberty to print and publish, and it is very difficult to bring the fact of printing or publication home to him. Thus, while the inhabitants of one province are complaining of the tyrannical restrictions which our laws impose on the press, the inhabitants of another province suffer from the irresponsible licentiousness of the press. The editor of a newspaper at Calcutta must have a licence from the Government. The editor of a newspaper at Madras may excite his fellow subjects to the most criminal enterprises, or may destroy the peace and honour of private families, with small risk of being convicted before any legal tribunal. The Act which I now propose is intended to remove both evils, and to establish a perfect uniformity in the laws regarding the press throughout the Indian Empire. Should it be adopted, every person who chooses will be at liberty to set up a newspaper without applying for a previous permission. But no person will be able to print or publish sedition and calumny without imminent risk of punishment.

IV

THE BLACK ACT

No. 9: 21 MARCH 1836[1]

GENTLEMEN, I am directed to inform you that the Governor-General in Council has attentively considered your memorial and that he can discover in it no reason for making any alteration in the draft to which it relates.

His Lordship in Council observes that you appear to be under a complete mistake as to the existing state of the law and as to the nature and extent of the contemplated change.

You state 'that the proposed rescission of 107 sec. of Stat: 53 Geo. III c. 155, being made without any restriction or qualification whatever, it will necessarily follow that suits or actions or *criminal trials* wherein British-born subjects are plaintiffs or defendants will be tried by laws to which they are total strangers'.

This statement is made up of errors. In the first place, neither the 107th section of the Charter Act of 1813, nor the draft now under the consideration of his Lordship in Council, has any reference whatever to criminal trials. Both relate exclusively to civil suits. In the second place, the rescinding of the 107th clause of the Charter Act of 1813 cannot in any way affect the situation of any British-born subject who may be a plaintiff. On reference to that clause you will perceive that all the privileges which it gives to British-born subjects are strictly confined to cases in which such subjects are defendants. Thirdly, the rescinding of that clause makes no change whatever in the law by which actions will be tried.

The error into which you have fallen on this last subject appears to his Lordship in Council to pervade the whole memorial. It is indeed the ground on which almost all your arguments rest. You seem to think that the Supreme Court, when sitting on appeals from the mofussil under the authority of the Charter Act of

[1] Macaulay's draft reply to the memorial submitted to the Government by the British inhabitants in Bengal, accompanying the minute following this, pp. 175-80. (*I.L.C.*, 28 March 1836, No. 14.)

1813, is at liberty to proceed on principles different from those to which the mofussil courts are bound to conform. You say 'that you are not asking too much if you require in your own case an appeal from Hindu or Mohammedan law or the law of the Hon. Company's Regulations to the laws of your country', and you affirm that your right to such an appeal has 'already been recognized and confirmed by Act of Parliament'.

His Lordship in Council directs me to inform you that you are altogether mistaken in supposing that you ever possessed such an appeal. You will, his Lordship in Council is convinced, perceive on a moment's consideration, that you have imputed to the British legislature an absurdity such as no legislature ever committed. A judicial appeal is, by its own nature, an appeal, not from one law to another law, but from one tribunal to another. Both tribunals must be bound to administer the same law; or the proceeding is not an appeal. It is the institution of a new judicial proceeding. The investigation by the court of original jurisdiction would under such a system produce nothing but expense and delay.

No such system was established in India by the Charter Act of 1813. That Act gave indeed an appeal in certain cases from the mofussil courts to the Supreme Court; but it gave no appeal from the mofussil law to the English law. In every case in which the Hindu law, the Mohammedan law or the law of the Company's Regulations is binding on the mofussil judge, the Hindu law, the Mohammedan law or the law of the Regulations is equally binding on the Supreme Court in its character of a Court of Appeal. The Charter Act of 1813 expressly provides that the Supreme Court when engaged in trying appeals from the mofussil shall be guided by the rules of the Company's courts. It provides that on such appeals the Supreme Court shall have such powers as the Sadar Dewani Adalat would have had, and shall make rules of practice for the conduct of such appeals 'conforming in substance and effect as nearly as possible to the course of procedure in the Sadar Dewani Adalat'.

You will, therefore, perceive that the question is not between one law and another but merely between one tribunal and another, not between the law of England and the law of the mofussil but between the Sadar Dewani Adalat and the Supreme Court bound to act exactly as if it were the Sadar Dewani Adalat.

This appears to his Lordship in Council to be a complete answer to all that you have urged touching the defects of the Indian systems of jurisprudence. His Lordship in Council is sensible of those defects. He regrets them; he agrees with you in hoping that it will be in the power of Government and of the Law Commission to remove many of them; and he also thinks with you that a considerable time must elapse before that great work can be brought to completion. But, until the existing laws shall be reformed, the Supreme Court, on appeal from the mofussil, is bound to act according to those laws; nor is it possible to name a single instance in which a judge of the Supreme Court would on such an appeal be justified in pronouncing a decision different from that which he would have pronounced if he had been a judge of the Sadar Dewani Adalat.

It appears from many passages in the memorial to be your opinion that the Act of Parliament of 1813 gave to British-born subjects an appeal in all cases from the Company's courts to the King's Courts. You appear never to have adverted to the important limitation by which that privilege is restricted. The appeal to the Supreme Court was given to British-born defendants only in cases [where] a party who was not a British-born subject would have an appeal to the Sadar Dewani Adalat. It was left to the Indian authorities to determine in what cases natives should have an appeal to the Sadar Dewani Adalat. It was consequently left to the Indian authorities to determine in what cases British-born subjects should have an appeal to the Supreme Court. Before the passing of the late Charter Act, the Government of every presidency in India had the power of enlarging or narrowing the extent of that privilege which you consider as so sacred and inviolable. Nor was this power suffered to be dormant. It was exercised, and exercised without calling forth a single complaint. By Reg. 4 of 1827 of the Bengal Code, the Supreme Court was indirectly deprived of its appellate jurisdiction in a large class of cases in which British-born subjects were concerned. His Lordship in Council is not aware that this Regulation, which continued in force several years, was productive of any evil, or that it gave rise to any murmurs. In fact it was adopted in compliance with the earnest prayer of a respectable body of English merchants and indigo planters settled in the mofussil. You will perceive, therefore, that what you describe as

'an unprecedented anomaly' has existed for several years in this part of India without giving occasion to the slightest complaint.

You state that you 'are British-born subjects of His Majesty and as such are entitled as your birthright to the enjoyment of the protection of British laws and institutions'. This claim, his Lordship in Council never can admit; nor indeed does he fully comprehend what is meant by British laws and institutions. There are in the island of Great Britain, two systems of law widely and fundamentally differing from each other. The law administered by the Sadar Dewani Adalat hardly differs more from the law of England than the law of England from the law of Scotland. His Lordship in Council finds some difficulty in understanding how a Scotchman who at home never lived under the English law and whose ancestors have never lived under the English law can by visiting India be 'entitled as his birthright' to live under that law, nor can his Lordship in Council perceive any reason for giving the protection of English law to the English which is not equally a reason for giving the protection of Scotch law to the Scotch. The principle for which you contend is, as his Lordship in Council believes, diametrically opposed to the uniform practice of the British Government. An Englishman in Trinidad lives under the civil law of Spain—in Berbice, under the civil law of Holland—in Mauritius, under the Code Napoléon. He cannot visit Scotland or cross the sea to Guernsey without becoming subject to laws to which he is an utter stranger and which contain much that startles him. His Lordship in Council is not prepared to allow that an Englishman in India is entitled to a privilege which he does not possess in any other part of the Empire.

As you have expressed yourselves strongly on this important subject his Lordship in Council has thought it his duty to make this explicit declaration of his sentiments concerning it. He does not, however, conceive that it properly forms any part of the present question. The rescinding of the 107th clause of the Charter Act of 1813 will make no change in the rights of British subjects. Its effect will be merely this, that what has hitherto been done by the Supreme Court will be done by the court of Sadar Dewani Adalat. The substantive law remains the same. The law of procedure remains the same. The individual judges only will be different.

His Lordship in Council entertains the highest respect for the talents, learning and integrity of the eminent persons who now preside in the Supreme Court. He is convinced that since the institution of that body there never was a time at which it might more safely have been entrusted with great powers and wide jurisdiction. But when his Lordship in Council looks back to the history of the last sixty years, he can find no reason to believe that the judges of the Sadar Dewani Adalat are likely, on an average, to be less upright, less diligent or less able than the judges of the Supreme Court. The judges of the Sadar Adalat are, like the judges of the Supreme Court, English gentlemen of liberal education. They are as free as even the judges of the Supreme Court from any imputation of personal corruption. They are selected by the Government from a body which abounds in men as honourable and as intelligent as ever were employed in the service of any State. The Government may certainly find in that body persons eminently qualified for high judicial functions: and it lies under a solemn obligation to look for such persons. His Lordship in Council does not conceive that in fact the Indian Government has generally shown less honesty or less discernment in the distribution of its patronage than has been shown by the ministers of the Crown in England. He therefore thinks that he is entitled to take it for granted that on an average of many years the judges of the Sadar Dewani Adalat will be found not inferior in judicial qualities to the judges of the Supreme Court.

The law according to which the Sadar Dewani Adalat will decide appeals from the mofussil will, as has already been said, be exactly the same law according to which the Supreme Court is now bound to decide them. In a great majority of cases the judges of the Sadar Dewani Adalat will probably be better acquainted with that law than the judges of the Supreme Court can possibly be. Points may doubtless arise which cannot be properly decided without a knowledge of the English law: but it does not appear to his Lordship in Council that it will be more difficult for a judge of the Sadar Dewani Adalat on such an occasion to learn what the English law is than for a judge of the Supreme Court to obtain information touching the Hindu or Mohammedan law. As respects the mode of procedure, the Sadar Dewani Adalat has a clear advantage over the Supreme Court. The Charter Act of

1813 directs the Supreme Court to conform on appeals from the mofussil to the practice of the Sadar. With that practice the judges of the Sadar must necessarily be quite familiar. The judges of the Supreme Court have to learn it. If his Lordship in Council is not misinformed the Supreme Court has repeatedly on such occasions been under the necessity of applying for information to the Sadar Dewani Adalat.

You state that venality prevails to a great extent in the mofussil courts and that on this account an appeal to the Supreme Court is desirable. His Lordship in Council directs me to observe that if this imputation be well founded it constitutes an additional reason for giving the appellate jurisdiction to the Sadar Dewani Adalat. That court is generally composed of gentlemen who have themselves administered justice in the mofussil, who know the forms which corruption ordinarily takes in this country, who must necessarily be better acquainted with the abuses of the native courts than any man can possibly be whose life has been chiefly passed in England and whose Indian experience is confined to Calcutta. It is the especial duty of the Sadar Dewani Adalat to watch over the conduct of the inferior judicial functionaries, to inspect their proceedings, to know their characters, and to bring the unworthy to punishment. His Lordship in Council trusts that you have formed a very exaggerated notion of the degree in which venality prevails among the officers of the Company's courts. But he is confident that if the disgraceful practices to which you refer cannot be checked by the Sadar Dewani Adalat they never will be checked by the intervention of a tribunal which possesses in a far smaller degree both the means of detecting guilt, and the power to punish it.

On the whole it is the opinion of his Lordship in Council, that the Sadar Dewani Adalat is better qualified than the Supreme Court to try appeals from the mofussil in which British-born subjects are parties. Let it, however, be supposed that the two courts are equally fit for the performance of this duty. On this supposition his Lordship in Council is of opinion that the advantages arising from uniformity of system would decidedly turn the scale in favour of the Sadar Dewani Adalat.

The presumption is evidently in favour of uniformity. All special exemptions carry with them an appearance of unfairness

and the burden of the proof lies on those who claim them. It is for them to show a title to their privilege. Difference of race or birthplace will never be admitted as such a title by his Lordship in Council, by the Court of Directors, by the King's Government, by the British Parliament or by the British people.

If his Lordship in Council were to admit that he is depriving British-born suitors of any advantage, he must at the same time admit one of these two things—that the Sadar is incompetent or that the Supreme Court is partial; that the tribunal to which the dearest interests of many millions have been entrusted by the Government is unworthy of confidence, or that His Majesty's judges would be disposed to strain a point in order to serve a countryman. His Lordship in Council is not disposed to make either of these admissions. He has no doubt that English defendants in India will obtain justice from the Sadar Dewani Adalat. It would be a gross and most unmerited insult to His Majesty's judges to suppose that any person would obtain more than justice from the Supreme Court.

The existing distinction, therefore, in the opinion of his Lordship in Council, adds nothing to the real security of any British-born subject in the mofussil. But it has the semblance of partiality and even of tyranny. It ought therefore to be abolished and the rather because it has been publicly defended in your memorial on principles from which it is the duty of his Lordship in Council to mark in the strongest manner his entire dissent.

His Lordship in Council has observed with great satisfaction that almost all the persons who have complained of the proposed Act are persons who are not likely ever to be affected by it. It does not apply to British-born subjects resident at the presidency; and it is only at the presidency, as far as his Lordship in Council is aware, that it has given occasion to any murmurs. Ample time has been given to persons residing in the remotest districts to express their feelings. But no remonstrance has yet arrived from any place out of Calcutta. His Lordship in Council cannot but think it extraordinary that a law in which those who are to live under it appear cheerfully to acquiesce should be regarded with so much apprehension by those who, at least in the character of suitors, cannot be affected by it.

His Lordship in Council trusts that this law will be acceptable

to the majority of British-born subjects in the mofussil: and he is confident that it will be acceptable to the native population. You state indeed that well-informed natives prefer the Supreme Court to the Company's courts. His Lordship in Council thinks it possible that at Calcutta this may be the case. But even in the immediate vicinity of Calcutta a different feeling prevails. It is notorious that some years ago when it was in contemplation to extend the jurisdiction of the Supreme Court over the suburbs of this city, great alarm was excited and strong remonstrances were sent in to the Government. In remoter districts this feeling is probably even stronger. In the western provinces it may be doubted whether it would be possible to find a single native who would prefer the Supreme Court to the Sadar Dewani Adalat of Allahabad.

The argument by which you have attempted to show that the Government of India cannot pass the proposed Act without exceeding its powers does not appear to his Lordship in Council to deserve serious refutation. He thinks it sufficient to declare that he has no doubt of the legality of the Act, and that he is resolved to take on himself the responsibility of passing it and of carrying it into entire effect.

No. 10: [no date][1]

THE draft which is now under our consideration is so important in itself, and derives so much extrinsic importance from the nature of the opposition which has been made to it, that I think it my duty to record my opinion concerning it.

By the Charter Act of 1813, British subjects settled in the mofussil were, with some reservations, placed under the jurisdiction of the Company's civil courts. But it was provided that in every case in which a native would be entitled to appeal to the Sadar Dewani Adalat, a British defendant might appeal to the Supreme Court.

In cases in which natives are concerned, appeals lie to the Sadar Dewani Adalat in suits originally instituted before a zillah judge and, under special circumstances, in suits originally instituted before the lower judicial functionaries. Europeans are not now

[1] *I.L.C.*, 28 March 1836, No. 13.

subject to the jurisdiction of the Sadar Amins. They can be sued in no mofussil court lower than that of the zillah judge. Consequently in every case in which a British subject is a defendant, he has an appeal to the Supreme Court.

The British in the mofussil have scarcely ever had recourse to this appeal, and seem to set very little value on it. In 1826, indeed, some of them actually begged to be deprived of it in a large class of cases. They petitioned to be made subject to the jurisdiction of the Sadar Amins, and stated that, unless this were done, they should, in petty cases, be left without any prospect of redress. In petitioning to be made subject to the jurisdiction of the Sadar Amins they were, in fact, as I have said, petitioning to be deprived to a considerable extent of their right of appeal to the Supreme Court. By Reg. IV of 1827, the Sadar Amins were empowered to take cognizance of cases in which Europeans were concerned. This continued to be the law till 1831. A change then took place in the judicial system and Europeans were again exempted from the jurisdiction of the lower mofussil courts. Whether this change was at the time proper is a point on which I will not offer an opinion. It is certain that Reg. IV of 1827 was called for by the British in the mofussil, that its operation was never complained of by them, and that, by some of them at least, it is still regretted. During the last cold season, I was assured by a deputation of indigo planters that they and those whom they represented were desirous to be made subject to the jurisdiction of the Sadar Amins; and when I mentioned to them the appeal to the Supreme Court, they declared that they did not value it in the least. In fact, such appeals are exceedingly rare. The present Chief Justice informs me that he scarcely remembers one instance of such a proceeding.

It appeared to the Government likely that in consequence of the provisions of the late Charter Act, the number of British residents in the mofussil would increase. It therefore seemed expedient to determine, before any great influx of such residents should take place, what jurisdiction the Company's civil courts should possess over them.

The principle on which we proceeded was that the system ought, as far as possible, to be uniform, that no distinction ought to be made between one class of people and another, except in

cases where it could be clearly made out that such a distinction was necessary to the pure and efficient administration of justice.

One such distinction, and one only, we thought it necessary to make. The general character of the munsiffs is such that we could not venture to entrust them with the decision of suits in which an European and a native might be opposed to each other. Those functionaries are ill paid. They do not appear to possess the public confidence. Their courts require a thorough reform, and, till that reform is effected, it would be highly inexpedient to give them jurisdiction in a class of cases in which the strong will very generally be opposed to the weak.

We therefore determined not to permit Europeans to sue or to be sued before the munsiffs. In other respects we thought that we might safely put Europeans and natives on exactly the same footing in all civil proceedings. Nor did it appear to us that there was any reason for allowing a British-born subject to appeal to the Supreme Court in a case in which a Hindu, a Mussulman, an Armenian, a Jew, a Greek, a Portuguese, or an American would have no appeal except to the Sadar Dewani Adalat.

In the draft of a letter which accompanies this minute, I have stated some of the reasons which lead me to think that as, a Court of Appeal from the mofussil judges, the Sadar Dewani Adalat is preferable to the Supreme Court. But in my opinion the chief reason for preferring the Sadar Dewani Adalat is this—that it is the court which we have provided to administer justice in the last resort to the great body of the people. If it is not fit for that purpose, it ought to be made so. If it is fit to administer justice to the body of the people, why should we exempt a mere handful of settlers from its jurisdiction? There certainly is—I will not say the reality—but the semblance of partiality and tyrrany in the distinction made by the Charter Act of 1813. That distinction seems to indicate a notion that the natives of India may well put up with something less than justice or that Englishmen in India have a title to something more than justice. If we give our own countrymen an appeal to the King's Courts in cases in which all others are forced to be content with the Company's courts, we do in fact cry down the Company's courts. We proclaim to the Indian people that there are two sorts of justice, a coarse one which we think good enough for them, and another of superior quality which

we keep for ourselves. If we take pains to show that we distrust our highest courts, how can we expect that the natives of the country will place confidence in them?

The draft of the Act was published and was, as I fully expected, not unfavourably received by the British in the mofussil. Seven weeks have elapsed since the notification took place. Time has been allowed for petitions from the furthest corners of the territories subject to this presidency. But I have heard of only one attempt in the mofussil to get up remonstrance, and the mofussil newspapers which I have seen, though generally disposed to cavil at all the Acts of the Government, have spoken favourably of this measure.

In Calcutta the case has been somewhat different; and this is a remarkable fact. The British inhabitants of Calcutta are the only British-born subjects in Bengal who will not be affected by the proposed Act: and they are the only British subjects in Bengal who have expressed the smallest objection to it. The clamour indeed has proceeded from a very small portion of the society of Calcutta. The objectors have not ventured to call a public meeting; and their memorial has obtained very few signatures. But they have attempted to make up by noise and virulence for what has been wanting in strength. It may at first sight appear strange that a law which is not unwelcome to those who are to live under it should excite such acrimonious feelings among people who are wholly exempted from its operation. But the explanation is simple. Though nobody who resides at Calcutta will be sued in the mofussil courts, many people who reside at Calcutta have or wish to have practice in the Supreme Court. These appeals indeed have hitherto yielded but a very scanty harvest of fees. But hopes are entertained, and have indeed been publicly expressed, that as the number of British settlers in the mofussil increases, the number of appeals will increase also. Great exertions have accordingly been made, though with little success, to excite a feeling against this measure among the English inhabitants of Calcutta.

The doctrines which during the last five or six weeks have filled the newspapers of this city are that the Government has no power to touch the jurisdiction of the Supreme Court, that an Englishman brings to India all the political rights which he possessed in London, that he owes no obedience to the Company

or the Company's servants, that Parliament alone can make laws to bind him, that he is one of the conquerors of this country, and one of the electors who chose the House of Commons at home, and that it is therefore absurd to suppose that the legislature can have meant to place him on the same footing with the natives. In the memorial before us these doctrines are maintained in more decorous language than has been used elsewhere. But the spirit of an exclusive caste breathes in every paragraph of that document.

These circumstances appear to me to have given a new character to the question. I certainly think it desirable that the Sadar Dewani Adalat should try those appeals from the mofussil. But I am quite ready to admit that the Supreme Court, composed as it now is, would be a very good Court of Appeal. Some people may doubt whether it was worth while to stir the question. But the question has been stirred. My voice is decidedly for going boldly forward. The least flinching, the least wavering at this crisis would give a serious, perhaps a fatal, check to good legislation in India. It was always clear that this battle must sooner or later be fought. The necessity has come earlier than I expected. But I do not think that we can ever bring matters to an issue under more favourable circumstances. We must remember that if we suffer the memorialists to carry their point it will be universally believed that we admit the soundness of their arguments. The real question before us is whether, from fear of the outcry of a small and noisy section of the society of Calcutta, we will abdicate all those high functions with which Parliament has entrusted us for the purpose of restraining the European settler and of protecting the native population.

The political phraseology of the English in India is the same as the political phraseology of our countrymen at home. But it is never to be forgotten that the same words stand for very different things in London and at Calcutta. We hear much about public opinion, the love of liberty, the influence of the press. But we must remember that public opinion means the opinion of five hundred persons who have no interest, feeling or taste in common with the fifty millions among whom they live; that the love of liberty means the strong objection which the five hundred feel to every measure which can prevent them from acting as they choose towards the fifty millions, that the press is altogether supported by

the five hundred and has no motive to plead the cause of the fifty millions.

We know that India cannot have a free Government. But she may have the next best thing—a firm and impartial despotism. The worst state in which she can possibly be placed is that in which the memorialists would place her. They call on us to recognize them as a privileged order of free men in the midst of slaves. It was for the purpose of averting this great evil that Parliament, at the same time at which it suffered Englishmen to settle in India, armed us with those large powers which, in my opinion, we ill deserve to possess if we have not the spirit to use them now.

I think that the Act before us is in itself a good Act. I think by passing it we shall give a signal proof of our determination to do justice to all races and classes. I think that if we withdraw it we shall be universally believed either to have assented to the monstrous doctrines of the memorial, or to have been scared by a very contemptible clamour. And thinking thus, I vote for passing the Act without any amendment.

With this minute I circulate a draft of a letter[1] in answer to the Calcutta memorial. I have done my best to preserve the gravity and dignity which become a Government engaged in a controversy with individuals.

No. 11: 9 MARCH 1836[2]

We are now, I trust, about to pass the Act giving to the Company's courts jurisdiction in civil cases over British-born subjects in the mofussil. Every thing which has taken place since I recorded my former minute on this subject has confirmed me in the opinion which I then expressed.

The Government of Madras, the Government of Bombay, the late and the present Lieut.-Governor of the western province, the civil service, as far as I can learn, almost to a man, are favourable to this measure. The class whose interests are most directly affected by it, I mean the British-born subjects in the mofussil, appear to approve of it. It has been three months before the public. The English settlers in the remotest districts have had

[1] See pp. 168-75.

[2] *I.L.C.*, 9 May 1836, No. 10.

ample time to become acquainted with it and to make up their minds as to its probable effect on their interests. They have the strongest motives to consider the question fairly and attentively. They have the best opportunities of forming a correct judgement. They know the manner in which justice is administered by the Company's courts. They know the value, and they know also the cost, of a proceeding in the Supreme Court. They are by no means a class of people disposed to lie down quietly under what they consider as oppression. They are, on the contrary, inclined to raise a clamour whenever they think their interests neglected. They have all the national impatience of control and they have also much pride of caste. No exertions have been spared to rouse their passions against this measure. They have been told that they are outlawed, that they are marked for destruction, that the Company regards them with the same feeling with which it formerly regarded those private adventurers who interfered with its monopoly, and that this Act is the first of a series of measures the object of which is to evade the liberal provisions of the late Charter and to make India so disagreeable a residence to the English that none will venture to settle there. They have been urged to meet, to remonstrate, to act in concert with the opponents of this law at the presidency. The effect of all this excitement has been that a single district has sent a petition signed by perhaps twenty persons against the proposed Act. In none of those provinces in which the greatest number of Europeans is settled and the greatest quantity of European capital invested is there the smallest sign of discontent.

In the meantime a small knot of people in Calcutta—a knot of people who are not to live under this law, who know nothing about the administration of justice in the mofussil, and who are interested in the question only as practitioners or officers in the Supreme Court—have kept up an incessant clamour against the Government and have done their best to conceal the smallness of their numbers and the weakness of their cause by the violence of their invective and the audacity of their assertions. They have produced no effect in the mofussil and scarcely any at the presidency. Their supporters appear to be dropping off. Their first memorial bore about a hundred names; their second, I think, only forty-seven. They threatened to call a public meeting. But

they have found that it would be imprudent to persist in that design; and nobody doubts that such a meeting would have been a ludicrous failure.

I mention these things lest the Honourable Court should imagine, from the virulence with which some of the Calcutta newspapers have attacked the Government on this occasion, that we have rashly provoked the hostility of the great body of our countrymen resident in India. Any person who should form his judgement from those newspapers would believe that the whole Empire was in a flame. The fact is that the hostility to the proposed law is confined to those who live or wish to live by the abuses of the most expensive court that exists on the face of the earth. The proposed Act will indeed directly affect their gains but little. There are not two appeals from the mofussil courts to the Supreme Court in five years. But the persons to whom I refer see in this measure the beginning of a great and searching reform. They see that we are determined not to suffer the high powers bestowed on us by Parliament to lie idle. They have therefore attempted to stop us at the outset and by interesting all classes of their countrymen in their quarrel to prevent us from proceeding to the correction of those evils which I firmly believe have ruined more native families than a Pindari invasion.

All the reasons which have led these persons to oppose this Act ought to lead us to pass it instantly. It is a pledge of our determination to rescue our native subjects from a ruinous system of chicane, to do justice without distinction of persons, to defy interested clamour, to exert fearlessly as well as prudently for the general good the whole of that vast power with which the British Parliament has armed us. I think this Act in itself an useful and important measure. But its intrinsic merits are now the smallest part of the question. There is no want of arguments for passing it. But the strongest of those arguments is the manner in which it has been opposed.

THE BLACK ACT

No. 12: [no date][1]

THE clamour which the practitioners of the Supreme Court succeeded for a time in raising against Act XI of 1836 never extended beyond the limits of Calcutta. Even within those limits it has now completely subsided. The meeting at which the petition and memorial were voted was attended by circumstances so ludicrous and disreputable that those who had convoked it were ashamed of it. Though by dint of earnest solicitation and of pressing circular letters from agency houses in Calcutta to persons up the country who had dealings with those houses, some signatures have been obtained from the mofussil, no subscriptions have come in from that quarter. The committee for conducting the opposition to the Act have within the last few days put forth an advertisement acknowledging that the English settlers up the country have not chosen to contribute to the fund which has been raised for the purpose of sending an agent home. When it is considered that the English settlers up the country are the only class of people whose rights the Act can in the smallest degree affect, this circumstance is alone sufficient to prove that the petition is entitled to very little attention.

When the material allegations of the petition are examined, they will be found to be, I do not hesitate to say, without one single exception either unfounded or frivolous.

It is not in fact as stated by the petitioners that all British-born subjects of His Majesty have the right of being governed by the laws of England throughout His Majesty's Indian territories. On the contrary, it is the fact that by Act of Parliament they have been made subject in many civil matters ever since 1813 to the jurisdiction of the mofussil courts in which, as every man in India knows, English law is not administered.

It is not the fact, as stated without qualifications by the petitioners, 'that the English law has prevailed in the town of Calcutta during 130 years'; on the contrary, it is the fact that, with regard to ninety-nine hundredths of the population of Calcutta, a law of inheritance, a law of succession and a law of marriage widely differing from the English law have always prevailed in that town. But if the allegation were true, it would,

[1] *I.L.C.*, 3 October 1836, No. 5.

with reference to the present question, be altogether frivolous, inasmuch as Act XI of 1836 makes no change whatever in the legal condition of any person residing in Calcutta.

