PART - II

HISTORY AND PHILOSOPHY OF INHERENT POWERS
CHAPTER - 1

INHERENT POWERS :
GENESIS OF THE CONCEPT

Power is the manifestation of authority. In human societies organized activities started from the dawn of History. 'Inherent Power' as a juristic concept does not have a clear and uninterrupted history. As the etymology of the word connotes it is the power of the court of law. Courts must have power to adjudicate. The source of the power is law. Law, enacted by legislature, or laid down by superior courts, or emanated from usage and custom, or derived from equity, or evolved from religious texts, or recognised from the thinking of philosophers, or encapsulated in maxims, confers the power on the court. But, when the law is not clear, or a specific law is absent, then also the courts must have power. Such power is inherent in the court. Even without being specifically called by any name the court has power to deal with unprecedented, unforeseen and unanticipated situations. The origin of this power, inherent power, is inextricably intertwined with the judicial process. Today the concept of inherent power has earned a place in the province of jurisprudence.

In the above situation to understand the acceptance, prominence and recognition of the concept of inherent powers in the realm of jurisprudence one has to assess the relevance of the various factors and forces which contributed to it. Similarly, when the examination of the concept is in relation to the criminal justice system and in respect of the High Court a glance through the major developmental events
in the legal and constitutional history of India is also required. This includes the evolution of judicial institutions in India during the modern period culminating in the establishment of the High Courts in 1862, and the legislative process which saved and preserved the inherent power of the High Court through the Criminal Law Amendment Act of 1923. With this amendment section 561-A of the Code of Criminal Procedure, 1898 was incorporated.\(^1\) When the Code was amended in 1955 this provision was left untouched. When the Code was reenacted in 1973, section 482 of the new Code became the repository for the provision in section 561-A of the earlier Code. The rest is present history which tells us how this power is exercised by the High Courts to give effect to the orders passed under the Code, or to prevent the abuse of the process of the court or otherwise to secure the ends of justice.

i. **Judicial Bases of Inherent Powers**

While diagnosing the juridical bases of inherent jurisdiction I.H. Jacob argues that the very nature of the court as a superior court of law a special power as we understand by inherent power is necessary.

"For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused"\(^2\)

According to the jurist "such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute".

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1. S. 561-A, Cr.P.C. \(^{1898}\), Ref: n. 25, Introduction
In the absence of such a power the courts remain only as formal organs without substantial power. Inherent power enables a superior court to fulfil the function of a court of law. In Connelly v. D.P.P. the court of Appeal has unequivocally accepted it. "The juridical basis of this jurisdiction is therefore the authority of the judiciary to uphold, to protect and fulfil the judicial function of administrating justice according to law in a regular, orderly and effective manner".

Even in the Anglo-Saxon jurisprudence and common law realm one finds the idea of the inherent power exhibiting an uncertainty. After going through the areas of adjudication where the terms 'inherent power' and 'inherent jurisdiction' occur one jurist wonders.

"Is this list of examples drawn from a single jurisdiction, or is it a cocktail of unrelated topics?"

After commenting that the inherent powers have a considerable history and the powers were in operation long before the term inherent jurisdiction began to be used to explain and describe this, M.S. Dockray refers to the oldest use of the term quoting from a Report of the Select Committee of the House of Commons,

"The oldest use of the term seems to be found in the power to punish contempt, which before 1875 was sometimes, but not invariably, said to be inherent.

For example,

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6. Id. at p. 122
Courts of justice in Westminster Hall ..... have inherent in them the summary powers of punishing such contempts without the intervention of a jury".  

The Common Law powers of the courts to amend the court's record, to stay actions, to prevent abuse of process or to control proceedings were exercised by the courts. But, the phrase inherent powers was not used. Terms such as "general jurisdiction" or "original powers", or simply "jurisdiction", were used to refer to power of this sort. Now all these are examples of inherent powers. In Metropolitan Bank v. Pooley the House of Lords held that:

"from early times (rather think, though I have not looked at it enough to say, from the earliest time) the court had inherently the right to see that its process was not abused by a proceedings without reasonable grounds"  

ii. British Administration of Criminal Justice

When the genesis of the inherent powers of the High Court is traced, one has to traverse the immediate past of the judicial process. In India, by immediate past what is meant is the modern period, to be precise, the British period. For this, one has to go through the history of administration of justice in India. The story of administration of justice in India, during the British period, is told through events from 1600 to 1950 A.D. Establishment of judicial institutions form a remarkable component of history. A remarkable point in the evolution of judicial institutions during the British period occurred with the establishment of the chartered High Courts in India in 1862.

7. Ibid.
9. Ref. supra. n. 5 at p. 123.
The High Courts became the highest judicial organ, second only to the Privy Council. Various jurisdictions were vested in the High Courts. Absence of substantive laws made it imperative, for this institution to exercise a high doze of inherent powers. Even after the constitution and the establishment of the Supreme Court, there has not been any diminution in the status or powers of the High Court.

According to H.M Seervai-

"Few British institutions commanded greater respect in India than the High Courts. It is unnecessary to stress the importance of a highly trained, incorrupt and fearless judiciary, especially in a federation where the judiciary has the power to declare laws and executive acts void as violating the Constitution. Following the British precedent, our Constitution provides that the judges of the Supreme Court and the High Courts shall hold office during good behaviour and can be removed only for proved misconduct or incapacity, by a process analogous to impeachment."¹⁰

iii. Sociological Evolution

Man lived on earth as Tribes, nomads, and sociologically identifiable groups. When society developed as an institution connecting man and man, an atmosphere of human action and interactions also developed. He developed economy. At first, it was subsistence economy. Then, there was surplus. Then, there was accumulation of wealth. Wealth was used by man to dominate over other men. Thus, commenced the political organization of society. State was the prod-

uct of this new dimension. Gradually, state became a strong institution capable of controlling all other institutions. The State was the embodiment of all accumulated power of human activities. State ruled men, State protected men - their lives and properties and State protected itself from outside intrusion.

When State emerged as a lasting institution, there required legitimacy for the activities of the State. This could be obtained only through a body of laws. The laws in the earlier period were inextricably connected with morality, religion, sociology and philosophy. In ancient India, all legal principles were to be found in the religious literature. Administration of justice became an important function of law. Justice came to be recognised as the important interest of all human beings. Interest in life, interest in family, interest in property, interest in position; all led man to think of justice, and to expect justice. State was the source. State ruled by the King was expected to maintain law and order. Even the King was expected to be under the laws. It is more a matter of culture than civilization, that man shall respect others and by respecting others, their interest, safety, and security shall also be secured. The King was all powerful. But, he had to act under law. In India, the concept of law was contained in the larger concept of Dharma. "Adharma" was against law and it was not tolerated. Law was defined in this context as a power, as a source of inherent powers controlling one and all. The 'Brihatharanyakopanishad' gives a definition of Dharma (Law).

