CHAPTER 3:
THE PLACE OF
PRECEDENT IN THE PRE-INDEPENDENCE ERA
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“The Past is Never Dead. It always remains in the Present.” [T.S. Eliot (1888-1965)]

3.1 The Place of Precedent in the Mohemmedan Law

The glorious Hindu period was subjected to intermittent invasions by the Muslims. Mohammed-bin-Quassim invaded on India in 712 A.D. & returned thereafter. The real penetration into India was made by Qutubud-din Aibek who established his supremacy in the whole of northern India. The Muslims, thereafter, continued to rule over India for centuries till year 1857 when the last Mughal king Bahadur Shah Zafar was dethroned by the British & the English established themselves as the next rulers of India.

The Mohammedans followed the Islamic law under the rules of sultans & Mughals with certain modifications to suit the circumstances of the age & to satisfy the needs of the people of the time. Muslim rulers did not interfere with the law of Hindus & the Hindus continued to be governed by their own law in personal matters. Mohammedan law was applicable to Muslims only. Both the systems had a religious conception of law in the sense they were ultimately supposed to have been based on revelation & that the law bound the rulers, Judges & the subjects. There are four sources of Mohammedan Law namely, Quran, Sunna, Ijmaa, &Qiyas. There both the Hindu & the Muslim legal systems were given due recognition by the Courts in settling the disputes between the parties.

In Islamic legal theory, the doctrine of precedent is not applied the way it is applied in common law system. In Islamic law, a judge is supposed to be a mujtahid and, thereby, not bound by the decision of a fellow (mujtahid) judge. Moreover, in Islamic law, a judge has to look for the earliest decision, & if one is found he is supposed to apply that & not apply any decision that is recent in time. In common law, the opposite is the case. A judge has to follow the latest decision of a higher court & not an old, overruled case.
The alleged disadvantages of the doctrine of stare dispositis are that even a wrong decision may have to be followed by the lower courts. However, as explained above, a court in such a case may avoid such a precedent by distinguishing it from the case at bar. Secondly, it allows the law to grow very slowly in comparisons to legislation; however, precedents are tested by times & are based on the wisdom of judges. Any bad precedent could be overruled or reversed by a larger Bench (of the Sup. Co.), especially if the subject matter is of such key significance to national life or the thinking is so obviously incorrect in the light of later suspected that "It is savvier to be at last right as opposed to be reliably off-base"because “Restoring a right is by far better than persisting in a manifest error."

Muslims ruled Sindh since 712 A.D. from the time of the Ummanyyad Caliph, Abdul Malik I . The Salateen ruled Delhi from 1206 A.D. to 1526. This was followed by the Mughal period from 1526 till 1857 although from 1707 till 1857 they had no real power as such. The judicial system under the Salateens as well as the Mughals did not follow the system of precedent that exists today on the Indian continent. The highlights the judicial systems of the East India Company & discusses the emergence of Precedent in that period & the subsequent period, i.e. when the East India Company was replaced by the British Crown.[15]

3.2 The Judicial System of the East India Company

The foundations of the British Empire in India were laid down by a company which was organized to further the British interests in overseas countries. The representative of the Company set foot on Indian soil in the reign of Jahangir in 1604. The company established its factory in Surat with the permission of the local Mughal governor in 1612. By 1661 the Company had factories in Surat, Madras & Bombay. The Company delivered justice arbitrarily which could be called as ‘traders’ justice’ because the Company’s officials were all traders & had no knowledge of law. Before 1726, judiciary developed in the three presidency towns followed a course of its own without any uniformity. The charter of 1726 focused on uniformity in all the three places. The courts established under the 1726 Charter derived their authority from the king & not
from the Company. Municipal institutions were established in the Presidents towns for the first time on firm basis & the English common law & statute law of England were introduced. At this stage, the Company tried to respect the sovereignty of local rulers.

The company’s main role till 1757 was not the acquisition of territory but rather facilitation of trade & commerce. In 1717, the Company had secured the right to collect revenue over 38 villages near Calcutta. After the battle of Plassey, the Company installed Mir Jaffar as the Nawab of Calcutta who ceded the zamindari of the 24 Parganas to the Company which now controlled 800 square miles of area called the ‘Moffussil’. The company provided the adalat system for the administration of justice in the Moffussil.In 1765, Shah alam granted the Diwani (revenue administration) of Bengal, Bihar & Orissa to the Company for an amount of 26 lacs of rupees per provided for a Moffussil Diwani Adalar in each district with Collector as judge to decide civil cases. For Muslims the court was to apply the Holy Quran while for Hindus it was applying the Holy Shastra. The Regulations of 1793 referred to ‘Hindu Law’ & ‘Mohammedan Laws’ instead of the Holy Quran & the Holy Shastra. The Collector was to be advised in the case of Muslims, by Qazis, & in the case of Hindus, by a Pundit. The 1781 Settlement Act considered Calcutta as her Majesty’s colony. On December 3, 1790, the criminal justice system was taken from the Muslim Qazis, Muftis & Maulavis & was given in the hands of the Company’s English servants. Muslim Law officers were to advise the courts. The regulation Act, 1773 authorized the Sup. enroll such Co. in many advocates Calcutta admit & “approve, ” so & attorneys at law” as the court “Shall see fit.” These were only English, Irish & Scottish attorneys. In 1793 Cornwallis created a regular profession authorizing the Sadar Diwani Adalat to enroll pleaders or vakeels, both Hindus & Muslims, for all Company’s courts. The 1857 war of independence changed the fate of India. The Bill of 1858 gave all territories in the possession or the government of the East India Company to the Crown. In 1833 the Privy Council was created. In 1861, Hi. Co. were created in Calcutta, Madras & Bombay. A Federal Court for India was established in 1937 which was replaced in Pakistan in 1956.
After describing the development of court system since the early settlement of the East India Company to the creation of the Privy Council in 1833 & the Hi.Co.s in 1861 it is necessary to mention the role played by the Privy Council, which was the highest court of Appeal for Indian courts in the evolution of the doctrine of precedent in India. In the beginning of Company's judicial administration the judges were supposed to follow the law of England. Unfortunately, for well over 150 years the Company did not bring professional judges, with the exception of Sir John Biggs & Dr. John St John in Calcutta & Bombay respectively, to preside as judges. Later on, professional judges were brought in by the Company to apply the law of England between the English Subjects. With the consolidation of the judicial system in the territories of the Company, law reporting started on a very small scale. The history of the doctrine of precedent, both in India as well as in England, has been bound up with the history of law reporting. Darin, who later on became a judge of the SadarDiwaniAdalat at Calcutta advocated in 1831 that statutory force should be accorded to the English doctrine of precedent in India so that judgement of a court shall be considered as binding upon itself & upon lower dowin in the hierarchy. [16]