It is not the fact that, before the passing of this Act, 'British-born subjects possessed a right of appeal in all cases to the Supreme Court'. In the first place, no British-born subject ever had any such right of appeal except in cases in which a native would have had a right of appeal to the Sadar Dewani Adalat. By the Charter of 1813, it was always in the power, not as now only of the Governor-General in Council but of the Government of Madras and of the Government of Bombay, by enlarging or narrowing the right of the native to appeal to the Sadar court to enlarge or narrow also the right of the Englishman to appeal to the Supreme Court.

And here I may observe that every argument which is urged from the beginning to the end of the petition in favour of the Supreme Court and against the Company's courts is exactly as applicable to cases in which Englishmen are plaintiffs as to cases in which Englishmen are defendants. If the Company's courts are so ignorant, so corrupt, so servile, that when not overawed by the Supreme Court they will not do justice to an English defendant, we may be certain that, when not overawed by the Supreme Court, they will not do justice to an English plaintiff. Now is it even pretended that during the twenty-three years during which English plaintiffs have been left to the justice of the mofussil courts, without any appeal to the King's Courts, their interests have in any respect suffered? I answer confidently that this is not and has never been pretended.

If so, I conceive that the question has been decided by experience; and that no honest Englishman need be afraid of being brought as a defendant before courts—tribunals which have sufficiently protected his interests when he came before them as a prosecutor.

But this is not all. A few years ago, the British in the mofussil were, at their own petition, placed under the jurisdiction of the Company's lower courts. The effect of the law which placed them under that jurisdiction (Reg. IV of 1827 of the Bengal Code) was to deprive them in a very large class of cases of their appeal to the Supreme Court even when they were defendants. This law was

rescinded some years after, injudiciously as I think, not however in consequence of any representations from British settlers but, I believe, from a fear that the British settlers might be able to obtain more than justice from native functionaries.

While Reg. IV of 1827 was in operation did a single Englishman petition against it? Did a single Englishman complain that he could not obtain justice? Did a single Englishman miss the appeal to the Supreme Court? I answer confidently: not one.

We have then had ample experience to guide us. During twenty-three years, English plaintiffs in the mofussil have had no appeal from the Company's courts to the Supreme Court. During several years a large proportion of English defendants had no appeal from the Company's courts to the King's Courts. That English litigants were treated with injustice in consequence of this arrangement is not even asserted. Why then is it to be supposed that they will be treated with injustice now?

All that the petitioners say on the subject of the law of inheritance, marriage and succession is founded on complete misapprehension of the whole scope and meaning of Reg. VII of 1832. That Regulation, indeed, is not expressed with so much neatness and precision as might be wished. But it is plain that it does not abrogate any portion of the law of England which, at the time when the Regulation was passed, was law in the mofussil. It merely says that none of its provisions are to be understood as justifying the *introduction* of English law except in cases to which that law is in equity and good conscience applicable.

The reasons which induced the Government not to answer more explicitly the question as to the substantive law to which Englishmen in the mofussil are subject were simply this: that no member of the Government, nor I believe any other person, can give an explicit answer to that question—that our Act made no change in the substantive law. We were and are certain that it does not in the smallest degree tend to increase the evils arising from the ill-defined state of the substantive law, and that it is a great improvement in the law of procedure we fully believe. It would surely have been the height of absurdity in the Government to suffer itself to be drawn, by persons of whose captiousness it had ample proof, into a controversy on a legal question abounding with difficulties which, to my certain knowledge, have

perplexed the most distinguished lawyers. Nothing is easier than to moot points touching the legal condition of Englishmen in the mofussil which all the ingenuity of Westminster Hall would be puzzled to settle, points which no judge would think of deciding without hearing them fully argued, and which, I believe, he would at last decide by making a law for the occasion.

The question which we, as legislators, had to look at was a practical question. It was not necessary for us to know—what nobody knows—the precise extent which the substantive law of England is the law under which Englishmen in India are placed. There are wide differences of opinion on this matter, considered as a matter of speculation. But these differences will be found to diminish greatly, if not to disappear altogether, in practice. Those who maintain that an English planter carries the substantive civil law of England with him to Tirhut or to Cawnpore do not mean that he carries with him the whole common and statute law exactly as it exists in Middlesex. They would admit that the circumstances of this country render it necessary that the English law should be modified by a very large and not very well defined equity. On the other hand, those who do not think that the English law, merely because it is English law, is applicable to an Englishman in the mofussil would yet admit that, in some cases in which Englishmen are concerned, the Company's judges, whose rule of decision is equity and good conscience, would be bound in equity and good conscience to decide according to the principle of English law. I see little difference between English law modified by a large equity so as to suit India, and equity frequently recurring for guidance to the English law when it has to deal with Englishmen. Two persons who would differ from each other widely as to the extent to which English law is, as such, law in the mofussil would agree in pronouncing that a mofussil judge ought to consider an Englishman as married who had been married in conformity with the law of England, and that the effects of a deceased English intestate ought to be distributed according to the English statute of distributions.

There is no doubt that the unsettled state of the English substantive law in the mofussil is an evil which requires correction. In a few years, I doubt not, it will be corrected. In the meantime, considered as a temporary substitute for a body of well-defined

law, I really think that the rule of the Company's Regulations which directs the courts to decide according to equity and good conscience is as [unexceptionable] as any other that could be devised. It is not meant to be a permanent rule. It is a prop which must be suffered to stand till pillars can be set up, and which will then be taken down. Such as it is, a hundred million of human beings live under it and obtain by means of it a certain measure of justice—not such as I wish to give them, but still such as suffices to hold society together and to make men tolerably secure in the enjoyment of the fruits of their industry. Though I admit that the rule is most defective, I do not see how we can at present have a better; and of this I am sure, that of all the millions who live under this rule the English in the mofussil have the least reason to complain. They are of the same race, they speak the same language, they profess the same religion, they have the same laws of inheritance, succession and marriage with the zillah and Sadar judges. If a zillah or Sadar judge can be safely trusted with the interests of Hindus, Mohammedans, Parsees, Jews, Armenians, is it not absurd to say that he cannot be safely trusted with the interests of his own countrymen? Is it not absurd to say that the only national usages to which he will not allow their due importance are those of his own nation? That the only law of marriage which he will treat with contempt is the law on which the legitimacy of his own children depends? That the only law of succession which he will disregard is that law which secures to his own nearest connexions the property which he may leave behind him?

The petitioners say that the provincial courts of first instance ought to be altogether prohibited from meddling with these questions of inheritance, marriage and succession. By the provincial courts of first instance, I presume that they mean courts of the Principal Sadar Amins. If so, they are under a complete mistake as to the system of procedure in the mofussil. The zillah courts are strictly the courts of first instance. No cause is tried by a Sadar Amin or a Principal Sadar Amin except on a reference to him from the zillah judge who is always an European functionary. It will be perceived that this is not an idle dispute about nomenclature but that it is a point of great practical importance. These English questions go first before an English gentleman who is at liberty to refer them to an inferior court if he thinks that court

competent to try them, or to reserve them to himself if he think that course preferable. Can we doubt that such a functionary will reserve to himself questions which are purely English and which a Hindu or Mohammedan functionary would not be likely to understand? Surely when we trust a man with such vast power, even the happiness of hundreds of thousands of foreigners, as a zillah judge possesses, we may give him credit for a disposition not to treat his own countrymen with absurd injustice.

The absurdity of the outcry which has been raised respecting the law of inheritance will be evident when it is remembered that no Englishman has a legal right at the present moment to purchase land in perpetuity in the mofussil. The Charter Act gave to Englishmen only the right to hold land for terms of years; that people who have no right to hold estates of inheritance at all should be in alarm because the law of inheritance is unsettled seems scarcely reasonable. The few who are permitted by the special indulgence of Government to hold such estates as matter of favour may surely submit to a law which the Government thinks necessary for the general interest of the people.

The apprehensions expressed respecting the law of marriage and divorce have, if possible, less foundation. Indeed I know of no court in the mofussil which has power to grant a divorce to any party of any race or religion.

Again, let it be remembered that almost all questions touching inheritance, marriage and succession must be between two persons both of British race. There may be exceptions. But they will be few. Now in all cases where both the parties are British subjects, the Supreme Court has concurrent original jurisdiction with the company's courts. In cases of divorce where British subjects are concerned, the Supreme Court has exclusive jurisdiction.

The petitioners think it hard that questions which ought to be decided by the law of England should be decided by judges not bred to the study of that law. Why is this harder than that questions of Hindu law and Mohammedan law should every day be decided by judges of the Supreme Court who were never bred to the study of Hindu or Mohammedan jurisprudence? The very Act of Parliament which gave that appeal, the loss of which is represented as so terrible an evil, directed the judges of the

Sadar Court to proceed on every such appeal according to the rules of the court of Sadar Dewani Adalat—of those rules the judges of the Supreme Court, learned and able as they are, are necessarily quite ignorant. There have only been as yet two appeals under the Act of 1813; and on both occasions the judges of the Supreme Court were forced to send to the judges of the Sadar to ask what was to be done. I cannot conceive why the judges of the Sadar should have more difficulty in learning what the law of England is on a particular point than the judges of the Supreme Court have had in learning what is the Hindu law, what is the Mohammedan law or what is the practice of the Sadar.

But the petitioners think it a great evil that Englishmen should be subjected to the jurisdiction of courts which carry on their proceedings in Persian or in the vernacular tongue. This is no place for discussing the advantages of employing the Persian language in legal proceedings. On that point I shall not give an opinion. But I wish to know why it is a greater evil that a few hundreds of Englishmen should be under the jurisdiction of a court which conducts its proceedings in Persian than that some hundreds of thousands of natives should be under the jurisdiction of the Supreme Court which conducts its proceedings in English. It is hard, according to the petitioners, that Englishmen should go before courts the pleaders of which do not understand the English laws or language. Why harder than that natives should be forced to go before the Supreme Court in which there is not a single barrister who has studied oriental law or who can speak any oriental language?

But the Company's judges, say the petitioners, are dependent on the Government and therefore no British subjects ought to be under their jurisdiction. That the dependence of judges on a Government is in many respects an evil will be universally admitted. Whether in India it be a necessary evil or not is a question concerning which there will probably be different opinions. But on what ground is it we are to make distinction between the Englishman and the native? On what ground are we to say that an inferior kind of justice such as can be procured from dependent judges is good enough for a hundred millions of our fellow creatures, but that we must have a purer sort for a handful of our countrymen?

Since the foregoing pages were written, I have read with great pleasure Mr Shakespear's valuable minute on this question. I have been particularly interested by his remarks on the charges which the petitioners have brought against the native judicial officers. I am willing to believe that the view which he has taken of the character of that class of persons is not too favourable. But if all that the petitioners say on the subject were true, I should still think the Act of which they complain a salutary Act.

In the first place, I think that nothing can be more pernicious or absurd than, because a certain body of functionaries are corrupt, to exempt from their jurisdiction a very small class distinguished by intrepidity, and by hatred of oppression and fraud, accustomed to a pure administration of justice and accustomed also to think little of the frown of power, certain to complain whenever they think themselves wronged and certain to be heard whenever they complain. Such a class the English settlers in the mofussil will be. To exempt them from the jurisdiction of the local courts and to leave subject to that jurisdiction a vast population timid, weak-spirited, the ready prey of every extortioner, the ready slaves of every tyrant, would, I think, be in the highest degree reprehensible. What is the great difficulty which meets us whenever we meditate any extensive reform in India? It is this: that there is no helping men who will not help themselves. The phenomenon which strikes an observer lately arrived from England with the greatest surprise, and which more than any other damps his hope of being able to serve the people of this country, is their own apathy, their own passiveness under wrong. He comes from a land in which the spirit of the meanest rises up against the insolence or injustice of the richest and the most powerful. He finds himself in a land where the patience of the oppressed invites the oppressor to repeat his injuries. Therefore it is that I am not desirous to exempt the English settler from any evil under which his Hindu neighbour suffers. I am sorry that there should be such evils, but, while they exist, I wish that they should be felt, not only by the mute, the effeminate, the helpless, but by the noisy, the bold and the powerful. If therefore I thought that the mofussil courts were as bad as the petitioners describe them to be, I should still say: 'Put the English settler under them. Then we shall know

the whole. Then we shall have ten corrupt functionaries brought to shame and punishment for one who is detected now.' Many abuses there are undoubtedly in the Company's courts; and therefore I would give the English settler a common interest with the native in the exposing of these abuses. The more these courts require amendment, the stronger are the reasons for giving those who have power to produce amendment motives for producing amendment. Many a grievance, which would pass unredressed because unknown while only some thousands of natives feel it, will be forced on the notice of the Government as soon as one of our countrymen smarts from it. I conceive that, if the Company's courts are corrupt, this is an additional reason why appeals from those courts should lie to the Sadar Dewani Adalat rather than to the Supreme Court. It is not pretended that the Sadar Dewani Adalat is corrupt. The judges of that court stand as high in repute for integrity—higher it is impossible to stand—as the judges of the Supreme Court. Integrity, then, being supposed equal in these two courts, which of the two is the more likely to detect corruption in a subordinate functionary? Which of the two is the better able to punish corruption when detected? Surely it cannot be doubted that a Sadar judge who has been in India from his youth, who has himself presided in a zillah court in the mofussil, who has passed years in the daily transaction of business with native law officers, who is familiar with all the shapes which dishonesty takes at a mofussil cutcherry, must be more likely to discover malpractices than an English barrister who, in the middle of life, has come out to this country and who has probably never stirred beyond the limits of a town which may be called a British colony. Again, if corruption is detected by a judge of the Supreme Court he has no power to punish it. The Company's law officers are not under his authority. If the Sadar Dewani Adalat should discover that a decision is corrupt, it would be their duty not only to set it aside but to visit the offending functionary with condign punishment.

The petitioners complain of the time at which the measure has been adopted; and I have reasons to know that a few enlightened persons who think this Act in principle good, and who altogether disapprove of the manner in which it has been opposed, are yet inclined to consider it as premature. They conceive that the

formation of a complete Code of substantive law ought to precede this change, instead of following it. I differ from them. I conceive that the admission of British-born subjects to settle in India rendered it desirable to take this measure without delay. That there are arguments in favour of postponing this measure till the completion of the Code of Civil Rights, I admit. But I say that all those arguments go further, and are arguments against admitting British settlers till the Code of Civil Rights is completed. Parliament has decided that British settlers shall be admitted, and that decision rendered the step which we have taken necessary. The Charter Act, after providing for the admission of British settlers, goes on positively to enjoin us to take measures immediately, and without waiting for the necessarily slow progress of the General Code, for the protection of the natives against the wrongs which may be apprehended from such settlers. The intention of Parliament, I firmly believe, was that British-born settlers should be placed, with as little delay as possible, under the jurisdiction of the Company's courts. My only doubt is whether we have fully acted up to the intentions of the legislature. For it is my persuasion that Parliament intended British settlers in the mofussil to be made subject to the criminal as well as the civil jurisdiction of the Company's courts. Till the passing of Act XI of 1836, an Englishman at Agra or Benares who owed a small debt to a native, who had beaten a native, who had come with a body of bludgeon-men and ploughed up a native's land, if sued by the injured party for damages, was able to drag that party before the Supreme Court—a court which in one most important point, the character of the judges, stands as high as any court can stand, but which in every other respect I believe to be the worst court in India, the most dilatory, and the most ruinously expensive. Judicial corruption is indeed a most frightful evil—yet it is not the worst of evils; a court may be corrupt and yet it may do much good. Indeed there is scarcely any court so corrupt as not to do much more justice than injustice. For there is no reason to believe that the party who is in the right will be less able to fee the judge than the party who is in the wrong; and, *ceteris paribus*, the worst judge will from selfish motives decide rightly rather than wrongly. Thus we see that in many countries and through many ages Society is held together, order is preserved,

property is accumulated, though the courts constantly receive bribes and occasionally prevent judgement.

A sullied stream is a blessing compared to a total drought; and a court may be worse than corrupt. It may be inaccessible. The expenses of litigation in England are so heavy that daily people sit down quietly under wrongs and submit to losses rather than go to law; and yet the English are the richest people in the world. The people of India are poor; and the expense of litigation in the Supreme Court is five times as great as the expenses of litigation at Westminster. An undefended cause which might be prosecuted successfully in the Court of King's Bench for about eight pounds sterling cannot be prosecuted in the Supreme Court under forty pounds sterling. Where an English barrister receives a guinea, a barrister here receives two gold mohurs—more than three guineas. For making a motion of cause an English barrister receives half a guinea; a barrister here receives a gold mohur. Officers of the court are enabled to accumulate in a few years, out of the substance of ruined suitors, fortunes larger than the oldest and most distinguished servants of the Company can expect to carry home after thirty or forty years of eminent services. I speak of Bengal, where the system is now in full operation. At Madras, the Supreme Court has, I believe, fulfilled its mission. It has done its work. It has beggared every rich native within its jurisdiction, and is inactive for want of somebody to ruin. This is not all. Great as the evils of the Supreme Court really are, they are exaggerated by the apprehensions of the natives to a still more frightful magnitude. The terror with which it is regarded by them is notorious. Within the last few months, in consequence of an attempt made by some persons connected with that Court to extend its jurisdiction over the suburbs of Calcutta, hundreds of respectable and wealthy natives petitioned the Government in language indicating the greatest dismay. To give to every English defendant in every civil cause a right to bring the native plaintiff before the Supreme Court is to give every dishonest Englishman an immunity against almost all civil prosecution. It is true that such appeals are scarcely ever heard of. There have as yet been only two actually brought to a hearing. But it is the opinion of some of the most experienced servants of the Company that the threat of appealing has often been employed and employed with

success by dishonest debtors against claimants; and I am quite certain from what I have myself seen of the dread with which natives regard the Supreme Court, and from what I myself know of the expenses of that Court, that the threat would in a great proportion of cases be successful.

I conceive, therefore, that the Act is good in itself and that the time for passing it has been well chosen. The strongest reason, however, as I formerly said, for passing it was the nature of the opposition which it experienced. Approved by the Governments of Madras, Bombay and Agra, approved by the body of the Civil Service, not disapproved by those English settlers to whom alone its provisions applied—it has been violently assailed by a portion of the English inhabitants of Calcutta. In this petition they have not taken quite so reprehensible a tone as in the memorials addressed to the Indian Government. But the same spirit of caste, the same love of oligarchical domination—disguising itself under the phraseology which in England we are accustomed to hear only from the most zealous supporters of popular rights—may be seen in both. While the excitement which has now completely subsided was in its full force, the organs of the opposition repeated every day that the English were the conquerors, the lords of the country, the dominant race, the electors of the House of Commons whose legislative power extends both over the Company at home and over the Governor-General in Council here. These constituents of the British legislature, they told us, were not to be bound by laws made by any inferior authority. The firmness with which the Government withstood the idle outcry of two or three hundred people about a matter with which they had nothing to do was designated as insolent defiance of public opinion. We were enemies of freedom because we would not suffer a small white aristocracy to domineer over millions.

How utterly at variance these principles are with reason, with justice, with the honour of the British Government and with the dearest interests of the Indian people, it is unnecessary for me to point out either to my colleagues or to the Honourable Court. For myself, I can only say that if the Government is to be conducted on such principles, I am utterly disqualified by all my feelings and opinions from bearing any part in it, and cannot too soon resign my place to some person better fitted to hold it.

The petitioners say that the East India Company has always been opposed to the free trade and settlement of the English in India; and they therefore conceive it to be a great hardship that they should be placed under the Company's courts.

This is an ingenious attempt to confound two things which are in themselves widely different, and which the English Parliament and nation are likely to regard with very different feelings. That jealousy of interlopers which the Company felt while the Company was still a commercial body was natural and not inexcusable. But it was a feeling not likely in any age to meet with much sympathy from the public; and the spirit of our age is so strongly and, as I think, justly opposed to restrictions on trade that an interloper thwarted and depressed by a powerful monopolist is sure to have the general voice on his side.

But is it just or reasonable to advert to a state of things which has wholly passed away, for the purpose of raising a cry against the Indian Government? The Company is no longer the competitor of the private merchant. It has ceased to be a commercial body. It is now merely a ruling body—and as such it has no interest to exclude from its dominions any class of people who are likely to make those dominions more flourishing by carrying thither the arts and industry of Europe.

As to the apprehension which the petitioners express, that the effect of this enactment may be to deter Europeans from settling in India, I cannot do better than quote the language of a most valuable servant of the Company, the late lamented Mr Mill. That gentleman was asked by the Committee of the House of Commons which sat on Indian affairs in 1832 whether he did not conceive that the total abolition of the King's Courts would prevent Europeans from settling in the interior. His answer was: 'By no means. I think the same motives which carry them into the interior now as far as their objects are honest and justifiable would carry them still; and if they go there for the gain of misconduct and oppression it is very much to be desired that they should not go at all.'

It is impossible that any rational person can be so prejudiced against the Company and its servants as really to believe that, having given up all connexion with trade, they are still jealous of all other traders.

But there is a jealousy, widely different from the old commercial

jealousy, of which the Company is invidiously and unfoundedly accused by the petitioners—jealousy which it is their duty and that of all who are in authority under them to entertain. That jealousy is—not the jealousy of a merchant afraid of being undersold, but the jealousy of a ruler afraid that the subjects for whose well-being he is answerable, should be pillaged and oppressed. India has been subjugated by English arms and is governed by English functionaries. To be an Englishman is therefore a rank in India. Nor is this all. Those qualities which enabled us to conquer and which now enable us to govern the country—that valour, that resolution, that intelligence, that closeness of union, that marked superiority both in mental and physical energy which reared our Empire, and which have upheld it, make every individual Englishman a formidable object to the native population. Under these circumstances, there is reason to fear that a tyranny of the worst sort, the tyranny of race over race, may be the effect of the free admission of British settlers into our provinces. This apprehension the British Parliament evidently entertained when it passed the Charter Act; and if any person is inclined to think it an unfounded apprehension, I would refer him to the writings and speeches to which this very Act has given occasion. In those speeches and writings it will not be difficult for him to detect, under the disguise of expressions which in England are generally employed by demagogues, the spirit of an oligarchy as proud and exclusive as that of Venice itself.

Against that spirit it is the first duty of the Government to make a firm stand. I at least will make no concession to it. And I most earnestly hope that the unflinching and uncompromising resistance which I have, in common with my colleagues, felt it my duty to offer to demands made in that spirit will be approved by the Honourable Court. I hope so, not principally on my own account, though their approbation must always be most gratifying to me, but because I am convinced that on the course which they may take the dearest interests of this Empire depends.

In all ages and countries a great town which is the seat of the Government is likely to exercise an influence on public measures disproportioned to its real importance. This is no evil if the interests, the opinions and the feelings of the population of such a town coincide with those of the population of the Empire. But

in India, unfortunately, while the influence of the society of the capital on the Government is greater than in almost any other country, the interests, feelings and opinions of that society are often diametrically opposed to those of the mass of the people. Calcutta is an English colony in the midst of an oriental population. Here we are surrounded by men of the same race and colour with ourselves, by men who speak and write our language, by men who constantly correspond with the country to which we all hope to return. That the favourable and unfavourable opinions of such men should affect us more than the opinions of crowds of foreigners, of heathens, of blacks, that the execrations of whole provinces in the mofussil should wound our feelings less than a scurrilous article in a Calcutta newspaper, that the benedictions of whole provinces should gratify us [less] than a complimentary address from fifty or sixty of our countrymen, is, I fear, but too natural. To overcome these feelings, to take greater interest in the many who are separated from us by strong lines of distinction than in a few to whom we are bound by close ties, to brave the clamorous censure of those who surround us for the purpose of serving those whose praises we shall never hear, is no more than our duty. But it is a duty in the performance of which we have, I think, a peculiar claim on the home authorities for support and encouragement. We have now, in defiance of misrepresentation, abuse and calumny passed a law which is considered by ourselves, by the late Governor-General, by the Governor in Council of Madras, by the Governor in Council of Bombay, by all or almost all the civil servants of the Company, as a law beneficial to the great body of the people. The English settlers in the mofussil, the English at the towns of Madras and Bombay are, to all appearance, contented with it. The English population of Calcutta alone, led on by a class of men who live by the worst abuses of the worst court in the world, have raised an outcry against us. If that outcry be successful, the prospects of this country will be dark indeed. But I know the Honourable Court and the British legislature too well to think that it can be successful; and I confidently expect that we shall receive on this occasion such support as may encourage us and those who shall succeed us, when legislating for the general good of India, to disregard the clamour of Calcutta.

V

THE SUPREME COURT AT CALCUTTA

No. 13: 1 FEBRUARY 1836[1]

In looking through the papers relating to the Court of Requests at Calcutta, it has occurred to me that it would be desirable to refer these papers to the Law Commission without delay. The commissioners should be requested to take into their immediate consideration the whole system of the Court of Requests, its composition, the extent of its jurisdiction as respects both the amount and the nature of claims, its mode of procedure, its charges, and the way in which those charges are met.

It is my firm conviction that we may, without laying additional burden on the State, provide Calcutta with a most efficient tribunal competent to dispose of all the less important and intricate civil cases.

This, however, is only a small part of the benefit which I anticipate from a revision of the system of the Court of Requests. We may with great advantage make trial in this court of several important reforms, before we introduce them in the mofussil. An apprehension is often expressed by persons whose opinion is entitled to great weight that principles of jurisprudence which theoretically are unobjectionable may in practice be found to produce pernicious results. We can never bring this important question to the test with so much care and so little risk as by trying the experiment in a court for the recovery of small debts at the seat of Government. A bad system may go on long in a remote zillah without attracting much attention. But evils which are daily felt by every shopkeeper in Calcutta must very soon be brought to our knowledge. The court will sit almost under our own eyes. We shall read its proceedings in the newspapers; we shall very soon be plied hard with petitions, if its machinery does not give satisfaction. We shall be able to correct our errors here, and we shall avoid falling into the same errors elsewhere. If on the other hand we find, as I have little doubt that we shall, that the theory now generally held by the most enlightened European

[1] *I.L.C.*, 1 February 1836, No. 5.

jurists is confirmed by experience, we shall proceed with greater confidence and with the approbation of the public to introduce throughout our Empire a rational, cheap and speedy system of procedure.

No. 14: 16 MAY 1836[1]

THOUGH I do not think it advisable that we should at present make many partial alterations in a judicial system which is about to undergo a thorough revision, there are nevertheless some exceptions from this general rule. There are some reforms so important that, however strong may be the general reasonings by which they are recommended, it is desirable that we should try them on a small scale and watch their effect before we introduce them into the laws under which a hundred millions of people are to live. There are local evils so monstrous that they cannot with propriety be suffered to exist during the eight or ten years which must, I fear, elapse before the whole civil and criminal law shall have been amended and digested.

I have therefore thought it my duty to call the attention of Government to the practice of the Supreme Court as a Court of Equity. My colleagues are probably aware that it is a Court of Equity as well as of common law. But they may not perhaps know that the amount of property of which it disposes as a court of common law bears no proportion to the amount of which it disposes as a Court of Equity. I speak within compass when I say that several suits in equity have been decided within the last few months in every one of which the property at stake was larger than the sum total of all the debts and damages which are recovered here at common law in two years.

When a question of fact arises in a proceeding in equity, the court decides that question on written depositions which are framed in answer to written interrogatories. It is scarcely necessary to point out the evils of this mode of taking evidence. It is of all modes the most dilatory, the most expensive, and the most unsatisfactory. A question which would be settled by viva voce testimony in a minute may occupy lawyers, solicitors and officers

[1] *I.L.C.*, 30 May 1836, No. 6.

during a year. A question which might be settled by viva voce evidence without the cost of an anna may cause an outlay which shall ruin a respectable family. I know from unquestionable authority that in a late suit in equity a portion of the depositions which was altogether immaterial to the case cost the enormous sum of five thousand rupees.

In a good court administering a good system of law, the whole expense of the most complicated suit could never amount to five thousand rupees. In this case five thousand rupees were expended not on the whole suit, not on the whole examination, but on the examination into a single point, and that an irrelevant point. They were expended without eliciting a single answer bearing on the case.

It often happens that, when months have been lost, and thousands of rupees spent in examinations of this kind, the court still finds itself altogether in the dark as to the real facts. It then refers the question for consideration to itself in its other character of a court of common law, and by means of a legal fiction, the nature of which it is not worth while to explain, enables itself to summon witnesses on the doubtful points, and to take the evidence of those witnesses orally. In this way a question with respect to which written questions and written answers have been accumulating during a year is sometimes settled in an hour.