"Law is the King of Kings,
Nothing is superior to law,
The law aided by the power of the King,
Enables the weak to prevail over the strong"\textsuperscript{11}

Dr. S. Radhakrishnan commented on this concept, in the \textit{Principal Upanishad} thus:-

"Even the Kings are subordinate to Dharma, to the Rule of Law". \textsuperscript{12}

This being the position of law, Administration of justice according to law became popular.

iv. Ancient and Medieval Period: Vedic Dharma, Marathas and Mughals

Indian legal history in the ancient and medieval period, takes its inspiration from the political organization. The empires which rose and fell in the Indian subcontinent from the days of Nandhas to the days of Mughals and Marathas contributed their might to the development of a native, indigenous jurisprudence. In the ancient period, it was rooted in Smrithies, Sruthies, Vedas, Vedanthas etc. It was the speciality of the Savants, to think of and speak of Dharma. In the medieval period, the Sulthans and Mughals gave a new dimension to the administration of justice. Their activities prompted the historians to call their rule islamic and the justice administered, the islamic variety of the justice. There was action and interaction between the pristine Indian philosophy and the Islamic philosophy. Since, the rulers were interested in fighting battle, and scholars were not interested in developing a jurisprudence in the changed context, the administration of justice was in a fluid state, sans laws, sans courts,

\textsuperscript{12} Ibid.
sans justice, sans judges, sans everything. When the British reached the Indian soil, in the early years of the 17th century, the Indian scenario was of a medieval, backward looking, superstitious, stagnant society, unaware of the great possibilities of the world around. It was the best of the times for the West and it was the worst of times for the East. It was the age of wisdom for the West and it was the age of foolishness for the East. It was the spring of hope for the West and it was the winter of despair for the East, and then Westerners came, to India and the East, riding on the waves of renaissance, reformation and geographical discoveries.

v. British Period

The historic events which marked the advent of the Westerners into the East was Vasco De Gama's successful landing at Calicut. Subsequently, more Europeans came. But, for the relevance of the discussion in this study, the arrival of the British is more significant. The British connection with India, technically begins in 1600 A.D. when Queen Elizabeth issued a charter establishing a company of merchants for conducting trade with the East. The first batch of British Merchants reached the Indian shores in 1608 at Surat, which was a major international port of the Mughals. Then, India was only a geographical expression. Mughals dominated a substantial territory, but there were the Rajapuths, the Marathas, and the southern Kingdoms, and a number of small principalities which owed allegiance to the big ones. There was utter chaos and confusion so far as the political organization of the peninsula was concerned. The British had only a commercial interest in the beginning. But, they soon de-

13. This comparison is analogous to the opening sentences of Charles Dickens' Novel A Tale of Two Cities.
developed economic interest, military interest and political interest. When political interest got established, all paraphernalia of polity came with it, including the administration of justice, legislative activities, executive power of the State, revenue administration, defence, maintenance of law and order, public services etc. Thus, the modern State was born in India, with the active involvement of the British. A random look into the history shows that legal and constitutional developments occurred simultaneously with the political, military and economic developments from 1600 to 1950 A.D.

vi. **Anglo-Saxon Jurisprudence**

The legal system which we have inherited today, has the legacy of Anglo-Saxon jurisprudence writ large on it. The British successfully dovetailed their system of jurisprudence with the disjointed systems in India. The story of Indian Legal system from 1600 to 1950 A.D. is gathered from the Legislative, Judicial and the governmental activities of the period. History of Britain during this period gives us important lessons in the development of their State, and their legal system. Establishment of curia-Regis which became parliament subsequently, the Privy Council, and the development of the legal system in England, provides enlightenment for India also. When, the British history is punctuated by epoch making events like signing of Magna Carta, by King John in 1215, Petition of Rights, 1629, Bill of Rights in 1688, the Act of the Settlement in 1781, the Reform Acts of 1832, to 1855, Parliament Acts of 1911 and 1949 which metamorphosed the Indian jurisprudence and supplied it a colour and character of the British system of life under the British system of administration.
During this period, with British influence, changes were introduced in India's legal fabric also. A random acquaintance with the development of laws from 1600 to 1950 A.D. takes us to the Charter of 1600, Charter of 1611, Charter of 1664, Charter of 1720, Charter of 1762, Charter of 1753, The Regulating Act of 1773, the Charter of 1774, Act of settlement 1781, the Pitts India Act, 1784, Charter Act of 1793, Charter Act of 1813, Charter Act of 1833, and Charter Act of 1853. All India Legislative Council established in 1833 was empowered to make law for all persons and all courts. Earlier, laws were to be registered with the Supreme Court. Now, laws made by the Central Legislative Council became binding on the Supreme Court and subsequently the High Courts also. Then came the Revolt which was a medieval, fudelist upheaval, which ultimately enabled the British crown, to further its strangle-hold over India. Power was transferred from the East India Company to the British crown. Queen of England proclaimed in 1858, that India formed a part of the British empire and all the assets and liabilities of the company stood transferred to the British crown. With this started an era of codification, era of centralised administration with major branches of law, codified and implemented including Civil Procedure Code, India Penal Code, Criminal Procedure Code, etc. They were followed by the Indian Contract Act, the Transfer of Property Act, the Indian Evidence Act, Negotiable Instruments Act, General Clauses Act, etc. British parliament also contributed in creating a tempo where by the Indian system emerged forward. After the Revolt, Indian Council Act of 1861 was passed by the Parliament. It was followed by the Indian Council Act, of 1892. The Indian Council Act of 1909 otherwise called

14. Ref. supra n. 11 at pp. 199-200
Minto-Morley reforms further advanced the development. The Government of India Act, 1919, which is otherwise called the Montague Chelmsford Reforms came as another milestone legislation. The Government of India Act, 1935 was the premier legislation forming part of future constitutional activities in India. The last major legislation passed by the parliament was the Indian Independence Act 1947. As per the provisions of this act, two dominions were created - Pakistan and India - with provisions to constitute institutions for drafting constitution and inaugurating their own independent Republics, which India realised on 26th January, 1950 with the inauguration of the Constitution of India. Within this framework functioned, all departments in India.

vii. **Constitutional History of Courts**

The administration of legal justice in the above context is discussed hereunder. The events which culminated and led to the drafting of the Indian Constitution, started from 1600 A.D. Similarly, the functioning of the judicial institutions also started during the above period and got transferred to their respective positions under the constitution of India, which includes their history, and performance till this date.

Administration of justice in the British India started on a rudimentary basis. After the establishment of the Surat Presidency in 1608 there were no laws and there were no courts. Nor was there any who felt for such courts because the British was not a force in India. The Indian society enjoyed the legacy of the Sultans, and the Mughals, and their system of administration including the Jagirdhari system, Ryothwary system and Mansab dari system, the Toddermal's
Bandobast, the Chouth and Sardeshmukhi of the Maraaths, etc. But, the British opened their innings on a very humble note, with the President and council at Surat. Their jurisdiction was administration of the Company's people. Not being satisfied with Surat, they proceeded to the South and reached Madras, which was "Madrasipattanam". The local Raja allowed them to establish their factory at Madrasipattanam and to fortify it as Fort St. George. Thus, came into existence the Black Town and the White Town. The White Town was the area inside the Fort and the Black Town was that which surrounded the Fort, where the Indians settled. This was around 1639.

In the White Town, there was no systematic court. In the establishment there was an Agent and Council, representing the President of Surat under the Surat Presidency. But, in the Black Town, an indigenous system of administration of justice existed. This is the meeting point of the occidental and oriental systems in the legal history of India. The name of the Court was Choultry and the name of the judge was 'Adhikaari'. Thus proceeded the administration of justice in India. The Choultry court gradually came within the control of the Company and 'Adhikaari' was replaced by a covenanted Civil Servant of the East India Company. Towards 1653, Choultry fell into oblivion. It had neither laws nor norms to guide it and to guide others. It was a court of summary jurisdiction, where the will of the 'Adhikaari' prevailed. After Choultry, with the promotion of the Agency in Madras to an independent presidency, in 1678 the Governor and Council in Madras constituted a High Court of Judicature for administration of justice. This was the first time when the nomanclature, the High Court of Judicature, was used in Indian scenario.
"In March 1678, the Governor and Council resolved that they would sit as a court on two days in a week to administer justice in all cases, civil and criminal, according to the laws of England with the help of jury of 12 men. This court was designated as the High Court of Judicature and was formally inaugurated on March, 27, 1678, at a public function".15

The High Court had appellate as well as original jurisdiction in the matter of administration of criminal justice. This was relegated to the background when the judicial charter of 1726 was issued. This system continued for sometime. Even the High Court of judicature had no laws to administer. It had only its inherent powers derived from the very existence of the court. Thus the High Court of Judicature functioned in Madras.

