CHAPTER II

JUDICIAL STRUCTURE IN BENGAL
ADMINISTRATION OF JUSTICE IN BENGAL.

At the beginning of the British rule in India the administration of Justice was intermingled with the administration of revenue that occasionally created confusion and problem. In phases, the Courts of Justice of the Nawab’s regime were re-shaped to the tune of British system. The most significant hall-mark came with Regulating Act of 1773, passed by British Parliament on the recommendation of the Committee of Secrecy of the House of Commons, 1773 for the establishment of a Supreme Court of judicature at Fort William, Calcutta. Giving effect to the regulation on 26th March, 1774, a charter of justice was granted for establishment of the Supreme Court at Calcutta which after its establishment on 22nd October, 1774 began functioning in January 1775. The Court was King’s Court appointed by the Crown and was independent of the authorities of Fort William. It had powers to exercise all civil, criminal, admiralty and eccelesiastical jurisdiction rendering all His Majesty’s subject liable to his jurisdiction. It was also
authorised to establish rules of practice and process to discharge its function. The Civil Jurisdiction of the Supreme Court extended over all European and British subjects resident in Bengal, Bihar and Orissa and every other person employed, directly or indirectly in the service of the company or of any of British subjects either at the time of bringing the action or at the time of the cause of action accrued. In criminal jurisdiction, it was to hold trials by grand and pretty jurors who were to be British subjects resident in the town of Calcutta. Interestingly, this Regulating Act as well as the charter responsible for establishment and constitution of the Supreme Court did not codify law to administer any suit involving the Indians. The Act had empowered the Court of King’s Bench in England to enquire into, hear and determine any crime misdemeanor or offence committed by any of the high officers of the Company such as Governor, Judge of the Supreme Court and others or by any other servant of the Company or by any of His Majesty’s servant residing in India against any of His Majesty subjects or any of the inhabitants of India. Since it was difficult to record evidence of witnesses in such cases in England, the Court of King’s Bench was to issue writ of
mandamus on Judges of Supreme Court at Calcutta for examination of the witnesses in India and to send the records of such examination to England.¹ When cause of action involved the Chief Justice and other puissant Judges of the Supreme Court at Calcutta, Governor General in Council was to examine witnesses in India and send the records to England on the direction of King's Bench.²

On this procedure, powers of the King's Bench were restricted to capital offence where Chancellor or Speaker of the House of Parliament could issue warrants for examination of witnesses in India.³ Appeals in certain cases and under certain conditions and Criminal Appeal with greater amount of restrictions as per the decisions of the Supreme Court were supposed to lay before the King in Council.

1. A.C. Patro, Administration of Justice under East India Company in Bengal, Bihar and Orissa, Cuttack, 1957, PP. 105-129, Sec. 40 of 13 Geo III C-63.

2. Ibid, Sec. 41 of 13 Geo III C-63.

3. Ibid, Sec. 42, of Geo III C-63.
The ambiguous and inadequate provisions of the Regulating Act 1773 and the Charter of Justice of 1774 brought the Executive and Judiciary of the Presidency into conflicts. The Act while aiming at better administration vested the Company’s administration in the province with effect from 1st August, 1774. A Governor General and 4 Councilors were appointed to serve as the highest Executive Presidency and empowered the Supreme Court to the task of dealing with oppression in the Executive Government, nowhere clearly defining nature and scope of the respective functions of the two wings. The Supreme Court exercised its authority over all persons and in all causes of action irrespective of the social or official position of the person concerned. It intervened on complaints being lodged even in the administrative orders of the Governor-General in Council in so far as they tried to interfere with the functions of the Court. But independent Judiciary was irreconcilable with the irresponsible Executive and the two branches of the administration soon came into conflict with each other. These conflicts constrained the Parliament to enact in 1781 Declaratory Act (21 – GEO III C.70), explaining and defining the powers and jurisdiction of the Supreme
Court. The Act prescribed that disputes involving questions of inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party should be determined by the personal laws and usages of Hindus and Mohammedans. It was also enacted that no person would be held to be subject to the jurisdiction of the Supreme Court solely on the ground that he was a farmer of revenue or a Zamindar. Also simply because persons were in the Companies employed would not be subject to the jurisdiction of the Supreme Court in cases of inheritance and succession. The Act indemnified the Governor-General in Council and officers acting under their order and authority in the due resistance to the process of the Supreme Court and clearly defined the jurisdiction of the Supreme Court and Legislative and Administrative powers of the Governor-General in Council. The matters including imposition and collection of revenue and the regulations of the Governor-General in Council were exempted in cases of excesses committed in the matter. Thus, the Act while clipping the jurisdiction of the Supreme Court

granted immunity to the Governor-General in Council. Although the Act of settlement, 1761, settled the relationship between the Governor-General in Council and the Supreme Court, it failed to describe precisely or the court failed to interpret consistently the jurisdiction of the Supreme Court over persons of the Indian origin.

The Supreme Court at first doubted and took time to consider whether administration of the goods of a Hindu could at all be granted but afterwards determined affirmatively and that the Administrator would be bound to administer according to the Hindu law and custom. Still it was not certain about its jurisdiction over persons of Hindu and Mohammedan persuasions, though administration was unhesitatingly granted to the estates of Armenians dying in and around Calcutta. The Court as well as the litigant public remained in doubt as to the extent of inhabitancy in Calcutta, which might make their persons liable to the jurisdiction of the Supreme Court. The condition for constructive inhabitancy remained undefined for a considerable period.