The Court of Chancery at home takes evidence in the same way. But there is a defence for this practice in the Court of Chancery at home which cannot be urged in favour of the practice of the Supreme Court here. The jurisdiction of the Court of Chancery extends equally over all England; and witnesses cannot without the greatest inconvenience be summoned from Cornwall and Northumberland to appear in Westminster Hall. But the interests which are under the protection of the Supreme Court are to a great extent concentrated at Calcutta, and in the majority of suits instituted in that court. All the evidence is within two or three miles of the judges. Here, therefore, there is no excuse for following the more tedious, the more costly and the more unsatisfactory mode of procedure.

I state these opinions with the greater confidence because I have discussed this question with the Chief Justice and Sir Benjamin Malkin and have found them as strongly impressed

as I am with the magnitude of the evil, and fully disposed to lend their valuable aid for the purpose of applying a remedy. I believe also that to a considerable extent Sir John Grant entertains similar views. It seems to me that we never can take up this important question under circumstances more favourable. The system which requires reform is a most intricate and artificial system. And it is most fortunate that those who understand it best and whose business is to administer it are disposed to assist in reforming it.

What I propose is that a letter should be written to the king's judges requesting them to state whether they think that it would be practicable and desirable to provide that the Supreme Court, sitting in equity, should take evidence viva voce, and also to inquire whether, if such be their opinion, they would have any objection to put themselves in communication with the Law Commission in order to frame an Act for that purpose.

No. 15: [no date][1]

THE question brought before us by the Governor-General has hitherto been considered by the Council of India in the Legislative Department. If, however, it shall be thought fit to adopt the plan proposed by the judges without any modification, it will be unnecessary to pass any law on the subject. The Executive Government and the Supreme Court acting in concert will be able to do all that is to be done. If we determine to force on the judges a measure of which they do not approve, an Act will of course be required.

I have conferred on this subject very unreservedly both with the Chief Justice and with Sir Benjamin Malkin; and on the whole I am disposed to think that our wisest course would be to take the plan just as it has been sent to us. I am not, I own, convinced that reduction has been carried far enough. I am not convinced that it is fit to give to any officer of the Supreme Court a salary larger than that of a puisne judge of the court, far larger than that of a judge of the Sadar; and larger by three-fifths than that of the Recorder of Penang. But I find that the distinguished

[1] *I.L.C.*, 23 January 1837, No. 76.

persons whom I have mentioned, and who, I am certain, have nothing but the public interest in view, entertain a strong opinion that such an arrangement is necessary to the efficiency of the establishment over which they preside. I do not think that it would be wise, for the sake of a few thousand rupees a year, to risk the dissolution of that close alliance which at present exists between the Government of India and His Majesty's judges, an alliance which, while the Code is in preparation, I think is of the highest importance to maintain. I am therefore willing that the plan should be adopted as it stands. In that case, as I have said, no Act will be necessary; and I therefore have no more to do with the proceedings. I may, however, be permitted to suggest that the Government should cause it to be distinctly understood that no person will ever henceforth acquire a vested interest in any office in the Supreme Court; and that no person who has not at present such an interest in his office will be considered as entitled to claim any compensation in case it should be deemed expedient to diminish his salary or altogether to abolish his situation.

VI

MACAULAY'S PROJECT FOR THE REFORM OF MOFUSSIL COURTS

No. 16: 25 JUNE 1835[1]

It is known to the members of the Government that Mr Millett was sometime ago charged with the duty of consolidating the Regulations relating to the constitution, the jurisdiction and the procedure of the civil courts in the old presidency of Bengal. He has performed this task with very great industry and ability; and the fruit of his labours is the extensive Regulation in seven parts which accompanies this minute.

Though Mr Millett has occasionally introduced into this Regulation changes which as far as they go are amendments of the existing system, he justly thought that his duty was not so much to reform the law as to bring it into a state in which it would be easy for higher authority to reform it. He has therefore abstained from proposing many alterations of the expediency and importance of which, I am well assured, he is as fully sensible as any person can be. From the same feeling he has preserved many of the faults of arrangement and style which deform the old Regulations.

He has, however, rendered a very great service to the public. He has brought together a mass of enactments which were till lately dispersed in different parts of the Regulations and which, in their dispersed state, it was impossible to contemplate without being overwhelmed and bewildered. He may be said to have rough-hewn a Code, which it is now our business to shape. The whole or almost the whole of what Mr Bentham would call the civil law adjective of the presidencies of Fort William and Agra is now before us and may be taken in at one view. It seems fit that we should now carefully revise that system, that we should consider what changes it requires, and that we should then refer Mr Millett's drafts, with proper instructions, to the Law Commission. That body will, I hope, be able in a few months

I.L.C., 3 April 1837, No. 16.

after the reference to frame a complete Code of Civil Procedure for the whole Indian Empire, or at least for this presidency and the neighbouring presidency of Agra.

The first part of Mr Millett's Regulations merely rescinds all the Regulations which he has consolidated.

The second part relates to the constitution and jurisdiction of the Company's civil courts in the mofussil. Here I think it my duty to recommend extensive changes.

At present there is in the mofussil a judicial hierarchy of four orders. At the head is the zillah or city judge. Below him are the Principal Sadar Amins. Then come the Sadar Amins. Lowest of all are the munsiffs. In the great mass of civil suits, the magnitude of the sum which is in dispute settles the question before which court the cause shall in the first instance be tried. In order to prevent the plaintiff from taking his case before the wrong court by making too high or too low a demand, a most cumbrous machinery has been devised which seems to me susceptible of being abused in the most flagitious manner for purposes of delay and chicane. If this defendant aver that the plaintiff has overrated or underrated the pecuniary value of the matter in dispute, a previous investigation takes place in which the question of value is tried, without any reference to the question of right. When a decision is pronounced, either party may appeal against this decision. In short, two lawsuits are made out of one. To what an extent this practice must increase the expense and delay of legal proceedings, and what advantages it gives to a litigious defendant with a full purse, I need not point out. I am also at a loss to understand how an inquiry into the value can, in the great majority of cases, be carried on without an inquiry into the right. Besides, the judge who afterwards tries the right is not bound by the decision which has previously determined the value. I suppose the following case to occur: A plaintiff wishes to have his cause tried by the Sadar Amin rather than the munsiff. He therefore states his demand high. The defendant, wishing to go before the munsiff, denies the correctness of the valuation. The preliminary investigation takes place. It is decided that the plaintiff has valued his demand correctly. The question of right is then tried by the Sadar Amin. He decides for the plaintiff, but gives him damages so small that the munsiff would have been competent to award those damages.

Here we have legal decision against legal decision. We have a judicial decree which bears on its very face evidence that it was pronounced by a court not authorized to take cognizance of the cause.

Should it be determined to adhere to the principle of making the jurisdiction of courts depend on the amount of the sum in litigation, I hope that at least this blemish will be removed from the law. I have proposed in a note on the margin of Mr Millett's Regulations a method which without delay or difficulty will produce the desired effect. I will explain and defend that proposition if necessary. But I earnestly hope that I shall be able to prevail on the Governor-General in Council wholly to abandon a principle which seems to me utterly indefensible.

Mr Millett proposes to raise all the degrees of the scale together, and to give to all the subordinate judges, munsiffs, Sadar Amins and Principal Sadar Amins jurisdiction in suits for larger amounts than those which are specified in the existing Regulations. This, as far as it goes, will doubtless be an improvement, provided always that, as Mr Ross proposes, the munsiffs are better paid. At present their administration of the law inspires no confidence. Their poverty makes it almost impossible for them to be honest. The Sadar Amins, on the contrary, are said, I believe truly, to possess the confidence of the public.

But I cannot see the necessity for having four classes of judges to try four classes of causes. The only ground on which I can conceive that such an arrangement can be defended is this: That causes differ in intricacy and importance, that abilities and knowledge which may be trusted with the decision of a simple or a trifling question may not be equal to the task of deciding on a very complicated or a very momentous question and that therefore we ought to have inferior judges for the inferior causes, and judges of greater talents and larger experience for causes of a higher kind.

This reasoning would be very sound if it were possible to discover any criterion either of the difficulty or of the importance of causes. But I doubt whether it be possible to find any general criterion which shall even approach to accuracy. And I am sure that the pecuniary scale which is at present established and of which it is now proposed to raise the gradations, but to retain the principle, is not such a criterion.

And first as to difficulty. Every person who has ever attended a court of law as a spectator for a single day is aware that the intricacy of a case bears no proportion whatever to the magnitude of the sum in dispute. A debt of a lakh of rupees on a promissory note or on a bill of exchange may be proved in two minutes so clearly that no doubt about it shall exist in any rational mind. On the other hand the smallest demand that can come before a court of justice may raise questions both of fact and law which would task to the utmost the abilities of the wisest judge that ever presided over the most august tribunal. I may safely challenge any person to state any difficult point relating either to matters of law or to the effect of evidence which is not just as likely to arise in a suit for fifty pounds as in a suit for fifty thousand pounds. Indeed, so far is it from being the fact that suits on the result of which large sums depend are the most complicated, that the general rule is notoriously rather the other way. Large debts are seldom contracted or paid without business-like forms and written memorials. And it is generally much less difficult to get at the truth respecting them than respecting claims arising out of petty contracts or wrongs.

The quantity of money demanded in a suit is, then, in no sense a measure of the difficulty of trying the suit. But is it a test of the importance of the suit? Surely a very defective one—so defective that I believe it to be in practice worthless. The real measure of the importance of a cause evidently is the quantity of pain and pleasure which the decision produces. And the quantity of pain and pleasure produced by the decision depends not on the absolute magnitude of the sum at stake, but on the magnitude of the sum compared with the means of the parties. A hundred rupees may be more to a clerk than a thousand rupees to a writer in the Company's service, or than ten thousand rupees to a member of Council. There are no doubt sums so small that they would be trifling to anybody, and sums so large that they would be important to anybody. But in the vast majority of cases the demand is important or unimportant according to the circumstances of the individual. It is generally such as would ruin a ryot would be little if at all felt by a wealthy man and would give different degrees of inconvenience to the intermediate classes.

Now if causes in which large sums are demanded cannot be

shown to be either more intricate or more important than causes in which small sums are demanded, why should we provide one class of judges to try the former description of causes and another class for the latter? I own that I can consider such a system in no other light than as a great injustice to the poor, who in every society are also the many, and who in every society, even under the best institutions which human skill and benevolence can devise, must from the very nature of things always encounter the rich at a disadvantage before any tribunals.

There must, it is plain, be at present two classes of judicial functionaries in the mofussil and, though no legal exclusion exists, the higher class must practically, for a long time, consist chiefly of Europeans, and the lower class chiefly of natives. Each class has its own merits and defects. In energy, in powers of general reasoning, in extent of general information, in integrity and humanity, the advantage is decidedly on the side of Englishmen. On the other hand the native has an acquaintance with the language, the manners, the modes of thinking and feeling of his countrymen such as the ablest and most experienced foreigner can scarcely ever acquire. He is therefore much more competent to judge of the value of evidence than an European functionary can be. He is familiar with all the shifts to which dishonesty generally has recourse in this country. There is another great and obvious advantage in native agency. It is far cheaper than that of Europeans.

On the whole it seems advisable that in our judicial system, as in other parts of our government, we should proceed on the principle of employing native agency under European superintendence. The original jurisdiction in all civil suits, I would leave to the subordinate courts. It would be the duty of the zillah judge to inspect and check those courts at every stage of their proceedings.

I would altogether abolish the office of Principal Sadar Amin which indeed seems to be considered as quite unnecessary by all the most experienced gentlemen whom I have consulted; and I would make a considerable change in the nature of the munsiff's office. The Sadar Amin's court should be the one court having original jurisdiction in all civil causes for all amounts and between all parties throughout the mofussil. My reasons I have already given. I have shown that it is impossible to make any general

classification of suits such that the difficult and the important suits shall come into one class and the easy and unimportant suits into another class. If there be no difference in difficulty or in importance between two classes of suits, it is plain that there ought to be no difference in ability and knowledge between the judges who are to try those two classes of suits. It seems to me quite clear that a man who is really competent to try the civil causes which now come before the Sadar Amin is competent to try any cause which can possibly come before any court. It is allowed, I believe, that though the decisions of the munsiffs are generally regarded with suspicion, the Sadar Amin's court is highly respected throughout the mofussil. To this court, therefore, acting, I repeat, under the constant superintendence of the zillah judge, I would give the original jurisdiction in civil suits.

The munsiff should be an assistant to the Sadar Amin. His chief duty would be to preside at the pleading which ought in every case, as I shall hereafter show, to be oral. I would assign this business to the munsiff, whom I suppose to be a functionary of less knowledge and experience than the Sadar Amin, because it is business in which it is not very easy to go far wrong and in which it is quite impossible to go fatally wrong. The object of pleading is to ascertain not what is the truth but what the parties affirm to be the truth. It is evident that the duty of superintending this process may be respectably performed by any man of ordinary sense. It will be scarcely possible for him to act partially or corruptly without being detected. By transacting this business, the munsiff will relieve his principal from a most extensive and laborious duty; and will acquire, with little or no risk to the interests of suitors, those habits of judicial investigation which may fit him for higher posts.

I would also allow the Sadar Amin, with the consent of the parties, to refer any cause to his munsiff for trial. Although it is, as I have tried to show, impossible to judge merely from the amount of the sum in dispute, whether a cause will be difficult or easy to try, yet when the Sadar Amin has the issue before him and knows the general nature both of the claims and of the defence, he will be pretty well able to judge what causes will be the least intricate. These causes, always with the acquiescence of parties, I would suffer him to entrust to his assistant.

We should thus have a class of functionaries who would be in a situation in which they might be expected to acquire judicial habits of mind and in which they would probably relieve their superiors from a great load of business; but in which they would not be able, however incapable or dishonest they might be, to commit much injustice. If a munsiff was found incompetent to try causes, parties would not consent to go before him, but would insist on being heard by the Sadar Amin. A munsiff before whom parties were willing to go would be known to possess the public confidence and, if the Government did its duty, would on a vacancy be promoted to the place of Sadar Amin.

When a munsiff by the consent of the parties tries a cause, all the rules relating to the Sadar Amin ought to apply to the munsiff *pro hac vice*, and the proceedings of the munsiff ought to be immediately superintended by the zillah judge without an intermediate appeal to the Sadar Amin.

The chief objection which I anticipate to this system is a fiscal objection. If my proposition should be adopted, we must have more Sadar Amins, and Sadar Amins cost more than munsiffs. To this objection, I should think it a sufficient answer to say that the munsiff's court, as at present constituted, is not a court on the decisions of which any reliance can be placed, that the administration of justice is the end of government; and that no Government has a moral right to raise twenty crore from a people, and then to tell them that they must put up with injustice because justice costs too much. But, in fact, I do not believe that the increase of expense would be great.

A thorough reform, such as we ought to effect in the whole system of pleading, of evidence and of appeal, would so greatly abridge lawsuits that one Sadar Amin would be able to do what is now the work of two or three. This I know to be the opinion of some of the ablest and most experienced servants of the Company in the Judicial Department. But even if a large increase of expense were to be the effect of the new arrangement, I am inclined to think with Mr Ross that it might be met by a change in our system which would tend to improve its efficiency by divesting the functionaries engaged in the collection of revenue of all their judicial functions, and thus saving the whole cost of the machinery which is now required to enable them to perform

those functions. Mr Ross will, I hope, fully develop the opinions which he entertains on this important subject.

Having constituted the courts in the manner which I have described, I would give them jurisdiction over Europeans and natives indiscriminately. There may be treaties by which some great families are entitled to have their causes tried in a peculiar way. If so, of course, the public faith must be sacredly observed. But this is the only exemption which I should be inclined to grant.

I may here observe that the late Charter has abolished the old rule which precluded Europeans from being Sadar Amins. The great majority of those officers will still be and ought to be natives of India; but it may deserve the attention of the Executive Government whether there would not be considerable advantage in appointing at least one English Sadar Amin for every zillah, where the English settlers are numerous.

Two other questions of great importance come before us in the second part of Mr Millett's Regulations. The first is: Within what zillah is a civil suit to be brought? The second: Within what time may a civil suit be instituted? The existing law seems to me to be very defective on both points. I cannot better explain my opinions than by putting them in the form of enactments. They will, for the most part, explain themselves.

The following then are the rules which I would lay down:

'All suits shall be brought within the zillah or city where the defendant resides, except as hereinafter excepted.

'1. A suit concerning immoveable property or encroachments arising from immoveable property shall be brought in the zillah or city wherein such property is situated; and if such property, being the subject of one suit be in more than one zillah or city then the plaintiff may bring his suit in any of the zillahs or cities within which the property shall be.

'2. A suit for damages in consequence of any injury done to the person, the property or the reputation may be brought, at the option of the plaintiff, in the zillah or city where the defendant resides or in the zillah or city where the injury was done.

'3. A suit may be brought in any city or zillah by consent of the parties.

'4. A suit may be brought in any city or zillah or transferred to any city or zillah by direction of the court of Sadar Dewani Adalat.'

Next, as to limitation of time, I would lay down these rules:

'No suit shall be brought for any injury done to the person, the property or the reputation, or for penal damages, in consequence of any breach of the law, when one year shall have elapsed since the time at which such suit might first have been brought, and no suit shall be brought in consequence of any debt or contract or for any property whatever when six years shall have elapsed since the time at which such suit might first have been brought except as hereinafter excepted.

'1. If the plaintiff were under eighteen years of age at the time when he might first have instituted the suit, the time of limitation shall begin to run from the day when he completed his eighteenth year.

'2. If the plaintiff were out of the territories of the East India Company at the time when he might first have instituted the suit, the time of limitation shall begin to run from the day on which he next entered the territories of the East India Company.

'3. If the defendant shall in writing acknowledge a debt or contract, the time of limitation shall run from the day on which he last so acknowledged the debt or contract.

'4. If the plaintiff shall prove that he was prevented from bringing his suit earlier by violence or fraud on the part of the defendant, the limitations shall not apply.

'5. Provided always that, in all cases in which the plaintiff denies his claim from another person, whatever portion of the time of limitation may have run out as against that other person shall be reckoned against the plaintiff.'

These rules which may of course require to be put into a more accurate form seem to me to meet the ends of justice. It may be necessary to add another exception in order to prevent the new limitations from having a retrospective effect. I would make no distinction between suits on the part of Government and private suits. A Government when it comes into a court of law ought to come thither as a common suitor.

When the courts are properly constituted and their jurisdiction properly defined, the next question which arises is as to the mode of pleading.

On this subject my opinion is that the pleading should in all cases be oral and that, except in very special cases indeed, the

parties should be confronted. The arguments in favour of this mode of pleading are familiar to all who have paid any attention to the philosophy of jurisprudence. I will, therefore, only say that in this country experience fully confirms what all general reasoning on the subject would lead me to believe. In the Upper Provinces oral pleading has already been introduced, not so completely as I propose to introduce it but to a considerable extent; and I have been assured by gentlemen of the highest reputation in the judicial branch of the service that, in proportion as it has been introduced, the ends of justice have been better promoted.

The plaintiff ought indeed to deliver in a written plaint, in order that, when the parties come before the judge to plead, the defendant may have a general knowledge of the claim which is made upon him. But neither in this written plaint, nor in any of the oral pleadings, nor, generally, in any affirmation made by either party, would I tolerate fiction. If either plaintiff or defendant asserts a wilful untruth to the court, he should be punished with as much severity as a perjured witness. I am utterly at a loss to understand on what principle we can make a distinction between a witness and a party, on what principle we suffer a party to declare that he does not owe money when he knows that he owes it, while we punish with the utmost rigour any friend who may be induced to deviate from the truth in the party's behalf. Until I see some perfectly new argument against these doctrines, I shall continue to think that no mind not darkened by prejudice and habit can fail to admit their truth.

I was at first inclined, as the Council will see from the marginal notes which I have made on Mr Millett's draft, to propose that the defendant should be called on for a written answer to the plaint. I now think that it would be far better to have all the stages of pleading subsequent to the plaint purely oral. A day should be appointed on which the two parties should appear together before the munsiff. Neither rank nor sex ought to give any privilege.

All respect, however, consistent with public justice, ought to be paid to the feelings of the natives of India. If the party cannot come to the munsiff, the munsiff must go to the party; if the party should be a man of high rank, the pleadings may take place at his house; if the party should be a woman of respectability, she

may be examined behind a veil. Persons of the highest dignity are examined thus as witnesses. *A fortiori* there can be no objection to examining them thus when they are parties. Distance ought to be no excuse for a party except when it would also be an excuse for a witness. It is absurd to require a man to put himself out of his way for the sake of justice in a cause which concerns other people, but to require no such sacrifice from him in a cause concerning himself.

I do not mean that there are no exceptions. There are cases in which it is impossible that the parties should be confronted. There are others in which it would be exceedingly inconvenient. Both plaintiff and defendant may be bedridden. Distance in a country so extensive and so imperfectly supplied with the means of conveyance will sometimes be an insurmountable difficulty. A matter which came before Council only a few days ago may serve as an instance. A jeweller in Calcutta supplies some articles of plate to a person at Meerut. The articles are not paid for. It is surely too much to require the jeweller to undertake a journey so long, so expensive, so uncomfortable at certain seasons, and to certain constitutions so dangerous, in order to recover a few hundred rupees. In such cases, I would allow the zillah judge to dispense with the general rule; but every such dispensation and the reasons for it should be reported to the court of Sadar Dewani Adalat.

But though in these cases the parties would not be confronted, they ought to plead orally. Their counter-statements ought to be taken down from their own lips, and if they are guilty of wilful falsehood they ought to suffer all the penalties of perjury.

Confrontation would however be the general rule. The excepted cases would not be one in a thousand. No vakil ought to be suffered to assist either party during this investigation. The legitimate uses of an advocate are to examine and cross-examine evidence, to state the effect of evidence, to argue disputable points of law. These are things which the most honest plaintiff or defendant may from want of intelligence, of presence of mind or of legal learning be unable to do for himself. But there is no plaintiff or defendant who cannot tell his own story straightforward, and this is all that in the preliminary investigation before the munsiff it is necessary for him to do. To allow any other person

to suggest his answer is to introduce into pleading that systematized and barefaced falsehood which is the worst taint of European jurisprudence. In countries where this taint has long existed, there may be great, perhaps insurmountable, difficulty in removing it. In India, happily, there will be no difficulty in making our system of procedure pure and keeping it so.

The munsiff having heard the story of each party, having examined them both, and if he thinks fit having suffered them to examine each other, will draw up a statement of the issue and show it to them. Either of them is at liberty to object to the way in which his case is stated; and the munsiff must correct the statement till each of them is satisfied with his own share of it. There must of course be rules to guide the munsiffs in this process, and remedies provided in case either party should attempt by perverse or frivolous objections to prevent the question from being brought to issue. Generally the proceeding would be short and simple. From the moment that the statement of the issue written by the munsiff has received the assent of both parties, that statement constitutes the whole record. A skilful munsiff will, with very short practice, be able to shape the statement of the plaintiff's demand in such a way as to exhibit all that is necessary to constitute a legal claim, and no more than is necessary. The decree will in that case merely set forth on which side the court gave judgement and for what amount. It is my firm conviction that there are very few cases indeed in which the whole record, framed on these principles, would exceed a sheet of letter paper.

When the issue is framed, a day will be fixed on which the Sadar Amin or, by his direction and with the consent of the parties, the munsiff will proceed to try the cause.

We now come to the law of evidence, a subject on which, as indeed on most other parts of the philosophy of jurisprudence, it is not easy to add to what has been said by Mr Bentham. The great principle on which that part of the law should be framed is that all evidence should be taken at what it may be worth, that no consideration which has a tendency to produce conviction in a rational mind should be excluded from the consideration of the tribunals.

In the draft now before us, it is proposed to admit, in certain specified cases, the evidence of the plaintiff and the defendant. I

conceive that it ought to be universally admitted. In most cases the parties are better acquainted with the truth than any witness who can be summoned. They have undoubtedly a strong interest to falsify. But justice could not be administered in any society for a day without the evidence of partial witnesses. And of all partial witnesses, the parties are least likely to mislead a judge of common discernment because their partiality is known. In criminal cases, the aggrieved party is suffered to give evidence against the aggressor. In cases of life and death, a parent is suffered to give evidence for a child. In an extensive class of civil cases—cases of mercantile account and so forth—it is proposed by this draft to suffer parties to give evidence. And it is utterly impossible to show that they are less likely to falsify in cases of this description than in others.

I cannot but hope that when we have brought justice near to every man's door, when we have made pleading oral, when we have made the law of evidence simple and rational, the number of unjust prosecutions will shrink to a small amount, and that the decisions will generally be just and speedy.

It is to be observed that throughout the whole proceeding, a superintending power is reserved to the zillah judge. For example, if the Sadar Amin refused to admit a plaint, if either party should have any personal objection to the Sadar Amin, if an inconvenient day or place should be fixed for the pleadings or for the trial, or the claim of a man of rank to be examined at his own house should be rejected, if either party should wish for a dispensation from the general rule of confrontation, if either party should think that he has not had fair play in the summoning of his witnesses, if the Sadar Amin should pronounce judgement by default against a party who may have a reasonable excuse for the default—in these and many similar cases, the aggrieved person will be entitled to apply for relief to the zillah judge, whose decision should generally be final. In some cases, however, it will be fit that the zillah judge should report the matter to the court of Sadar Dewani Adalat; and in others it may be proper that the complaining party should be entitled to apply to that court if the zillah judge refuses him relief. These, however, are questions of detail into which I will not at present enter.

When the Sadar Amin has pronounced judgement, there will

still be in every case an appeal from that judgement to higher authority. I must own that no part of the jurisprudence of Bengal seems to me so defective as the law of appeal. Two, nay in some cases three, appeals are allowed. In cases where Europeans are concerned an appeal lies from the zillah court to the Supreme Court; that is to say, from a court which administers one system of law to a court which administers another. In some cases the Court of Appeal takes new evidence, and thus altogether abandons its proper functions and transforms itself into a court of original jurisdiction. In other cases, a court which has not heard the evidence takes upon itself to revise the decision pronounced by a court which has heard the evidence. All these seem to me to be great abuses and to require a thorough remedy.

Appeals naturally divide themselves into two classes—appeals on matters of law and appeals on matters of fact.

As to appeals on matters of law, it seems clear that they should always be made if possible directly to the highest law authority, that is to the court of Sadar Dewani Adalat. That court will, if properly constituted and regulated, be able to decide all such appeals promptly. I propose to relieve it almost entirely from what is now, I believe, the most burdensome part of its duty—that of trying appeals on matters of fact. I propose also to give to every judge of the Sadar the whole judicial power of the court. The appeals should be divided among them either by rotation or by assigning to each a certain number of zillahs. The latter I should think the preferable course. But it is of little importance on what principle the partition is made.

By taking this course we should have the advantages of what has been quaintly but expressively called 'single-seated justice' in the decision of causes, while we should at the same time have at our command the advice of a deliberative body consisting of the first men in the Judicial Department. When Government asks the advice of the Sadar Dewani Adalat where they are required to report on the expediency of a proposed law or on the merits of a public functionary, they will form a council. When they sit on causes, each will sit separately and act quite independently.

There is a species of appeal on matters of law which does not exist in this country, but which ought, I think, to be introduced and encouraged. It is not unusual in England for a jury to be

fully satisfied as to the facts of the case, and yet to be quite in doubt as to the legal effect of those facts. In such a case it is commonly their practice to return a special verdict in which they set forth the facts, state their uncertainty as to the law and leave their decision to depend on what the judges shall determine respecting the legal question. It seems to me that we might with great advantage take a hint from this part of the English jurisprudence. A Sadar Amin, if he be an honest man, is likely to be a far better judge of the question of fact which is to be tried on native evidence than any European functionary can be. But he may often be in doubt about the law. In such a case, I would allow him to decide the question of fact and to send the question of law to a higher authority. If the question were not a very puzzling one, an answer might arrive by return of dak, and, as many questions which would puzzle a Sadar Amin would be quite familiar to a learned and experienced judge of a higher court, this course would, I am persuaded, prevent many tedious and expensive appeals.[1]

The number of appeals on matters of law appearing on the face of the record is, I believe, small in proportion to the number of appeals on matters of fact. Now I would allow no appeal, in the strict sense of the word appeal, on matters of fact—I would never allow a judge who had not heard the evidence to revise the decision of a judge who had heard the evidence. It is the fundamental principle of the whole law of appeal that every appeal shall be from a less competent tribunal to a more competent tribunal. But an appeal from a judge who has heard the evidence to a judge who has not heard it is, by the nature of things, an appeal from the more competent to the less competent. An English judicial functionary will generally be a very superior man to any Sadar Amin. But the Sadar Amin will probably be at least as competent as the Englishman to weigh the value of native testimony. And when the Sadar Amin actually hears and sees the witnesses, and the Englishman only reads the written depositions, it seems to me that the Sadar Amin, unless he be, what no Sadar Amin ought to be,

[1] In practice, I believe, such references are sometimes made at present. But I can find nothing relating to them in the law.

an absolute idiot, must be the better able of the two to decide the cause. We know that written depositions preserve but a part, often but a small part, of the circumstances which determine our belief or disbelief of testimony. Two men shall give evidence which, when written down, shall have exactly the same appearance of truth. Nobody from reading the depositions shall be able to say that one is in the smallest degree more or less trustworthy than the other. And yet every human being who heard them examined may have been fully satisfied that the one was telling the truth and that the other was lying. This is not a rare case. It is a case of daily occurrence in every court of justice. It is, I am assured, at least as common in this country as at home; and, probably, in a majority of the causes which are decided at home the manner of the witnesses goes for something.