In 1686, the Admiralty court was established in Madras. Then there came the Mayor's courts of Madras in 1688. These courts also had no enacted or codified laws governing the jurisdiction or control the actions of the judges. The Mayor and the council members, called Aldermen, manned the Mayor's court, whereas the Admiralty court was manned by a judicial officer called Judge-Advocate. This was the first time when a professional expert was inducted into the system of administration of justice in India. The judge-advocate was to be a person learned in law. One Sir John Biggs was the first Judge-advocate, but the absence of laws and lack of professional competence made the two institutions function at daggers drawn distance, because their decision often ran counter to each other. The character and good sense of the judges were the only forces which gov-

erned the functioning of this court. In other words, Justice, Equity and Good Conscience governed the functioning of these courts. Whenever the Judges lacked in sense of equity and good conscience justice was a sure casualty. Commenting on the administration of justice in Madras between 1639 - 1726, M.P. Jain makes the following observations,

"Thus justice was rough, severe and not according to any fixed system of law but according to judges' discretion." 16

In the meantime, Bombay and Calcutta Presidencies were established in 1660 and 1690 respectively. Administration of justice in Bombay and Calcutta had never been taken up and the three presidencies had nothing in common among them in the matter of administration of justice. Then an effort was made, on the request of the East India Company, by the British Crown to introduce a uniformity and consistency in the three Presidencies. Of course, commercial activities of the British were gaining momentum and their economic power was fast being consolidated. An organized judicial institution on a systematic and uniform fashion, was then necessitated because the sand under the feet of the Indian Rulers was being fast drained by the British, leading to military, commercial and political hegemony.

Thus, the Judicial Charter of 1726 was issued. With this, India was to be given a face lift in the Administration of justice. A Mayor's court and a Court of Record were envisaged in the three presidencies. Local legislatures were also constituted. These legislatures were to enact laws on two conditions. Firstly, such laws should not be against the laws of England. Secondly, they should not be against

16. Id. at 76
natural justice. The output by the local legislatures was very scant. The Mayor's Court and the Court of Record in effect had no body of laws for effectively administering justice. They had more or less to bank heavily on the concept of justice, equity, and good conscience. This is another name of inherent powers. According to M.P. Jain,

"The Mayor's Court dispensed justice not according to any fixed law but as its charter laid down in a summary way to according to justice and good conscience and laws made by the company".  

He quotes the celebrated historian, Kaye to drive home the shallow state of affairs, "Justice gained little by the establishment of the Mayor's Court", for these courts were composed of "the company's mercantile servants - men of slenderest legal attainments, and the slightest judicial training."  

Inherent powers operate in the absence of specific enacted laws. It is the cardinal principle of equity. This dictum of inherent powers remained as the chief inspiration for all courts to come in the modern period. This is inspite of the intense legislative activity that followed during the 18th, 19th, 20th centuries. Even then, the proliferation of laws has made inherent powers more relevant.

After the judicial charter of 1726, came the regulating Act of 1773, One of the provisions of the Act was to enable the British Crown to issue charters to establish Supreme Courts at Calcutta, Bombay and Madras. Through the Regulating Act, the political and legal activities shifted from Madras to Calcutta and Calcutta became the capital of

17. Ibid.
18. Ibid.
India till it was shifted to Delhi in 1911. The Supreme Court at Calcutta and other places also had to function largely on the principle of equity, justice and good conscience. There was no clear body of civil or criminal laws. The Supreme Court was a court of law as well as court of equity. The Supreme Court of Calcutta had civil and criminal jurisdiction. Appeals were to the Privy council. The presence of inherent powers in the Indian judicial process manifesting with the Supreme Court of Calcutta.

"The Supreme Court was authorised to frame such rules of procedure, and to do all such acts, as were necessary for the administration of justice and due exemption of all powers granted to it".¹⁹

The Supreme Courts were crown courts because they were established through the Charters issued by the British Crown. They had jurisdiction only over the Europeans in the Presidencies. They had excluded the natives from their jurisdiction. They had a provision for engaging pleaders for the first time. But, it was the haven for the Europeans. The significance of Supreme Court at Calcutta was the change to parliamentary enactment in the matter of administration of justice.

"With the passage of this Act, the era of Royal charters gave place to the era of parliamentary enactments. Henceforth, parliament enacted a number of Acts, usually one Act at an interval of twenty years each, to renew the Company's Charter. On each occasion the affairs of the Company were subjected to close investigation and scrutiny and each time the

¹⁹. *Id.* at p. 6.
authority of the Crown and Parliament was tightened over the Company".20

Simultaneous with this, the company had its own judicial set up. When Warran Hastings became the Governor of Bengal and subsequently, Governor General, he introduced three installments of judicial reforms, in 1772, 1774, and 1780. It is popularly known as the Adalath system. Hierarchies of courts were established with Civil and Criminal jurisdiction. In the Civil jurisdiction, there were Small Causes Adalath, Mofussil Diwani Adalath, and Sadar Diwani Adalath, with appellate jurisdiction to Privy Council, in England. This jurisdiction of the Privy Council started with the judicial Charter of 1726 lasted till 1949.21

In the Criminal side, Warran Hastings, established Mofussil and Sadar Nizamath Adalath. Between the two systems, attention was given to the Diwani Adalath, because they had jurisdiction to decide civil and revenue cases. Administration of criminal justice was left in the hands of native Muslim law officers, Khazies, the Mufties and Moulavies, where as Diwani Adalaths had collectors and covenanted civil servants of the company as judges. M.P. Jain speaks about the desperate situation in which administration of justice remained even during the adalath system.

"The administration of criminal justice had hitherto been completely left to the Muslim law officers. The mofussil fouzdari adalaths were manned by Kazis, muftis and moulvies. The shadow of the Nawab's authority was still suffered to exist in

20. Id. at pp. 67-68
21. Id. at p. 315
this sphere even though it had disappeared from all other spheres. The Sa'dar Nizamat Adalath sat at Murshidabad and was presided over by Raza Khan as the Naib Nawab. He thus controlled the entire criminal judicature. He appointed and removed criminal judges at his pleasure, passed any sentences he wished and was subject to none and answerable to nobody. The control of the Governor-General and Council over the criminal judicature was purely nominal and extremely feeble as has been pointed out earlier. 22

An improvement was perceptible in the matter of administration of civil justice. The so called Islamic criminal law had very little of rationale and scientific qualities of Islamic jurisprudence. So far as the Islamic rulers were concerned, expediency was their watchword. Consequently Nizamath Adalath worked without any legal backing. The only principle which they could rely on was Justice, Equity and Good Conscience. The General atmosphere regarding the administration of criminal Justice was one of neglect,

"Prompt execution of the law is the essence of criminal justice so that people are deterred from committing crimes, but proceedings of the criminal courts in those days were extremely tardy and dilatory" 23

After the Regulating Act of 1773 Sir John Shore developed a criminal procedure following the reformatory tempo created during Lord Cornwallis. Lord Cornwallis gave a thorough overhauling in 1793. He had disclosed the faulty state of affairs. The information col-

22. Id. at p. 129
23. Id. at p. 131
lected from the questionnaires sent to the Magistrate revealed the sorry state, which is reflected in the following words:

"The Muslim Criminal Law which in the opinion of Cornwallis was against Natural justice and a Human Society Defects in the constitution, organization and administration of criminal courts."\textsuperscript{24}

Sir Elijah Impey's, regulations passed for cases not covered by the Plan of 1772 to be decided by Justice, Equity and Good Conscience.

"This provision gave the courts the power to decide cases in a just manner on questions not covered by the provisions of Hindu Law or Muslim Law. Though it gave a very wide discretion to the Judges to decide the disputes according to their ability, to meet the ends of justice, the expressions Justice, Equity and Good Conscience, themselves gave a sound guidelines and imposed the Judges to act in a fair and reasonable manner and helped the development of 'judge made' law, on various branches not covered by the personal laws".\textsuperscript{25}

Later Elphinstone's Code also recognised the principle of equity. The administration of justice with the company courts called Adalaths and the crown court called the Supreme Court, offered a paradoxical situation. These two systems of courts had very little in common between them. But, the system remained till the Revolt of 1857. The period upto 1857 is generally called early period. During this period lack of clarity of laws and well structured judicial institu-

\textsuperscript{24} ld. at p. 154
\textsuperscript{25} Id. at p. 35
tions made administration of justice onerous. Regarding the condition in the early settlements W.A.J. Archbold observes,

"with regard to the administration of justice, we must be precise. The whole question, indeed, bristles with difficulties, as can be appreciated by any one who reads Sir James Fitzjames Stephen's "Nunecomar and Impey". The more so as neither Parliament nor the charter nor the company in the early days ever took the trouble to make matters at all definite. We know that there was a good deal of difference between the position as it was dejure and what it was in reality, and this pretense if so we may call it is reflected in the legal situation"26.