The intricate question of the Hindu law perplexed the Supreme Court Judges to the extent that while determining the loss and
usages of the Hindus, opinion of the Pandits of the Supreme Court were, however, not viewed with so much veneration as that of the opinion of the Mohammedan Law Officers of the Sudder Nizamut Adawlut.

Unlike the Suddere Dewany and Sudder Nizamut Adawluts, the Supreme Court as far as practicable followed the English Rules of evidence, followed in England and no allowance was given for the character of the natives. Occassionally new rules had to be drawn up in the Presidency for the practice of the Supreme Court in order to raise them to the standard being followed in the Courts of England.

The Supreme Court at Calcutta with its West Minister leanings, had when required, recognised the force of usage prevailed in Bengal. It did not succumb to the plea of the Englishmen of applicability of English law and usages in cases between the Englishmen and the Indians. In 1842 in Sibanarayan Ghosh Vrs. Russick Chunder Neoghy it was held that a Bengal mortgage, even though un-accompanied with possession, gave a lien upon the land giving sanctity to local usage and immemorial customs. Regulation-I of 1798 fortified the view of the Court that possession was not essential by the Hindu law to the validity of the
contract of pledge. In 1851, one F.W.Biddle and another person attempted to avail themselves of the usury laws of England as a defence to the action taken by Issen Chunder Chatterjee, a Hindu who lent them money with interest at more than 12% but the Court decrying applicability of the usury laws to the native lenders held that where the borrower was a British subject and the lender an Indian, Section 39 of the Statute III GEO III 63 against usury need not apply and the interest allowable was to be at the agreed rate. However, the Supreme Court refrained as far as practicable from interfering in the business of administration of the Company's Government. In 1825, it was held that u/s 24 of Statute 21 GEO III C.70, the Court had no jurisdiction to entertain a Civil action for false imprisonment against a provincial Magistrate acting in his judicial capacity, however, irregular and illegal his act might have been. The Supreme Court had no power, it was held, to remove a conviction by a Zilla Magistrate of a British subject except under 53 GEO III C.155.5

Warren Hastings had been responsible for the conflict between the Executive and Judiciary of the Province of Bengal, Bihar and Orissa. Even prior to the promulgation of the Act of 1781 it was decided by the Supreme Court in 1781 in Rex Vrs. Ramgobind Mitter and others that the powers of the justices of the Kings Bench of England had been given to the justice of the Supreme Court severally but the Supreme Court as a Court had not any such power. The Court could not, for example, issue a writ of *habeas corpus ad testificandum* to bring up a prisoner confined by the warrant of the Governor-General Council under Regulation III of 1881. The Governor-General in Council might issue his warrant to arrest and detain, without a regular trial, of the British subjects within and without the jurisdiction of the Supreme Court, and such warrant was considered a good return to a writ of habeas corpus.

The English law relating to personal liberty prevailed in Calcutta concerning all its inhabitants but beyond the local limits of Calcutta in the Mofussils the English law on this subject was the personal law of British subjects only.\(^7\)

The legitimate right of the English settlers being governed by the King's laws and Royal Courts became to some extent a cause of oppression to the people of India finding themselves under control of the foreign government. The European British subjects enjoyed the privilege of exemption from the jurisdiction of the Company's courts. Even when the European Magistrate of the district committed the accused to the Supreme Court at Calcutta, it was difficult for the prosecutor to adduce sufficient evidence before the Supreme Court, which might be deemed adequate for conviction. The immobile country people did not like the idea of going upto Supreme Court for justice against the actions of a British-European subject who wielded enormous influence in the locality in which the aggrieved Indians lived. Little change in the attitude came in

the year 1813 when British subjects residing, trading or holding immovable property in the provinces were made amenable to the Company's courts in Civil suits brought against them by the Indian people with a right of appeal to the Supreme Court at Fort William in cases where an appeal otherwise lay to the Sudder Dewanny Adawlut. In 1836 it was enacted that no person by reason of birth or descent should get exemption from the jurisdiction of Company's courts.\(^8\) In justice and fairness, the Government of India in 1849 drafted two Bills, one for trial by jury and the other for abolishing exemption from the jurisdiction of the East India Company's criminal courts. But the Bills were dropped then on the face of opposition of the British community.

Some of the servants of the East India Company sent a petition to the Parliament against Grant's proposed Jury Bill. The European-British subjects also presented a memorial for the repeal of Act XI of 1836 rendering them amenable to the jurisdiction of the Civil

Courts in the mofussil. Some of the witnesses before the Committee of Indian Affairs (1853) as well as the Royal Commission set up to consider the Reform of the Judicial Establishments, Judicial Procedure and the Laws of India suggested for the amalgamation of the Sudder and Supreme Courts. Macaulay’s Code, again, intended to supersede the English criminal law and to bring the British under the criminal jurisdiction of the Company’s courts.