Now this being the case, it seems to me most extraordinary that we should suffer a judge who only knows a cause from reading the depositions to reverse the decision of a judge who has looked the witnesses full in the face, who has noted not merely their words, but the tones in which those words were uttered, who has read the lines of their countenances, who has observed in one the stammering of a man conscious of fraud, in another the suspicious fluency of a man who is repeating a tale learned by rote.

If the Court of Appeal looks only at the depositions, its decision on the matter of fact will in my opinion be of less value than that of the court below. If the Court of Appeal calls for the witnesses and re-examines them, it ceases to be a Court of Appeal. It tries the cause over again.

At the same time I would not, in a country like this, suffer the decision of the lower court on an issue of fact to be final. The course which ought to be taken is obvious. In no case let the judgement of the Sadar Amin on a point of fact be *reversed* by any court which has not heard the evidence. But let it be competent to either party to demand a new trial. Let the zillah judge have the superintending power in this matter. If, on going through the depositions, he sees reason to doubt whether justice has been done, let him order the question to be tried over again. If he thinks that the Sadar Amin meant to do justice and is quite competent to try the cause but has committed some error, such as the best magistrate will now and then commit, he should point

out that error to the Sadar Amin, and direct him to avoid it in the second investigation. If the zillah judge sees reason to think that the Sadar Amin was partial or is not competent to try so intricate a cause, he may send it before a different Sadar Amin. Lastly, if it should appear to him that the cause is one which no Sadar Amin in his zillah is likely to try fairly and well, he may try it himself.

After two successive decisions on the same side, I think that the power of granting a third trial ought to be reserved to the Sadar.

There are many parts of the law relating to process which appear to me to require alteration. And the general opinion of those whom I have consulted is that the whole business of summoning witnesses, serving notices and executing decrees might be performed in a much more simple and expeditious manner. To suggest the remedies, however, would require far more local knowledge than I possess. The Government ought, I think, to direct the Law Commission to give particular attention to this subject.

There still remain three questions of the greatest importance to which I must request the attention of my colleagues.

The first is the question of language. In what language should the records of judicial proceedings be kept?

This question seems to me to be at once decided if we determine, as I hope and trust we shall, that the pleadings shall be oral. For if the decree is to be framed in conformity with the terms of the issue, and if the issue is to be taken down from the lips of the parties, it seems necessarily to follow that the language which the parties speak must be the language of the record. There may here and there be a person residing in Bengal who cannot speak Bengali or in Arakan who cannot speak the Mugh; but these are rare exceptions; and the rule ought evidently to be fixed with a view to the general convenience. Whatever is the vernacular language spoken by the mass of the population of a zillah ought to be the language of the record. When the practice of oral pleading is introduced, the reasons which have hitherto been urged in favour of a foreign language will lose their weight. The record will be so short that the terseness which distinguishes the Persian language will be but a slight advantage and the diffuse-

ness of which the vernacular dialects are accused will be but a slight inconvenience.

If a translation of a record should be required for the use of a superior court, that translation may be made into any language which the superior court may prefer. And it may be proper to give to that translation, under proper safeguards, all the authority of an original.

The next point to which I wish to call the attention of the Council is the practice of levying taxes in various forms on the institution of suits and at various stages in their progress. I think it my duty to urge the Government in the strongest manner to abolish this system altogether. No question in the whole science of jurisprudence seems to me clearer, and very few are more important.

A tax is in itself an evil. The burden of the proof always lies on those who defend a tax; and there are only two grounds on which any tax can be defended. It may be defended as a mode of prohibition. It may be defended as a source of revenue. The institution fees are defended on both grounds, but chiefly on the former. The former is indeed the only ground assigned in Regulation XXXVIII of 1795, by which those fees were first instituted.

They are desirable, it seems, because they diminish the quantity of litigation. Litigation is an appeal to the courts of law and is a good thing or a bad thing according as the laws and the courts are good or bad. If what the courts administer be injustice, these taxes are defensible or are objectionable only as being far too low. They ought to be raised till they amount to a prohibitory duty; or rather the courts ought to be shut up, and the whole expense of our judicial establishments saved to the State. But if what the courts administer be justice, is justice a thing which the Government ought to grudge to the people? If it be good that there should be laws, if it be good that men should have recourse to the laws, if in proportion as recourse to the laws is made difficult men must either suffer wrongs without redress or redress their wrongs by the strong hand, if, in the happiest and most enlightened societies when all that wisdom and benevolence can do to improve jurisprudence has been done, the great mass of the people must still have some difficulty in recurring to the laws, is it fit that a Government should, of set purpose, add to that difficulty? I am utterly

unable to find any reason for taxing litigation which would not be a reason for prohibiting litigation altogether.

The preamble of the Regulation which first established these fees is perhaps the most eminently absurd preamble, though that is a bold word, that ever was drawn. It sets forth that many groundless suits have been instituted, that the business of the judges is greatly increased and that the establishing of fees on the institution and trial of suits and 'on petitions presented to the courts is considered as the best mode of putting a stop to this abuse without obstructing the bringing forward of just claims'.

As the authors of this law affected to give their reasons, it would have been well if they had really done so and had stated on what grounds they *considered* that the exacting of an institution fee from every plaintiff without distinction *would* prevent the bringing of unjust suits, and not prevent the bringing of just suits.

It is undoubtedly a great evil that frivolous and vexatious actions should be instituted. But it is an evil for which the Government has only itself and its agents to blame and for which it has the power of providing a most efficient remedy. The real way to prevent unjust suits is to take care that there shall be just decisions. No man goes to law except from the hope of succeeding. No man hopes to succeed in a bad cause unless he has reason to believe that it will be determined according to bad laws or by bad judges. Dishonest suits will never be common unless the public entertains an unfavourable opinion of the administration of justice. And the public will never long entertain such an opinion without good reason. If the subject were not one which most deeply concerned the welfare of the people, there could be no better object of ridicule than a Government which constitutes its courts of law in such a manner as to give fraud an advantage over honesty, and then fines every man who goes to such infamous places.

The preamble which I have quoted asserts that a tax on a suit drives away a dishonest plaintiff and does not drive away an honest plaintiff. This is not only unsupported assertion but assertion directly in the teeth of all reason. Why did dishonest plaintiffs apply to the courts before the institution fee was imposed? Evidently because they thought that they had a chance of success. Does the institution fee diminish that chance? Not in the smallest degree. It neither makes the pleadings

clearer, nor the law plainer, nor the corrupt judge purer, nor the stupid judge wiser. It will no doubt drive away dishonest plaintiffs who cannot pay the fee. But it will also drive away honest plaintiffs who are in the same situation. There is not the smallest reason to think that it will exclude a greater proportion of the one sort than of the other. It divides all plaintiffs into two classes. But the principle of the division is not that honest men are admitted and dishonest men are excluded, but that the richer are admitted and the poorer excluded. We might exactly as well resort to any of the tests which are in use among the rudest and most superstitious of our native subjects. We might just as well give a man a handful of rice to chew and let him bring his suit if the rice proved moist and send him away if it continued dry, as apply this ordeal, for it deserves no other name, as a mode of discriminating between honest and dishonest suitors.

Another consideration will show the absurdity of this system. There are two parties to every suit; and one of the two must necessarily be in the wrong. If the object of this tax be to prevent unjust litigation, we ought clearly to impose the tax on the party who is most likely to be the most unjust litigant. Is then the plaintiff or the defendant the most likely to have justice on his side? I believe that the records of all tribunals will show what indeed any person who knows the world or looks into his own mind would expect, that in a great majority of cases the plaintiff is in the right and the defendant in the wrong. This is certainly the state of things in England. It is so here, and I believe that it is so everywhere. Now if this be so, and if we are resolved to lay a tax on a lawsuit before it is decided for the purpose of preventing dishonest litigation, justice and reason plainly require us to lay that tax on the party who is the more likely of the two to be the dishonest litigant, that is to say on the defendant. The absurdity of the proposition strikes us at once, because we are not accustomed to it. But in itself it is demonstrably more reasonable than the present practice.

It has been said by gentlemen for whom I have the highest respect that in this country nothing but an institution fee prevents the poor from harassing the rich with vexatious prosecutions. I own that I found some difficulty in believing, on the authority of any person however eminent, that a state of things so utterly

unlike anything that exists elsewhere could really exist here. Make your legal proceedings as simple, as cheap, as expeditious as you can, the rich man must still have an advantage over the poor man. To diminish that advantage is one of the chief ends which a legislator should propose to himself. It is an end which we cannot hope to attain completely. But every approximation is something. To take the directly opposite course, to frame laws avowedly for the purpose of making justice absolutely inaccessible to those to whom at least it is accessible only with difficulty, is a policy which I find it hard to reconcile with what I know of the abilities and benevolence of those who defend it.

This question was discussed last July at Ootacamund. I then offered all the opposition in my power to the project of establishing institution fees in the kingdom of Mysore. The opinions of others, of Colonel Morison in particular, was that, unless some such check were provided, all the rich would be laid under contribution by swarms of needy prosecutors. The question was decided by the arrival of a dispatch from the Court, which positively prohibited the levying of any such tax. The experiment has now been tried; and the result has established the soundness of the reasonings which I then submitted to the Council. None of the evils which were predicted have followed.

The letters of the Commission contain no trace of any such evils. Colonel Morison, with the candour which was to be expected from him, has informed me that the private accounts which he has received from that part of India lead him to believe that the experiment has turned out well, and that his apprehensions were groundless. It is with the greatest pleasure that I cite on this subject the testimony of my distinguished colleague, and I earnestly hope that, in this attempt to extend to all India a reform which has been so successful in Mysore, I shall have his powerful assistance.

I do not conceive that any check on frivolous and unjust litigation is necessary except that which will always exist whenever there are good laws and good judges. If the decisions are just, as they ought to be in ninety-nine cases out of a hundred, no man will be fool enough to play at so ruinous a game as that of bringing vexatious actions against his neighbours. If, however, it be thought that any other restraint is necessary, I am prepared to propose one. Let us enact that the losing party in a civil suit,

whether plaintiff or defendant, shall over and above damages and costs pay a fine to the Government. This is a provision which will really effect what the present system only pretends to effect. It will spare the party who is in the right. It will punish the party who is in the wrong. It will really discourage vexatious prosecutions and pertinacious resistance to just prosecutions.

Some exemptions must indeed be allowed. The zillah judge should have power to remit the fine in cases in which the law might be so obscure that the losing party might honestly think himself in the right. A Government which omits to define the rights of its subjects clearly and precisely has no business to punish them for not knowing what their rights are.

If the course which I recommend be adopted, the fiscal reasons which have been urged for maintaining this system will at once be met. We shall levy as large a sum on the suitors as we levy now; but it will be levied on unjust litigants after the decision, and will not be extorted indiscriminately from honest and dishonest plaintiffs before the trial.

Together with this great abuse, the effect of a mistaken regard for the interests of the rich, I would remove from our laws another abuse which has arisen from a mistaken tenderness for the poor. I would altogether abolish the suit *in forma pauperis*. It is the business of the Government to make the laws as simple as possible, to place the tribunals as near every house as possible, and thus to make justice as expeditious and as cheap as possible. But I would have no special provision in favour of any class. We are bound to make a lawsuit as cheap and easy a proceeding as it can be made. But, when we have done this, we are no more bound to relieve a man from the inconveniences which poverty produces in a lawsuit than from the inconveniences which it produces in all the other parts of human life. We are no more bound to find a man a vakil gratis than to find him rice and clothes gratis. Good legal advice may be important to a suitor. But surely it is not more important to him than good medical advice to an invalid. And why the State which suffers its poor subjects to die by thousands for want of good physicians should be bound to find them good advocates, I am unable to comprehend.

There are some very good provisions in the Regulations which relate to the suits of paupers. But they are good not for the suits

of paupers only but for all suits. For example, the pauper is punished if he wilfully misrepresents his case. I have proposed to punish every litigant, rich or poor, who wilfully misrepresents his case. The pauper is allowed to institute an action without paying a fee. I have proposed to abolish these fees altogether. Indeed, if my propositions should be adopted, the pauper will have all the advantages which he now has except the advantage of having a vakil found for him by the public. The only difference will be that he will have these advantages in common with all other suitors.

The principle of the suits *in forma pauperis* seems to me so thoroughly bad that I will not enter into any detailed examination of the existing law on that subject. Yet I cannot help adverting to the unreasonable rule which provides that a man may sue *in forma pauperis* for sixty-five rupees but not for sixty-three rupees, to the equally unreasonable rule which allows him to sue *in forma pauperis* for a debt, but not for an assault, and to the cumbrous machinery by which the value of the matter in dispute is ascertained before the suit is instituted.

I should certainly feel very unwilling to make this proposition if I thought that any poor man would under the system which I wish to establish find any insuperable difficulty in obtaining justice. But in truth he will then have in all kinds of actions for all amounts and without any previous investigation all the advantages which the suit *in forma pauperis* only gives him in certain kinds of actions and for certain amounts, with this exception that the State will not provide him with a legal adviser. The assistance of a legal adviser, however, though it must always be useful, will not, under the system which I propose, be indispensably necessary to the conduct of a cause. And, supposing it to be indispensably necessary, there can be little doubt that a plaintiff who has a good cause will find vakils to undertake it on speculation, or moneylenders to advance the fees. These things always adjust themselves when Governments are wise enough to leave them alone. But one departure from sound principles renders other departures necessary. I have no doubt that the practice of bringing actions *in forma pauperis* was the effect of the old laws against maintenance and champerty. The iniquity of denying all redress to a poor man, kept out of his own by a knave, was too glaring to be tolerated in any society. But the injured person could not prosecute without money and the

State had in its wisdom forbidden anybody to assist him with money for the purpose of prosecution. Accordingly the State was forced to do what would have been far more simply and more judiciously done by individuals if the law had left them at liberty to risk their own property at their own discretion.

I have now explained the nature of the principal changes which I think it desirable to make in the law of civil procedure. There are many points of minor importance which may be left to the consideration of the Law Commission.

Mr Ross's experience has enabled him, as the Council will see, to offer many suggestions on matters of detail which seem to me extremely valuable. I have the greatest pleasure in saying that the propositions which I now submit to the Council are the result of much unreserved communication with that gentleman, that I owe very much to his advice, and that I expect to receive his support.

No. 17: 6 FEBRUARY 1837[1]

It seems to be certain that there is no valid objection to an enactment extending the jurisdiction of the Principal Sadar Amins to all cases, whatever may be the amount in dispute.

It is plain that causes in which large sums are at stake are not likely to be more intricate than causes in which small sums are at stake. It is impossible to imagine any question either of fact or of law which can be raised in the course of a suit for a lakh of rupees and which is not equally likely to be raised in the course of a suit for a thousand rupees. The largeness of the sum at stake has no more connexion with the difficulty of trying the cause than the largeness of the sum at stake on a game at cards has to do with the chances of the game. Indeed, if the largeness of the sum has any effect as respects the difficulty of trying the cause, that effect is generally favourable. For where large sums are at stake, the recollections of witnesses are generally clear and evidence is often fixed in permanent forms. As far as my own observation goes, I should say that those trials in which there is the greatest difficulty in arriving at the truth, in which the judge is most perplexed and in which the jury remain longest in deliberation, are not trials in which great property is at stake;

[1] *I.L.C.*, 13 February 1837, No. 4.

and I have often heard the same remark made by experienced judges and advocates.

Neither are causes in which more than 5,000 rupees are at stake necessarily more important than causes in which a less sum than 5,000 rupees is at stake. The importance of a cause depends not on the absolute amount of the property in dispute but on the proportion which that property bears to the means of the litigants.

Not thinking that those causes the cognizance of which is now withheld from the Principal Sadar Amins are either more intricate or more important than those causes which the Principal Sadar Amins are now actually trying, I see no reason against removing the restriction.

The reason given by the Sadar court seems to me very feeble. They say that it would be desirable to watch longer the effect of the system established by Reg. V of 1831 and to extend the powers of the Principal Sadar Amins gradually and with caution. Business, they say, is not [in] such a state as to require the sweeping enactment which we contemplate. Yet, at this very moment, this very court is calling on us to pass a still more sweeping enactment, to place a still greater confidence in the Principal Sadar Amins. For it seems to me that to allow the Principal Sadar Amins to sit as the substitute of the zillah judge on an appeal hitherto cognizable by the zillah judge alone is a far stronger measure than to allow the Principal Sadar Amins to try, in the first instance, suits for any amount.

My own wish would be to give the native functionaries original jurisdiction in every case and appellate jurisdiction in no case; I certainly would not [give them appellate jurisdiction], in order to relieve the European functionary, until I was satisfied that sufficient relief would not be given by extending the original jurisdiction of the native functionary.

That some relief will be given by extending the original jurisdiction of the native functionary is clear even from the reply of the Sadar court.

This relief I would give. If this relief be not sufficient, and if it be impossible to increase the number of European functionaries in those districts in which the pressure of business is so considerable, I would then very unwillingly grant the new appellate jurisdiction to the Principal Sadar Amins. But I should in that

case seriously consider whether, on a comparison of evils, it would not be better to give to the decision of the Principal Sadar Amin on such an appeal the same effect which the decision of the zillah judge would have, than to allow another appeal from the Principal Sadar Amin to the zillah judge. If the decision of the Principal Sadar Amin has the same effect as that of a zillah judge, there is risk of injustice. If after the decision of an appeal by a Principal Sadar Amin there is a second appeal to the zillah judge, there is the certainty of expense and delay. I hope that Mr Ross and Mr Shakespear will second their opinions on this point, and that they will also consider whether there be any middle course, any class of appeals with respect to which we could safely allow the decision of the Principal Sadar Amin to have the same effect as that of the zillah judge. It has occurred to me that we might provide that no summary appeal should be referred to a Principal Sadar Amin for decision without the consent of the parties: and that in all appeals so referred, the decision of the Principal Sadar Amin should have the same effect as a decision pronounced by the zillah judge. But I offer this suggestion with great diffidence.

No. 18: [no date][1]

I SHOULD have no doubt about the propriety of instantly adopting the measure proposed by Mr Shakespear if I felt satisfied that the munsiffs as a class possessed and deserved the public confidence.

It was from no disposition to show partiality to Europeans that by Act XI of 1836 we exempted them from the jurisdiction of the munsiffs. We were of opinion last year that the munsiffs were generally too poor to be proof against temptation and that an English litigant would generally be able to offer temptation. We shut the Englishman out of the munsiff's court, not because we thought that the Englishman would have harder measure than the native in that court, but because we thought it but too probable that the Englishman would obtain more than justice.

I of course could not have any experience in this subject. I [formed] my opinion after consulting those whom I thought best able to judge, and, unless I am greatly mistaken, both Mr Ross and Mr Shakespear then agreed with me.

[1] *I.L.C.*, 31 July 1837, No. 25.

It certainly will be thought both here and at home, if we adopt the course recommended by Mr Shakespear, that either we were in a great error last May or that we are in a great error now. It was so natural, so obvious a course, when we were giving to the Sadar Amins jurisdiction over Europeans, to give that jurisdiction to the munsiffs also that everybody must suppose us to have had some reason for drawing the line where we did. What was that reason? Has it been removed? Has it not on the contrary been strengthened? If the measure proposed by Mr Shakespear be in itself a good one, we were guilty of a great oversight in not making it part of Act XI of 1836. We shall never have so good an opportunity of adopting it as we had then. But if it be open to objections, if those objections a year ago appeared to be decisive, what has happened to diminish their force? A new privilege has been granted to Europeans, a privilege which the Court of Directors evidently consider as likely, unless proper precautions be taken, to lead to much evil. They have thought it necessary to remind us on this occasion that it is our duty to take measures for preventing the natives from being oppressed by European settlers. Do we conform to their directions, and can we expect of their approbation if the very first step which we take after granting this new privilege should be to send causes between Europeans and natives before a court in which, as we ourselves held but a few months ago, a native is not likely to obtain justice against an European?

No. 19: 15 MAY 1837[1]

I CONCUR very generally in the remarks contained in Mr Shakespear's minute. The declaration of the court of Sadar Dewani Adalat that it would not be proper to empower the Principal Sadar Amins to adjudicate causes exceeding the amount which they are at present authorized to determine seems hardly consistent with the approbation bestowed by that court on Mr Millett's draft by which the power of the Principal Sadar Amins is greatly extended. Nor indeed does it appear consistent with reason to allow a man to try causes in which 5,000 rupees are at stake and to refuse to trust him with higher causes. It is quite as bad a

[1] *I.L.C.*, 31 July 1837, No. 7.

thing that suits for 5,000 rupees should be tried by corrupt judges as that suits for five lakhs should be tried by corrupt judges. Five thousand rupees is a sum the loss of which is quite sufficient to ruin an honest man and his family; and the loss of five lakhs can do no more.

I cannot venture to give any opinion of my own as to the state of morality among the public functionaries. I hope and trust that Mr Shakespear's views on that subject are correct. But I am quite willing to take the premises with which I am furnished by the Sadar judges; and I say that on these premises, they do not appear to me to reason correctly. For, after all, we must work with such machinery as we have. If justice cannot be got pure, we must be content to have it sullied. Everybody knows that a Hindu witness is not generally deserving of so much credit as an English witness. Yet we receive the evidence of Hindus, and on that evidence we even take away human life; because if we were not to do so society would be left altogether without protection. As we act with respect to native witnesses, we ought to act with respect to native judges. We may regret that they have not the honourable feelings of English gentlemen. But what can we do? We cannot change the heart and mind of a nation in a day. We cannot place ten or twelve English gentlemen in every zillah. The revenue of India will not bear that expense. We [can] therefore either withhold justice from the great body of the people, or give them such justice as can be dispensed by the instrumentality of native functionaries under European superintendence. That there must be one general system is acknowledged by everybody. The immense majority of suits are tried by Principal Sadar Amins, and by officers who stand far below Principal Sadar Amins in respectability; and the Sadar court makes no objection to this arrangement. The propriety of the general rule is universally admitted. But a very small number of suits ought, it seems, to be excepted from this rule. And on what principle does this exception rest? What is the distinction between these suits and the mass? Are these suits more complicated? Are they more important to the litigants? Are they more likely to be corruptly decided? The Sadar judges have given no opinion on any of these points. My own opinion is that suits of this description

will often be exceedingly simple, and that they will often be less important to the parties than suits which the Principal Sadar Amins are now allowed to try. On the whole I should think that they are less likely to be corruptly decided than suits for smaller sums, for the great check on a corrupt judge is the probability of appeal, and in suits of this description, a party who thinks himself aggrieved will always think it worth his while to appeal.

I seriously think that, even in the supposition that all the facts are as the Sadar judges take them to be, it would be exactly as reasonable to select by lot one suit out of every fifty and to exclude the Sadar Amin from the cognizance of the suits so selected as to maintain the existing practice. The argument of the Sadar court when reduced to plain language is this: The native judges are bad and currupt. Therefore leave to them more than nine hundred and ninety-nine cases in a thousand. Leave to them all the cases of the poor and almost all the cases in which the middle classes are concerned. Leave to them a power which enables them to reduce unjustly to hopeless poverty every inhabitant of the Empire, except perhaps a twenty-thousandth part of the population. Reserve all your care and scrupulosity for the interest of that twenty-thousandth part. Exempt from the jurisdiction of these corrupt officers a few causes which differ from the mass only in this, that the higher orders are almost exclusively concerned in them. This is my answer to all that the Sadar judges say about pay, hazardous experiments, sweeping powers, and momentous changes. I am certain that in the proposed Act there is nothing hazardous or sweeping or momentous. I am certain that all the evil which in the most unfavourable supposition this Act can by possibility produce will be to the evil already existing as a drop to a bucket. I must own that I am unable to comprehend this solicitude for the welfare of the few and this indifference to the welfare of the many, this anxiety to exempt some hundreds of people from calamities to which millions are left exposed.

One difference I well know there will be between cases in which large sums are at stake and other cases. Cases in which large sums are at stake are likely to make most noise. The parties generally belong to the wealthier and more intelligent portion of

society. They are by no means so likely to sit down quietly under wrong as the poor and the ignorant. And this seems to me an answerable reason for giving cognizance of these cases to the same judges who try the cases in which the body of the people are interested. If human ingenuity were tasked to invent a method of making and keeping the judicial administration corrupt, it could not frame a better than that which is recommended by the Sadar court. That court would have us provide justice of two different qualities for two different classes; a superfine justice carefully purified for the rich, a coarse and sullied justice for the poor. They would have us send the zemindar, the banker, the indigo planter, in all cases of importance, before a judge of undisputed integrity, while we send the ryot or the small shopkeeper in a case where his all may be at stake before a judge known to be undeserving of confidence. I regret that there should be abuses in our courts of justice. But, while such abuses exist, I think it desirable that all classes should suffer from them alike. Then they will be exposed, and I trust speedily reformed. But what the Sadar judges propose is to exempt from the suffering caused by these abuses—not the class of people who are likely to suffer most severely, but the class of people who, when they do suffer, are likely to complain most loudly. This is certainly a very convenient course for a Government which thinks only of its own quiet and is quite willing that the people should be wretched as long as their wretchedness does not show itself in murmurs. But it is a course altogether unworthy of a Government which proposes to have the welfare of its subjects in view. I have no doubt at all that, if we pass this Act, we shall have more complaints of the abuses of the mofussil courts than we ever had before; and I have as little doubt that [if] their complaints [were] cited to prove [that] the Act is a bad one, I [should] draw directly the contrary inference. It is bad that there should be maladministration. But it is good that where there is maladministration there should be complaints. For complaints, though they are produced by maladministration, tend to produce a good administration. The policy recommended by the Sadar court leaves the disease in all its malignity, and merely keeps out of sight those symptoms which might enable us to judge of the nature of the disease and to apply a remedy.

Therefore, taking for granted all the premises of the Sadar court, I am led to a conclusion diametrically opposed to that at which they have arrived. I say this respecting the main question. For many of the suggestions offered by the court on [collateral subjects] appear to be deserving of consideration.

I agree with Mr Shakespear in thinking that it will be desirable to give in all cases which may be referred under this Act an appeal direct to the Sadar Dewani court. Neither in these cases, nor in any other class of cases, would I allow more stages of appeal than one.

I think it most desirable that some addition should be made to the salaries of the Principal Sadar Amins, and indeed of all the native judicial officers. It seems to me that it would be sufficient to fix the salary of a Principal Sadar Amin at 500 rupees a month, exclusive of the expenses of his establishment, which ought to be separately defrayed. Much larger sums have been mentioned. Mr Money, I see, proposes a clear 1,200 rupees a month. But I confess that I am rather inclined to think that to give such large salaries would be useless extravagance. It is perfectly true, as the Sadar court say, that a needy class of magistrates are very likely to be corrupt. But it is equally true that when a magistrate receives pay which enables him to live in credit and comfort, according to the notions of the class to which he belongs, the heaping of additional wealth upon him has no tendency to make him more honest. To take the illustration with which the Sadar court furnish me: The covenanted servants of the Company are now liberally paid, and their integrity presents a most gratifying contrast to the rapacity of their predecessors seventy years ago. But I do not believe that if the pay of the civil service were tripled the increase would produce any improvement whatever. Five hundred rupees a month is more to a native than 2,000 rupees a month to an Englishman. A native with 500 rupees a month will not be corrupt from the pressure of want. And neither 500 rupees a month, nor 5,000, nor all the treasure of Sadat Ali, will satisfy the cravings of avarice.