Early Law reporting was a private enterprise. Sir Francis Maonguhten, formerly a judge of the S.C. of Calcutta, inserted questions of Hindu law decided by him by way of illustration in his Consideration upon Hindu Law, published in 1824. Sir William Maonaughten did likewise in his Principles & Precedents of MoohummeudanLaw. Published in 1825. Up to 1850 various judges of the courts had published numerous law reports. Similarly, reports of SardarDiwaniAdalat, SardarFawzdariAdalat& different Hight Courts working since 1861 are also reported. The era of authentic law reporting began with the Indian Law Reports Act, 1875, The Indian Law Reports Calcutta series started in the same year. Thus, the two indispensable requirements for the requirement of the doctrine of precedent hierarchy of courts & the emergence of authentic law reporting were fulfilled in 1875. A series of Indian Law Reports (I.L.R.) of Each Hi. Co. started. Bombay, Madras & Allahabad started in 1876. Moreover, the landmark deception in Beamish v Beamish the
forerunner of the rule (as it was followed then) that a higher court is bound by its own previous dictions, coincided with the passing of the India Hi. Co.s Act, 1861.

The Privy Council had earlier declared in Mata Prasad v. NageshwaarSahanthat “Bharat to question any principle enunciated by this Board, although they have a right of examining the facts of any case before then to see whether & how far the principle on which stress is laid applied to the facts of the particular issue of fact.” The Hi. Co.’s held in a number of cases that subordinate courts were bound by the deceptions of the High Course even if the lower courts did not agree with the correctness of a particular edition. Statutory recognition to the authority of precedent was given in s. 212 of the Govt. of India Act, 1935. It laid down that the decision of the Privy Council & the Federal Court would be binding upon the courts in India.

The Privy Council, however, did not bind itself by its own previous decisions. In Read v. Bishop of London the Judicial Committee asserted its freedom to consider previous decisions on merits. It is important to note that this position was against the rule Beamish v. Beamish. It started that “Whilst fully sensible of the weight to be attached to such deceptions, their lordships are at the same time bound to examine the reasons upon which the decisions rest & to give effect to their own view of the law” The Privy Council held in The Compensation to Civil Servants Casethat it is bound in law, & without independent examination on merits, to follow a prior ruling in an appeal irrespective of whether it is right or wrong. This was similar to the position of the House of Lords at that time, In A.G. Ontario v. Canada Temperance Federationthe Privy Council clearly asserted its independence & observed that the Judicial Committee is not absolutely bound by its own prior editions. Yet the Board would seldom depart from its own old standing on constitutional questions. This was once again against the firm practice of the House of Lords which was reaffirmed in the famous London Tramways Case.[17]
3.3 Application of English Law in India

Recording tor as the contents of the Indin law are concerned we have to look back to the time of the East India Company (1600-1857). The Regulations of 1793 modified the law applicable to Muslims & Hindus; previously, the Holy Quran & the Holy Shastra were applicable to Muslims & Hindus, respectively. In 1793 the laws applicable to both the communities were Mohammadan Law for the Muslims & ‘Hindus Law for the Hindus. From the very beginning the Company’s Courts were administering Muslim & Hindu Law with the help of muftis, mauvlavis& pundits. Court. Hierarchy & law reporting started facilitating the doctrine of precedent. Moreover, the Mayor’s Court in Madras in 1687 held that all causes shall be adjudged Recording tor equity & good conscience. The same was reasserted in the Charter of 1726 & later Charters, Regulations & Acts. The Privy Council held in in 1886 that the formulas Justice, equity & good conscience’ or Justice & right’ implied the application of English law, it found applicable to Indian society & circumstances. The last factor was the codification of many laws for which a sense of urgency was felt after the events of 1857 when the Company was replaced by the crown. The Code of Civil Procedure was first enacted by the Indian Legislature in 1859 & was amended three times in 1860, 1861 & 1874. The second time it was enacted which was also amended in 1882,1888,1892,1894 & finally in 1895. The present Code of Civil Procedure was enacted in year 1908. The Limitation Act was first enacted in 1859 & the amended Limitation Act was enacted in the year 1860. The Indian Penal Code came in 1860 & enforced on 1st of January. 1862. A General Criminal Procedure for the whole subcontinent in 1882. This last Act was supplemented by a new code in 1898. The Evidence Act & the Contract Act were enacted in 1872 while the Indian Companies Act came in 1866. These Acts were fully based on the English law & that is how substantive rules of English law found their way into Indian law.