All these proposed measures had been strenuously opposed by the British inhabitants in India. They sent petitions to the authorities in England against the promulgation of the equalising provisions. In November 1856, William Theobald, a practising Barrister of the Supreme Court at Calcutta, was deputed by a numerous body of the British and Christian classes of Calcutta and of the Lower Provinces of Bengal to proceed to England.

1) to secure a parliamentary opposition to the amalgamation of the Supreme and Sudder Courts;

2) to preserve with an unimpaired jurisdiction the Supreme Court as a Court of English law;
3) to preserve trial by jury of Christians for the British and Christian inhabitants;

4) to promote the establishment of English law as administered in the Supreme Court as the *lex loci* of India for all classes of persons and all kinds of interests not governed by special law; and

5) to promote the prayers and declared principles of the petitions sent to England from Calcutta during the two immediately preceding sessions.⁹

The sons of Bengal, famous for their learning and loyalty,¹⁰ in opposition to the sectarian activities of the European British subjects,

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10. Ibid, The proceedings of the public meeting of the Bengal community held on 29th July 1853 at the Town Hall, Calcutta.
held, on the other hand, a great public meeting in the Town Hall of Calcutta on 6th April, 1857,\textsuperscript{11} to consider the propriety of supporting so much of a project of law before the Legislative Council of India as referred to the extension of the criminal jurisdiction of the mofussil courts to all classes of Her Majesty's subjects without respect of religion, race, or place of birth with Raja Kalee Krishna Bahadoor in the Presidential chair. The objectionable features\textsuperscript{12} of the judicial administration of the time were discussed, with regard to the superior administrative and judicial efficiency of the native agency as opposed to the European British personnel and suggestions were solicited for their redemption. Some of the Englishmen, too, it has to be remembered, supported the


\textsuperscript{12}Ibid, Sec. 105 and 205 of 53 Geo III, C.155, Clause 1 of Sec.2 of Bengal & Ben. Regulation II of 1796, Clause 1 of Sec.19 of Ceded Provinces Regulation VI of 1803.
cause of the Bengali gentlemen.\textsuperscript{13}

In spite of the new Indian Penal Code, the Indian Judges and Magistrates, prior to 1882, could not try any European or American offender nor could they enquire into the offence alleged to have been committed by him. Shortly after the Code of Criminal Procedure (Act X of 1882) was passed, the question was raised whether the provision of that Code which limited the jurisdiction over European-British subjects outside the Presidency Town to judicial officers who were themselves European-British subjects could be modified.\textsuperscript{14} After consulting the local Governments the Government of India had arrived at the conclusion that the time had come for modifying the existing law and removing the existing bar upon the investment of native magistrates in the interior with powers over European-British subjects. The Government of India

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accordingly decided to settle the question of jurisdiction over European-British subjects in such a way as to remove from the Code of Criminal Procedure, at once and completely, every judicial disqualification as based merely on race distinction. The Anglo-Indian press, chiefly, 'The Englishman' and 'The Stateman', started propaganda against the equalising Bill, and a European Defence Association had been formed to agitate about the promulgation of the equalising law. The necessary amendment to the Indian Code of Criminal Procedure was proposed by the Government of India and secured the sanction of the authorities in England on 2nd February, 1883. Opinions in favour of the Bill of the eminent Judges of the High Courts and professors and administrators could not, however, prevail against the sentiments expressed in opposition to the Bill.\textsuperscript{15} It had to be provided, therefore, that only those Indian Judges and Magistrates who would be made Justices of the Peace could wield jurisdiction over the European and American offenders,

\textsuperscript{15}Patro, Op.Cit, Opinion in favour of the Ilbert Bill being a collection of the recorded opinion of some of the most eminent men in support of that measure together with an appendix containing the favourable opinion of the High Court Judges of Calcutta, Bombay and Madras, 1885.
though the new law did not materialise in its effect. The law was subsequently revised so as to enable the Indian accused to claim to be tried by a majority of his countrymen as jurors just as the European-British subjects could. The European and American citizens could claim the same privilege if a large number of jurors of their own nationality were available. In any case they could claim to be tried by jurors whose majority consisted of white men.

The conflict of interests between the Englishmen and the Indians, notwithstanding the Special Report of the Indian Law Commissioners (1844) concerning judicial administration and judicial establishment in Bengal, Bombay and Madras, the assurance given in Parliament for the amalgamation of the Supreme Court and Sudder Courts, the proposals suggested by some of the witnesses before the Committee on Indian Affairs in 1853, the Rules drafted by the Law Commissioner, as appointed on 17th March, 1854, for the proposed amalgamation and later on the passage of the Code of Civil Procedure in 1859, the Indian Panel Code in 1860 and the Code of Criminal Procedure in 1816, laying down a uniform system of law and procedure for all the
courts of the country, prepared the way for the amalgamation of the two Sudder Courts and the Supreme Court into the High Court of Judicature at Fort William in Bengal with effect from 1st July, 1862.\textsuperscript{16} The Chief Justice and the two puisane Judges of the Supreme Court became the Chief Justice and Judges of the High Court that was established.\textsuperscript{17}

\textbf{LAW IN OPERATION IN BENGAL PRESIDENCY}

The general administration in Post-Plassey days experienced a degeneration. The influence of the Company’s Agents began to operate in the administration of justice in Bengal, Bihar and Orissa in order to suit the commercial interest of the Englishmen there. It was during the period of nominal control of the Nawab, under the East India Company, the

\textsuperscript{16} Patro, Op.Cit, Section 6 of 24 and 25 VIII.