With the Revolt of 1857, the company was liquidated. The company's courts also disappeared. The fabric of administration was changed with the entry of the British crown, and therefore, the Supreme Courts also had to exit from the arena of administration of justice. Then came the modern period in the history of administration of justice in India with the Indian Councils Act of 1861. The Act provided for establishing chartered High Courts in Calcutta, Bombay and Madras. Thus, the institution called the High Court of Judicature came into existence in India. With the merging of two systems of judiciary after the Revolt of 1857 ensured the process of the High Court. The High Court Act, 186227 gave power to issue letters patent to the crown for establishing the High Courts at Bombay, Calcutta and Madras. The High Court had very comprehensive jurisdiction,

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27. 24 and 25 Vict. C. 104
including inherent jurisdiction. As per section 9 Civil, Criminal, admi-
ralty and testamentary jurisdictions were in the High Court. Section
15 provided for power of superintendence over all other courts. 28
Letters patent were the sources of the power of the court. Section
16 facilitated High Courts. The Crown could modify or revoke the
letter patent. 29 The tempo created in 1861 continued and it led to
legislations like The High Court Act 191130, Government of India
Act 1915, Government of India Act 1935, This development culmi-
nated in the establishment of Indian Constitution.

There was only the Privy Council above the High Court, having a
superior jurisdiction. When the Federal Court was established in 1937
it was only having very limited jurisdiction. Even when Federal court
(Enlargement of Jurisdiction) Act (Act 1 of 1949) was passed, it did
not entirely abolish the jurisdiction of the Privy Council. 31 It was the
Constituent Assembly which passed the Abolition of Privy Council
Act 1949 which came into force w.e.f October, 10, 1949. All the cases
pending with the Privy Council stood transferred to the Federal Court.
But, even the Act of 1949 saved the jurisdiction of Privy Council to
deliver the judgment where they were reserved for orders.

"By virtue of this clause the last decisions were given by the
Privy Council on December 19, 1949 and with these ended
the jurisdiction of the Privy Council which functioned with dis-
tinction as the highest tribunal for British India, for two centu-
ries". 32

28. Id at p. 201
29. Ibid.
30. 1&2 Geo. V.C. 18.
31. Id. at p. 218
32. Ibid.
The last judgments which were to be delivered by the Privy Council are *Govindaram v. Gondal State*,\(^3\)\(^3\) and *Manmohan Das v. United Province*,\(^3\)\(^4\)

The Charter of 1865 issued to establish the High Court of Calcutta had contained the earliest traces of inherent powers, apart from the principles of equity which are generally attributed to inherent powers. The High Court had power to review decisions of the lower courts. Similarly, principles of equity could also be applied.\(^3\)\(^5\) Clause 26 of the Charter of 1865 runs thus

"The High Court could review any decision rendered in criminal trial by one or more Judges of the High Court in the exercise of its ordinary original criminal jurisdiction."

Clause 19 provides for the law to be applied

"(a) In the Original jurisdiction the court was required to apply law or equity as would have been applied by the Supreme Court."

There was more definiteness regarding the proceedings.

"In criminal matters, in exercising ordinary original jurisdiction, the High Court was required to follow the procedure which was being followed by the Supreme Court and in all other cases the Criminal Procedure Code 1861."

Even then the administration of justice was in a haphazard man-

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33. AIR 1950 P.C. 99
34. AIR 1950 P.C. 85
35. *Id.* at p. 201
ner. There was no fixed rules as is shown from trials of Mrs. Dawes, Gilbert and De Lima, a Portuguese national.\textsuperscript{36}

The quality of justice was very poor, which provided prior to the establishment of the Supreme Court.

"The quality of administration of justice during this period was crude. No principle of substantive or procedural law governed the judicial proceedings. Judgment-Debtors and Criminals were sent to prison for indefinite periods. In one case in Indian convict on a charge of murder was hanged and his body in chain was displayed at a prominent place. Apart from death sentence, mutilation of the limbs, branding and whipping, forfeiture of property and fine and banishment were the punishments which were being inflicted. The Governor and Council had the power to pardon death sentence. Englishman guilty of serious offences were being sent to England. Piracy was considered a serious offence punishable with death. Interlopers were tried as Pirates by the Admirality Court. Robbery was punishable with death. For stealing, the punishment was slavery.

Thus the position during this period was, there was no standard or criteria for imposing penalties or methods of Execution. Conditions of imprisonment were horrible. The cases were decided, and quantum of punishment which had absolutely no relation to gravity of the offence was being imposed according to whims and Fancies and prejudices of Judges. The modes of punishment were generally inhuman and bar-

\textsuperscript{36} Id. at pp. 104-106
barous and was being used against those who were caught
to deter others."\textsuperscript{37}

Section 19 of the Act of Settlement 1781 had recorded the courts
power to form rules of power. There was earnest attempt to analyse
the adalath of criminal justice then or on an insufficient measure.

viii. \textbf{Equity, Fair Play and Good Conscience as Guiding
Principles}

The transition from the Company's Court and the Crown Court
to the High Court was without any specifically enacted body of laws.
Equity, fair play and good conscience provided the guiding principle.
But, when the High Courts began to function, the codification of laws
had already been set in. The first Law Commission under the Chair­
manship of Lord Macaulay drafted the Indian Penal Code, along with
it, the Civil Procedure Code and the Criminal Procedure Code were
also introduced. Then came other important legislations. The High
Court as a judicial institution came to stay. The High Courts in
Calcutta, Bombay, and Madras function even today continuing with
their legacy of the eventful past. Then there came High Courts of
Allahabad, Lahore, Patna, Oudh and Kashmir. These High Courts
also functioned along with the earlier High Courts even after inde­
pendence. They get their respectful position with the Scheme envis­
gaged under the Indian Constitution. The High Courts had as their
apex court, the Privy Council. When the Government of India Act,
1935 provided for establishing the Federal Court., the prestige of
the High Court remained. The Federal Court was meant for inter­
preting the provision of the Government of India Act, 1935. Then in

\textsuperscript{37} Id. at p. 108
1948 the Amendment of the Jurisdiction to the Privy Council was enacted in the Central legislature, where by the Federal Court began, to exercise the power earlier exercised by the Privy Council. But, when the Constitution of India, was inaugurated, the Federal Court was Christened as the Supreme Court of India and the Judges of the Federal Court sat as the first judges of the Supreme Court of India.

ix. Power to Issue Prerogative Writs

While elaborating the emergence of judicial institutions during the British period in India, one finds that till the establishment of High Courts in 1861, there was no uniformity or method in the administration of justice. The High Court had full jurisdiction including the power to issue prerogative writs. The High Court was the premier institution vested with the divine function of the administration of justice. It included jurisdiction in civil and criminal law. In 1898, the Code of Criminal procedure was enacted taking the provisions from all the earlier procedural criminal laws. The Code contained about 565 provisions, but even then the High Court had to face situations where specific provisions of law were not present in the matter of procedure. The Court could not escape from its duty to decide cases on the excuse that there was no law empowering it. Here in lay the significance of inherent powers of the Court. Through an amendment in 1923, the inherent powers of the High Court were saved by introducing section 561A into the Code of Criminal Procedure, 1898. It was not an introduction of jurisdiction. But, it was the discovery of an already existing jurisdiction. It was not a conferring of power through an Act of legislature. It was only recognition and preservation of a
power by the legislature. The power existed independent of any legislation. That is inherent power. The power that is available to a court even in the absence of all laws. The power that is necessary for doing "ex debito justitiae".

x. Emergence of Inherent Powers

While tracing the roots of inherent powers, it is ultimately found in the moral and ethical dimension of the human character, which the society has always valued much. A person who was in authority for administration of justice had to be conscious of the divine function he was to discharge. It could be a function having a bearing on the rights of other persons. An analysis of the developments reaching the establishment of judicial institutions and enactment of laws in the modern period would compel one to believe that inherent powers of the Court cannot be claimed by any peculiar legal system. In India, owing to the anglo-saxon influence, inherent powers were accessible to a court when provisions of law were either absent or silent with regard to a situation. Establishment of High Courts in 1861 was a landmark development in the story of the judicial process in India. Initially three High Courts were established in the three major presidencies.