Here it should be noted carefully that the wrong application of English precedents actually committed nothing but a judicial murder of innocent Raja Nand Kumar who was engaged nothing but a small forgery which is not at all any major offence in India.[18]
3.4 Introduction of the English Doctrine of Precedent Into India

Probably the introduction into India of the English doctrine of precedent was the most important factor in shaping the sources of law in British Indian Empire. The role played by English language as a court language is also worth mentioning. The tradition of legal profession had taken birth & the resultant law was the Anglo-Indian Law of the Subcontinent & Anglo-Mohammedan law instead of Islamic law. India had inherited this Anglo-Indian law as its substantial body of law. The translation of the basic texts of the Hindu & the Islamic law (such as the Shrutis, the Smritis the Puranas&Hiday a FatawaAlamgiriya), henceforth used by Hindu Pundits & the Muslim qudis&mufits, gave birth not only to the so-called Anglo-Muhammadan Law, but “to the very colonialist notion that to govern India” (or any other territory) meant having to change its Jural modus operandi. & to do so, it was ineluctable that not only the native agency had to be suppressed at any cost, but a new & “improved” local (but not necessarily native) agency had to be cultivated. The objective of the British was declared by ThomasBabington Macaulay (an Hon Member of the EIC Ruling Council) when he asserted that the aim of the Britihs was to foster a group of educated men, “Indian in blood & color, English in taste, in opinions, in morals & intellect,” Recording tor Hallaq “It would in no way an exaggeration to say that” with the substitution of “Indian” for “British” & “Modern” for “English”, the statement was & remains prophetically accurate. However, a more Sigdifying process was the utilization of the principle of gaze decisis by Anglo-Indian court framework, a system that, for many good reasons, could not evolve in medieval Indian law. The doctrine of precedent deprived the Hindu pundits & the Mulsimquazis of a wider army of opinions to choose from in light of the facts presented in the case. Once a judge was bound by a previous decision, there was no place for the Hindu pundits & the Muslim muftis-cum-author-jurist in judicial process. Subsequently, they fully disappeared from the legal as well as intellectual life of the jural community on the whole Sub-continent. Once the Anglo-Indian law was enshrined in a doctrine of binding precedent the sources of legal authority were transformed. Hallab has nicely described the effect of colonialism & the introduction of stare deices.[19]
It is this permanent transformation that we are dealing with. Although the colonialists are long gone but the transformation they had left is lasting. Precedent, therefore, played a significant role in the shaping of the legal systems to come in India because the editions of the English judges at the time were sometimes contrary to the Hindu & the Islamic law, however, they were biding precedents for lower courts for generations.

Dr. Asaf Fyzee has given a list of such cases in which Islamic law was modified by the Privy Council English through the agency of. They Privy Council came under the socio-political influence of the then Legislative Council, one of its eminent members & an eminent jurist Barrister Muhammad Ali Jinah mounted a seething attack on the role of the Privy Council. He severally criticized its role thus-

“The Privy Council has on several occasions' absolutely murdered Hindu & Slaughtered Mohamedan law.”

Harsh but extremely true criticism of the veteran lawyer cannot be taken lightly anywhere in the sub-continent. So now it is our prime duty to built up a just & appropriate local jural system. Recording tor another member of the legislative assembly Sri Hary Sing Gaur, the deceptions of the Privy Council did not enjoy any universal acceptance, particularly in case relating to Hindu & Muslim law.

3.5 Law Reporting In British India

The era of authentic law reporting in the Sub-continent formally started with the passing of Law Reports Act, 1875. However, before this Act selected cases were reported by individuals. Sir Francis Macnaughten, formerly a judge of the S.C. of Calcutta, inserted questions of Hindu Law decided by him way of illustration in his Considerations upon Hindu Law, Published in 1824. As started earlier, Sir William MacNaughten did likewise in his Principles & Precedents of Mohummudan Law in 1825. Both these were works on personal laws. Till 1850 various judges of the courts had published numerous law reports. Similarly, reports of SadarDiwaniAdalat, SadarFawzdariAdalat & different Hi. Co.s working since 1861 were also published. The Indian Law Reports Calcutta series started in the same year. Thus the two indispensable
requirements of the doctrine of precedent hierarchy of courts & the emergence of authentic law reporting were fulfilled in 1875. A series of Indian Law Reports (I.L.R.) of each Hi. Co.- Bombay Calcutta, Madras & Allahabad started in 1876. Publications of Law reports of Lahore Hi. Co. & Chief Court of Sindh commenced in 1920 & 1939 respectively. [20]

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3.6 Structure of Subordinate Judiciary in Pre Independence- British India 1726-1947

As discussed above the basic structure of the subordinate judiciary follows the colonial judiciary structure. The lower judiciary is situated at the district level. There are essentially to level of courts in the district judiciary with an intricate hierarchy within these levels: first, Civil Courts; & secondly, criminal courts. Our hierarchy is based upon the The Code of Civil Procedure 1908 & the Code in criminals Procedure 1898. Section 3 of the Ordinance recognizes the following categories of Civil Courts;