\textsuperscript{17} Ibid, Section 8 of 24 and 25 VIII.
judicial administration of the country like its general administration underwent a rapid degeneration. The reasons of degeneration were manifold. To begin with, the vast territories of Bengal, Bihar and Orissa had to be administered by a handful of Englishmen. In the 18th century, the number of Englishmen engaged in carrying on the civil government of the provinces of Bengal, Bihar and Orissa was less than 300 out of which a number not exceeding 30 was allotted for judicial administration over a populace of more than one crore. The second reason was that the experienced Englishmen who after retiring left for home, taught nothing to the successors who depended upon them. The third reason was that the Judges at the lower court level were devoid of adequate equipment of legal knowledge. The erstwhile clerks of the company were appointed superintendents, i.e. Judges under the Regulation of 11th April, 1780. Fourth reason was ignorance of Europeans of the provincial language of the country and there was no inclination to learn Sanskrit or Arabic in which languages laws of Hindustan were preserved and taught all over India. The Hindu and Mohammedan law of interpretation, too appear perplexing to the European Judges.
The Company’s Government tried to meet the situation of increasing terrorist and dacoity by collective penalisation. Under the system, the co-villagers of dacoit, though themselves law abiding, had to be fined.

Further changes introduced by the Company during the transition period abolished some of the institutions serving useful purpose in the society for a fairly long period of the Indian history. Under the Company’s resettlement, the Indian Zamindars had been deprived of their faujdary jurisdiction of apprehending criminals, trying or submitting them for trial to local faujdars.

The British system preferred to do away with the native judiciary system in order to generate confidence in the native people in the courts and some tangible steps were taken for the purpose. On 5th July, 1781, a Regulation of 95 Articles was passed amending and consolidating the pre-existing rules of Civil Procedure. Under Article 94 of this Regulation, the Sudder Dewanny and the mofussal dewani adawluts were required to openly declare the laws before the public, to
publish them in Persian and Bengal translations, to affix the Regulation in some conspicuous part of the court room to stay there for a month. This Regulation continued in force till 27th June, 1787 when a revised code consisting of 91 Articles was adopted. In 1793, Regulation XLI, a revised edition was passed. In 1797, the Company's Government was empowered under 37 Geo.III. c.142 by the Parliament of Great Britain, to enact a Code of Regulations governing the rights of person and property of those who were subject to the jurisdiction of the provincial courts. With the passage of time, additional Regulations had to be passed, and during the period of 42 years i.e. between 1793 and 1834, as many as 675 Regulations were enacted forming the Bengal Code. This 675 Regulations governing the establishment and procedure of the civil and criminal courts, regulated the general administration of the country, prescribed the manner of assessment and collection of revenue; dealt with occasional cases as they arose from time to time; did not enact much substantive law to be administered by the courts of judicature established, retained Mohammedan criminal law upto 1832, allowed Hindu and Mohammedan law as personal laws of the communities in the matter of
inheritance, social and religious institutions, prescribed the application of the law of Justice, equity and good conscience in cases not expressly covered by Regulations; and absolved in 1832, people not professing Mohammedan faith if they so desired, from the operation of Mohammedan criminal law.

The pleaders of the civil courts were to be appointed by the Saddar Dewanny Adawlut, selected at the earlier stage from amongst the students of the Mohammedan College, Calcutta, Hindu College, Benaras and from any other persons, Mohammedan and Hindu duly qualified by character and education and study of Mohammedan and Hindu Laws.

The Governor-General in Council was empowered to pass such Regulations as were found to be necessary for the internal Government of the British territories in India. The increasing legislative powers of different provincial Government from 1813 onwards were responsible for the growth of a heterogenous system of laws as enacted by the Regulations of different provinces.

The judges of the provincial courts of Appeal, the Munsif, Sudder Amin, Judges of the Sudder Dewani Adwalut and Supreme Court
Judges were empowered to administer justice with equity and good conscience and in cases where no specific laws exerted, these judges resorted to English law books for their guidance. The decision of the British Courts in parallel cases were also taken as guidance. Thus, for all practical purposes the principle of justice, equity and good conscience as practised in the British Indian Courts i.e the principles of the English law found applicable in Indian atmosphere. In the realm of procedure in the civil courts, too, different procedures were followed in the different courts or even in the same court for its different jurisdictions for different types of suits or for different modes of trials of the same suit. The coordinating authority desired a unification in the laws, substantive and procedural. The only way of checking the process of borrowing English law was to substitute the foreign rules for the British India. Thus, at the time of renewal of the Chapter of the East-India Company in 1833 it was realised that British India needed very much a code of laws which might introduce a uniform system of law and procedure throughout the British possessions in India, reducing the scope of judicial legislation in the name of justice, equity and good conscience. The British Indian statutes, civil
and criminal, substantive and procedural, were enacted without owing their origin to the institutes, texts or their commentaries of the Pre-British India or to the post-Plassey text books of Hindu or Mohammedan law. Though theoretically conscious of the importance of the relations of the Indian customs, usages, laws and institutions to the new laws to be enacted for the Governance of the people here, the law Commissioners factually could not do justice to the said relation. The Commissioners working in England even resisted the changes introduced by the Government of India to the Draft Bills prepared by the Commission. The result was that even where a few vestiges were allowed to remain as relics of the ancient laws of the Indians, they assumed the English grab.