"The High Courts were not only much better instruments of justice than the preceding courts, but also represented the unification of the hitherto existing two disparate and distinct judicial systems of the company's court and the Royal Court in each of the three presidencies of Bengal, Bombay and Madras. The process of establishing High Courts, initiated in 1861, continued to gain momentum thereafter, resulting in the creation of a number of High Courts in the various Prov-
inces in course of time. The High Courts occupy a respectable and significant place in the judicial hierarchy of the country".38

The establishment of High Court provided a forum for the operation of inherent power. It marked the arrival of "a modern judicial system under various legislation".39 It marked the blessings of Rule of Law in India. Under this the High Court also came under the operation of Rule of Law.

"The establishment of three High Courts is an important landmark in the legal history of India as it laid the foundation for development of a sound and firm judicial system in India".40

The dual judicial system prevalent in the Presidencies town had contradictions between the Supreme Court and the moffusil courts. With the establishment of High Courts, a homogeneity was given to the judicial institution. The Supreme Courts which functioned in the presidency towns were the harbingers of the High Courts. Regarding the appointment of judges and jurisdiction of the court, High Courts inherited several aspects from the earlier Supreme Court. But the contradictions which existed prevented the Supreme Court from generating great interest.

"The general jurisdiction of the Supreme Court extended to the geographical limits of the concerned presidency town, beyond the presidency town, the court exercised a personal jurisdiction on a few categories of persons, e.g., British subjects and Company's servants. The court had only an origi-

38. Ref. supra n. 15 at p. 399.
39. Ref. supra n. 11 at p. 99
40. Ibid.
nal and no appellate jurisdiction, except in the single circumstance of a written agreement between an inhabitant of Bengal and His Majesty's subject in which the former voluntarily accepted the Supreme Court's jurisdiction. The Supreme Court had no jurisdiction in revenue matters. For the most part the court applied the English law though in certain cases it also applied the personal laws to the Hindus and Muslims. The judges of the Supreme Court were all barristers, sent out to India from England, they were appointed by the crown's pleasure. The Supreme Court's procedure was based closely on the model of the procedure followed by the courts in England. Before 1833, the Supreme Court was not bound by the Regulations of the Government unless registered with the court".41

But, the Supreme Courts derived their powers not only from statutes, but also from common laws and equity concepts. One important source of power was the inherent powers derived from the principles of justice, equity and good conscience. While tracing the history of common law and Equity in India it is found that no separate courts existed for administering equity. M.C. Setelwad in his book 'The Common Law in India' comments thus:-

"The Supreme Courts had both common law and equity jurisdiction. As courts of equity, they had power and authority to administer justice as nearly as may be according to the rules and procedure of the High Court of Chancery in Great Britain."42

41. Ibid.
In his book 'Outlines of Equity' J.R. Lewis observes that the equity jurisdiction was concerned with defects in law or the failure at Common Law. According to him at the end of 13th Century those who could not get justice in the common law courts approached the King with petitions. The King referred the petitions to the Chancellor.

"(Chancellor) he was concerned with a supplementary jurisdiction remedying the defects of the common Law on grounds of natural justice and conscience".

Then it was thought aloud in judicial parlance whether Judicature Acts had fused law and equity? J.R. Lewis refers to the observation of Jessel M.R. in Salt v. Cooper.

"But, it was not any fusion of anything of the King, it was the vesting in one tribunal the administration of Law and Equity in every cause, action or dispute which should come before that Tribunal".

Lewis also refers to Errington v. Errington where Lord Denning suggests that law and equity are fused.

In a sense these courts combining both common law and equity jurisdiction brought about in advance the fusion of the law and equity jurisdiction which was effected in England by the Judicature Act, of 1873 and 1875.

In India, however, law and equity were always treated as part of

44. Id. at p.3
45. (1880) 16 Ch. D. 544 at 549 quoted ibid.
46. Ibid.
47. [1952] 1 All E.R. at p. 155, quoted by J.R. Lewis, in Outline of Equity, Ch. I.
the same system. We have seen how the principle of equity law came into existence as justice, equity and good conscience. Laws in India now recognizes no distinction between the legal and equity rights.

Meaning of Equity:-

"The law and equity which the High Courts enforced in the presidency towns were those which were being applied by the Supreme Court, on which the successor be in its appellate jurisdiction. Its role of decision was justice, equity and good conscience, which had served the Sadar Courts." 46

Lord Denning examines the relevance of equity in the administration of justice. Equity is a concept capable of producing great result in the administration of justice. But, it has its own danger, if equity is administered by persons of doubted integrity and character. For this, Denning refers to the incident of the Chancellor's foot. The phrase the 'Chancellor's foot was first used by the very learned John Selden who was a little younger than Francis Bacon. In 1617 he wrote a brief discourse on the office of Lord Chancellor in England. Lord Denning quotes his words,

"Equity is a roguish thing; for law we have a measure to know what to trust to. Equity is according to the conscience of him who is Chancellor: as it is larger or narrower so is equity. This all one as if they should make the standard for the measure we call a foot to be the Chancellor's foot." 49

Lord Denning appreciates the charm of the above metaphor,

which brings out the personnel element involved in the concept of equity at that time. Denning says that the concept varies as much as the foot of one Lord Chancellor varies from that of his successor. The decisions rendered by Lord Chancellor's varied depending on their concepts of equity and this prompted John Selden to define equity in the above manner. Denning explains the relevance of equity and this was a dominant factor in his thought process.

"In the 19th century the law of England was dominated by the difference between law and Equity. Law had its own strict rules, Equity was, or should have been more flexible. It was the means by which the needs of the people could be met. As Sir Henry Maine said in his *Ancient Law* \(^{1}\), "Social necessities and social opinion are always more or less in advance of law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. The greater or less happiness of a people depends of the degree of promptitude with which the gap is narrowed." \(^{50}\)

The subject of equity is capable of being made a topic of further law research. Again on doing equity, Lord Denning refers to another decision:

"And it was the Privy Council in *Plimmer v. Wellington Corporation*, who said that...... the court must look at the circumstances in each case to decide in what way the equity can be satisfied' giving instances. Recent cases afford illustrations of the principle. In *Inwards v. Baker*, it was held that, despite

\(^{50}\) Id. at p. 197.
the legal title being in the plaintiffs, the son had an equity to remain in the bungalow as long as he desired to use it as his home. Dankwerts L.J. said, equity protects him so that an injustice may not be perpetrated.\textsuperscript{51}

Dicey also, like Denning, speaks of equity while talking on public opinion in influencing the judicial process. According to him, "It is clear that the system of trusts invented and worked out by the courts of equity, has stood the test of times, just because it gave effect to ideas unknown to the common law, and at one period hardly appreciated by ordinary Englishmen".\textsuperscript{52}

The morality of the courts at that time was higher than that of 'the traders or politicians' but it so happen that the ideas entertained by the Judges of that time had often fallen below the 'highest and most enlightened public opinion of that time.'\textsuperscript{53} Referring to Ashbourner's Principle of Equity, Dicey under scores the relevance of equity:-

"As to equity - in 1800, the Court of Chancery had been engaged for centuries in the endeavour to make it possible for a married woman to hold property independently of her husband, and to exert over this property the rights which could be exercised by a man or an unmarried woman".\textsuperscript{54}

Dicey shows that particularly at common law, this principle was kept alive by the Court. At common law it was indeed the property of

\textsuperscript{51} Id. at p. 220.
\textsuperscript{52} A.V. Dicey, Law & Public Opinion, p. 368.
\textsuperscript{53} Ibid.
\textsuperscript{54} Id. at pp. 376 - 377.
the trustee, but he was bound in equity to deal with the property ac-
cording to the terms of the trust, and therefore in accordance with
the wishes or directions of the woman. There they constituted the
'separate property' or the separate estate of the married woman.55

Equity has grown to a stature similar to the other principles in
common law. If we follow 'in the very most general way', without
attempting to go into details, the course of parliamentary enactments
from 1870 to 1893, the closeness of the connection between 'a whole
line of Acts and the rules of equity, or in other words, a body of
already existing judge-made law' will become apparent.56 Dicey also
speaks about the draw back of equity. According to Dicey rules of
equity has delayed law reforms:

From the above discussion on the dynamics of equity it is clear
that equity is a source of power to the court to temper adjudication
with fairness, justice and morality. According to J.R. Lewis principles
of equity provides a sort of flexibility to the entire machinery of the
law.