1) District Court;
2) Additional District judge;
3) The Court of Civil Judge
4) The Court of Civil Judge
5) The of small causes courts established under the Provincial Small Causes Courts Act 1887; and
The Hi. Co.s have, for the purpose of determining the pecuniary limits of the jurisdiction exercisable by civil judges in Original Civil suits & proceeding placed the civil judges in three categories namely:

A) Civil judge Class I;

Courts of Civil judges as the first they’re in Civil courts hierarchy. Appeal against decision of a Civil Judge lies to the District Judge. However, if the pecuniary value of the suit is 2.5 million or more then, appeal is made to the Hi. Co., Appeal against the decision of the District Judge is made to the Hi. Co. & then to the S. C.if permitted by the H. C. or the Sup. Co.. In many cases appeal against the edition of District Judge is not provided & lawyers approach the Hi. Co. in writ petition. Such a case may eventually reach the Sup. Co.s as well. Writ petitions are frequently used by lawyers in civil cases.

District Criminal Courts

Like the Structure of Civil Courts there are similar Code in criminal Procedure hierarchies in Under Section 6-7 of the (Cr. P.C.) Criminal Courts. The classes of Criminal Courts are as follows.

a) The Court of Sestion;

b) The Courts of Chief Judicial Magistrate;

c) And Judicial magistrate First Class, Second Class & Third Class

d) Constituted under other law other than the Cr. P. C. to Such other courts as may be.

As explained above the Hi. Co.s are constitutional courts under the privations of the Constitution but they also have jurisdiction conferred upon them by or under any other law. The latter may be called as the statutory jurisdiction of the Hi. Co.s. the categories of Magistrates are given below.

Under old section 6-7 of the Cor.. P. C 1898, Magistrate of the lst Class;

1) Magistrate of the IInd Class;

2) Magistrate of the Third Class

[Our present Code in 1974 has kept only First class category of the Indian Magistrates criminals Procedure]
Magistrate is appointed under privations of the Cr. P.C. For the purposes of the Cr. P.C. the Sections Judges & the Additional Sections Judges & Magistrates are subordinate to the Hi. Co. & the Sessions Judge. A Sections Judge & an additional Sessions Judge may pass any sentence authorized by law subject to the condition that a sentence of death passed by any such judge is subject to confirmation by the Hi. Co.. An Assistant Sections judge may pass any sentence authorized by law, except a sentence of death or imprisonment for a term not exceeding seven years.

1) Courts of Magistrate of the First Class may pass imprisonment for a term not exceeding three years including such solitary confinement as is authorized by law; or with a fine. The Magistrate’s Court is considered as the first tier of Criminal Courts. Appeal against the edition of a Magistrate lies to the Sessions Judge (which may be taken by the Additional Sessions Judge), which from the second tier of Criminal Courts but the First appellate tier. Thus, if a person convicted by a Magistrate wishes to appeal against his/her conviction, she can approach the Sections Judge. Hi. Co.s in all provinces form the second appellate tier. Thus, appeals against the decoctions of the Sessions Judge are admitted by the Hi. Co.. Appeal against Hi. Co. decision is made to the Sup. Co.. There is some leaf-forging in appeal in criminal matters as well. When a case is decided by a Section 30 Magistrate & the imprisonment is more than three years then appeal is not made to the Sections Judge but directly to the Hi. Co.. [21]

3.8 The Evolution of Tribunals In British India

The British Rulers had started to develop the Tribunal system but its speed was much low. There were many different types of special courts & tribunals of civil & criminal nature created under special laws. The Imperial Government was authorized by the Royal Charter to create such courts & tribunals. There were numerous tribunals within the Indian legal system such as Service Tribunals like Central Administrative Tribunal. Income Tax Appellate Tribunal, Insurance Appellate Tribunal, Custom, Excise & Sales Tax Appellate Tribunal, Environmental Tribunal, Consumer Fora& may others. In addition, there are numerous special courts such as Special Courts (Control of
Narcotic substances), Banking Courts (Recovery of Loans), Special Courts (Offences in Banks), Special Courts (Customs, Taxation & Anti-terrorist activities prevention), Drugs Courts, Accountability Courts, & Labour Courts etc. The jurisdiction of these administrative courts was highly expansive i.e. the whole of the British India, practically to the modern Republic of India, the Islamic Republic of Pakistan, the Democratic Republic of Bangla Desh, & the Republic of Burma [Recently renamed as Myanmar. It is to be carefully noted that the then Rangoon Hi. Co. was under the Federal Court of India], the Republic of Ceylon [Recently renamed as Shri Lanka]. There also existed Revenue Courts under the State Land Revenue Acts. These courts have hierarchal organization of their own. These are, in case of revenue courts, The Board of Revenue, the Commissioners, the Collector, the Assistant Collector. A typical tribunal consists of a Chairman, who is legally qualified, & two members, who are called technical members. Appeals against the decrees of provincial Services Tribunals & Federal Services Tribunals lie to the Sup. Co..