As the law stood, Section 72 Chapter VII of Act 1872 no Magistrate or Sessions Jude had jurisdiction to enquire into a complaint or to try a charge against a European British Subject unless he is a Justice of the Peace and himself a European British subject. An exception to this rule was allowed within the limits of Presidency town where under Act IV of 1877, a Presidency Magistrate, whether himself a European or not
had the same jurisdiction over the European as over natives of the country.

Previous to the passing of Act X of 1872 (the present Criminal Procedure Code) no Magistrate or Justice of the Peace, even though a European himself, had jurisdiction only outside limits of the Presidency towns to try a charge against any European British subject. But all Magistrates who were Justices of the Peace had jurisdiction to enquire into charges against Europeans and to commit them to the High Court for trial (Sections 59, 40 and 41 of Act XXV of 1861, the old Criminal Procedure Code). Under Section 3, Act II of 1869, the Government was empowered to appoint any covenanted Civil Servant to be the Justice of Peace. Under Act X of 1872, however, a Covenanted Civil Servant even though a first class Magistrate and Justice of the peace, would have no jurisdiction over a European British subject unless he himself is a European British subject. This provision of the law gave rise to an invidious distinction and to many practical inconveniences in the case of those natives of the country who in the course of time expect to attain to the position of a District Magistrate or of a Sessions Judge.
Hence, when the Bill for Act X of 1872 was still pending before the Council an amendment to Section 72 in favour of the native members of the Covenanted Service was proposed by the Hon'ble Mr. Ellis. The amendment was put to vote and was lost by a majority of 7 against 5. It is remarkable that the minority in that instance comprise the highest official of the State. The President and Governor-General, the Commander-in-Chief and the then Lieutenant-Governor of Bengal and his successor in office, all voted for the amendment in face of resistance from a section of European subjects in order to procure peace. Act III 1884 was passed.

Right to the European British subjects for their trial with assistance jury only by District Magistrate or Sessions Judge was subject to the conditions:

i) No distinction to be made between European and native District Magistrates and Sessions Judges.

ii) Powers of District Magistrates under Section 446 of the Code to be extended to imprisonment for 6 months or fine of Rs.2,000 rupees.
As per the report of the Select Committee:

a) The power of appointing Judges of the Peace will remain on its present footing.

b) All District Magistrates and Sessions Judges will be ex-officio Justices of the Peace, and will have power to try European British subjects;

c) District Magistrates will be empowered to pass upon a European British subject a sentence extending to 6 months imprisonment or 2,000 rupees fine, or both, that is to say, a sentence twice as severe as they are empowered to pass at present but any European British subject charged before a District Magistrate will have a right to require that he shall be tried by a jury of which not less than half the number shall be European or Americans, or both;

d) A European British subject committed for trial before a Court of Session will have a similar
right, even in those districts where trials before the Court of Session are not ordinarily by jury.

"When a jury is claimed before a District Magistrate, and the Magistrate has reason to believe that a jury composed in the manner required by the law can not conveniently be constituted to try the case before himself, he may transfer it to another District Magistrate or Sessions Judge. The question as to the particular court to which the case should be transferred is one which must obviously be determined with reference to administrative considerations, and to the varying circumstances of different districts. Accordingly it is left to general rules, which are to be framed by the High Court with the approval of the Local Government. But there is power for the High Court to make special orders in exceptional cases. The Court to which a case is thus transferred is to try it with all convenient speed and with the same powers and according to the same procedure as the Magistrate from whose Court it is transferred".

As observed by Sir John Strachey, the Act, introducing jury system, ended controversy with the virtual though not avowed
abandonment of the measure proposed by the Government. The Act extended rather than diminished the privileges of European British subjects charged with offences, and left their position as exceptional as before. The general disqualification of native Judges and Magistrates remains; but, if a native appointed to the post of District Magistrate or Sessions Judge, his powers in regard to jurisdiction over European British subjects were equated with an Englishman holding a similar office. This provision, however, was subject to the condition that every European British subject brought for trial before the District Magistrate or Sessions Judge had the right, however, trivial be the charge, to claim to be tried by a jury of which not less than half the number shall be Europeans or Americans. No such claim could be made by natives charged with offences and it was a claim which could not be made by an Englishman in a Magistrate Court in his own country. The Legislature virtually declared that the summary powers of the European Magistrate over European offenders shall be taken away not because this was held to be in itself desirable, but because such powers could not be given to a District Magistrate who was a native. All English Magistrates of the 1st Class,
outside the Presidency towns, other than the District Magistrate are appointed to be justices of the Peace and they exercise jurisdiction over European British subjects as they did before, but not native Magistrate in similar position could be appointed to be justice of the peace or exercise such jurisdiction. In fact, this change in law did not equate the European British subjects with the native in the eye of law, there being less chance of elimination of unveiling truth when in case of transfer for trial with assistance of jury, complainants and witnesses were liable to send away to great distance from their home as was the case before 1872 when the trial of the European British subjects could only take place before the High Courts. Thus, the law had certainly not been changed for the better, but for practical purposes it remained much as it was before Act III of 1864 was passed.