I have another strong objection to fixing the salaries of Principal Sadar Amins at 1,000 rupees or 1,200 rupees a month. The point at which I would aim would be to fix those salaries high enough to be an object to respectable natives; but not high

enough to be an object to European adventurers who have any interest. 1,000 or 1,200 rupees a month would be an object quite sufficient to bring such adventurers to India in swarms with recommendations which it would be very unpleasant to the dispensers of patronage in this country to treat with neglect. The evils which such a state of things would produce require no illustration.

At the same time, I think that it might be wise to create a very few situations of 800 or 1,000 rupees a month, and to fill those situations with the oldest and most distinguished Principal Sadar Amins. The high salaries of those few situations would give respectability to the whole of the native judicial service; and the Principal Sadar Amins would, through their whole career, have these lucrative and honourable posts in view as motives to combined exertion and good conduct. If no person who had not been in some subordinate judicial office during a considerable number of years were eligible for these situations, there would be no risk of the intrusion of improper persons from England.

VII

MACAULAY'S PROJECT FOR THE REFORM OF JUDICIAL PROCEDURE

No. 20: 11 JANUARY 1836[1]

THE question immediately before us seems rather to belong to the province of the Executive Government; as, however, the Court has directed us to consider it in the Legislative Department, and as, if it should be determined to dispense with the fifth judge, a legislative measure will be necessary to alter the constitution of the Bombay Sadar, I see no impropriety in giving my opinion.

The question lies in a narrow compass. The answer of the Bombay Sadar, indeed, as Sir Robert Grant appears to think, rather perplexes than elucidates the matter. But from Mr Sutherland's minute it is clear that on the particular point referred by us to Bombay no doubt whatever exists. It is quite clear that if one judge be entrusted with the whole power of the court a fifth judge will be unnecessary.

But it is the opinion of Mr Sutherland that such a concentration of power in a single judge would be in the highest degree pernicious and unpopular. He seems to doubt whether any plan so dangerous can really have been contemplated by us; and expresses a strong hope that we shall not sacrifice justice to revenue. In this opinion the other members of the Bombay Government appear to concur.

I should be as unwilling as any person to impair the efficiency of a Supreme Court of Appeal for the sake of a saving of a few thousand rupees a month. But I am not convinced that the step which seems to be regarded at Bombay with so much dread would impair the efficiency of the Sadar. I am inclined to believe that it would, on the contrary, render the Sadar more efficient.

I will not now go over all the arguments which may be urged for single judges against a plurality. Those arguments are familiar to all who have studied the general principles of jurisprudence; and they have fully satisfied my own mind. It does not appear

[1] *I.L.C.*, 1 February, 1836, No. 11.

from the papers before us that these arguments have been at all considered by the Bombay Government. Not the faintest allusion is made to them. It is taken for granted that two judges will decide better than one, and three better than two. Nor does it appear to have occurred to any of those whose opinions are before us that the scheme which was suggested from hence could possibly have been dictated by other than mere fiscal considerations.

As it is admitted that by giving to a single judge the powers of the court we should enable the court to get through its business; as I believe that, in general, one judge transacts business better than several; and as nothing whatever is before us which can be considered as tending to show that Bombay is an exception to the general rule, I think the fifth judge superfluous.

I generally agree with what Mr Shakespear proposes. I might indeed be inclined to go farther. But I feel that there may be advantages in introducing gradually reform which seems to be regarded with very little favour by the authorities at Bombay.

No. 21: 7 MARCH 1836[1]

I CANNOT give my consent to the draft, marked D, which we have received from the Madras Government. It is somewhat curious that we should have been requested by the Government to pass two drafts framed at the same time and grounded on the same set of reasons yet most widely at variance with each other. The one draft gives to a class of native Chiefs in the territories of Fort St George privileges which no subject ought to enjoy. The other takes away from the same class privileges of which no subject ought to be deprived. The one exempts them from the ordinary mode of trial. The other renders them liable to punishment without any trial at all. We determined at a former meeting to reject the draft by which it was proposed to make persons of this description liable under certain circumstances to banishment without being heard in their own defence; and we have now to consider whether we will exempt them from the power which the ordinary courts exercise over all others.

Two reasons are urged in favour of the proposed draft. It is said that the difficulty and danger of executing civil process within

[1] *I.L.C.*, 2 May 1836, No. 6.

the districts inhabited by these Chiefs are such that the service cannot be performed by the ordinary officers and that it ought therefore to be transferred to the collector. Others who refuse to allow any weight to this argument conceive that some indulgence ought to be shown to the feelings of men of ancient descent, great authority and high spirit, and that if, by any modification of the ordinary rules of law, the minds of such men can be conciliated, that modification may with propriety be adopted.

I cannot think either of these arguments satisfactory. If the courts of law have not power enough to execute their decrees in these districts, we ought to increase their power. That we have the means of subduing the refractory spirit of these Chieftains is admitted. The framers and defenders of this draft entertain no doubt that the collector will be able to carry the process of the courts into execution. If the collector be able to do this, why should the judge be unable to do it? It is competent to the Government to arm the courts with all the power with which it has armed the collectors, and it is surely the duty of Government to arm the courts with all the power necessary for the carrying of judicial decrees into full effect. It is a bad sign for a State when the machinery which is provided for the administration of justice is contemptibly weak, while the machinery which screws revenue out of the people is irresistibly strong. It is a bad sign for a State when the judge can be defied with impunity unless he calls in the aid of the tax-gatherer.

If it be the fact that these districts are in such a state that it is not easy or safe for the ordinary officer to serve process within them, I would adopt any measures which might be necessary to correct so great an evil — I would even go so far as to pass a law depriving of his zemindari every Chief within whose domain any resistance was offered to the authority of the courts. The Executive Government is bound to put down such resistance by all the means in its power, and to yield to such resistance would be impolitic, undignified and unjust to the great body of our peaceable subjects.

Nor can I readily admit that we ought to consult the feelings of these Chiefs by exempting them from the ordinary rules of law. This is a practice to which, in my opinion, the British rulers of India have been but too much inclined. Instead of giving a new

exemption, instead of privileging against the process of the courts a class which has hitherto been subject to that process, we ought rather to retrace our steps. The course which we have followed has too much tended to encourage the people of this country in one of the most pernicious prejudices which can possibly exist—in the notion, I mean, that the laws were not made for the wealthy and noble, and that it is unworthy of a man of rank and spirit to submit to the procedure by which truth can be best ascertained and justice most fairly administered. It may be imprudent to take away privileges which have already been given. But we ought to be very cautious how we add to the number.

If the Council should be inclined to adopt the draft, I would suggest some amendments in the details.

If the provision contained in the first clause is necessary, it ought to be more extensive. It ought, like the subsequent provision, to include the relatives and dependants of the privileged Chiefs. If a district is in such a state that it would be exceedingly difficult and dangerous for an officer of a civil court to execute process against the zemindar, it would surely not be very easy or safe to execute such process against the zemindar's brother. Indeed it seems to have been from mere inadvertence that the framers of the draft omitted in the first clause all mention of the zemindar's family. For in the third clause they propose that it shall be competent to the Governor in Council 'to declare from time to time the ancient zemindars and rajas to whom, *with their relations and members of their families*, the provisions of Sections I and II of the Act shall be applicable'.

In the second clause of the draft a distinction is made between European and native judges. This distinction, though it runs through the whole Madras Code, cannot be reconciled with the Charter Act. A native may now be a judge of the Fouzdari Adalat. An European may hold the lowest judicial situation. It would be better to mention the courts by their proper titles.

Lastly it seems improper that the exemptions should be strictly personal while the reasons for the exemptions are in a great measure local. One of the principal arguments urged in favour of the measure is that the districts inhabited by these Chiefs are in such a state that it is not easy or safe to execute the process of a civil court within them. But the draft is framed in

such a way that they, their kinsmen and their servants, if they were to come down into the plains and to settle in the most quiet part of the presidency, would still enjoy their privilege.

No. 22: 6 JUNE 1836[1]

I HAVE read with great attention the minutes which have been recorded on the subject of Mr Millett's draft; and I must say that the opinions which I laid before the Government a year ago remain in all essential points unchanged. I perceive that I have not sufficiently guarded some expressions; I am also inclined to think that I rather underrated the difficulty and importance of the duties of the functionary who is to superintend the pleadings and to frame the issue; I am now disposed to entrust that part of the business, not to a subordinate officer, but to the judge who is to try the cause.

This is the only alteration of any importance which my views have undergone. I have missed no opportunity of obtaining information from those who possess local experience, and it is my firm conviction that the system which I have recommended, and above all other parts of that system the practice of confronting and examining the parties, will in this country be eminently conducive to the discovery of truth, to the prompt redress of wrong and to the prevention of frivolous and vexatious litigation.

I am of opinion that the draft with the minutes which have been recorded concerning it, should be sent to the Law Commission for consideration at the proper stage of their proceedings. I cannot agree with Mr Shakespear in thinking that the draft, in its present form, ought to pass into a law. Mr Shakespear has quite misunderstood an expression which I lately employed. I certainly do not think that the whole law of rights and remedies for the whole Indian Empire can be promulgated in the form of a Code in less than eight years. But I never imagined that eight years or half that time would elapse before the completion of the Code of Civil Procedure. The Penal Code will, I trust, be sent up to Government in the course of the next cold season. The Code of Criminal Procedure ought to be finished in 1837. In the beginning of 1838, the Commission will, I hope, enter on the work of

[1] *I.L.C.*, 3 April 1837, No. 28.

framing the Code of Civil Procedure. This work will have been greatly facilitated by the discussions which will have preceded it; for the Code of Civil Procedure will necessarily have much in common with the Code of Criminal Procedure. I conceive, therefore, that in little more than two years from this time the Code of Civil Procedure may be laid before the Government.

When I spoke of eight or ten years, I was referring, not to the Codes of Procedure, but to the Code of Civil Rights. The formation of this last Code will be infinitely the most difficult and important part of the business of the Law Commission. The work of ascertaining and digesting all the existing rights and usages which make up the substantive law of India is likely to occupy even a longer time than I allowed for it. I shall be glad to be assured that it will be well and thoroughly accomplished before 1850.

Now if it be probable that in 1838 the Law Commission will complete the Code of Civil Procedure for all India, is it desirable to put forth this very imperfect Code for Bengal in 1836? I think not. I would, however, rather do this than direct the Law Commission to abandon the work in which they are now engaged and, leaving the Criminal Code half finished, to begin the Code of Civil Procedure. I am certain that we shall never have a Code for our Indian Empire unless we are content to do one thing at a time. The worst course of all would be to refer this draft to the Law Commission, desiring them to make at present such amendments in it as are consistent with its general principles and to postpone others till they come to the consideration of the Code of Civil Procedure for all India. The effect of taking this course would be that the Law Commission would have to frame two Codes of Procedure instead of one, and that they would be occupied for a year in revising and correcting laws which would not be more than a year in force.

No. 23: RULES OF PLEADING [no date][1]

I ENTIRELY concur in the sixth recommendation respecting the mutual examination of the litigant parties by each other. In our own courts the principle is admitted, although the method by which

[1] *I.L.C.*, 3 April 1837, No. 31.

effect is given to that principle is so circuitous and costly as to have deprived it of much of its real value. Suitors in our common law tribunals can examine each other only by commencing new suits for that purpose in the Courts of Equity. If the object itself be desirable, I can discover no reason why it should not be effected in the direct simple form which Mr Cameron has proposed.

Mr Cameron proceeds to advise that, in those cases in which the suitors themselves are subject to examination, the oath should be dispensed with, but that for every wilful violation of truth they should be liable to punishment. Considering how strong in all societies is the influence of self-interest, and how powerful is the temptation to a suitor to misrepresent the facts upon the proof or disproof of which the success of his suit may depend, I cannot think it reasonable to expect that in Ceylon suitors admitted to give evidence in their [own] causes will usually be found deserving of much confidence. I therefore agree it is unwise to exact an oath from persons in that predicament. Such a rule would, in a great majority of cases, provoke men to violate one of the most sacred religious duties and would thus tend to a general relaxation of moral principle. This is an evil for which no occasional facility in ascertaining facts upon a judicial inquiry could adequately compensate. I would therefore absolve the suitor himself from the necessity of being sworn. He must not however be punished for a false statement with the same severity as if he had sworn falsely. In common apprehension, which in this instance I think is correct, the demerit of falsehood is greatly enhanced by the violation of the religious sanction of an oath, and though in strictness it may not be the province of the penal law to punish actions with reference to their comparative immorality, yet any law which should be made with a total disregard of that distinction would so revolt the ordinary feelings of mankind as to lose much of its proper efficacy.

1. The complaint shall set forth the facts material to the plaintiff's case truly, clearly, with all practicable particularity as to place and time, and without extraneous circumstances, or unnecessary words of abuse.

2. The answer of the [defendant] shall follow as nearly as possible the words of the complaint, and shall plainly state which of

the assertions in the complaint are admitted and which are denied. And any new matter which the defendant may state shall be set forth truly, clearly, with all practicable particularity as to place and time, and without extraneous circumstances or unnecessary words of abuse.

3. If either party shall wilfully perplex the case by introducing extraneous matter or shall unnecessarily employ abusive words, it shall be competent to the zillah or city judge, after inspecting the proceedings, to impose on the party so offending a fine not exceeding Rs. 50 for any one complaint or answer.

4. If either party shall in the pleadings wilfully and knowingly make a false assertion, he shall on due conviction thereof be liable to the same punishment to which witnesses convicted of wilful and corrupt perjury are liable.

5. When the answer has been delivered in, the court shall appoint a day for the appearance of both the plaintiff and defendant in person; and if either party be a man whose rank and station would make it disgraceful for him to appear in a public court of justice, the court may be held at the residence of such party; but in every such case, all extraordinary expense arising from so holding the court at such private residence shall be borne by the party objecting to appear in the public court. And if the plaintiff shall not appear in person at the appointed time, or within the term of . . . days then next ensuing satisfy the court that he had sufficient reason for non-attendance, the complaint shall be dismissed with full costs. And if the plaintiff shall attend at the time appointed, but if the defendant shall not attend, or within the term of . . . days then next ensuing satisfy the court that he had a sufficient reason for non-attendance, the court shall proceed to try the cause on *ex parte* evidence.

6. When the two parties are before the court, the court shall examine them both as to the contents of the complaint and of the answer, not for the purpose of then deciding the case but for the purpose of precisely ascertaining the question at issue between them. And the examination shall be taken down in writing. And the court shall, after such examination, frame a statement of the issue to be tried and put the same in writing and show it or read it to both parties. And if either party object to the statement of the issue, the objecting party shall then and there protest against

that statement, and if no such protest be then and there made it shall not be competent to either party at any subsequent stage of the proceedings to object to such statement.

And if such protest shall be made, the whole proceedings shall be forthwith transmitted to the court holding the next superior jurisdiction and such court shall after inspecting the proceedings, confirm the statement of the lower court or alter it or direct a re-examination of the parties or summon the parties before it for examination, and the decision of such superior court shall be final.

If no such protest be made, the court shall appoint a day for the trial of the cause.

Much of this will doubtless require correction. I have said nothing about women of rank, because I am not sufficiently conversant with the native usages to suggest any method respecting them. It may deserve to be considered whether, *under special circumstances*, the zillah judge may not admit parties to appear by their vakils. It may also deserve to be considered whether it be necessary that the court which is to try the cause should also frame the issue, whether, e.g. in a suit before a Principal Sadar Amin, the preliminary examination might not, without inconvenience, be entrusted to a munsiff.

No. 24: 3 APRIL 1837[1]

As the law now stands, a most unnecessary delay is thrown in the way of the successful party. After a decision in his favour, he has to petition the court to carry into effect that decision—its own decision—and the adverse party is called upon to show cause against the performance of the decree. Surely execution ought as a necessary consequence to follow judgement, without any fresh hearing of the litigants? I would propose that unless within . . . days the court in which the decision had been pronounced should receive a superior court notice that an appeal against the decision had been made to that superior court, execution shall follow as matter of course.

[1] *I.L.C.*, 3 April 1837, No. 32.

The only exception will be those cases in which, by the death of the plaintiff or defendant between judgement and execution, the claim or liability may have passed to a new person. In such a case, the court must examine into the facts before granting execution.

If these opinions are approved of by the Council, the earlier sections of Mr Millett's Reg. V can easily be remodelled.

No. 25: APPEALS: 3 APRIL 1837[1]

I INTEND to offer in this paper a few concise hints respecting the law of appeal in the civil courts. If what I suggest should be approved, there will be no difficulty in making the necessary amendments in Mr Millett's fourth Regulation.

Appeals may be of two sorts—appeals on matters of law, and appeals on matters of fact.

About the first class of appeals there is little to be said. The only alterations which I would suggest there [are]:

1. I recommend that if the original judgement be affirmed by one Court of Appeal, there shall be no second appeal to a higher judicature, except on the ground of corruption in the lower courts.

2. It seems to me desirable that when the lower court distrusts its own judgement on a point of law, it should be at liberty to send that point of law up for the decision of the next superior court, without any application from the parties. It may well happen that an inferior judge may have thoroughly sifted a question of fact and yet may be in doubt as to the law of the case; under such circumstances he ought, I think, to pronounce a decision similar to the special verdicts often formed by English juries. He ought to state distinctly the facts as they have been proved, and to send them up to the higher court. The higher court, taking the facts for granted, ought to pronounce upon the law or to send the legal question, if necessary, to a still higher tribunal. I am inclined to think that many appeals would be prevented if the judges were at liberty to take this course. The expense would be absolutely nothing.

Appeals on matters of fact are of two kinds. An appeal may be founded on matters of fact extrinsic to the merits of the suit:

[1] *I.L.C.*, 3 April 1837, No. 33.

for example, a plaintiff whose cause was dismissed because he did not promote it within the legal time may appeal on the ground that he had a sufficient excuse for his delay, but that the court below would not admit it. A defendant who has not appeared, and against whom a decision has been pronounced on evidence *ex parte*, may appeal on the ground that he had not proper notice of the complaint. Either party may appeal on the ground that proper diligence was not used in summoning the witnesses and so forth. These are questions which the Court of Appeal must investigate by hearing evidence viva voce; and if the petition should appear to be well founded, the cause ought to be tried over again. In these cases, I think only one appeal ought ever to be allowed.

But the perplexing question is what course ought to be taken with regard to appeals on matters of fact given in evidence at the trial of a cause?

Now it seems quite clear that all appeals should be from a less competent to a more competent judicature. But a judge who has heard the evidence, unless he be an absolute fool, has immense advantage over a judge, however able, who has not heard the evidence. I suppose that even the munsiffs will be persons of good understanding and capable of weighing testimony with tolerable precision. If they are not, they clearly ought not to be entrusted with any power over the fortune and liberty of their neighbours. Surely an intelligent munsiff, who has himself examined the witnesses, who has noted the tones of their voices and the changes of their countenances, who has observed in one the hesitation of a man conscious of fraud, in another the suspicious fluency of a man who is repeating a tale learned by rote, such a munsiff, I say, is more competent to decide on the truth or falsehood of the story than the most learned and ingenious judge of the Sadar who has before him only written depositions. Every person accustomed to watch judicial proceedings must often have heard witnesses whose manner convinced him that they were perjuring themselves, yet who said nothing which if taken down by a shorthand writer would enable any judge who had not been present to pronounce them unworthy of credit.

If, therefore, the Court of Appeal decide merely by looking at

the depositions sent up from the court below, its decisions will not, in my opinion, be entitled to so much respect as those of the court below. If it sends for the witnesses, and examines them, it ceases to be a Court of Appeal. It is trying the cause afresh. I would therefore provide that in no case whatever shall a Court of Appeal *reverse* the decision of the lower court on the ground that the lower court has decided without evidence or against evidence. If on inspecting the depositions, the Court of Appeal should conceive that injustice has been done, I would allow it to order a new trial. The Court of Appeal might, if necessary, try the cause itself or send it before a different munsiff or Sadar Amin, or remit it to the former judge with instructions as to the course to be followed by him in trying it again. But in no case whatever would I suffer a judge who had only read the depositions to reverse the decision of a judge who had heard the witnesses.

No. 26: [no date][1]

A CONSIDERABLE part of the change which is proposed may be, as it appears to me, most conveniently effected without any legislative enactment.

I would pass the first clause of the proposed Act as a separate law for the Madras presidency alone, as it is in that presidency alone that such a law is required.

I would pass another short Act for the whole of India to the following effect:

'It is hereby enacted that no person shall, by reason of any conviction for any offence whatever, be incompetent to be a witness in any stage of any cause, civil or criminal, before any court in the territories of the East India Company.'

The reasonableness of such an enactment is obvious. Indeed I can conceive nothing more unreasonable than to allow an accomplice who has not been tried to turn king's evidence and yet to refuse to receive his evidence after his conviction till he has either been pardoned or punished. The only object with which we receive evidence is to get at truth; and why a criminal should be less likely to tell truth during the interval between his conviction and the expiration of his imprisonment than on the day

[1] *I.L.C.*, 19 June 1837, No. 7.

before his trial or the day after he is let out of confinement, it is not very easy to say.

I think that, as this law is obviously proper and as it is necessary to enact some such law for cases of thuggee, it is best to make it universal. I am unwilling to pass a law which would seem to imply that we are disposed to put up with worse evidence in cases of thuggee than we think necessary in other cases. I am not sure that we have not gone a little too far in this direction already. If for the suppression of thuggee it be desirable that we should admit in cases of thuggee a species of evidence which it would be desirable to admit in every case, I would much rather admit it in every case than pass an Act which by making thuggee an exception to the general rule seems to recognize the propriety of the general rule.

If these two Acts are passed, it seems to me that the Executive Government is competent to do all the rest.

In England the old system of *approvement*, which bore a great analogy to the existing system in India, has long been entirely superseded by a much more simple and convenient mode of proceeding. It is the common practice for magistrates to hold out hopes of pardon in commutation of punishment to offenders on condition of their giving full and true information against their accomplices. These promises have no legal effect whatever. They cannot be pleaded in a court of justice. But the Government considers its faith as pledged in such cases, and has never, as far as I am aware, failed to redeem the pledge even when the magistrate has acted indiscretely in giving the assurance.

I do not see what difficulty there would be in introducing into India a system which has been found to work so well in England. If every magistrate were authorized to promise exemption from capital punishment to any thug on condition that they will make a full disclosure, I do not think that anything more would be necessary. The thug may then be put upon his trial for the minor offence of having belonged to a gang of thugs, and if he pleads guilty may be condemned to perpetual imprisonment. While he remains so imprisoned, he will still be a competent witness under the law which I have proposed.

This seems to me the best way of effecting what we have in view without making a separate Code of Evidence for one particular crime.

No. 27: 10 JULY 1837[1]

I HAVE given the best consideration in my power to the propositions of the Governor-General and the remarks of Mr Ross and Mr Shakespear. Some of the questions which His Lordship's paper raises are not in strictness legislative questions; but they all spring out of an important legislative measure. They are all closely connected with matters which are now engaging or which must soon engage the attention of the legislature: and I therefore venture to offer an opinion on them all.

I highly approve of His Lordship's propositions respecting the appointment of a Superintendent of Police. But I think with Mr Ross and Mr Shakespear that it would be inadvisable to give to such an officer any control over the civil courts.

The division of official labour in India is at present exceedingly defective. It ought to be one of our chief objects to correct this great vice of the existing system. By giving to a Superintendent of Police any control over the courts of justice we should, I conceive, render the system more objectionable than it is now. I cannot perceive the smallest connexion between the duties of a Superintendent of Police and those of a functionary employed to watch over the administration of justice. The talents, the turn of mind, the knowledge, the experience which the situations require are altogether different. A man may be an excellent Superintendent of Police without the sort of ability which a judge ought to possess, without the temper which is befitting in a judge, without even a smattering of the Hindu or Mohammedan laws of marriage and succession, without having ever read the rules of procedure contained in the Company's Regulations. The functions of a Superintendent of Police have as little to do with the business of the civil courts as with the business of the Salt Departments or of the Surveyor-General's office.

The objections to the plan of uniting in one person offices which require very different qualifications are obvious. It is all but certain that such a person will perform some of his duties ill. It is highly probable that he will perform them all ill. If indeed it could be shown that the ordinary employments of a Superinten-

[1] *I.L.C.*, 31 July 1837, No. 11.

dent of Police were not likely to occupy so much of his time as the public is entitled to require, this might be a reason for throwing to him any miscellaneous business which might serve to fill up his leisure. But I cannot think that such an officer would be less fully employed than a commissioner of revenue. On the contrary, I believe that the business of superintending the police would be sufficient to occupy all the time and to task to the utmost all the power of the most active and energetic servant that the Government possesses. By giving him other duties, even if we suppose that they are duties for the discharge of which he is well qualified, we shall draw away his attention from the highly important business with a view to which principally he is appointed.

Whatever I have said on this subject, I have said on the supposition that the control which it is proposed that the Superintendent should exercise should be a control over the civil courts alone—I mean over the civil courts as contradistinguished from the criminal courts. It is possible, however, that His Lordship may not have intended to use those words in so strict a sense. If it be meant that the Superintendent of Police should exercise any control whatever over the courts which administer justice in criminal cases, my objections to the plan would be very much stronger. That such a functionary should exercise control over the civil courts would be, I think, an inconvenient division of labour. But to give to such a functionary any control over the criminal courts would be to invert the relation in which the tribunals and the police ought to stand to each other. The Superintendent of Police will, in criminal cases, be in some sense a party. It is evidently his interest that the prisoners who are by his instrumentality brought before the courts of justice should be convicted. If of a hundred thugs who are by his means brought to trial, ninety are convicted, his official character is raised. If ninety are acquitted his official character will suffer. There are therefore the same objections to putting the criminal courts under his control which there would to putting the Court of King's Bench under the control of the Attorney-General or the Court of Exchequer under the control of the Commissioners of Excise.

Of course the Superintendent will, as Mr Ross has observed, be at liberty to bring to the notice of the Government any defect

in any part of the judicial administration which may come under his notice. But this liberty he ought to have only in common with all other public servants, nay with all other members of the community. With the civil court, he ought to have no official connexion. With the criminal courts, indeed, he must have some connexion. But that connexion ought to be the very reverse of what appears to be proposed. He ought not to control those courts but to be controlled by them.

On the subject of the prison at Alipore, I cordially agree with the Governor-General. If His Lordship's proposition were one about which there could be two opinions, I should think with Mr Ross that it might be advisable to wait for the report of the Prison Discipline Committee. But the nuisance is really too frightful and too scandalous to be suffered to last for a single day; and all that, as a member of the Prison Discipline Committee, I have learned on the subject satisfies me that the Alipore gaol cannot too soon be divided into wards of such size that the prisoners may be easily managed and restrained.

I am duly gratified to find that His Lordship is willing to do so much in the way of raising the salaries of the native judges, and though I heartily wish that it were possible to do all that Mr Ross proposes, yet I will not press His Lordship to go beyond what, in the present state of the Indian finances, he thinks safe.

As to the details of the proposed plan, there is one part of them, and only one, to which I am inclined to object. I rather agree with Mr Shakespear in thinking that the sum which it is proposed to lay out for the purpose of making a higher grade of munsiffs might be better employed.

It is undoubtedly very desirable that the munsiffs should be stimulated to an active and faithful discharge of their duty by the hope of promotion. But that hope is even now held out to them. The Sadar Aminships will to a very great extent answer the purpose for which it is proposed to institute these upper munsiffships. I am aware that the Government is not absolutely bound to select the Sadar Amins from among the munsiffs; but I should hope that there will be very few instances of munsiffs distinguished by ability and integrity who will not become Sadar Amins.

I am on the whole inclined to think that it would be desirable to raise the salaries of all the munsiffs a little more than is

proposed rather than to make so large an increase as is proposed to the salaries of one fourth of the number. I quite approve of His Lordship's proposition respecting the Principal Sadar Amins. But it seems to me that there is a wide distinction between the case of the Principal Sadar Amin and that of the munsiffs. The Principal Sadar Amins are all in the receipt of salaries which put them at their ease. That being the case, I think that the small sum which we can spare to them will be more usefully employed in creating a few high prizes for eminent merit than it would be if distributed among them. But the munsiffs are not in the receipt of salaries sufficient to support them in respectability, and till they are so I think that every rupee which we can afford to them ought to be employed in raising the salaries of the whole body. The hope of future promotion is a strong motive. But the sense of present want is stronger. That there should be valuable prizes for the judicial service is a great object. But the first object is that there should be no blanks.