3.9 The Legal System in the Indian Princely States

There were more than 500 mostly small Indian Princely States which had directly accepted the sovereignty of the British Crown & had acquired certain rights like internal administration including the administration of the local judiciary. Hyderabad, Mysore, Jaipur, Gwalior, Kashmir, Bahawalpur, Dacca were considerably bigger States having their own different Flags, Police System, Judicial System, Universities, Currency & Postal System quite different from that of the British India. These Princely States were under the Rajas, the Maharajas, the Nayakas, the Rayas, the Nawabs& the Nizams. Let us have a bird’s eye view upon the Legal & Judicial System in the Hyderabad State under the Nizam. The Hyderabad had Urdu as a State Language. The Court Procedure including pleadings, arguments & the judgments were all issued in Urdu only. The Researcher had found approximate equivalent Urdu translation of the British Indian Laws. For example the Qanun-e Tijarat was very close to Indian Contract Act while Qanun-e-Shahadat was also very close to the Indian Evidence Act. Taajirat-e-Riyasat was akin to the Indian Penal Code.
The State had a well developed Legal Profession. The Nizam had established the Osmania University for the higher education. It had both a degree as well as a diploma course in law. The diploma holders in law were called Vakalat-e-Ba’darja-Duam [Advocates of the Second Rank]. They were allowed to practice in the Lower Courts only while the degree holders in law were called Vakalat-e-Ba’darja-Awwal [Advocates of the First Rank] & they were allowed to practice from the Lower Court to Privy Council. The Law graduates were elevated to the Upper Courts afetr seven years of legal practice. The Legal & Judicial Reporting of the State was done through the Zarida [The Official Gazette]. It was expected that the advocate should be able to produce Nazeer [precedent] appropriately to the Court. The precedent from the Imperial Court was called the AngreziNazeer& it was the duty of the advocate to make an authentic translation of it into Urdu before producing it to the Cout of Law.

The State had a massive area of 16+4 =20 districts; however the Nizam had an actual control of the 16 districts only as the 4 districts were handovered to the British Sovereign for the Sub-sidery Alliance. Each of the 16 districts had a ZilaAdalat having Diwani [Civil] &Faujdari [Criminal] jurisdictions. It had power to administer the lowest Taluka Courts. They were the Court of First Instance in most of the matters. Dar ulQada was the Sup. Co. of Hyderabad.theNizam It was in fact the Privy Court of Appeal Council of, the Final. There territorial limits was no provision for any appeal outside the State the Hyderabad.

The precedents of Dar ulQada were binding upon the all Lower Courts. The precedents of the Federal Court of India & the Grand Privy Council of London had a high guiding value however they had no binding force in any part of the Princely State. The only exception can be traced was of course the [Old] Secunderabad Cantonment Territory which was directly under the British Sovereign. Presently Hyderabad &Secunderabad are mixed into each other in such a way that they are being called the “Twin-Cities”. In Pre-Independence period the Secunderabad Territory had a fully developed English administrative, legal & judicial system quite different from the Nizam’s Rule in rest of the State. [22]
The position of the other Princely States was more or less the same. The Kingdom of Nepal [Now extinct & replaced by a Republic], the Kingdom of Sikkim [Now extinct & replaced by a Constituent State of the Indian Republic] & the last but not least the Kingdom of Bhutan was much similar to that of the Hyderabad State. These Himalayan Territories were fully independent even in the British times; however their protection responsibility from the external aggressions was totally under the Imperial Indian Administration under the special pacts. Hence they are mentioned just as a passing reference.

3.10 The Evolution of the British Legal System in India by surpassing the Mogul Sadar Adalats

Before actually turning towards the very nature of the Modern Indian Legal System, it is safe to the Indian Constitutional & the legal system. the historical background of have a bird’s eye’s view upon The researcher has decided to study the Historical perspective broadly from 31/12/1600 A. D. upon which the East India Company was given a Royal Charter in London & particularly from 1858 when the advancing feet of the Company Rulers were restrained by the Queen Victoria, herself by declaring the winding up of the Company & assuming the Royal duties as the Empress of India. Her Royal Declaration was read here by her Vice-Roy, Lord Canning at the Allahabad Durbar. The epoch making event actually brought a unique & systematic administration in India. The Rule of Law, the Principles of Natural Justice & Independence of Judiciary, all doctrines from the ancient Anglo-Saxon jurisprudence became core part of the British Indian Administration. The Royal Proclamation of Queen Victoria brought similarity in the law application all over India. The uniformity was brought in civil & criminal law application while the Empress has graciously granted autonomy to the Hindu & the Muslim subjects to adopt their own personal laws. The Royal Administration established the world famous three universities in India- Bombay, Calcutta & Madras. It was the beginning of modern secular education in India. English was enforced as a medium of instruction. It is to be noted that, the English educated Indian Patriots’ were the early Freedom Fighters. National Law during the British Rule must be studied minutely. Before the English Advent it was only in Criminal matters that Muslim Law
applied to Hindus throughout or most of India, whereas in other subjects the non-Muslims were allowed to follow their own customs. There was no territorial law. As there were, increases in the population of Christians, Jews, Parsees & the persons whose religious affiliations were doubtful, It was felt that some form of national law was essential, particularly from about 1833 when India was opened to all Europeans. Moreover Muslim & Hindu Laws, even though in theory apt to regulate the totality of human relationships, had, as a matter of fact, many gaps, it was realized that a legal system applicable to people of all religions & a new territorial India law is created. A first & principal distinction was made between the, Calcutta & Madras on the one Presidency Towns of Bombay hand & the rest of India on the other. The Company Administration frequently took the help of the Hindu Pundits & the Muslim Qazis especially those knowing English language along with Sanskrit & the Arabic & the local languages in order to interpret the complex problems of the Personal Laws & antique customs of the respective communities. The English Courts operated in the Presidency Towns. In principle they applied the English law in rest of all matters. They also applied the statute law of the Crown Territories as it existed in 1726. It was due to inadequate legislation passed here by the Company Administration. The Company Administration & their Judiciary made serious blunders in application of the English precedents to the Indian cases & a gross injustice occurred. For example the Rt. Hon. Elijah Impel, The Chief Justice of the Sup. Co. at Calcutta, inflicted the capital punishment on Raja Nand Kumar for committing forgery. In India it is never treated as any serious offence. Such situation in the administration of justice had created a wide dissatisfaction & a state of anarchy up to certain extent. In the course of time the Crown was compelled to take a strong notice of the Company’s mal-administration. It resulted into its abolition & the direct Rule of the Crown in the British acquired territories after the bloodshed of 1857.