THE PROVINCIAL COURTS OF APPEAL

The territorial jurisdiction of six mofussil dewani courts were established at Calcutta, Moorshedabad, Burdwan, Dacca, Purnea and Patna under Regulation of 11th April, 1780. This number increased to
18 on 6th April, 1781. 14 such courts were placed under the superintendence of a covenanted civil servant of the Company to be styled Judge and rest under Collectors of Revenue.

Appeals from the decisions of the provincial dewany adawaluts lay in the Governor-General in Council with restriction of valuation determined from time to time. Since such appeals became too costly the Governor-General in Council in 1793 instituted four Provincial courts of Appeal at Patna, Dacca, Moorshedabad and neighbourhood of Calcutta.18 A fifth court of appeal for the Province of Benaras in 1795 and sixth for the ceded and conquered territories of Berar and Oudh in 1803 were established. Each of these courts was superintended by three Judges selected from the covenanted servants of the Company. Three Indian Law Officers consisting of a Kazi, a Moufti and Pundit were appointed to assist the Judges.

18. A.C. Patro, Administration of Justice under East India Company in Bengal, Bihar and Orissa, Cuttack, 1957, pp. 152-156.

Regulation V of 1793.
Appeals could be preferred in Provincial Courts of Appeal against the decisions of City and Zilla Courts in the first instance.\textsuperscript{19} The Provincial Court of Appeal had discretionary powers to entertain any appeal for any non-appealable case\textsuperscript{20} to admit further evidence and to remand back.

In 1805 the Provincial Courts of Appeal were authorised to admit a summary appeal in cases where the zilla and city courts refused to admit or hear original suits on the ground of default, delay or other informality.\textsuperscript{21} In 1808 Zilla and City Courts were restricted in their original jurisdiction for suits of the value of Rs.5,000/-. Suits of more valuation to be instituted in the Provincial Courts of Appeal.\textsuperscript{22}

The manuscript proceedings of the different courts of appeal show passing of decree on compromise in a very large number of cases.

\textbf{19. Patro, Op.Cit, Sec.23 of Regulation XLIX of 1863.}\n
\textbf{20.Ibid, Sec. 24 of Regulation XLIX of 1863.}\n
\textbf{21.Ibid, Sec. 11 of Regulation II of 1805.}\n
\textbf{22.Ibid, Sec. 2 and 3 of Regulation XIII of 1808.}
The Provincial Courts of Appeal were gradually superceded, and zilla and city Judges were empowered to have primary jurisdiction in suits exceeding Rs.5,000/- in value. Provision was made to lay appeals to the Sudder Dewany Adawlut for their original decision.

Finally, in 1833 the Provincial Courts of Appeal were abolished, pending transfer of original suits to the zilla and city courts and appeals to the Sudder Dewani Adalut. To meet the demand additional Zilla and City Judges were appointed.

The Zilla and City Judges an administration of law courts legitimately questioned the interpretation of Regulation by the Courts of Appeal and sent their own interpretation to the Sudder Dewany Adawlut or Sudder Nizamut Adawlut through the respective courts of Appeal. They were, however, bound to carry out the precepts of the Courts of Appeal.

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24. Ibid, Sec. 28 Regulation V of 1831.

25. Ibid, Sec. 5 of Regulation II of 1833.

26. Ibid, Sec. 2 Regulation VIII of 1833.
The Judges of the Zilla, City and Appeal Courts seemed to have generally relied on their own knowledge for the interpretation of the Regulation. In some cases they were found to have followed books imported from Europe.

The Zilla Judges, too, exerted themselves for the due discovery of the law applicable in individual cases. Thus when the claimants were Portuguese, the Judge of Zilla Chittagong sought enlightenment from the Sudder Dewany Adawlut on the nature of the personal law applicable who in turn obtained opinion of the Advocate-General.

The Sudder Dewany Adawlut was not found to have been dissatisfied with the Provisional Courts of Appeal except in some cases for the paucity of the volume of work done by them. The manuscript Reports of the Abstract Registers of the Provincial Courts of Appeal, and the City and Zilla courts indicate that their work was otherwise satisfactory to the Sudder Dewany Adawlut.
THE COURTS OF CIRCUIT

On the line of the proposal of Warren Hastings Regulation of 27th June, 1787 enabled the Company's Magistrates to take cognizance of petty offences, the major and more serious offences being left as the exclusive jurisdiction of the criminal courts of the country working under the Naib Nazim. The appointment, control and removal of the Judges and Officers of the criminal courts continued to be the privileges of the Naib Nazim. The sentences of the Nizamut Adawlut at Moorshedabad continued to be final and were executed under the superintendence of the Naib Nazim to be reported to the Council at Fort William only after the execution.