There are 350 munsiffs. His lordship proposes to pay 265 of these munsiffs at the rate of 1,200 rupees a year, and the remaining 85 at the rate of 1,800 rupees a year. For the same sum we might pay all the 350 at the rate of about 1,350 rupees a year. The addition which would thus be made to the salary proposed by the Governor-General for each munsiff would be by no means a contemptible addition. An addition of one-eighth to the income of a very wealthy person is little felt. But an addition of one-eighth to the income of a person who has barely a competence and is struggling to keep up appearances is of very great importance. I think that in many cases the difference between 1,200 rupees a year and 1,350 rupees a year may be the difference between distress and comfort, between anxiety and peace of mind, between dependence and independence, and consequently between official corruption and official integrity.

If it should be thought that 1,200 rupees is sufficient to enable a munsiff to live with decency according to his situation, I shall submit to the opinion of those who know this country and the habits of the people better than myself. But in that case I shall agree with Mr Shakespear in thinking that it would be better to lay out 50,000 rupees a month in raising the pay of the Omlah of the courts than to create a superior class of munsiffs.

VIII

THE LAW COMMISSION AND THE PENAL CODE

No. 28: [no date][1]

THAT the final results of the labours of the Law Commission will be beneficial to the Indian Empire, I have never for a moment doubted. It is, however, most true, as the Governor-General has stated, that those physical causes which in this climate often disturb the best concerted arrangements for the public service have greatly retarded the work in which the Commission is engaged. All the members of that body were not assembled till the month of August 1835. During the twelve months which followed they were able to attend to their duties with only slight interruptions. But during the last rainy season—a season I believe peculiarly unhealthy—every member except myself was wholly incapacitated for exertion. Mr Anderson has been twice under the necessity of leaving Calcutta, and has not till very lately been able to labour with his accustomed activity. Mr Macleod has been, till within the last week or ten days, in so feeble a state that the smallest effort seriously disordered him; and his health is so delicate that, admirably qualified as he is by very rare talent for the discharge of his functions, it would be imprudent in forming any prospective calculation to reckon on much service from him. Mr Cameron, of the importance of whose assistance I need not speak, has been during more than four months utterly unable to do any work and has at length been compelled to ask leave of absence in order to visit the Cape for the recovery of his health. Thus, as the Governor-General has stated, Mr Millett and myself have during a considerable time constituted the whole effective strength of the Commission. Nor has Mr Millett been able to devote to the business of the Commission his whole undivided attention. He has been selected by the Government to perform the arduous and important duty of framing a law on the subject of rent-free tenures. In one sense the choice was most judicious for I believe that no man possesses greater powers of application and under-

[1] *I.L.C.*, 2 January 1837, No. 3.

stands better the very difficult and delicate subject which has been referred to him. On the other other hand, I must consider it as a great misfortune that at a time when accidents beyond all human control had deprived the Commission of three of its members, a great load of business, quite distinct from the business of the Commission, should be imposed on the secretary. Mr Millett himself informed me a few days ago, when I talked with him on the subject, that it is not probable that during the next month he shall be able to give us much assistance in the Law Commission.

The Governor-General requests me to state my opinions as to the causes which have impeded the progress of the labours of the Commission. I know of none except those which I have mentioned. If all the members had retained their health, and if the whole time of the secretary had been at our command, I have not the smallest doubt that the Penal Code would now have been in the press. For, in spite of all the unfortunate circumstances which I have mentioned, such a Code is now actually drawn. All that remains is to revise it with care and to add notes and explanations for the satisfaction of the Government and of the public. Many of the notes and explanations are already prepared. I must say, therefore, that even if no allowance be made for the untoward circumstances which have retarded our progress, that progress cannot be called slow. People who have never considered the importance and difficulty of the task in which we are employed are surprised to find that a Code cannot be spoken of extempore or written like an article in a magazine. I am not ashamed to acknowledge that there are several chapters in the Code on which I have been employed for months, of which I have changed the whole plan ten or twelve times, which contain not a single word as it originally stood and with which I am still very far indeed from being satisfied. I certainly shall not hurry on my share of the work in order to gratify the childish impatience of the ignorant. Their censure ought to be a matter of perfect indifference to men engaged in a task on the right performing of which the welfare of millions may during a long series of years depend. The cost of the Commission is as nothing when compared with the importance of such a work. The time during which the Commission has sat is as nothing compared with the time during which that work will produce good or evil to India.

Indeed if we compare the progress of the Indian Code with the progress of Codes undertaken under circumstances far more favourable we shall find little reason to accuse the Law Commission of tardiness. Bonaparte had at his command the services of experienced jurists to any extent to which he chose to call for them. Yet his legislation proceeded at a far slower rate than ours. The French Criminal Code was begun under the consulate in March 1801. The Code of Criminal Procedure was not completed till 1808, the Penal Code not till 1810. The Criminal Code of Louisiana was commenced in February 1821. After it had been in preparation during three years and a half, an accident happened to the papers which compelled Mr Livingston to request indulgence for another year. Indeed, when I remember the slow progress of law reforms at home and when I consider that our Code decides hundreds of questions, every one of which will bear considerable discussion, every one of which if stirred in England would give occasion to voluminous controversy and to many animated debates, I must acknowledge that I am inclined to fear that we have been guilty rather of precipitation than of delay.

Thus much respecting the Code. The references which the Government has made to the Commission from time to time may be divided into two classes. Many subjects have been referred to us not that we might immediately report on them but that we might take them into consideration in their proper place, as we should proceed with the Code. On some subjects we have been requested to prepare Acts as early as we conveniently could.

With respect to this latter class of references the Commission may perhaps be thought to have been dilatory. Such an opinion would, however, be unjust. They had prepared many months ago an Act for consolidating and amending the existing law on the subject of stamps. This Act they sent to the Board of Customs, Salt and Opium, and requested that body to favour them with its suggestions. The Board was at that time fully occupied. The abolition of the internal transit duties and the introduction of the new tariff threw on it an unusually heavy load of business. A very long delay consequently took place in that department and we did not receive an answer to our inquiries till the Commission was in that state of inefficiency in which it has been since last August.

An Act for the better regulation of the Court of Requests at

Calcutta and also an Act for improving the mode of administering justice in criminal cases at Calcutta were prepared nearly six months ago. They were sent to the judges of the Supreme Court but no answer has yet been received. The pressure of business in that court, the ill health of the Chief Justice who was forced to go to sea at the very time which he intended to have employed in preparing an answer to our reference, and the important correspondence which the judges have lately carried on with the Government, sufficiently account for this delay.

Some references which were lately made to the Commission were brought under its consideration as soon as Mr Macleod and Mr Anderson returned to their duties. I have no doubt that the Government will receive speedy answers.

I have now, I conceive, said enough about the past and the present. I will proceed to explain my views respecting the future.

The manner in which the Governor-General proposes to supply for the present the vacancy caused by Mr Cameron's absence seems to me very judicious. I have already said that it will not be in Mr Millett's power for some time at least to devote all his attention to the business of the Law Commission; and I greatly regret this circumstance. Still I think that his knowledge of the business of the Commission will render an hour of his assistance more valuable to us than two hours of the assistance of any other person could for some months be expected to be; and I earnestly hope that in a very few weeks he will be at liberty to devote all his powers to the duties of his new situation.

Mr Grant has not, as far as I am aware, turned his attention particularly to those inquiries in which the Law Commission is engaged. But I entertain the highest opinion of his abilities and I am satisfied that he will distinguish himself in any department of the public service in which he may be employed.

I agree with the Governor-General in thinking that we ought with as little delay as possible to entreat the Court of Directors to add another member to the Commission. There is no Board in India which is so important to keep at its full complement. In almost every other department, a temporary vacancy can be supplied at an hour's notice. If Mr Macnaughten or Colonel Casement is taken ill, their deputies can attend the Council and conduct the business of the office for a few weeks without any

serious inconvenience to the public. If [a] Sadar judge is compelled to go to the Cape for his health, a temporary substitute can be readily found. But it would, as His Lordship has justly remarked, be idle to put any man into the Law Commission for three months or six months. A Code, I mean a Code which deserves the name, is not a mere series of unconnected provisions; it is one great and entire work symmetrical in all its parts and pervaded by one spirit. It is not sufficient to consider whether a rule appears in itself to be unexceptionable. It is necessary to consider also how that rule may affect other rules which are scattered over every part of the Code. It is doubtless on this account that several eminent jurists have maintained that the work of framing a Code ought always to be entrusted to a single person. It was on this account that the legislature of Louisiana thought it advisable to entrust that work to Mr Livingston rather than to a Commission. In Europe or the United States of America, I believe that this would be the best course. In this country, the case is different. It might be possible to find in France, for example, a man who possessed all the qualifications which would enable him to form a good Code for France. But it would be quite impossible, I apprehend, to find in India a man capable of singly forming a good Code for India. The servants of the Company are from a very early age so actively employed that it is almost impossible for them to devote much time and thought to the study of the philosophy of law. On the other hand an English jurist, whatever may be his talents or his general acquirements, knows nothing of the languages, customs and prejudices of the people of this country. The Bombay Criminal Code is the description of Code which I should expect from a laborious and experienced zillah judge. In that Code the legislator seems to have no guide except his own recollections. There are several useful practical rules intended to suppress local evils—rules which would never have occurred to a person fresh from Europe. But the definitions define nothing. The classification of offences and the distribution of punishments appear to be regulated by no fixed principle. It is hardly possible to doubt that some clauses were framed solely because the author of them had in his mind some particular cause which he had himself tried. On the other hand a Code drawn by the ablest English Law Commissioner, whatever might be the neatness of its arrangement, the

terseness of its style and the correctness of the distinctions which it might contain, would probably leave great classes of evils wholly unprovided for and excite strong feelings of hostility among the native population. In this country, therefore, I conceive that a Commission composed partly of persons sent out from England and partly of members of the Civil Service is most likely to succeed in the work of framing a Code. But I think it of the highest importance that the members of such a Commission should be changed as seldom as possible. To put in a Commissioner as a substitute for a few months seems to me altogether absurd. Such being the case, it is much desirable that the members should be sufficiently numerous to make it highly improbable that the whole body will be at once incapable of exertion.

I agree with the Governor-General in thinking that the fourth advisory member of Council ought always to be at the head of the Commission. There is one strong reason for making that arrangement which His Lordship has not mentioned. The situation of fourth ordinary member of Council would be little more than a lucrative sinecure if he were not also a member of the Law Commission.

I am strongly inclined to think that the Council has been too much in the habit of referring to the Law Commission questions which might have been settled without any such references. In saying this I am passing censure on myself, for several of those references were recommended by me. Experience leads me to think that the attention of the Commission should be as much as possible confined to the Code and that the Council should itself perform the work of current legislation. Such a body as the Law Commission is not particularly well fitted for such a work as the preparation of a Stamp Act. A Stamp Act prepared by the Board of Customs would probably be superior in every respect, except perhaps neatness of expression, to a Stamp Act prepared by the Law Commission; and the time which the Law Commission employed in collecting information about the details of the stamp system might have been far more usefully employed on the Code.

Whenever any measure extensively affecting the rights of any large [community] is required I think, with His Lordship, the Council ought to call for the assistance of the Law Commission and sometimes also for that of the Supreme Court and of the Sadar

Dewani Adalat. But I think that we ought not to adopt any such measure at present except on clear proof of a pressing necessity. In the case of the Parsees residing at the presidencies, I think that such a necessity exists. But I do not conceive that it would be wise to enact at this time a law for settling the rights of the Armenians, of the Jews or of the East Indians. That these rights should be unsettled is undoubtedly an evil. But it is not practically a very crying evil. It may without any very serious inconvenience be suffered to exist till the Code shall be completed, and the Code will never be completed if those who are engaged in framing it are perpetually called off from the consideration of one portion of the law to propose temporary palliatives for the evils arising from some other portion.

I heartily wish that it were possible to bring the proceedings of the Law Commission under the constant supervision of Government. But I must own that I do not see how it is possible for the Government to exercise such supervision. When the successive portions of the Code are laid before the Council, it will be for His Lordship in Council to decide whether the work has been executed in such a manner as proves that the Commissioners have neglected their duty or are intellectually incompetent to perform it. If the Government shall be satisfied that the Commissioners are indolent or incapable, it will be their duty to reprimand us or to take still stronger measures. But in the meantime I do not see what the Government can do. A report would tell nothing. The minutes of our sittings may be called for. Those minutes would show what subjects we have discussed and how many times we have recast particular chapters of the Code. But whether our discussions have been of any use, whether our frequent recasting of chapters has been mere trifling or has been useful and judicious labour cannot be known till the Code makes its appearance.

At the same time if any member of the Government be of opinion that there would be any advantage in calling either for a report or for the production of the minutes of the Commission, I have not the smallest objection. I could wish, however, that any such call might be postponed for three months in order that the attention of the Commission may be as little as possible withdrawn from their most pressing and important duty—the completing of the Penal Code.

No. 29:
A LETTER FROM
THE INDIAN LAW COMMISSIONERS: 2 MAY 1837[1]

MY LORD

We have now the honour to lay before Your Lordship in Council the Penal Code which we have prepared in conformity with the orders of Government.

2. The time which has been employed in executing this work will not be thought long by any person who is acquainted with the nature of the labour which it requires, with the history of the other works of the same kind, and with the unfortunate circumstances which, after having rendered the Commission during a great part of the last year almost entirely inefficient, have at length wholly deprived it of the services of a most valuable member at the very time when those services were most needed.

3. It is hardly necessary for us to entreat Your Lordship in Council to examine with candour the work which we now submit to you. To the ignorant and the inexperienced the task in which we have been engaged may appear easy and simple. But the members of the Indian Government are doubtless well aware that it is among the most difficult tasks in which the human mind can be employed; that persons placed in circumstances far more favourable than ours have attempted to perform it without success; that the best Codes extant, if malignantly criticized, will be found to furnish matter for censure in every page, that in a work so extensive and complicated, there will inevitably be, in spite of the most anxious care, some omissions and some inconsistencies, and that we have done as much as could reasonably be expected from us if we have furnished the Government with that which may be improved into a Code.

4. Your Lordship in Council will be prepared to find in this performance those defects which must necessarily be found in the first portion of a Code even when that portion is executed by persons far superior to us in capacity, experience and learning. Such is the relation which exists between the different parts of the law that no part can be brought to perfection while the other

[1] *I.L.C.* 5 June 1837, No. 1.

parts remain rude. The Penal Code cannot be clear and explicit while the substantive civil law and the law of procedure are dark and confused. While the rights of individuals and the powers of public functionaries are uncertain, it cannot be always certain whether those rights have been attacked or whether those powers have been exceeded.

5. Your Lordship in Council will perceive that the system of penal law which we propose is not a digest of any existing system; and that no existing system has furnished us even with a groundwork. We trust that Your Lordship in Council will not hence infer that in other parts of our labours we are likely to recommend unsparing innovation and the entire sweeping away of ancient usages. We are perfectly aware that legislators ought not to disregard even the prejudices of those for whom they legislate; and though there are not, of course, the same objections to innovation in penal legislation which there are to innovation affecting vested rights of property, yet, if we had found India in possession of a system of criminal law which the people regarded with partiality, we should have been inclined rather to ascertain it, to digest it, and moderately to correct it than to propose a system fundamentally different. But it appears to us that none of the systems of penal law established in India has any claim to our attention, except what it derives from its own intrinsic excellence. All those systems are foreign. All were introduced by conquerors differing in race, manners, language and religion from the great mass of the people. The criminal law of the Hindus was long ago superseded, through the greater part of the territories now subject to the Company, by that of the Mohammedans, and is certainly the last system of criminal law which an enlightened and humane Government would be disposed to revise. The Mohammedan criminal law has in its turn been superseded to a great extent by the British Regulations. Indeed, in the territories subject to the presidency of Bombay, the Mohammedan law has been altogether discarded, except in cases where Mohammedans are concerned, and even in such cases it is absolutely in the discretion of the judge whether he will pay any attention to it. The British Regulations, having been made by three different legislatures, contain, as might be expected, very different provisions. Thus, in Bengal, serious forgeries are

punishable with imprisonment for a term double of the term fixed for perjury. In the Bombay presidency, on the contrary, perjury is punishable by imprisonment for a term double of the term fixed for the most aggravated forgeries. In the Madras presidency, the two offences are exactly on the same footing.

6. In Bengal, the purchasing of regimental necessaries from soldiers is not punishable except at Calcutta, and is then punishable with a fine of 50 rupees. In the Madras presidency, it is punishable with a fine of 40 rupees. In the Bombay presidency, it is punishable with imprisonment for four years.

7. The term of imprisonment assigned to a convict who escapes from custody without using any violence in the Bombay presidency is double of the term assigned in Bengal and in the Madras presidency to a convict who escapes with violence. On the other hand the term of imprisonment assigned to a coiner in the Bombay presidency is little more than half of what it is in Bengal and the Madras presidency. The vending of stamps without a licence is punishable in Bengal with a moderate fine; the purchasing of stamps from a person not authorized to sell them is not punished at all. In the Madras presidency the vendor is punished with imprisonment but there also the purchaser is not punished at all. In the Bombay presidency both vendor and purchaser are liable to imprisonment for four years and flogging.

8. Thus widely do the systems of penal law now established in British India differ from each other. Nor can we recommend any one of the three systems as furnishing even the rudiments of a good Code. The penal law of Bengal and the Madras presidency is in fact Mohammedan law, which has gradually been dis-stated to such an extent as to deprive it of all title to the religious veneration of Mohammedans, yet retaining enough of its original peculiarities to perplex and encumber the administration of justice. In substance it now differs at least as widely from the Mohammedan penal law as the penal law of England differs from the penal law of France. Yet technical terms and nice distinctions borrowed from the Mohammedan law are still retained. Nothing is more usual than for the courts to ask the law officers what punishment the Mohammedan law prescribed in a hypothetical case, and then to inflict that punishment on a person who is not within that hypothetical case and who by the Mohammedan law

would be liable either to a different punishment or to no punishment. We by no means presume to condemn the policy which led the British Government to retain and gradually to modify the system of criminal jurisprudence which it found established in these provinces. But it is evident that a body of law thus formed must, considered merely as a body of law, be defective and inconvenient.

9. The Bombay Code is free from the evil. But we cannot by any means approve of the manner in which it apportions punishments to crimes. Simple theft, for example, is punishable with imprisonment for only six months, while embezzlement is punishable with imprisonment for seven years. The damaging of any public edifice, well or water course is punishable with imprisonment only for six months, while the secret destroying of any private property, however small, is punishable with imprisonment for five years. Every conspiracy to injure or impoverish any person is punishable with imprisonment for ten years; so that a man who conspires to commit a theft and afterwards repents of his criminal purpose may be punished with twenty times the imprisonment to which a man is liable who commits actual theft. All assaults which are of such a nature as to cause a severe shock to the mental feelings of the sufferer are classed with the atrocious crime of rape; and punished as severely as rape. Many important classes of offences are altogether unnoticed; and this omission appears to us to be very ill-supplied by one sweeping clause which arms the courts with almost unlimited powers to punish as they think fit offences against morality, or the peace or good order of society, if these offences are penal by the religious law of the offender. This clause does not apply to people who profess a religion with which a system of law is not connected. A Hindu, therefore, or a Mohammedan, who is punishable as such for adultery, as soon as he declares himself a Christian is at liberty to commit adultery with impunity.

10. Such is the state of the penal law in the mofussil, in which the population, which lives within the local jurisdiction of the court established by the king's Charter, is subject to a very artificial system of criminal law, which has been imported from a distant part of the world, which was for the most part framed without the smallest regard to the peculiarities of Indian society, and which, even in the country for which it was framed, is consi-

dered by the great majority of enlightened men as requiring extensive reform.

11. Under these circumstances, we have not thought it desirable to take as the groundwork of the Code any systems of law now in force in any part of India. We have, indeed, to the best of our ability, compared the Code with all those systems and we have taken suggestions from all. But we have not adopted a single provision merely because it formed a part of any of those systems.

12. We have also compared our work with the most celebrated systems of western jurisprudence, as far as the very scanty means of information which were accessible to us in this country enabled us to do so. We have derived much valuable assistance from the French Code, and from the decisions of the French courts of justice on questions touching the construction of that Code. We have derived assistance still more valuable from the Code of Louisiana, prepared by the late Mr Livingston. We are the more desirous to acknowledge our obligations to that eminent jurist because we have found ourselves under the necessity of combating his opinions on some important questions.

The reasons for those provisions which appear to us to require explanation or defence will be found appended to the Code in the form of notes. Should Your Lordship in Council wish for fuller information as to the considerations by which we have been guided in framing any part of the law, we shall be ready to afford it.

13. The arrangement which we have adopted is not scrupulously methodical. We have indeed attempted to observe method where we saw no reason for departing from it. But we have never hesitated about departing from it when we thought by doing so we should make the law more simple. We conceived that it would be mere pedantry to sacrifice the practical convenience of those who were to study and to administer the Code for the purpose of preserving minute accuracy of classification.

14. Thus some rules of construction and some definitions which might seem from their nature entitled to a place in the first chapter will be found, not in that chapter, but in the vicinity of the penal clause with which they are most closely connected.

15. In the arranging of the penal clauses, we have followed the same course. Thus, though the passing of bad money is

cheating, we have thought it advisable to place it among the offences relating to the coin. In the same manner, though the passing of a forged note is cheating we have thought it desirable to place it in the chapter of forgery.

16. One peculiarity in the manner in which this Code is drawn will immediately strike Your Lordship in Council. We mean the copious use of illustrations. These illustrations will, we trust, greatly facilitate the understanding of the law, and will at the same time often serve as a defence of the law. In our definitions, we have often found ourselves under the necessity of sacrificing neatness and perspicuity to precision, and of using hard and awkward expressions which would convey our whole meaning and no more than our whole meaning. Such definitions standing by themselves would repel and perplex every reader, and would be fully comprehended only by a few students after long application. But we hope that when each of these definitions is followed by a collection of cases falling under it, and of cases which though at first sight they appear to fall under it do not really fall under it, the definition and the reasons which led to the adoption of it will be readily understood. The illustrations will lead the mind of the student through the same steps by which the minds of those who framed the law proceeded; and may sometimes show him that a phrase, which may have struck him as uncouth, or a distinction which he may have thought idle, was deliberately adopted for the purpose of including or excluding a large class of important cases.

17. There are two things which a legislator should always have in view while he is framing laws: The one that they should be, as far as possible, precise, and the other that they should be easily understood. To unite precision and simplicity in definitions intended to include large classes of things, and to exclude others very similar to many of those which are included, will often be utterly impossible. Under such circumstances, it is not easy to say what is the best course.

18. That a law and especially a penal law should be drawn in words which convey no idea to the bulk of the people who are to obey it is an evil. On the other hand a loosely worded law is not law, and to whatever extent a legislature uses vague expressions, to that extent it abdicates its functions and resigns the power of making law to the courts of justice.

19. On the whole, we are inclined to think that the best course is that which we have adopted. We have in framing our definitions thought only of making them precise, and have never shrunk from rugged or intricate phraseology when such phraseology appeared to us to be necessary to precision. If it appeared to us that our language was likely to perplex an ordinary reader, we added as many illustrations as we thought necessary for the purpose of explaining it. The definitions and enacting clauses contain the theory of the law, the illustrations exhibit the law in full action and show what its effects will be on the events of common life.

20. Thus the Code will be at once a statute-book, and a collection of decided cases. The decided cases in the Code will differ from the decided cases in the English law books in two most important points.

21. In the first place, our illustrations are never intended to supply any omission in the written law, nor do they ever, in our opinion, put a strain on the written law. They are merely instances of the practical application of the written law to the affairs of mankind. Secondly, they are cases decided not by the judges, but by the legislature, by those who make the laws and who must know more certainly than any judge can know what the law is which they mean to make.

22. The power of construing the law in cases in which there is any real reason to doubt what the law is, amounts to the power of making the law. On this ground the Roman jurists maintained that the office of interpreting the law in doubtful matters necessarily belonged to the legislature. The contrary opinion was censured by Justinian with great force of reason, though in language, perhaps, too bitter and sarcastic for the gravity of a Code. *Eorum quidem vanam subtilitatem tam risimus, quam corrigendam esse censuimus. . . . . Explosis itaque huiusmodi ridiculosis ambiguitatibus, tam conditor quam interpres legum solus imperator iuste existimabitur.*

23. The decisions on particular cases, which we have annexed to the provisions of the Code, resemble the *imperial rescripts* in this that they proceed from the same authority from which the provisions themselves proceed. They differ from the *imperial rescripts* in this most important circumstance, that they are not made *ex post facto*, and that therefore they cannot be made to

serve any particular turn, that the persons condemned or absolved by them are purely imaginary persons and that therefore, whatever may be thought of the wisdom of any judgement which we have passed, there can be no doubt of its impartiality.

24. The publication of this collection of cases decided by legislative authority will, we hope, greatly limit the power which the courts of justice possess of putting their own sense on the law. But we are sensible that neither this collection nor any other can be sufficiently extensive to settle every question which may be raised as to the construction of the Code. Such questions will certainly arise and, unless proper precautions be taken, the decisions on such questions will accumulate till they form a body of law of far greater bulk than that which has been adopted by the legislature. We conceive that it is proper for us, at the time at which we lay before Your Lordship in Council the first part of the Indian Code, to offer such suggestions as have occurred to us on this important subject.

25. We do not think it desirable that the Indian legislature should, like the Roman emperors, decide doubtful points of law which have actually been mooted in cases pending before the tribunals. In criminal cases, with which we are now more immediately concerned, we think that the accused party ought always to have the advantage of a doubt on a point of law, if doubt be entertained by the highest judicial authority, as well as a doubt on a matter of fact. In civil suits which are actually pending, we think it on the whole desirable to leave to the courts the office of deciding doubtful questions of law which have actually arisen in the course of litigation. But it appears to us that every case in which a superior court reverses the decision of an inferior court on a point of law, every case in which there is a division of opinion in a court consisting of several judges on a point of law, every case in which any judge of any rank entertains a doubt on a point of law which has arisen in his court, ought to be reported to the legislature. If the Law Commission should be a permanent body, these cases might with advantage be referred to it for examination. In some cases it will be found that the law is already sufficiently clear and that the misconstruction which has taken place is to be attributed to weakness, carelessness, wrong-headedness or corruption on the part of an individual, and is not likely to occur again. In such

cases it will not be necessary to make any change in the Code. The Executive Government may, if such a course should be thought advisable, admonish or dismiss the offender. Sometimes it will be found that a case has arisen respecting which the Code is silent. In such a case it will be proper to supply the omission. Sometimes it will be found that the words of the law are not sufficiently precise. In such a case it will be proper to substitute others. Sometimes it will be found that the language of the law, though it is as precise as the subject admits, is not so clear that a person of ordinary intelligence can see its whole meaning. In such a case it will generally be expedient to add an illustration such as may distinctly show in what sense the legislature intends the law to be understood, and may render it impossible that the same question or any similar question can ever again occasion difference of opinion. In this manner every successive edition of the Code will solve all the important questions as to the construction of the Code which have arisen since the appearance of the edition immediately preceding. Important questions ought to be settled without delay, and no point of law ought to continue to be a doubtful point more than three or four years after it has been mooted in a court of justice. An addition of three or four pages to the Code will stand in the place of several volumes of reports and will be of far more value than such reports inasmuch as the additions to the Code will proceed from the legislature and will be of unquestionable authority, whereas the reports would only give the opinions of the judges which other judges might venture to set aside.

26. We have not inserted in the Code any clause declaring to what places and to what classes of persons it shall apply. Our reason for omitting to insert such a clause is that we entertain serious doubts as to the precise extent of the legislative authority possessed by Your Lordship in Council.

27. It can hardly be supposed that Parliament intended that the Indian Government should, under the new system, have in many respects a legislative authority less extensive than that which the Government of every presidency possessed under the old system; and it is certain that under the old system the Governments of all the presidencies passed Regulations which were held to be binding on the subjects of the Company beyond the limits

of the Company's territories; nor was the legality of this practice, as far as we are aware, ever disputed. At present the Governments of the presidencies are deprived of all legislative power, and the legislative power given to the Supreme Government is expressly declared to extend to all persons, courts, places and things within the Company's territories, and also to 'all servants of the said Company within the dominions of Princes and States in alliance with the said Company'. This specification of a particular class would seem, according to ordinary rules of construction, to prove that Parliament did not intend to give to the Governor-General in Council the power of legislating for any person not of that particular class, or for any person who might be in the dominion of any Asiatic State not bound by a treaty of alliance to the Company.