The Jurisdiction of the English Courts originally availed only in disputes involving an English manor for those who formally admitted it. In 1781 when the Jurisdiction of the Courts was broadened to include all disputes, it was provided that for matters involving Muslims or Hindus the Court would adjudicate according to Muslim or Hindu Law. The law based on English law, which was applied in the Presidencies, was nonetheless at the origin of what later became Anglo-Indian law. In the rest of India, the
situation was different. The Courts in the Mofussil were not Royal Courts; they were established by the East India Company which from 1765 had the right, in virtue of its privilege (Diwani Grant), to collect taxes in exchange for an annual payment of a prefixed sum to the Mogul emperor with this right went that of administering justice in private matters. This situation continued until 1857 when the Government of India was placed under the direct authority of the Crown.

Governor-General Warren Hastings in 1772 made a plan. With respect to inheritance, marriage, caste & religious usages or institutions, the rules of Hindu or Muslim law were, Recording for each case, to be applied Recording for the Hastings plan. In other matters deceptions would be rendered Rendering for general principles of justice, equity & good conscience. This formula is employed in a Regulation of 1781 creating two Superior Courts, one for private law matters which was SadarNizamatAdalat for the provinces of Bengal, Bihar & Orissa.

It was used again in the Indian Hi. Co.s Act of 1861 which recognized that the Mofussil was as follows As a result the situation in administration of justice throughout India.: on the one hand. Muslim & Hindu law, applicable only in certain subjects matters, did not have the same breadth of application as in the presidency Towns; apart from them, the applicable law was not the English law the Courts had to find the applicable rule of law by seeking the solution most in agreement with general principles of justice, equity & good conscience.

In the first phase of British rule, Justice was administered by civil administrators (Revenue Officers) who had no legal training or knowledge of English law; they often adjudicated in one of the Indian languages. English law was hardly appropriate of course to populations in which the English were in a very small minority. It seems therefore that a variety of customary or religious rules, which appeared to these officers to be most suitable in virtue of religious & others factors, was principally applied, & that these were drawn from Hindu or Muslim law, local customs were simply dictated by the individual Judges notion of good sense.

3.11 Period of Codification under the British Administration
The Charter Act of 1833 marks the opening of the second period. The First Law Combustion was appointed in India in India to the privations of section 53, the charter Act, of 1833. The Law Commissions was headed by Sir T.B. Macaulay & consisted the former members C. Cameron, J.M. Macleod; G.W. Anderson & F. Millet & worked from 1833 to 1840 at which time it submitted its famous report known as the Lex Loci report.[23]

The Commissions planned to draw up there codes. One for systematic exposition of the Muslim Laws another for the Hindu laws & a separate third for the territorial law to be applicable in all cases. The Commission prepared a draft of the Indian penal code & submitted to the Government on 2nd May 1837. It could not immediately enact into a code, of the Law of Limitation in British India. The Second Law Commotion in 1853 abandoned the two projects codes i.e. the Hindu & Muslim law codes in favour of others which provided for a more acceptable system based on Lex Loci. Sir John Romilly was appointed as the President of the Commotion did not submit any draft of any particular laws along with its reports. Due to the Indian Mutiny of 1857 the Government decided to brings reforms following the reports of Second Commissions. From 1859 to 1882 an intensive legislative movement produced a number of codes & important statutes.

A vast body of Indian law was thus created and, with the cooperation of two new commissions’ i.e. the Fourth Law Commissions (1879)&Third Law Commissions (1861-1870) it replaced the authority of the English Law in the presidencies & the old system of obtaining relief from the Mofussils ultimately changed. It was the beginning of the systematic Rule of Law in India. The British Rulers stressed on codification. The Indians received the landmark enactments like The Indian Code of Civil Procedure, 1859, The Indian Penal Code, 1860 & The Code in crimoinalProcedure 1861 along with the great masterpiece like The Limitation Act 1859.

The period of 1862-1872 called the Golden Age of Codification. During the tenure of Sir Maine & Sir James Stephen several Acts were enacted. They were:


As a result of Fourth Combustions (1879) recommendations, the 1881 Instruments Negotiable Act, The, 1881, the probate Trust Act 1882 & Administration Act 1882. A true reception of the English law was brought about by means of these various laws drawn up by English jurists who often in fact worked only in London. By 1887 the evolution of legal systems was complete for at this time the Privy Council, administration of Indian law the final Court for the judicial committee of the, felt itself able to say that “equity & good conscience” could generally be interpreted to mean the rules of English law if applicable to Indian society & circumstances.