In 1790, on the proposal of Lord Cornwallis, the intention of the criminal in a case of murder was accepted as the determining factor in awarding punishment and not the manner or instrument of perpetration.27

27. A.C.Patro, Administration of Justice under East India Company in Bengal, Bihar and Orissa, Cttack, 1957, PP. 130-151, Minute of Lord Cornwallis, 1 December 1700.
The relatives were debarred from pardoning the offender. In 1793 it was enacted that the Judges were authorised and directed to commute the sentences of mutilation and amputation awarded to the prisoner in conformity to the futwa of Mohammedan law officers. The prisoners had to undergo hard labour for 7 years against a sentence of loss of one limb and for fourteen years to that of loss of two limbs.

The Regulation of 3rd December 1790, was enacted for a better administration of criminal justice in Bengal, Bihar and Orissa. It was observed that preceding regulations and institutions as constituted did not sufficiently succeed in repressing the crimes of robberies, murders and other enormities, and attributed the failure of the administration to the delay in bringing the offenders to punishment, to the law not being duly enforced, and to the defects obtaining in the constitution of the country criminal courts. The Government, therefore, resolved to vest the superintendence of the administration of criminal justice in the Governor-General in Council with a view to ensuring a prompt and impartial

28.Patro, Op.Cit, Article 34 of Regulation of 3rd December, 1791. This article interatia was preceded by the General Regulation of 1772.
administration of the criminal law throughout the three provinces of Bengal, Bihar and Orissa. The Governor-General and Members of the Supreme Council assisted by the Kazi-ul-Kuzat and two Mooftis exercised the power of Naib Nazim as Superintendent of the Nizamut Adawlut. For the mofussal, four courts of Circuit were created for the Divisions of Calcutta, Dacca, Moorshedabad, and Patna, each to be superintended by two covenanted servants of the Company, denominated Judges of the Courts of Circuit, each judge being assisted by a Kazi and Moofit. These Courts of Circuit would try serious cases, not triable by the Magistrates.

Of the Courts of circuit while one Judge was touring one circuit, the other Judge was holding jail delivery at the divisional headquarters. In 1793 the number of Judges increased to three who composed Provincial Courts of Appeal, established in the same year. Thus the same judges and the same Indian Law Officers constituted both the Court of Circuit and the Provincial Court for a Division. In 1795 a
fifth Court of Circuit for the territory of Benaras\textsuperscript{29} and in 1803 the sixth such Court were created for the territory of Oudh\textsuperscript{30} whose jurisdiction was extended in 1805 to the Provinces wrested from Dowlet Rao Scindeah. In 1806, there was territorial adjustment amongst six Courts of Circuit.

The dual charges of Judges of Provincial Courts of Appeal and Courts of Circuit resulted in accumulation of cases. For that in 1794 it was ordered that only two of the Provincial Court of Appeal Judges would hold Court of Circuit within the Division while third in rotation would stay at the headquarters to carry out the day to day business of the Provincial Court of Appeal. Since this system did not hold any decrease of the pendency, in 1797 it was decided that one of the two judges, including the senior judge at the headquarters for executing the business of the provincial Dewanny Adawluts. There was a modification to this arrangement in 1806 when it was ordered that the senior judge of the

\begin{thebibliography}{99}
\item[] Patro, Op.Cit, Regulation V of 1795.
\item[] Ibid, Regulation VII of 1803.
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Provincial Dewanny Adawlut of Appeal also had to go on Circuit on rotation. Arrangement so far made did not reduce the excessive pressure of work upon the Circuit Court judges for which undertrial prisoners had to remain in jail custody for considerable period before beginning of their Jail deliveries.

In the year 1799, lower Courts had each an average of 3540 cases pending for disposal. The Indian law officers viz., Sheristadars and Peskars because of their undue influence over the Magistrate and in the matter of preparing the serial order of the cases to be heard, were found with doubtful integrity. The wide prevalence of perjury in the courts of law vitiated the purity of the decisions arrived at. Mohammedan law prescribed corporal punishment, imprisonment and public disgrace with the authority of discretion vested in the Magistrates in awarding the punishment. In the year 1825 inferior criminal courts were allowed a greater extent of jurisdiction\textsuperscript{31} and the law considerably restricted the

\textsuperscript{5} Patro, Op.Cit, Section 7 of Regulation XII of 1825.
number of cases where reference to the Nizamut Adawlut was required to be made.

The Judges of the Courts of Circuit inspected the magisterial proceedings in cases of persons confined under requisition of security for good behaviour. Regulation XXII of 1793 empowering the magistrates to imprison the suspect had been much abused as sometimes the security prisoners were retained in the Jail for a considerable period without any just cause. The Courts of Circuit enjoined the power to free such prisoners who could not, by the strict observance of Section 10 of Regulation XXII of 1793 were imprisoned. The prevalent system of requirement of $3/4$ of the villagers to attest the character certificate of an accused and to remain present in the court at the time of trial was abolished on the recommendation of judges of the Courts of Circuit. In appropriate cases, Circuit Judge was to make reference to the Sudder Nizamut Adawlut at Calcutta to review the case as in the case of Vakeel 31. Parto, Op.Cit, Regulation IX of 1807.
of Government Vrs. Hurry Nye were irregularity was committed in violation of Section 3 of Regulation IX of 1808.33