28. It is in our opinion most desirable that this power, a power which whether legal or not was exercised without ever being questioned where natives were concerned by the Governments of all the three presidencies before the passing of the late Charter Act, should be possessed by the Government of India, and that it should extend not only over natives but also over British-born subjects of the king. The relation between the Company's Government and the native Government is of quite a different kind from the relations which exist between neighbouring States of Europe. The Company's Government exercises such a power over its subsidiary allies that it is bound to take thought for the welfare of the countries ruled by those allies. The inhabitants of Oudh and Berar are for many purposes virtually the subjects of the British Government, and they have a right to expect from the British Government the discharge of many of the duties of a sovereign. There were not stronger reasons for giving to the Council of India the power of legislating for British-born subjects who reside in the territories of our allies. Nor is it only with a view to the protection of the natives of India that the Government ought to possess this power, if it is destitute of this power. If its penal laws do not apply to persons beyond its frontier, its subjects may at Lucknow or at Hyderabad counterfeit its coin, forge its promissory notes, send forth the most inflammatory writings among its troops, corrupt its servants; and the only way in which such criminals could be brought to punishment would be by employing the agency of the

native Government, a course to which there might be the strongest objection.

29. Indeed if the legislative power of the Indian Government be thus restricted, it is difficult to say what course can be taken with respect to subjects of the Company who after committing crimes in the dominions of subsidiary princes escape into the British territories. To give up such persons to Governments which are in the habit of inflicting punishments shocking to humanity, and which conduct trials with little regard to justice, would be a course hardly consistent either with the duty which rulers owe to their subjects or with the dignity which it is important that the paramount power should maintain. Yet if we refuse to give up the offender, we must surely try and punish him or we shall give to every neighbouring power a just ground for complaining and even for actual hostilities.

30. Still greater inconvenience is to be apprehended from the restrictions on the legislative power of Your Lordship in Council as respects the high seas. We find it difficult to believe that Parliament, while giving to the Council of India the power of making laws for all places and persons within the territories of the Company, intended that as soon as a native of those territories had put off from the shore in a fishing boat he should be at liberty to disobey laws made by the Council of India, that while everybody at Madras and everybody at Masulipatam is bound by the Acts of the Supreme Government, the crew of a coasting vessel bound from Madras to Masulipatam should not be bound by those Acts, that it should be necessary to bring every native who should commit a petty offence in a ship close to the coast of Malabar before the Court of Admiralty at Madras to be there dealt with according to the rules of the English criminal law.

31. It appears to us also that unless some power of legislating for the Indian seas be possessed by the Indian Government there will be considerable difficulty in enforcing obedience to rules which are absolutely necessary for the prevention of smuggling, or of the communication of infectious disease. It seems to us, e.g., very questionable whether, as the law now stands, Your Lordship in Council is competent to provide any punishment for a captain of a ship lying off Madras who should refuse to suffer a custom-house officer to come on board, or to

inspect the cargo, or who should commit the most flagrant breach of quarantine regulations at a time when, by doing so, he might endanger the lives of hundreds of thousands.

32. Should Your Lordship in Council partake of our doubts as to what your legal powers are and agree with us in opinion as to what those powers ought to be, we would suggest that it would be advisable to bring the matter with as little delay as possible to the notice of the home authorities.

33. Your Lordship in Council will see that we have not proposed to except from the operation of this Code any of the ancient sovereign houses of India residing within the Company's territories. Whether any such exception ought to be made is a question which, without a more accurate knowledge than we possess of existing treaties, of the sense in which those treaties have been understood, of the history of negotiations, of the temper and of the power of particular families, and of the feeling of the body of the people towards those families, we could not venture to decide. We will only beg permission most respectfully to observe that every such exception is an evil, that it is an evil that any man should be above the law, that it is a still greater evil that the public should be taught to regard as a high and venerable distinction the privilege of being above the law, that the longer such privileges are suffered to last the more difficult it is to take them away, that there can scarcely ever be a fairer opportunity for taking them away, than at the time when the Government promulgates a new Code, binding alike on persons of different races and religions, and that we greatly doubt whether any consideration except that of public faith solemnly pledged deserves to be weighed against the advantages of equal justice.

34. The peculiar state of public feeling in this country may render it advisable to frame the law of procedure in such a manner that families of high rank may be dispensed, as far as possible, from the necessity of performing acts which are here regarded, however unreasonably, as humiliating. But though it may be proper to make wide distinctions as respects form, there ought, in our opinion, to be, as respects substance, no distinctions, except those which the Government is bound by express engagements to make. That a man of rank should be examined with particular ceremonies or in a particular place may in the present state of Indian

society be highly expedient. But that a man of any rank should be allowed to commit crimes with impunity must in every state of society be most pernicious.

35. The provisions of the Code will be applicable to offences committed by soldiers as well as to offences committed by other members of the community. But for those purely military offences which soldiers only can commit, we have made no provisions. It appears to us desirable that this part of the law should be taken up separately, and we have been given to understand that Your Lordship in Council has determined that it shall so be taken up.

36. We have only to add that if Your Lordship in Council shall be of opinion that the Code which we have the honour to submit to Government is one which may furnish the groundwork of a good system of penal law, we would respectfully recommend that it be printed for general information. Should Your Lordship in Council direct it to be printed, we request that we may be permitted to superintend its progress through the press and to make such amendments as may occur to us during that progress.

We have the honour to be, etc.,

T. B. MACAULAY
J. M. MACLEOD
E. ANDERSON
F. MILLETT

IX

MISCELLANEOUS MINUTES

No. 30: 13 NOVEMBER 1835[1]

I AM sorry to find that our opinions differ widely on the questions submitted to us by Government and that they differ most widely on the most important of those questions.

That great evils exist, that great injustice is frequently committed, that many ryots have been brought—partly by the operation of the law and partly by acts committed in defiance of the law—into a state not very far removed from that of predial slavery is, I fear, too certain. But I see no reason to believe that any of the measures respecting which the Government has consulted us would in any material degree alleviate these evils.

Some of these measures, indeed, are quite unexceptionable and would, as far as they went, operate beneficially. I would certainly give to the Sadar Amins jurisdiction in civil causes in which Europeans or Americans might be concerned. The only objection which has occurred to me is this: At present an Englishman has an appeal to the Supreme Court in every case in which a native would have an appeal to the Sadar. Natives have an appeal to the Sadar in causes originally tried before the zillah judge. All causes in which Europeans are concerned in the mofussil are now tried before the zillah judge. The Englishman, therefore, has a direct appeal to the Supreme Court. If the Government should give to the Sadar Amins jurisdiction over causes in which Englishmen are parties, our countrymen will be deprived of the right of appeal which they now possess and possibly some discontent might by this change be excited among them. But I do not conceive that this discontent would be deep or extensive, particularly if the Government should, in the exercise of its undoubted power, appoint a few intelligent Englishmen to the place of Sadar Amins in those districts which contain a considerable number of European inhabitants.

The Regulation which gave to the indigo planter who made advances to a ryot a lien on the indigo crop seems to me highly objectionable on principle. But I do not conceive that by rescin-

[1] *I.L.C.*, 28 December 1835, No. 25.

ding it the Governor-General in Council would give any sensible relief to that class of the population whose interests appear to be peculiarly the object of his solicitude. The question appears to be a question between the planter and the zemindar. It is not easy to see how it can be of any consequence to the ryot which of the two may distrain on his crop. I have no reasons to believe that the zemindars exercise their power with more justice or humanity than the planters. The zemindar, however, has great reason to complain of the existing Regulation. It transfers to others that undoubted right of distress which he formerly possessed. Two other people by an agreement between themselves, to which he is no party, are allowed to deprive him of what is his due; and in return the law gives him a remedy which is certainly less expeditious and simple than that which he anciently had. Exactly to the same extent to which this Regulation is a benefit to the indigo planter, it must be considered as the robbery of the zemindar. The misfortune is that when once a Government falls into such an error there is great difficulty in returning to the right path. In the very act of destroying old rights, we create new rights which must be destroyed in their turn, if we revert to the old order of things. The zemindar had great reason to complain when his lien was transferred to the planter. The planter who had invested his capital in the indigo business on the faith of the Regulation of 1823 would have some reason to complain if that lien were now taken from him and given back to the zemindar. On the whole I should be inclined to recommend that no planter should be entitled, except of course by virtue of a special contract to which the zemindar should be a party, to distrain for any future advances. With respect to advances already made, I would leave him the remedy which he now possesses. I must again repeat, however, that the question is one in which the ryot appears to be very little interested.

The law of pounding is in an exceedingly unsettled state all over India; and this want of certainty doubtless leads to oppression and injustice everywhere. These evils do not, however, appear to be peculiar to the indigo districts. At a proper time, it will be necessary for the Law Commission to take up the whole subject. It is a subject on which it will be impossible to legislate usefully without an extensive inquiry into existing rights and customs.

The plan of rendering invalid all contracts for the delivery of indigo which are not registered seems to me highly objectionable. It would either be useless or in the highest degree vexatious. If the present mode of registration should continue, the proceeding would be a mere mockery. An agent employed by the planter would attend, and would register without inquiry all the agreements of the planter with all the ryots. There would be no examination. Nobody would ask whether the peasant had made the contract freely or under fear of personal violence, whether he had made it with a full knowledge of what he was doing or under the influence of deception. If, on the other hand, the registration is to be made really efficient, if the registering officer is to exercise over the labourer the same species of guardianship which in England the judges of the Court of Common Pleas exercise in certain cases of contract over married women, if the parties are to appear, if the ryot is to be privately interrogated, assured of protection and encouraged to accuse the capitalist, the business would be absolutely interminable. In some districts, 30,000 contracts would probably require registration in a year. These contracts, I believe, are generally made at one season of the year. A great number of registrars would be necessary to conduct the examination into all their agreements. And the registrar entrusted with the conduct of such an examination must be no common man. He must be not only a man of sense but, what in this country is hard to find, a man of independence and integrity—a man who will dare to stand for the poor native against a rich Englishman. It would be hard to find such functionaries in sufficient numbers. It would be absolutely necessary to pay them well. The charge would be immense, and after all it may well be doubted whether the advantages which the labourers would derive from such a system of guardianship would compensate for the journey, the attendance, the trouble and the loss of time.

There are contracts which it is very desirable to register, contracts which are seldom made, which are made for long terms, which are great events in a man's life, which are likely to affect the rights of third parties, and which are of such nature that they cannot be made without considerable trouble and great formalities. The purchase of an estate is an instance. The security which registration gives to all the parties concerned in the transaction is

highly valuable. The trouble of procuring registration is but a trifle in comparison with the trouble which must attend such an event. But to require that all contracts for all terms between all the capitalists and all the working people of great provinces should be registered, and registered with such safeguards as to make it certain that every contract is freely and deliberately made, would be to dissolve the whole frame of society. The general rule which is followed all over the world is this: that no judicial verification of a contract should take place till it is alleged that the contract is broken. At present it is probable that not one contract in a thousand is in any country on earth the subject of a lawsuit. If the immense majority of contracts were not performed without legal investigation and decision, the world could not go on for a day. The effect of a system of registration such as that which I have been considering would be that every contract without exception would be the subject of legal investigation and decision before it was made.

The Government have asked whether the Commissioners think that there would be any advantage in declaring invalid all contracts for indigo which shall be for a term longer than one year. I should greatly disapprove of such a measure. It would evidently be opposed to a great general rule; and it is not made out to my satisfaction that the circumstances of this particular case form any exception to that general rule.

The general rule is this: that grown up men, not idiots or insane, should be suffered to make such contracts as are not injurious to others and as appear to them to be beneficial to themselves. To say that the ryots of this country are mere children and ought to be specially protected is, I conceive, quite incorrect. They are not intellectually inferior to the peasants of other countries. They are as well acquainted as we are with the difference between an anna and a rupee and between a month and a year. They are suffered to make the most important contracts, and nobody proposes to deprive them of this power except where indigo is in question. They marry, they govern their families, they are treated by our courts of justice as persons quite capable of comprehending the nature and consequences of their acts. If they are not so, if they are not able to judge for themselves in matters which only concern themselves better than the Government

can judge for them, they will require protection not in this particular case alone but in ten thousand other cases. I conclude, therefore, there is nothing in the intellectual state of the ryot which renders it proper that contracts freely made by him should be set aside.

But it is said these contracts are not freely made. Force and deception are employed. The peasant assents to disadvantageous terms from fear of bludgeon men, or is tricked into signing some paper which he does not understand. I answer that in all such cases there ought to be a remedy. The law, I apprehend, would even now reach these oppressive and fraudulent practices. If not, the law ought to be altered. In every case of coercion or deception, the contract should be set aside and the tyrannical and dishonest capitalist should be punished with exemplary severity. But what is now proposed is that we should attack, not the evil but a circumstance in itself wholly indifferent, not tyranny or dishonesty but a certain term arbitrarily fixed upon, not unfair contracts but long contracts. The sound rule is this: If a ryot has been intimidated or duped into making an agreement for a month, a day or an hour, cancel the agreement and punish the wrongdoer. But if, unterrified and undeceived, he has made a contract for two or three seasons, enforce it. A Government cannot be wrong in punishing fraud or force, but it is almost certain to be wrong if, abandoning its legitimate functions, it tells private individuals that it knows their business better than they know it themselves and is resolved to serve them in their own [interest].

The proposition now under consideration belongs to a class of propositions which cannot be regarded with too much suspicion. If there be any one political truth proved by a vast mass of experience, it is this, that the interference of legislators for the purpose of protecting men of sound mind against the inconveniences which may arise from their own miscalculations or from the natural state of markets is certain to produce infinitely more evil than it can avert. It was no doubt a humane feeling which dictated usury laws, laws against forestalling and regulating laws for raising the wages of labour, for lowering the price of commodities, laws for limiting the number of hours during which adults should work and many other laws of the same kind. But the invariable effect of such laws has been to

injure society and to injure more especially that portion of society which the Government humanely wished to protect. The needy man who could have borrowed at 10 per cent, when cursed with the compassionate aid of the lawgiver is forced to pay 15 per cent. That which would have been a scarcity, if prices had been regulated by the avarice of the corn-dealer, becomes a famine when the prices are regulated by the benevolence of the Government. The measure which we are now considering is a measure of this kind. A ryot consents to bind himself to deliver a certain commodity to the capitalist during several successive seasons. If he has been terrified or deluded into making this agreement, the agreement is of course null. But if he has not been terrified or deluded, on what principle are we to refuse him permission to bring his only commodity, his labour, to market in his own way and to dispose of it on such terms as in the state of the market are the best which he can obtain?

If we cannot prevent the indigo planter from oppressing or cheating the ryot, this restriction will evidently be a mere nullity. If we can prevent the planter from oppressing and cheating, then no ryot will make a long contract without what he thinks a *quid pro quo*. And I conceive that a ryot is infinitely a better judge of what is or what is not a *quid pro quo* in such a case than any Government, even the most enlightened, can possibly be. I, therefore, object to this provision and to all other provisions of the same kind which have been suggested.

On the whole, I am not satisfied that any peculiar system of law is required for the indigo districts. I believe that the evils which exist in those districts differ little either in kind or degree from those which may be found in almost every part of our Indian Empire. There is a bad judicial system; there is a bad police. There is a people accustomed for ages to be plundered and trampled upon and ready to cringe before every resolute and energetic oppressor. The system of dacoity and the system of thuggee are more malignant evils of the same family. They are evils which never could exist to the same extent in which they exist here in a country where the tribunals and police were more efficient or in a country peopled by a manly and high-spirited race. To come nearer to the case which we are now considering, we have no reason to believe that the conduct of the zemindars is in any

respect better than that of the indigo planters. I suspect it is commonly worse.

I have no doubt that Government can do very much to remove these evils when a good system of law and police is established, when justice is administered cheaply and purely; when idle technicalities and unreasonable rules of evidence no longer obstruct the search after truth, a great change for the better may be expected to take place. This is all that we can do directly. But by doing this, we shall indirectly produce a great effect on the national character. The people of India will learn to place confidence in the administration of justice. They will find that they can safely stand up for their rights. They will appeal fearlessly to our courts against the tyranny of the rich and powerful.

In a few years we shall have done, I trust, what can be done by legislation. That still more important change in the character of the population, to which I look forward, must be the work of several generations. In the meantime we deceive ourselves if we consider the evils which exist in the indigo districts in any other light than as symptoms, and by no means the worst symptoms, of a general disease which requires a general remedy and which it is idle to think of subduing by local applications.

No. 31: 14 DECEMBER 1835[1]

I HOPE and believe that I do not overstep the line of my official duties when I venture to call the attention of the Council of India to the subject of prison discipline. That subject, though in strictness it may be within the province of the Executive Government, is yet most closely connected with the great work in which the Law Commission is now engaged.

It is scarcely necessary to say that the best Criminal Code can be of very little use to the community unless there be a good machinery for the infliction of punishment. Death is rarely inflicted in this country at present, and it certainly must be the wish of the Government and of the Law Commission that it should be inflicted more rarely still. The practice of flogging has been abolished; and we should, I am sure, be most unwilling to revive it. The punishment of transportation is so expensive—to

[1] *I.L.C.*, 21 December 1835, No. 1.

say nothing of the other objections—that it can be employed only in a small number of cases. Imprisonment is the punishment to which we must chiefly trust. It will probably be resorted to in ninety-nine cases out of every hundred. It is therefore of the greatest importance to establish such regulations as shall make imprisonment a terror to wrongdoers and shall at the same time prevent it from being attended by any circumstances shocking to humanity. Unless this be done, the Code, whatever credit it may do to its authors in the opinion of European jurists, will be utterly useless to the people for whose benefit it is intended.

Whatever I hear about the Indian prisons satisfies me that their discipline is very defective. We need not go far for proofs. The gaol in our immediate neighbourhood is in a condition which reflects great dishonour on our Government. Hundreds of the worst and most desperate criminals are assembled there. They are all collected in one great body. They are therefore quite able when their passions are inflamed to overpower any resistance which those who are placed over them can oppose to their fury. It is only a few months since they murdered the superintending magistrate. At present no visitor can enter the gates without danger. And this evil exists on the very spot at which the great quantity of European intelligence and power is concentrated—at the seat of Government—under the very eyes of the supreme authority. It is universally known. It is a common topic of conversation. It might, unless I am greatly mistaken, be removed by very simple means and at a very light expense. When such is the state of the gaol at the presidency, we can hardly suppose that a good system is followed in the mofussil. And all that I can learn on the subject leads me to believe that the prisons of India generally require great improvements.

I do not imagine that in this country we can possibly establish a system of prison discipline so good as that which exists in some parts of the United States. We have not an unlimited command of European agency, and it is difficult to find good agents for such a purpose among our native subjects. Still I am satisfied that much may be done. In this town, at least, and at a few other places, we might be able to establish a system not much inferior in efficiency to that which exists in New York and Philadelphia.

What I would suggest is that a committee should be appointed

for the purpose of collecting information as to the state of Indian prisons and of preparing an improved plan of prison discipline. In particular I would recommend that the committee should be instructed to report on the state of the gaol at Alipore, and to suggest such reforms as may make that place a model for other prisons. Such a committee will cost nothing to the public. Several distinguished servants of the Company and two of the judges of the Supreme Court have expressed to me their willingness to give all the assistance in their power. Mr Shakespear, who feels strongly the importance of the subject, is willing to be one of the members. If the Governor-General in Council should be disposed to accede to my proposition, I would suggest that it would be desirable to appoint Mr Shakespear president of the committee.

No. 32: 23 JANUARY 1836[1]

THE object which the Madras Government has in view seems to be a very proper one. But the draft cannot be adopted without amendments.

It is proposed that 'the provisions contained in Reg. XIV of 1816 of the Madras Code, regarding the appointment, control, practice and punishment of vakils in the zillah courts shall be applicable, *mutatis mutandis*, to the office of Assistant Government Commissioners'.

The difficulty lies in the words *mutatis mutandis*. On referring to the Regulation in question, I find it difficult to say what the *mutanda* are, or for what they are to be *mutata*.

It is provided by Reg. XIV of 1816 that the vakils who practice in the zillah courts shall be proposed by the zillah judges, and shall be admitted by the provincial court. A zillah judge may suspend a vakil, but cannot dismiss him from office. The case must be referred with all expedition to the provincial court in which the power of removal is vested.

These rules are to be applied, *mutatis mutandis*, to the office of Government Commissioner. Who then is to be considered as corresponding to the zillah judge? I suppose the Government Commissioner. In that case, who is to exercise over the

[1] *I.L.C.*, 25 January 1836, No. 14.

Commissioner an authority analogous to that which the provincial court exercises over the zillah judge? It can hardly be supposed that the provincial court is to judge of the fitness of persons who wish to act as vakils in the office of the Commissioner. For it is expressly provided by Reg. IV of 1833 that 'it shall not be competent to any court established in the provinces subject to the presidency of Fort St George to interfere in respect to any matters adjudicated by such Commissioner . . . ' And it would surely be unreasonable to make the Commissioner subject in this single case to an authority of which, in all other cases, he is quite independent. Nor am I aware that there is any authority which stands to the Commissioner in a relation at all analogous to that in which the provincial court stands to the zillah judge. And if there were such an authority, the right of that authority to control the Commissioner in the choice and removal of vakils ought to be distinctly affirmed, and not left to be inferred from such words as *mutatis mutandis*.

I recommend that these objections should be submitted to the Madras Government, and that they should be requested to state whether they wish to place the Commissioner under any control with respect to the appointment and removal of vakils, and if that be their wish, under what control they propose to place him.

No. 33: 14 NOVEMBER 1836[1]

I SEND in circulation with the minute the papers relating to the Bank of Bengal and the draft of an Act on the subject. The proposed Charter has furnished the groundwork of this draft; but I have made considerable alterations to which I beg to call the attention of my colleagues.

I have completely altered the whole form, arrangement and language of the proposed Charter which, like the existing Charter, is distinguished, even among English legal instruments, by prolixity, tautology, obscurity, affected precision and real vagueness. The provisions which I propose lie within a much smaller compass, and will I think be easily comprehended by all parties concerned.

I have omitted some provisions because I thought them utterly

[1] *I.L.C.*, 30 January 1837, No. 8.

inefficacious for good or evil. Such is that in clause 8 of the proposed Charter which directs that if the proprietors report to the Government that they wish one of the Government directors to be removed, the Government shall do what the Government may think just and proper. The Government ought on all occasions to do what it thinks just and proper. If such an enactment as this adds to the probability that the Government will act conscientiously, the whole Indian Empire should have the advantage of it as well as the Bank of Bengal: and we ought to make a law directing the Government on all occasions to do what is just and proper. If on the other hand such an enactment adds nothing at all to the probability that the Government will act conscientiously, I do not see why it should be retained. The clauses which require oaths of fidelity from the directors and officers of the Bank seem to be equally idle. Honest men will do their duty without such oaths; and dishonest men will not be restrained by oaths, the breach of which will not expose them to the penalties of perjury.

Other provisions I have omitted because they impose restrictions for which I can discover no sufficient reason. On this, as on all other occasions, the sound principle of legislation is that freedom is the rule and restraint the exception; that the burden of the proof lies on him who proposes to prohibit any thing. Applying this principle to the constitution of the Bank of Bengal, I must say that I see no reason for many of the restrictions which are laid on the freedom both of individuals and of the corporation. I see no reason for not allowing the proprietors to select an outgoing director if they place greater confidence in him than in any other candidate. I can easily conceive occasions on which the loss of the services of such a director might be a misfortune; and I cannot see any advantage whatever in the restriction.

The rule limiting the number of shares which a single proprietor may hold is another of these unnecessary restraints. This rule is in fact constantly evaded, and this circumstance would alone be a sufficient reason for omitting it. As far as it is operative, its effect must evidently lie to narrow the market for Bank shares and thus to lower their price. Some such rule might indeed be necessary if the number of votes which a proprietor could give varied directly as the number of his shares. But the number of votes does not increase in proportion to the

number of shares; and no individual, though he were to lay out half a crore in the purchase of Bank stock, can have more than seven votes. Under these circumstances the institution does not appear to require protection against the overbearing influence of a single proprietor or of a small knot of proprietors. If such protection be required, it will be much more effectively given by another measure to which I now wish to call the attention of the Council.

I propose that the capital stock of the Bank shall be divided into shares of 1,000 rupees each, and that a single share shall entitle the holder to a vote. The effect of this measure will be that the proprietory body will be enlarged and that it will become impossible for any small junto to control its proceedings.

On other grounds this measure seems to me very desirable. The shares consisted formerly of 10,000 So rupees each. They now consist of 4,000 Company's rupees each. But the inconvenience of forcing a proprietor either to keep a whole share or to sell a whole share when the shares were so large was obvious. Accordingly the proprietor was permitted to sell a fraction of a share, such fraction being 1,000 rupees or some multiple of 1,000 rupees. The consequence is that there are proprietors of Bank stock who are not entitled to vote, and whose interest is left to the direction of men in the choice of whom they have no share. A is a proprietor of 4,000 rupees of Bank stock and has consequently a vote. He wishes to raise money. He sells a thousand rupees of his Bank stock to B, a thousand more to C, a thousand more to D. Here we have four proprietors each, it may be, having as great a stake, in proportion to his wealth, in the prosperity of the Bank as any shareholder. But all the four are absolutely excluded from all share in the management of the concerns of the Bank. This I think a great evil. It seems to me that in all such companies the stock ought to be transferable in fractions as small as can be made transferable without inconvenience; and that the smallest fractions in which the stock is suffered to be transferable should be a share and should entitle the proprietor to a vote. The smallest fractions of stock of the Bank of Bengal which can be transferred is now 1,000 rupees; nor do I see any reason for proposing any change in this rule. I would therefore provide that 1,000 rupees should be a share and should entitle the proprietor to a vote. For

convenience in transacting business it will be desirable that certificates which may now be divided should, under the new arrangement, be consolidated if such be the wish of the proprietor.

The directors have hitherto been found to transact business according to a set of rules intended to guard the Bank from the risk of extensive loss. Most of these rules I have retained but some of them appear to require alterations. In framing such rules two principles ought to be borne in mind—first that no unnecessary restraint should be imposed, and secondly that whatever restraint is imposed should be really effectual. Rules which appear to secure a Bank from ruin are a mere fraud on the public if they are evaded. Now it will not, I believe, be denied that the rule which prohibits the lending of more than a lakh to a single firm is often evaded. If so, it is a mere imposition on everybody who has dealings with the Bank to suffer such a rule to stand as part of its constitution. It has been evaded, I suppose, because it has been universally felt to be a very hard and unreasonable rule. In the proposed Charter this rule is greatly modified. I propose a rule altogether different. I propose that no loan of more than a lakh should be made to any one person or firm without an unanimous vote of a meeting at which two-thirds of the directors are present. This rule, if it be not evaded, will, I should think, be a sufficient security; and I must say that the directors appointed by the Government ought to consider it as peculiarly their duty to see that no rule laid down by the Government is under any pretext evaded.

The Bank is tied up from lending to Government more than a certain sum which by the proposed Charter is fixed at seven lakhs and a half. I think this rule objectionable and I propose to substitute for it a rule which while it suits the Bank, will not compel the Bank to refuse assistance to the State at times when the lending of such assistance might be beneficial to the Bank as well as to the State. I propose that the Bank shall not lend to the Government more than seven lakhs and a half without an unanimous vote of a meeting at which two-thirds of the whole body of directors and two-thirds also of the directors not nominated by the Government are present.

The twentieth clause of the proposed Charter contains some new provisions to one of which I object most strongly. It is that

the Bank shall be entitled to sell the share of a proprietor for a debt due to itself. If I rightly apprehend the meaning of this clause, its effect would be that when a man owes two lakhs of rupees, one lakh of which is due to the Bank, and has no property except Bank shares to the value of a lakh of rupees, the Bank would get twenty shillings in the pound, and the other creditors nothing at all. The privilege which the Bank has of applying the dividends on shares to the discharge of debts due to itself seems to me quite as much as ought to be conceded. I would let the Bank refuse to register the transfer of a share belonging to proprietors who might be in debt to the Bank, because by so refusing the Bank protects not only its own interests, but the interests of all the creditors of such a proprietor.