Indian codes & statutes are found in English legal concepts, but they are far from being merely a consolidation of them. The Codification was used as an instrument of legal reform, not merely to achieve a systematic rearrangement of the earlier rules. Indian codification marks some progress in comparison with English law. The special circumstances prevailing in India were very naturally taken into account in the codification. For these reasons Indian codification marks some progress in comparison with English law & has been used as a model by a number of countries (especially the Eastern Africa, & the Sudan) wishing to codify their laws while still remaining within the common law tradition. Despite these reforms & the reliance on the technique of enacted legislation & codification, the law of India was very much part of common law family.

India is attached to the common law tradition not only by its concepts & techniques but also because of its concept of the judicial function & the importance which it attached to the administration of justice, Matters of procedure & the idea of the rule of law. Indians have confidence in good procedures, & these are based on English practice, in order to arrive at what is a substantively just solution. After the failure of the Great Indian Mutiny of 1857, The Queen-Empress Victoria established her own rule in India by winding up the old East India Company. Indian Hi. Co. Act was passed in 1860
for a systematic administration of justice in this country. A provition was made for the last appeals to be referred to the Grand Privy Council from all parts of the Empire including India. A treatise on the Sup. Co. of India will remain incomplete if its' immediate predecessors Her Majesty's Most Honorable Privy Council & the Honorable Federal Court of India are not contemplated comprehensively as a part of introductory historical perspectives.

3.12 Legal, Judicial & the Administrative Development in India

The aspirations of the Indian peoples compelled them to establish the Indian National Congress in 1885. They started to demand more & more autonomy to the native Indians which resulted in the passing of the following major enactments which form the base of our earlier Constitution Law. They are as follows –

[A] Indian Councils Act 1861
[B] Indian Councils Act 1909 (Morley – Minto Reforms)
[C] Government of India Act 1919 (Montague – Chelmsford Reforms)

3.13 Her Majesty's Most Honorable Privy Council

The balance of Privy Counselors is largely made up of politicians. The Prime Minister, Cabinet ministers & the Leader of Her Majesty's Opposition are customarily an Imperial Institution, officials from the Sixteen Commonwealth Realms including Australia, Canada, New Zealand, Falkland, Isle of Man[ India before 1947] are also frequently appointed thus the Council has become practically become successful in maintaining the emotional ties between all the Commonwealth Realms with the Royal House of Windsor, their Common Legacy.

The Privy Counselors can choose to affirm their allegiance towards their Royal House in similar terms should they prefer not to take a religious oath. The initiation ceremony for newly appointed Privy Council is held in private & typically requires kneeling on a stool before the sovereign & then kissing hands. It is said that Tony
Bennsaid & Jeremy Corbyn were appointed as the Privy Counselors; however they tried to alter the established antique Anglo-Saxon customs.

Illustration [2] Queen-Empress Victoria & Her Privy Councilors

Meetings of the Privy Council are normally held once each month wherever the sovereign may be in residence at the time. The quorum, recording for the Privy Council Office, is three, though some statutes provide for other quorum. The Counselors are required to attend regularly. The settled practice is that day-to-day meetings of the Council are attended by four Privy Counselors, usually the relevant Minister to the matters pertaining.

The Queen’s Most Excellent Majesty Elizabeth II has graciously & successfully brought decentralization under her sovereignty in many parts of the Commonwealth Realms. It
is said that the drama of history is played on the stage of geography. Her Majesty must have considered the convenience of her subjects by taking into account the vast geographical distances between the British Isles & her other Commonwealth Realms. Her Majesty has given her Royal Assent to The Govt. of Act. 1982, The Canada Act was 1982, The Australia Government of (AUS) & The Government of New Zealand Act 1986. Her Majesty is the Apex Royal Authority over all these Realms, under the respective provisions’ of the enactments passed in Her Pleasure. They are now the parts of the Written Constitution of the respective Realm.

Thus, today, the United Kingdom remains the only Realm under Her Majesty with an Unwritten Constitution. Her Majesty is normally present in London, while, at Canberra, Ottawa, Wellington, Gibraltar, etc. the Vice-Roys (Governor-Generals) are appointed in her sweet will. They are delegated with certain powers especially giving Royal Assent to the decisions taken by the elected representatives of the subjects of Her Majesty living in the respective Crown Territories. The Queen has also allowed the Decentralization of the Apex Judiciary, i.e. The Privy Council in London, once the highest Court of Appeal for all the present sixteen Commonwealth Realms. Recent developments especially after our Independences in 1947 are of academic interests only.
They are given here as the passing reference only. It is particularly done as we still follow the Windsor Model of Government in all the aspects of the Executive, the Legislative & the Judiciary. The Queen’s Privy Council of Canada is functioning at Ottawa. Same is the position of Australia, where there is a Royal Executive Council of Australia at Canberra. There is no need to send the last appeals to London from these Commonwealth Realms. However the New Zealanders & the certain other Commonwealth Realms can still send their last appeals to the Privy Council in London.

Even, the last appeals from Brunei -Dar-e-Salam can still be admitted to Privy Council in London, if the Sultan of Brunei, has given his Royal Assent to those matters which are to be sent there. The Judicial Committee continues to hear appeals from
several Commonwealth countries, from British Overseas Territories, Sovereign Base Areas & Crown dependencies.

The all Privy Counselor has the privilege of individual access to the sovereign. Companions were considered to appreciate this privilege independently; individuals from the House of Commons have the privilege on the whole. For each situation, individual get to may just be utilized to delicate counsel on open issues.

The last Indian case decided by the Grand Privy Council was that of N. S. KrishnaswamyAyyangar v. PerumalGovardan from the then Madras Presidency. It was decided on 15/12/1949 & on the same day the Lord Chancellor promulgated His Majesty’s will to transfer the remaining Indian cases to the Federal Court of India, New Delhi for their final disposal.