"The necessity for an equitable jurisdiction arose in the first
place out of the fact that the law could not provide a remedy
in all deserving cases. Equity may, therefore, be regarded in
the first instance as a system of rules based on fairness and
morality (or natural justice, to use a more precise phrase)
but existing outside the rules of law. These rules and prin-
ciples are therefore a 'gloss' upon the law, the oil which lubri-
cated the creaking medieval machinery of the law, which still

55. Ibid.
56. Id. at pp. 389 - 390.
today (within limits) provide an escape from the strict application of certain legal rules". 57

Dias gives a reasonable account of the relevance of equity in the administration of justice.

"In one sense equity is synonymous with justice. In so far as the purpose of law is to do justice, Cicero spoke of acquittals as the principle which makes possible any systematised administration of law, namely, deciding like cases alike". 58

A need for justice developed over and above the available law and Aristotle spoke of Equity as a need to correct legal justice. Broadly speaking, one function of equity is to mitigate in various ways the effects of the strict law in its application to individual cases and the other function is to procure a humane and liberal interpretation of the law itself. 59

Equity arises out of the process of law in its applications and it is fashioned by the hands of those charged with that task. A parallel is found in the Roman law. There the rigidity and shortcomings of the civil law were remedied by the Praetors similar to the Chancellors in English law. As with the Roman Civil law, the common law, too, became technical, so appeals were addressed by aggrieved litigants to the King himself to give relief as a matter of conscience. The King handed these petitions to the Chancellor, an ecclesiastic in the early days and the 'Keeper of the King's conscience'. Thus, there grew up a new jurisdiction in Chancery. 'The Praetors and Chancellors are

57. Ref. supra n. 43 p. 7.
58. R.W.M. Dias, Jurisprudent (1994) p.221
59. Id. at pp. 319-320.
the parallel sources of equity in the two systems'. 60

Equity in the Roman context is Praetorian law and in the English law it is the Chancellor's law. The Roman jurist Pappinina explained thus:-

"Praetorian law, he said is what the praetors introduced for the purpose of assisting, supplementing and correcting the civil law. *jus praetorium est quod praetors introduxerunt adjuvandi vel suppleandi vel corrigendi juris civilis gratia*". 61

There even arose conflict between the common law and English law in the Equity. But, ultimate victory was brought by Equity.

"The judicatore Act, 1873, provided, Generally in all matters not herein before particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail". 62

But, those who relies the merit of equity tried to resolve the conflict between the Equity and common law. Maitland in his work Equity, suggested thus:-

"Equity had come not to destroy the law, but to fulfil it. Every jot and every title of the law was to be obeyed, but when all this had been done something mighty yet be needful, something that equity would require" 63

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63. *Id.* at p. 321
Dias also attempts an analysis on the positive aspects on the principle of equity. Principles of equity always gave leverage to Judges with imagination and foresight to go everywhere with a sort of judicial activism. This is evident from Lord Denning, who realised the merit of equity in *Solliay v. Butche*, 64 *Central London Property Trust v. High trees hosue* 65 and *Bendal v. MC Whirter.* 66

Dias gives a graphic description of right to equity cristalised in law as in the case of inherent powers of High Courts under section 482 of the Code of Criminal Procedure.

"During the formative periods of Roman and English law the creative function of equity was not marked. In the more de­veloped law it tended to be less active, but remained in the form of a cloud of principles to guide and ameliorate the application of the law, eg no one shall profit from his own wrong, nor be unjustly enriched at the expenses of another. These and other such principles were crystallised in the con­cluding Title of the Digest, and it was these that came to be absorbed as the fundamental principles of modern civilian systems. In English law, which did not 'receive' Roman law, equity solidified in time in much the same way as the com­mon law had done, so much so that there has been a call for a revival of the old spirit of equitable justice. Lord Denning, in particular, ever since he became a High Court Judge, has been foremost in striving to inject a new equity into the law.

If the rules of equity have become so rigid that they cannot

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64. [1915] 1 K.B. 671.
remedy such an injustice, it is time we had a new equity, to make good the omission of the old.

Some of his experiments have met with success, others have not. Perhaps the reluctance of some of his colleagues to go along with him reflects the age-old need to strike balance between certainty and adaptability".67

xi. High Courts' Jurisdiction

When the High Courts were established, a new era opened in the judicial set up in India. It was an era of transformation in the political leadership of the country also. When the Indian High Courts Act was passed by the British Parliament on the 6th day of August, 1861 titled as "An Act for establishing High Court of judicature in India",68 it was considered to be another attempt to chastise the institutions administering justice. But, the provisions of the High Court Act infused greater degree of professionalism and rationale basis to the administration of justice. The Act of 1861 delineated the feature of the High Court:

"It vested authority in Her Majesty to issue letters patent under the Great Seal of the United Kingdom, to erect and establish High Courts of Judicature at Calcutta, Madras and Bombay. The High Courts were to come into existence at such time as Her Majesty might deem fit. Each of the High Courts was to consist of a Chief Justice and as many puisne judges, not exceeding fifteen, as Her Majesty might from time to time think fit to appoint. The judges were to be selected

67. Ref. supra n. 58 p.
68. Ref. supra n. 15 pp. 407-408.
out of the following categories of persons. (1) Barristers of not less than five year standing: (2) Members of the convened civil service of not less than ten year's standing, who shall have served as zillah judges, for at least three years of that period, (3) persons "who shall have held judicial office not inferior to that of principle sadarameen or judge of a small cause court for a period of not less than five years". (4) Persons who have been pleaders of a Sadar court or High Court for a period of not less than ten years". It was however laid down that not less than one third of the judges of a High Court, including the Chief Justice, were to be barristers, and not less than one-third of judges were to be members of the covenanted civil service. The Judges of the High Courts were to hold their office during Her Majesty's pleasure."69

The jurisdiction of the High Court was substantial; each of the High Courts was to have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate, and matrimonial jurisdiction, original and appellate, and all such powers and authority for in relation to the administration of justice in the presidency for which it was established, as Her Majesty might grant and direct by such letters patent. The letters patent could impose directions and limitations as to the exercise of original, civil and criminal, jurisdiction beyond the limits of the presidency towns. Subject to any directions contained in the letters patent, and without prejudice to the legislative powers of the Governor - General in council, each High Court

69. Id. at pp. 408-409.
was to have and exercise all jurisdiction and every power and authority whatsoever, "in any manner vested in any of the courts" abolished. The High Courts were further authorised to exercise, until the crown provided otherwise, the whole of the jurisdiction being exercised at the time by the Supreme Courts of Calcutta, Madras, and Bombay, over inhabitants of such parts of India as might not be comprised within the local limits of the High Courts. All provisions of the Acts of Parliament, or of any orders of Her Majesty in Council or charters or of any Acts of the Indian Legislature, applicable to the Supreme Courts were to apply to the High Courts as well so far as they were consistent with the provisions of the Indian High Courts Act and the charters issued under it, subject to the legislative power of the Governor-General in Council." 70

xii. **Supervisory Jurisdiction**

In addition to the above, the High Courts were to have supervisory jurisdiction. The institution of High Court became the success story and subsequently High Courts were established in other areas. The Court had extra-ordinary jurisdiction in Civil and Criminal matters.