Judicial-cum-Administrative actions of the Courts of Circuit were subjected to Judicial review from time to time. Commission of heinous crimes mostly depended on confession of the criminals. The instinct of self-preservation inherent to the society tolerated the method which extorted the confession from the criminals.34 The English Judges with their judicial outlook could not entertain the idea of extorting confession from the criminal against the background of the existing state of things in India as well as in Europe and the Judges always suggested better preventive methods in the form of larger establishment of police functionaries. The system of informers and intriguers though useful in the eyes of the Administrators, was viewed with disfavour by the judiciary even in those early days of British rule in Bengal, Bihar and

Orissa. While making trenchant criticism of the practice of extorting and fabricating confessions resorted to in the mofussal, the Judges directed the Magistrates to strictly observe the various orders of the Government prohibiting the extortion of confession and introducing checks and restrictions as might prevent the malpractice as far as practicable. The law required, among other things, that where a prisoner could read and write the confession it was invariable to be recorded in his own handwriting and not in that of any other person. The confession again, had to be witnessed by one or more persons who had to sign their names and were not men to be influenced by the police, the paper to which the original signatures might be affixed was to be sent to the magistrate and no the copy than the original could be regarded admissible as evidence. The Privy Council in Appeal No.11/36 from a Judgement of the High Court of Lahore on 10th October, 1935 advised his Majesty to allow the Appeal setting aside the conviction of the Appellant for dacoity with murder which was passed by the Addl. Sessions Judge, Lyallpur and

35. Patro, Op,Cit, Esmein, History of Continental Criminal Procedure (Continental legal History Services ), PP. 322.32.
confirmed by High Court, Lahore, on the sole ground of non-compliance to the provisions of Section 164 of the Criminal Procedure Code on the part of the Magistrate in recording confessional statement of the convict. Great emphasis was required to be given on such confession of a dacoit basing on which the guilt of dacoit could be proved. When under Mohammedan Law administered by country courts, evidence of two positive witnesses was absolutely required to award a capital punishment dacoits usually committed their atrocities at night or in an unidentified manner where rarely a witness dare to depose against to inflict capital sentences to the dacoits. Other technicalities of Mohammedan Law were also providing loopholes for escape of the criminals from capital punishment. When a murder had been perpetrated by means of an instrument, not designed for shedding blood it would be held that the intention to kill was not proved and a fine instead of death was to be awarded. A dacoit killing another in self-defence with a sward

or knife would be condemned to death but where he held the head of the child under water till her death and looted belongings of the child, the dacoit was to be found guilty of manslaughter and condemned to pay the price of blood. Privilege was allowed to the nearest kin of a murdered person to pardon the murderer.

Catching the spirit of justice some of the Circuit Judges followed the foot-steps of the Nizamut Adawlut. In the case of Vakeel of Government (Prosecuter) Vrs. Nunnah the accused was charged with cutting off left hand at the wrist of his 14 year old wife and taking into consideration the compromise petition of the wife who willfully forgave her accused husband, the Court of Circuit of Zilla Bundalcund while convicting the prisoner referred the case to Nizamut Adawlut, recommending mercy to the accused remarking that as per the spirit of Criminal law, punishment is inflicted not for the gratification of the passions of individuals but for the information of offenders as an example to others. In response to the recommendation, Nizamut Adawlut while

maintaining conviction with an admonition released him from the penalty in consequence of the injured party withdrawing her claim.

Judges of the Courts below were permitted to address the Nizamut Adawlut even after a final decision of the Nizamut Adawlut had been passed quashing their decisions. The prevailing spirit of cooperation amongst the different organs of the judicial system was well apparent from Letter No.355 dt. 3.10.1851 to the Nizamut Adawlut from Sessions Judge of Tipperah.

In 1829, Commissioners of Circuit were appointed with the same powers as Judges of Circuit to hold jail deliveries twice a year to perform all duties discharged by the Superintendent of Police and to be under the authority of the Nizamut Adawlut. But at the same time the Courts of Circuit were abolished.38

In 1831, Indian Officers were invested with extended jurisdiction in criminal matters empowering Magistrate to refer in criminal case to a Sudder Ameen or a Principal Sudder Ameen for investigation though they were not authorised to make any commitment.

In the same year, the Zilla and city Judges, not being the Magistrates were empowered to conduct the duties of the Sessions, to try commitments made by the Magistrates and to hold monthly jail deliveries and to pass sentence or refer the trials to the Nizamut Adawlut under the same rules as were applicable to the Commissioners of Circuit. Of course, they were not to interfere with the management of the Police and all appeals from the orders of the Magistrates lay to the Commissioners of Circuit.\textsuperscript{39} In 1832, Principal Sudder Ameens, Sudder Ameens and Law officers were authorised to sentence persons convicted of theft to labour in addition to corporal punishment and imprisonment. In 1835, it was enacted that all or any part of the duties and powers of Commissioners of Circuit could be transferred by the Governors of Bengal and Agra respectively, to the Sessions Judge.\textsuperscript{40}

The Judge of Circuit was required to inspect the prisons in person and to submit reports to the Nizamut Adawlut at Calcutta.

\textsuperscript{39} Patro, Op.Cit, Regulation VII of 1831.

\textsuperscript{40} Ibid, Section 3 of Regulation II of 1832 Act VII of 1835.