I have altogether omitted the provisions relating to by-laws. The Bank has now gone on for many years without making a single by-law. It is therefore clear that practically these provisions are unnecessary; and theoretically they are highly objectionable. They give to the directors a power of making laws, of sanctioning those laws by fines, and of settling in what manner such fines shall be recovered. It is true that these by-laws may be rescinded by a general meeting of the proprietors. But it is not to the proprietors alone that the operation of these by-laws may extend. This appears from the Charter which lays down that the by-laws shall be published for the information of the proprietors 'and of all others whom they may concern'. It is provided indeed that the by-laws are not to be contrary to law; but this limitation leaves ample room for oppression. It is also provided that the by-laws are to be reasonable, a limitation so vague as to afford no security at all. Experience has proved that the Bank stands in no need of this legislative power; and I would on no account suffer such a body to possess such power. These are the most important alterations which I have made in the plan contained in the proposed Charter. I have not inserted any clause authorizing the Bank to form branch-banks. It is not the wish of the Bank that such a clause should be inserted. The proposition originated with the Government. The papers which Mr Prinsep and Mr Fullerton have drawn up on this subject have perfectly satisfied me that such an extension of the operation of the Bank would be by no means advisable.

No. 34: [no date][1]

THE question about the Bombay passes is of a difficulty quite out of proportion to its importance. The draft submitted by the local Government is one which we have no legal power to pass. I do not believe that our legislative authority extends to the high seas. If therefore a captain of a ship were, in conformity with the provisions of clause 11 of the draft, to seize a vessel in the Arabian Gulf for want of a pass, and if the owner of the vessel seized were to prosecute the captain in the Supreme Court, I do not apprehend that the judges would admit our Act to be a justification of the seizure. Such I know from conversation to be the opinion of the Chief Justice here; and I am sure that no person can be less disposed than he is to look for technical objections to the exercise of our legislative powers.

The draft seems to me to be in other respects objectionable. It provides that ships shall be registered at the place to which they belong. It then provides that ships shall be deemed to belong to the place at which they are registered. This is legislating in a circle. Every time that a vessel has a new commander, every time that she has a new owner, every time that she is enlarged or cut down, every time that her name or number is changed, she must be registered again. And it is evident from the language of the draft that the registration *de novo* may be made at a different place from that at which the original registration was made. For it is expressly provided that if a vessel be registered *de novo* she shall then be deemed to belong to the place at which she is registered *de novo*. A vessel may therefore be registered at Bombay as of 50 tons burthen as the property of A and as commanded by B, and the same ship may be registered at Surat as of 45 tons burthen as the property of C, and as commanded by D. Nay, the same ship may appear in five or six registers. Such registration as this can lead only to fallacious conclusions respecting the quantity of shipping employed in the coasting trade. It must be useless for statistical purposes; and it is not very easy to see for what purpose it can be useful.

It seems to me that the best course would be to have one Central Registry Office at Bombay, and to require the registrars

[1] *I.L.C.*, 12 June 1837, No. 4.

of the other ports to send up periodical returns thither. If the system be adopted, the quantity of shipping will be exactly known and there will be no danger that one vessel may be counted three or four times over.

It seems to me that the passes are quite useless if we cannot, as I am convinced we cannot, give the power of seizure on the high seas. The revenue to which the Bombay Government attaches so much importance may be just as easily raised by fees on registration as by fees on the taking out of passes, and a fine may be imposed on the owners of unregistered coasting craft. If it be desirable that the tax should be annual, a matter about which I own that I have some doubts, there will be no more difficulty in acquiring annual registration than in acquiring the annual taking out of a pass.

If the Council agree with me in opinion, it would perhaps be advisable to state our views to the Bombay Government before we take any further step.

No. 35: 5 AUGUST 1837[1]

THE question before us seems to be one of considerable difficulty. But I hope and believe that the difficulty will be found to be by no means so great as it seems. If we were to take up the question as one on which we were to exercise our ingenuity, it would be easy to find objections not admitting of a ready answer to every plan which can possibly be proposed. But our object is to make an arrangement which is likely to answer in practice, and that object I am satisfied is by no means unattainable.

The first question is: What are we legally competent to do?

As I understand the Charter Act, we cannot divest the Vice-President and Council of any part of the executive powers of the Governor-General in Council. So I construe the words 'in whom, during the absence of the said Governor-General from the said presidency of Fort William in Bengal, the powers of the said Governor-General in assemblies of the said Council shall be reposed'. I understand these words to mean, first, that the Vice-President in Council shall have the same powers with the Governor-General in Council and secondly that the powers

[1] *I.L.C.*, 4 September 1837, No. 6.

belonging to the Vice-President personally in meetings of the Council shall be the same as those which the Governor-General personally exercises in such meetings. I conceive therefore that the extraordinary power given by the 49th Section of the Act to the Governor-General belongs to the Vice-President during the Governor-General's absence. This I know to be the construction which much better lawyers than myself put upon the words which I have cited.

If this construction be correct, we are not competent to take away by law any portion of the executive power from the Vice-President in Council. But the Act of Parliament goes on to authorize us to give the whole or any part of that power to the Governor-General.

The case then stands thus: Parliament, by an enactment with which we cannot meddle, has settled what shall be the powers of the Vice-President in Council. It is left altogether to us to settle what shall be the powers of the Governor-General when absent from his Council.

We have two courses between which we must make our election. We may give all the executive powers of the Governor-General in Council to the Governor-General so that he may have co-ordinate authority with the Vice-President in Council, or we may give some of those powers and withhold the others.

There are objections to both courses. The objections to the former course are in theory unanswerable. Certainly that there should be two equally supreme powers in the State, each of them authorized to do whatever the other is authorized to do, and neither of them authorized to restrain the other, is a most anomalous state of things. It would be easy to suppose cases in which the most ludicrous and the most disastrous consequences might follow from such a division of powers. Suppose the Governor-General to conclude an alliance with Lahore against Sind while the Vice-President in Council concludes an alliance with Sind against Lahore; suppose the Governor-General to recognize one prince as king of Oudh, while the Vice-President in Council recognizes another; suppose two different Residents, with directly opposite instructions to arrive at the same court, the one accredited by the Governor-General, the other by the Vice-President in Council; suppose the Governor-General to direct

that a prisoner in the situation of Shamsuddin or of Jhola Rai shall be liberated, while the Vice-President in Council directs that the same prisoner shall be hanged. There is certainly no want of specious arguments against a system under which such occurrences are even possible.

On the other hand it is certain that there is hardly any complicated Government in the world, in the constitution of which there are not defects of a very similar description; and that such Governments do actually go on for ages without a single instance of practical inconvenience arising from such defects. In the English Government, e.g., there are several authorities, every one of which, if it chose to carry its opposition to the others beyond a certain point, would bring utter ruin on the country. But in practice we know that opposition is not carried to such a point. The same may be said of the French constitution. In the United States the Federal Government is supreme for some purposes, the State Governments for other purposes. The line is not drawn with such precision as to exclude all doubt. When a difference of opinion arises there is no authority legally competent to arbitrate; and if both parties were disposed to push matters to extremities, the only appeal would be to arms. But this Government has existed for about half a century without experiencing any such calamity. Indeed, we find that all over the world difficulties of this sort are, to use Mr Burke's words, 'on the whole sufficiently, that is, practically, reconciled without agitating those vexatious questions, which in truth rather belong to metaphysics than to politics, and which can never be moved without shaking the foundations of the best Governments that have ever been constituted by human wisdom' (*Observations on 'The Present State of the Nation'*). Of the truth of this remark, India has itself afforded abundant proof. Indeed the Government could not go on for a day if we all chose to be as perverse and unreasonable as we might be without violating the letter of the law. If there had been disposition in the members of the Indian Governments to make no mutual concessions and to stand in all cases on their extreme legal rights, every visit of a Governor-General to the Upper Provinces, of a Governor of Madras to Ootacamund, of a Governor of Bombay to Poona, would have been attended with most serious consequences. But nothing of this has happened. And it was probably this long

experience of great anomalies in the Indian Government attended with little or no inconvenience which led the British Parliament to frame the law in the manner in which it now stands.

If it be determined not to give to the Governor-General the entire executive power of Governor-General in Council, where is the line to be drawn? Is he to be made generally subordinate to the Vice-President in Council, and to be allowed to do only such acts as he may from time to time be authorized to do by a letter from Calcutta? This would, in my opinion, be to place the Governor-General in a position in which neither the legislature nor the Court of Directors can be supposed to have meant that he should stand. Indeed no Governor-General would ever leave his Council on such terms. Is he to have the full power of Governor-General in Council with respect to certain matters, and no power with respect to others? It is clear, in the first place, that such an arrangement would be open to the same objection which may be urged against the arrangement proposed by me. For with respect to a portion of the public business there would be two co-ordinate authorities; and that portion could hardly be so small as not to afford ample opportunity for disgraceful and mischievous disputes, if we suppose a great deficiency of good sense and good temper. I really think that the argument against giving a general co-ordinate power is very nearly if not quite as strong against giving a partial co-ordinate power. There are other arguments against giving a partial co-ordinate power to which practically I am inclined to attach more importance. Where ought the line of partition to run? I am utterly unable to draw it — I mean to draw it with legal precision. I can see plainly that on all important matters, where there is time for communication, the Governor-General and his Council ought to communicate with each other and to act in concert. But the word important is no word for a law. There is no word more significant to the understanding of a plain man who means to act in perfect good faith. But it is a word about which a litigious man might quibble for ever. As to drawing by law a line between one part of the Indian Empire and another, or between one department of the public business and another, I hold it to be out of the question. There must be lines, of course. But they will be lines which cannot be marked by precise words, though

they will be easily perceived by sensible men disposed to co-operate cordially for the public service.

I would therefore take the risk—a risk which in the present case I consider as hardly worth mentioning—of confiding to the Governor-General during his absence the whole executive power of Governor-General in Council. I would not encumber the Act with any explanations or any provisos for saving rights, which rest on higher authority than ours, which we cannot take away, and to which it would be hardly decorous in us to add a sanction which they do not need. But I think that it would be desirable to prefix to the Act, whenever it shall be published, a resolution explaining the view which we take of the law, giving in popular language and without any attempt at legal precision a general notion of the way in which the two co-ordinate authorities [propose] to divide the executive business, and declaring the perfect confidence which they place in each other.

APPENDIX I

SOME ACTS PASSED BY THE GOVERNOR-GENERAL IN COUNCIL, 1834-8[1]

Number and Year of Act	Short Contents	Page Reference in Introduction if any	Notes
IV of 1835	One Justice of the Peace, competent to exercise such powers as were formerly exercised by two, for Calcutta.	77-8	
VII of 1835	Bengal and Agra Jurisdiction of sessions judges; Governors competent to define their powers, etc.		
X of 1835	Production of the Government *Gazette*, good evidence of the passing of an Act.	22-3, 26, 29-30	Repealed by Act II of 1855.
XI of 1835	Liberty of the Press	40-46	
XV of 1835	Madras Witnesses and contempt of court: (1) Witness not attending before the Sadar Adalat, or refusing to give evidence, subject to fine not exceeding Rs. 500, and committed until he shall consent to give evidence. If fine not paid, he may be confined for further term not exceeding three months. (2) Persons guilty of contempt of Sadar Adalat in open court may be immediately fined, not exceeding Rs. 500, or be committed for a period not exceeding six months. (3) Sadar Adalat may commit any person who appears to have been guilty of perjury, and send him for trial to the zillah court.		Repealed by Act XVI of 1862.

[1] This table was prepared with the help of W. Theobald's *The Legislative Acts of the Governor-General of India in Council*, Vol. I.

Number and Year of Act	Short Contents	Page Reference in Introduction if any	Notes
XVI of 1835	Concerning Indigo Contracts 'Be it enacted that from the 1st of November, 1835, so much of S. 2 of Reg. V. of 1830, of the Bengal Code, as provides that persons instigating and inducing ryots to evade the performance of their engagements, may be prosecuted for the full amount of the penalty specified in the original agreement of the ryot, together with all expenses and costs of the suit, and S. 3 of the same Reg. providing that persons contracting for the cultivation of Indigo Plant, who shall wilfully neglect or refuse to sow or cultivate the ground specified in their engagement shall be deemed guilty of misdemeanour, and liable to punishment, be rescinded.'		S. 3 of Act X of 1836 gives a remedy against any person inducing a ryot to break his engagement. This Act is important as one of the first to repeal the old Regulation which protected the interests of the indigo planter at the cost of the cultivators.
XVII of 1835	Gold and Silver Coinage (1) What silver coins shall be coined within the territories of the East India Company. (2) The obverse and reverse to bear the head and name of the reigning sovereign and the designation of the coin in English and Persian. (3) New coins to be legal tender. (4) Relative value between new and old coins. (5) Quarter rupees, legal tender only in payment of fractions of a rupee. (6) Existing contracts for payment of Calcutta Sicca rupees at a different rate from above, if payment is made in any other presidency, shall be performed according to the terms agreed. (7) What gold coins shall be coined at the mints.		Other Acts relating to silver coinage are XIII of 1836 and XXXI of 1837. See below.

NUMBER AND YEAR OF ACT	SHORT CONTENTS	PAGE REFFRENCE IN INTRODUCTION IF ANY	NOTES
	(8) What gold coins shall bear on obverse and reverse. (9) No gold coin shall be legal tender. (10) The Governor-General in Council may direct the coining and issuing of coins, prescribe devices, etc., on copper coins, and establish, etc., mints.		
XVIII of 1835	BENGAL: CHAPRAS OR BADGES '(2) No person to wear any chapras or badge intended to resemble any . . . worn by servants of Goverment under pain of fine and imprisonment as for a misdemeanour. Every chapras or badge, worn by others than servants of Government shall bear the name of the employer. Any violation of this rule punishable with fine and imprisonment.'		Owing to misuse of the badge, the old regulations prohibited its being worn by persons other than Government servants. These regulations were repealed but precautions taken against the misuse of badges.
XXI of 1835	COPPER COINAGE (1) The following copper coins only to be issued in Bengal, viz. (i) Pice, (ii) Double Pice, (iii) Pies, with devices to be fixed by the Governor-General in Council. (2) and (3) Pice, legal tender for 1/64, double pice for 1/32, and pies for 1/192 of the Company's rupee.		Repealed by Act XIII of 1862, S.1.
II of 1836	BOMBAY: CUSTOMS DUTIES (2) One and one-half per cent import duty to be levied on articles mentioned, in addition to former customs duties. (3) Drawback allowed on exportation to the United Kingdom in British bottoms.		Repealed by Act I of 1838.
III of 1836	BOMBAY: CATTLE DUTY Duties levied on imports of cattle into Salsette abolished.		The duties were levied by the Peshwas. The objection against the duties was that they bore heavily on

Number and Year of Act	Short Contents	Page Reffrence in Introduction if any	Notes
			farmers who imported cattle for agricultural purposes.
IV of 1836	Insolvent Debtors' Act	66	
V of 1836	Bengal: Execution of Decrees Zillah and city judges may refer to the Principal Sadar Amin applications for the enforcement of decrees.	84-6	Repealed by Act X of 1861.
VII of 1836	Bombay Municipal Taxes		
VIII of 1836	Bengal: Personal Disabilities and Privileges (2) British-born subjects or their descendants to be subject to the same jurisdiction as others, in respect of all acts done by them as Principal Sadar Amins, Sadar Amins or munsiffs.	113	
X of 1836	Bengal: Indigo Contracts (2) Whenever the right to indigo plants is contested and an order made for delivery to one of the parties, the party shall not cut or remove the indigo until he shall have given security to make good any claim which shall be ultimately established. (3) If any person knowing a ryot to have made a contract, under which money has been advanced to the ryot, shall prevail upon the ryot to break his contract, the party who made the advance shall be entitled to proceed by civil action to recover from the other party and ryot damages to the extent of the injury sustained. Provided that a person shall not be liable to an action in consequence of any act done to procure payment of a debt or performance of a lawful contract.		This Act was second in the series of those passed to regulate indigo contracts.

Number and Year of Act	Short Contents	Page Reference in Introduction if any	Notes
	(4) Plaintiff and defendant may be examined, and compensation for expenses and loss of time be awarded, if award is for defendant.		
XI of 1836	The abolishing of personal disabilities and privileges.	47-57	
XIII of 1836	The abolishing of the Sicca rupee and certain local coins. (1) Calcutta Sicca rupees to cease to be legal tender from 1 January 1838.		
XVIII of 1836	(2) Repeals Sec. 5, Reg. XXV 1817. Pice struck at Benares and Farrukhabad to be legal tender only within those provinces.		
XIV of 1836	Bengal The abolishing of transit and town duties, and imposition and regulation of customs duties.		
XIX of 1836	Concerning the increased capital of the Bank of Bengal.		
XX of 1836	Bengal Concerning estates under Butwarra or Partition. (2) No Butwarra while in progress shall be quashed by the Board of Revenue, except as herein provided. (3) The Board may give six months' notice to be affixed in the office of collector and munsiff. Butwarra may be quashed if not objected to within six months, etc.		
XXI of 1836	Authorizing the creation by the Governor-General in Council of new zillahs, etc., in Bengal.		

Number and Year of Act	Short Contents	Page Reference in Introduction if any	Notes
XXIV of 1836	MADRAS AND BOMBAY Concerning the names of offices of Indian judges. (1) Officers designated in the regulations of Fort St George as native judges shall be designated as Principal Sadar Amins. (2) In Bombay presidency, Principal Native Officers and Junior Native Commissioners to be respectively designated as Sadar Amins and munsiffs. (3) Every British-born subject or descendant who shall be appointed Principal Sadar Amin, Sadar Amin or munsiff, in the presidencies of Fort St George or Bombay, shall, in respect of his official acts, be amenable to the jurisdiction of the same tribunals as if he were not of British origin. (4) No person shall, by reason of place of birth or of descent, be exempted from the jurisdiction of the assistant judge of Bombay.		This Act was intended to reduce the diversity of official designations existing in the presidencies and also to clarify points arising out of the terms of Acts VIII and XI of 1836.
XXVIII of 1836	MADRAS: VAKILS AND PLEADERS Candidates for the situation of vakil in the Courts of Adalat shall be appointed under S. 3 of Reg. XVIII of 1814, and the qualifications of candidates shall be ascertained by examination before law officers, etc.		Repealed by Act XI of 1864.
XXIX of 1836	MADRAS: MUNICIPAL ASSESSMENTS	86-8	
XXX of 1836	THUGGEE (1) Whoever shall be proved to have belonged to any gang of thugs, shall be imprisoned for life with hard labour. (2) Every person accused of the offence herein made punishable may be tried by any court, which would have been compe-		The importance of the Act lies in its finding a remedy for the evil of thuggee. The remedy provided is a summary trial. It also gets rid of the hampering process of Mohammedan criminal law.

Number and Year of Act	Short Contents	Page Reference in Introduction if any	Notes
	tent to try him, if his offence had been committed within the zillah. (3) No court shall require a Butwa from any law officer, or any trial under this Act.		
XXXI of 1836	MADRAS: GOVERNMENT GRANTS Reg. IV of 1831, relating to grants of money or land-revenue made by the British Government shall be extended to similar grants made originally by any native Government and afterwards confirmed or continued by the British Government.		
XXXII of 1836	BENGAL: IMPORTATION INTO OF FOREIGN SUGAR		This Act was intended to discourage the importation of foreign sugar not grown in British possessions.
II of 1837	BOMBAY: BHORE GHAT TOLLS	138	Repealed by Act X of 1861.
III of 1837	BENGAL: SADAR COURT (1) That each of the courts of Sadar Dewani Adalat may direct that any original suit or appeal brought before any zillah or city court, subordinate to such court of Sadar Dewani Adalat shall be transferred to any other zillah or city court, subordinate to the same court of Sadar Dewani Adalat. (2) Whenever such transfer of any suit shall be made, the court shall record the reason of the transfer in its proceedings.		
IV of 1837	LANDED PROPERTY DISABILITY '(1) Any subject of His Majesty may acquire and hold property in land, or in any emoluments issuing out of land, in the territories of the East India Company. '(2) All rules which prescribe	109	

Number and Year of Act	Short Contents	Page Reference in Introduction if any	Notes
	the manner in which such property may be acquired and held by natives shall extend to persons who shall acquire or hold under this Act.'		
V of 1837	BENGAL: EMIGRATION ACT 'Prohibits the reception of native emigrants on board ships without order of Government or permit.'		The Act was necessary owing to the hardships inflicted on Indian labourers going to Mauritius.
VII of 1837	SUPREME COURT: FREE PARDON	67-8	
IX of 1837	PARSEES: LANDED PROPERTY (1) All immoveable property, situated within the jurisdiction of any of the Supreme Courts, belonging to any Parsee shall, as far as regards its transmission, in case of death and intestate, be of the nature of chattels real and not freehold. (2) In any suit at law or in equity, no advantage shall be taken of any defect of title arising out of the transmission of such property upon the death and intestate of a Parsee beneficially interested in the same, or by will, if such transmission took place before 1 June 1837, and took place according to the rules which regulate the transmission of freehold property, or was acquiesced in by the persons interested according to the rules which regulate the transmission of chattels real.		This was one of the first Acts regulating the succession of Parsees according to their customs.
XIV of 8371	FOREIGN BOTTOMS Whenever any foreign State in Asia or Africa shall permit the importation or exportation of goods in British vessels on the same terms as goods in vessels belonging to such foreign State, the Governor-General in Council may direct that goods		

Number and Year of Act	Short Contents	Page Reference in Introduction if any	Notes
	may be imported into the East Indies, or exported thence, in vessels belonging to the subjects of such foreign State, on the same terms.		
XVII of 1837	Post Office Act		
XVIII of 1837	Thuggee Any person charged with murder by thuggee, or with having belonged to a gang of thugs, may be committed by any magistrate or joint magistrate for trial, before any criminal court competent to try such person.		On the same principle as Act XXX of 1836.
XIX of 1837	Evidence No person to be incompetent as a witness by reason of conviction for any offence, whatever.	128-9	
XXI of 1837	To empower the Residency Government to dispense with any oath, not being in any judicial proceeding.		
XXIV of 1837	Bengal: Mofussil Police Appointment of the Superintendent of Police.		
XXV of 1837	Bengal Judiciary System	108-9	
XXVI of 1837	The Governor-General to have all powers of Governor-General in Council except that of making laws, from the notified day of his having quitted his Council for the NW. Provinces until he shall rejoin his Council		
XXIX of 1837	Bengal: Persian Language	131	
XXXI of 1837	Coinage		

Number and Year of Act	Short Contents	Page Reference in Introduction if any	Notes
XXXII of 1837	Emigration Act		On the same principle as Act V of 1837. The contract with the Indian labourer had to stipulate to convey him back free of charge after five years.
XXXIV of 1837	Madras: Judiciary (criminal). Magistrates may send persons for trial, committal, or confinement to Principal Sadar Amin, except Europeans and Americans, who shall be sent as heretofore to the criminal judge.		
IV of 1838	Bombay: Perjury Sadar Adalat may commit any person for perjury apparently committed before it, and send him for trial to the zillah court.		

APPENDIX II

STANDING ORDERS OF THE COUNCIL OF INDIA

AT a meeting of the Council of India, held on 6 July 1835, resolved that the following rules be adopted as Standing Orders of the Council of India in its Legislative Department.

I. When the Governor-General of India in Council shall approve of the draft of a law, the draft shall be printed and published for general information.

II. No draft of a law shall be ordered to be published till at least one week shall have elapsed from the time it was first laid before the Council of India in its Legislative Department.

III. When a draft of a law shall be approved, a day shall be appointed for reconsideration thereof, which day shall be at least six weeks later than the day of publication.

IV. On the day appointed for the reconsideration of the draft, it shall be competent for the Governor-General in Council to pass it into law with any amendments which he may deem necessary.

V. In case any member in the Council shall represent that any amendments which may have been made appear to him to require larger consideration, the discussion shall be adjourned for a period of not less than one week.

VI. In case any member of the Council shall present in writing that any amendments which may have been made appear to him of so new and important a nature that they ought not to be adopted without being previously published for general information, every other member of the Council shall record his opinion on that point, with reasons for that opinion, and if the majority shall then be of opinion that the amendments are of so new and important a nature that they ought not to be adopted without being previously published for general information, the amended draft shall be published and the further consideration thereof shall be adjourned to a day later by at least six weeks than the day of such second publication.

VII. Every member of the Council shall be entitled either on occasion of a draft of law being ordered to be published, or on occasion of its being passed or finally rejected, to demand that every member shall record his opinion and the reasons thereof.

VIII. Any of the foregoing standing orders may be suspended by an unanimous resolution of the Council of India, but in every such case, the reasons for that resolution shall be recorded.

IX. If there be a majority of the Council of India for suspending any standing order, any member may demand an adjournment of the

discussion for at least twenty-four hours and on resumption of the discussion at the reassembling of the Council, each member shall deliver in his opinion, the reasons thereof in writing, and if a majority, including the Governor-General or the President of the Council for the time being, shall still be for suspending the standing order, the standing order shall be suspended and not otherwise.

W. H. MACNAUGHTEN
Secretary to the Government of India

APPENDIX III

THE CONSTITUTION AND JURISDICTION OF CIVIL COURTS IN THE MOFUSSIL

I. UNDER WARREN HASTINGS

CHART I (1772)

GRADE	COMPOSITION	JURISDICTION
III Petty causes	The head farmer of the pargana. (For the facility of ryots and to save them the worry and expense of travel.)	Causes not exceeding Rs. 10: decision final.
II Mofussil Dewani Adalat or Provincial Court of Dewani in each district	Presided over by the collector and assisted by officers of the cutcherry, and in cases of Hindu and Mohammedan law by Brahmins and Maulvis.	All disputes concerning property, real or personal; all causes of inheritance, marriage and caste; all claims of debts, disputed accounts, contracts, partnership and demands of rent, with the exception of the right of succession to zemindaris and taluqdaris.
I The Sadar Dewani Adalat	Presided over by the President or the senior member of Council and two others, attended by the Dewan of the Khalsa and others as above.	Appeals from Grade II in disputes of over Rs. 500 in value and original causes excepted from the jurisdiction of that grade.

CHART II (1781)[1]

COURT	COMPOSITION	JURISDICTION	REMARKS
Mofussil Dewani Adalats	Presided over by a covenanted servant of the Company, called the Superintendent of Dewani Adalat.	All civil causes without exception.	The number of courts increased from 6 to 18. In only four districts the office of civil judge and collector exercised by the same person.

[1] In this are only noticed changes from the first chart.

APPENDIX III

CHART II (CONT.)

COURT	COMPOSITION	JURISDICTION	REMARKS
Sadar Dewani Adalat	Provisional appointment of Sir Elijah Impey as the Chief Judge.	Appeals from above in disputes of over Rs. 1,000.	

II. UNDER LORD CORNWALLIS

CHART III (1793)

COURT	COMPOSITION	JURISDICTION	REMARKS
Of the Indian Commissioners, Amins, Salisan, or munsiffs	Indian personnel.	Suits of not over Rs. 50. Appeals to the court of the zillah and city judge.	
Registers	These officers were attached to the zillah or city courts. Indian personnel.	Suits of not over Rs. 200. Decisions subject to the revision of the zillah or city judge.	
Zillah and city courts	One European judge.	All civil suits and appeals from above. Appeals to provincial courts.	23 zillah judges. 3 city judges. — 26
Provincial Courts of Appeal	Each presided over by three European judges.	Appeals from above. Decision final in suits not exceeding Rs. 1,000.	Four provincial courts: Calcutta, Patna, Dacca and Murshidabad.
The Sadar Dewani Adalat. Final Court of Appeal in India	Presided over by the Governor-General in Council.	Appeals from above.	Appeals were allowed from this court to the King in Council in suits exceeding £5,000 in value.

LORD MACAULAY'S LEGISLATIVE MINUTES

III. UNDER LORD WILLIAM BENTINCK

CHART IV (1831)

COURT	COMPOSITION	JURISDICTION	REMARKS
Munsiffs	Indian personnel	Suits not exceeding Rs. 300. Appeals to the zillah and city judge.	
Sadar Amins	Indian personnel	Suits not exceeding Rs 1,000. Appeals to the zillah and city judge.	Original suits were referred to them by the zillah and city judges.
Principal Sadar Amins	Indian personnel	Suits not exceeding Rs. 5,000. Appeals to the zillah and city judge and special appeal to the Sadar Dewani Adalat.	As above, and also, by special permission of the Sadar Dewani Adalat, the zillah and city judge could refer appeals to them.
Zillah and city courts	European personnel	Appeals from above and original suits involving over Rs. 5,000	Though the Provincial courts still existed, they were being steadily superseded by these courts.
Provincial Courts of Appeal	European personnel each presided over by three European judges.	Appeals from above	
Sadar Dewani Adalat	Presided over by four European judges	Appeals from above	

APPENDIX IV

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