"As regards the criminal jurisdiction the High Court was to have an ordinary original criminal jurisdiction within the same local limits as its ordinary original civil jurisdiction. Beyond these local limits, this jurisdiction of the High Court also extended in respect of such persons, eg. British subjects, over which the Supreme Court enjoyed such jurisdiction - In exercise of its ordinary original criminal jurisdiction, the High

70. *Id.* at pp. 412-413.
Court was empowered to try all persons brought before it in due course of law. These clauses in the charter did not effect any change in the administration of criminal justice in the presidency town or in respect of persons subject to its criminal jurisdiction, residing in the interior of the country. The position was exactly the same as it existed under the Supreme Court".71

xiii. Inherent Powers

Justice is the chiefest necessity of man and justice should be administered by the court and by the court alone. For this, the High Court must have power unaffected and unlimited by any of the provisions in any of the laws. This is inherent power. Such inherent power is required to give effect to any order passed under any law; to prevent the abuse of the process of the Court; and to secure the ends of justice. In criminal law, the principle of inherent power has been the subject matter of intense judicial debate, after independence when reform of judiciary was thought of, simultaneously requirements of laws were also contemplated. The Law Commission came out with its report. The report touched the inherent powers of the court also. While there was all round support for simplifying the procedure, to avoid delay in the administration of criminal justice, there was effective support for retaining the inherent powers of the High Court. To unravel knotty situations of criminal law, the Law Commission suggested that inherent powers be conferred even on subordinate courts. Even though this suggestion is debatable, in the context of uniqueness of inherent powers, matching only with the constitutional powers of the apex court and the High Courts. When the criminal proce-

71. Ibid.
dure Code was enacted in 1973, section 482 of the Code reserved and saved the inherent powers of the High Court. Even now, we know that there is no foolproof definition of inherent powers. We know that High Court must be equipped, with inherent, inalienable, irreducible powers to give effect to orders passed under the Code, to prevent abuse of the process of the Court and to secure the ends of justice.

In Aiyar v. Pathu the Kerala H.C. underlined the indispensable nature of inherent powers. The purpose of the Code is to ensure administration of justice. So, it was held, if there is want of any specific provision due to silent of the Code, the power under S. 482 can be invoked to fill up, the lacunae. According to the judges, in the above decision, Courts have since oldest times evolved theory of inherent, implicit or ancillary powers and applied the same to regulate their proper and effective functioning. In the discharge of their duties the courts must be able to get over technicality and to serve the ends of justice.

xiv. What is Inherent Power

What is inherent powers is the question. This is answered by the Supreme Court and the High Courts through decisions from time to time demonstrating occasions for invoking the inherent powers and not invoking inherent powers. So, the core of the inherent powers is occupied by the maxim 'justice, equity and good conscience' several contours can be delineated apart from the ingredients contained in section 482 of Cr.P.C. The inherent powers of the High Court in the administration of criminal justice has great cleansing effect so

72. 1988 (2) KLT 446.
far as the stream of justice and the system of judicial process are concerned. Inherent powers ensure fairness, clarity, and transparency to justice administration. Its roots traced to principles of equity takes us to the rudiments of the concept of justice. Inherent powers aim at maintenance of good conscience. Since, the court is conscious of the above qualities, the persons who approach the court also observe the virtues of equity. Whether the accused, the complaint or the prosecution, approaching the High Court through the channels of inherent powers, there must be credibility to the pleas. This is because there is no straight jacket formulae for the application of inherent powers. Pendency of a civil case or a departmental proceedings can be a favourable factor for a person to invoke inherent powers. But, for the sake of invoking inherent powers one should not use a proceedings pending before a statutory authority as ploy to get the favour of the court. Especially when the power under section 482 Cr.P.C. is textured with discretion and the person coming to the court has record of violating equity. Inherent power are the hallmark of the preeminence of law. It is the cradle of Rule of law. If Rule of law is synonymous to natural justice, fairness and rationale, inherent power provide the necessary punch to realise the above objectives. The equity cult of inherent powers is revealed by a quick estimate of judicial response to given situation.

In *Shri Mukesh Kumar and others v. Commissioner of Income Tax and others*, an application for invoking inherent powers was filed. The main ground was that an application filed under section 245(c) of the Income Tax Act was pending consideration of the settlement commission. The petitioner allegedly concealed details of In-
come and had produced incorrect particulars. The High court held that on this ground the criminal proceedings could not be stopped. But, the High Court disposed of the petition, after considering the various aspects raised in the petition, giving liberty to the petitioner for approaching the Magistrate concerned for stay of prosecution with the final disposal of application before the settlement commission. There is no scope for interference by High Court if an absolute right of the person is not proved to be violated. Failure to provide notice of hearing to the counsel or the party cannot concern the High Court to apply inherent powers.\textsuperscript{74} The broad judicial policy regarding the invocation of inherent powers is laid down through the utterances of the pioneer institutions.\textsuperscript{75}

The inherent powers are used with the laudable objective of achieving a rounded perfection to the concept of justice. The powers help us to fine tune our sense, comprehension and vision of justice. It is a stigma for a person to become accused in a criminal case. Usually, acquittal absolves the accused of all allegations. But, acquittal comes after trial. For a person who is abundantly innocent even the trial is a punishment because for no wrong committed he is made to undergo thousand natural shocks inflicted by the strain of the procedure. And, finally when acquittal comes, if the court acquits him on benefits of doubt the person is again made to suffer the slings and arrows of the outrageous fortune and carry the burden of doubt

\textsuperscript{74} \textit{Kailash Chand Agarwal v. State of U.P}, 1996 Cri.L.J. 927 (All.)
which again is stigmatic to a conscientious of mind. In *Amarnath Pandey v. State of M.P.*,\(^76\) the M.P. High Court allowed a petition filed invoking inherent powers. The petitioner was accused in a criminal case alleging misappropriation of money. He was acquitted by the trial court. In the judgment the trial court used the term benefit of doubt. The accused claimed clean acquittal. The court referring to the authorities holding ground regarding benefit of doubt held that the accused is entitled to the doubt a reasonable man, or thinking man's doubt. It is not the doubt of a timid mind.

Doubt does not become evidence when there is neither possibility nor remote probabilities. The court also reminded itself of the fact that the benefit of doubt could be misleading also. Thus application of inherent powers is yet another aspect of fairness in action. The acid test of all situations is fairness. Only then be justice is to be done manifestly and undoubtedly. One cannot think that a judge of the High Court can act illegally under the cover of inherent powers. The aesthetics of justice administration can equip one to distinguish between permissible and impermissible. The judges of High Court, including the Chief Justice have no inherent power to act against violation of the rules of the High Court. In *Dwip Chand v. Prakash Kumar*\(^77\) it was held that the Chief Justice of High Court has no inherent power to constitute a special bench at the request of a single Judge in violation of Rules. The single Judge is bound to follow the decision of the Division Bench, instead he cannot insist for the constitution of a special Bench to be treated as a comouflage to do an illegal thing.

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76. 1988 Cri.L.J. 522 (M.P)
77. 1979 Cri.L.J. 542 (Cal.)(F.B)
xv. Inherent Powers Non Formal

It is true that inherent powers adhere to less of formalism. This is because of the history of the inherent power which developed around the concept of justice. This is not to mean that inherent powers strike at formalities. On the other hand the powers are exercised to advance the cause of justice. In Kuldip Singh v. Prabhjot Silky,78 a unique situation arose. In a proceedings seeking for maintenance the judgment was duly delivered, pronounced, typed and corrected. The same remained unsigned due to the death of the Magistrate. It was held that the judgment was not rendered ineffective in the above context. Relaying on Iqbal Ismail Sodawala v. State of Maharashtra,79 the court held that an application to quash the execution of an order for maintenance on the ground that judgment was unsigned was not sustainable. Whether inherent powers are applied or not in a given circumstances the High Court always looks forward to protect the interest of justice. Similarly, less adherence to formalism does not mean discarding procedure established by law. In the interest of justice, High Court can consider a petition filed under Article 226 and 227 of the Constitution as one filed under section 482 Cr.P.C. also. Even without the affected persons coming to the court the High Court in connected proceedings could invoke inherent powers. An application under section 482 Cr.P.C. for compensation can be deemed as one filed under section 456 Cr.P.C. The High Court can also suo-motto take action under section 482 Cr.P.C. These are all to secure the ends of justice. This does not mean that a petitioner or his counsel can take liberties with the provision of the procedure Code and put the High Court in a catch 22 position. In Rajeev Bhatia v. Abdul

78. 1995 Cri.L.J. 223 (P.H)
79. AIR 1974 SC 1880
Mohd. Gani, the court took exception to the nomenclature of the petition "the inherent revisional powers' used by the petitioner. It is an instance of bad pleading where the High Court criticized strongly, because the powers of the High Court under sections 397 and 482 Cr.P.C. are distinct, different and mutually exclusive and ought not to be equated. The petition could either be for revision of the order under section 397 or for quashing of the order under section 482 Cr.P.C. invoking inherent powers.

xvi. **Equity as the Root**

Equity as the root of inherent powers is settled through the decisions of the Supreme Court and High Courts. In *Muralidhar and another v. State of U.P. and others* the S.C. held that the relief gained through an application under S.482 Cr.P.C. is equitable. So the party who comes to the court must do equity first. There should not be any suppression of facts. The Supreme Court, in the above case, set aside the order of the High Court and directed the party to move a fresh petition. In a proceedings under section 482 Cr.P.C. the party obtained an order from the High Court without disclosing the fact that an earlier revision petition was dismissed. According to the Supreme Court such orders are not sustainable. It was held that the High Court was to decide the case appreciating and considering the entire facts.

The argument that the basis of inherent powers of the court is routed in Equity, becomes more convincing in light of the responses of the High Courts and Supreme Court. The general principle of equity are applied in the matter of inherent powers. The reason gov-
erning the inherent power is that no State prosecution shall be allowed to continue arbitrarily. At the same time the person who comes to the High Court to invoke inherent powers must not carry the weight of an in-equitous position. If the applicant does not allow the Magistrate to follow a procedure and rushes to the High Court, he is on the wrong side of equity. In *Ari Hand Singh Sachan v. State of U.P.* the Allahabad High Court repelled an application under section 482 for the reason that the applicant has not allowed the Magistrate to follow the procedure contained under section 239 of the Cr.P.C. The procedure laid down is for the Magistrate to examine both parties, consider the prosecution statements and then discharge the accused if the Magistrate considers that allegations are not triable. Similarly, suppression of material facts while coming to the High Court can cost dearly to the petitioner. In *Anand Kumar Jain v. State of Orissa*, the petition was dismissed for suppressing the fact regarding the filing of an earlier application for quashing a proceedings. Subsequent application would be frivolous duplication of the first one. The mode adopted by the petitioner was deprecated. In *Mukund Singh and others v. S.D.M. and others*, the petition was dismissed as the vital fact regarding the prior order of appointment of Receiver was not brought to the notice of the court.

If a person participates in the trial to a considerable extent and comes to the court after almost the completion of the trial, there is no scope for inherent powers. This was so held by the Calcutta High Court in *Indubhushan Das Gupta v. State*, the applicant had participated in the trial and after some time preferred a petition under

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82. 1982 Cri.L.J. 1419 (All.)
83. 1996 Cri.L.J. 1154 (Ori.)
84. 1996 Cri.L.J. 2378 (P&H)
85. 1995 Cri.L.J. 1180 (Cal.)
section 482 stating that FIR does not reveal an offence alleged. In Harjit Singh v. State of Punjab, also the High Court declined to quash the trial proceedings as the petition was filed immediately after completion of prosecution evidence. The High Court was of the opinion that the trial court should be given a chance to arrive at a definite conclusion and it would not be in the interest of justice to quash the proceedings. So when a person comes to the High Court with a petition under section 482 Cr.P.C. in a way he is demanding equity to be done in that case, such person must himself do equity first.

The Central and pivotal ground for invoking inherent powers is that the averments in the complaint do not constitute offences alleged, it is easily said than proved, while the court will not hesitate to invoke inherent jurisdiction to steer clear the stream of judicial process of all pollutants, the court is equally adamant to see that a proceedings based on genuine grounds is left unruffled. After abusing the process, one cannot allege abuse of the process. Persons who try to bye-pass the course of justice, persons who try to make short cut to success, persons who try to take the court for granted, and persons who act as enemy of the Society cannot avail of inherent powers. If, fine is imposed on a person with time limit, default in payment of such fine disqualifies a person to come to the High Court challenging the decision of the lower court.

xvii. Justice as the End

One cannot secure the ends of justice after doing greater injustice or doing with the intention of greater injustice. When a new leg-

86. 1980 Cri.L.J. (NOC) 106 (P&H)
87. Ref. Ramlakhan and others v. State, 1986 Cri.L.J. 617 (All.)
islation is enacted one cannot take advantage of the new legislation to defeat an already existing case. In *Bhasheer Khan v. Jameela Bee*, the challenge against the recovery proceedings under section 128 Cr.P.C. on the anvil of Muslim Women (Protection from divorce) Act, 1986 was dismissed. Similarly, a finding of fact regarding the maintenance of the wife cannot be challenged under inherent powers. If the husband fails to honour the direction of a court for maintaining his wife, the court views the action with suspicion. In *Makdum Ali v. Narghese Banon*, it was held that the husband's conduct throughout the proceedings was not meritorious as he was appearing, disappearing, and re-appearing in the case at his will and pleasure. The High Court did not entertain the petition.

xviii. **Diverse Nature of Inherent Power**

Power to do substantial justice is an inherent power. The power to issue writs is an inherent power. The power to declare law is an inherent power. The power of judicial review is an inherent power. The Power to punish for its contempt is an inherent power. In all these aspects, the paradigm against which function of the court is tested against the paradigm of reason and common sense. This conforms with Lord Moulton's definition of law, as the commonsense of the community. So we have in criminal jurisprudence the commonsense of the community crystallised in the inherent powers of the High Court. So when we address the genesis of the inherent powers, we start from the doctrine, of justice, equity and good conscience, when we discuss the development of inherent pow-

88. 1994 *Cri. L. J.* 361 (M.P)
90. 1983 *Cri. L. J.* 111 (Delhi)
ers, we see the operation of justice, equity and good conscience and when we assess the present position of the inherent powers, we feel the all pervading impact of the maxim, justice, equity and good conscience. It follows that the inherent powers of the High Court are rooted in justice, equity and good conscience. It is found that the inherent powers of the High Court are developed through justice, equity and good conscience and established in justice, equity and good conscience. Even in the application of the inherent powers the High Court is guided by the considerations of equity. In *Aravindakshan v. State of Kerala*\(^{91}\) it was held that inherent power is discretionary and it shall not be used in favour of a person who does not come with clean hands.

**xix. Constitution Supplements Inherent Power**

The Constitution continues the jurisdiction of the powers and the law administered by a High Court immediately before the commencement of the Constitution, but the ban on original jurisdiction on matters concerning revenue, imposed in 1781 to put an end to disputes between the Supreme Court and the Council in Bengal is abolished. Jurisdiction in this context means competence to hear and decide cases.

'Power' is the administrative power such as the power to regulate procedure as prescribed duties of office. In the case of the older High Courts these are contained in Letters Patent mostly from the Crown but modified by orders made under the Independence Act, 1947.\(^{92}\)

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91. 1985 KLT (SN.66) at p.41