3.14 The Federal Court of India

The Federal Court of India was a lawful body, developed in India in 1937 under the courses of action of the Government of India Act 1935, with extraordinary, re-assessing and directing Jurisdiction. It worked until 1950, when the Sup. Co. of India was set up. The seat of the Federal Court was at Delhi. There was a benefit of allure to the Judicial Committee of the Privy Council in London from the Federal Court of India. The Federal Court had first class one of a kind Jurisdiction in any question between the Central Government and the Provinces. At to begin with, it was locked in to hear offers from the Hi. Co.s of the areas in the cases which incorporated the elucidation of any Section of the Government of India Act, 1935. From 5 January 1948 it was in like manner connected with to hear guarantees in those cases, which did exclude any translation of the Government of India Act, 1935. The Federal Court showed up on 1 October 1937. The seat of the Court was the Chamber of Princes in the Parliament working in Delhi. It began with a Chief Justice and two puisne Judges Delineation [4] Federal Court Of India-1935

The principal Chief Justice was Sir Maurice Gwyer& the other two Judges were Sir Shah Muhammad Sulaiman& M. R. Jayakar. Sir ShrinivasVaradachariar additionally filled in as Acting Chief Justice of this Court in 1943. Sir PatricSpens& Sir
HarilalJekisundasKania likewise remained its; Chief Justices in the turmoil of the Independence Struggle. It worked until the foundation of the Sup. Co. of India on 28 January 1950. Indian research understudies particularly related with the lawful & the social resources must have a flying creatures’ eye see upon the life & works of the colossal legal adviser Sir HarilalJekisundasKania (3 November 1890 – 6 November 1951) the last Chief Justice of the Federal Court of India & the primary first Chief Justice of the Sup. Co. of India. His understanding of the instituted & the standard law including the points of reference has turned into a beacon for the meandering barks of the Indian legal scholars. The scientist has considered sme of his judgments in the accompanying
In 1857, when the Indian society was led by the various Rulers of the small Princely States, the first War of Indian Independence was fought. It actually resulted in failure. The revolutionary princes lost not only their lives but also their states. The British Rulers decided to protect only those princes who were loyal to them. After 12 years of the Great War, an epoch making event occurred in the History of the World. In 1869, the Great Apostle of Peace Mohandas Karamchand Gandhi, now lovingly called Mahatma Gandhi was born in Porbunder. He was educated in the imperial capital London & was
called to bar. After a little practice he decided to plead for all the members of human race who were forced of live in serfdom by the imperial forces of the United Kingdom, France, Holland, Spain & Portugal. Mahatma was only against the policies of injustice & never against the common people of the imperial countries. He severely fought for the people of India & Africa. He inspired the people of Indonesia & Indochina. He invented some of the miraculous weapons unknown to the History of Human Race. They were Non-violence, Non-Cooperation, Civil Disobedience; Satyagraha & Unshun [Uposhan] i.e. fast including Fast up to Death. The mighty weapons compelled the Imperial British Forces to actually retreat from the Indian soil by promulgating the Indian Independence Act 1947. Before their departure the British played their last card of Divide & Rule. They partitioned the Country into two nations.

As the whole Indian Judicial System is the Gift of the British Raj it becomes quite necessary to have birds eyes view upon the basic tenets of the hierarchy of Royal Courts in the Commonwealth Realms under the Royal House of Windsor There was no territorial law.

3.15 Hierarchy of Royal Courts in the British Commonwealth Realms

The researcher has here provided the normal hierarchy of the judicial system in the British Commonwealth Realms. Before 1947 there were 54 Realms, including the Undivided India. After our Independence many Asian & the African territories became independent. Most of them are no Republics. They don’t send their last appeals to the Privy Council. There is no binding force of the judgments of the Privy Council in these Republics. Presently there are 16 Commonwealth Realms which constitutionally recognize the Queen Elizabeth II as the Head of the State. The most important of them are Australia, Canada & New Zealand. The Queen normally sends her Vice-Roy/Governor-General to these countries to perform her legal & judicial duties in her sweet will. Many Realms have altered many aspects of the Old Administration. Modern Realms are as good as free nations. Canada has changed the National Flag from the Union Jack to the Maple Leaf while Australia has changed its National Song from God Save the Queen to Advance Australia Fair. We can now find slight variations in the
Judicial Hierarchy of the Mother Country & the other Realms. However the following is the common pattern. [27]

1) **Magistrate's Courts**
   In England & Wales, they are Lower Courts having a significant Civil Jurisdiction. Domestic Proceedings Act, 1978 & Children Act, 1989 are administered by this Court hence it is also called Family Proceeding Court.

2) **County Court**
   The County Courts are available at nearly all the counties in England & Wales. They have a small pecuniary jurisdiction. Normally upto £ 1000 (Lord Wolf's Interim Report 1995 has recommended to increase the pecuniary jurisdiction upto £ 5000.

3) **Hi. Co. of Justice**
   The Hi. Co. of Justice was created in 1873. It now has three Divisions the Court of Chancery, the Queen's Bench Division & the Family Division.

4) **The Crown Court**
   These Courts have assimilated the old Assizes & the Quarter Sections. They hear all cases involving trial. They also hear appeals from the magistrates’ court.

5) **Court of Appeal (Civil Division)**
   The Court of Appeal hears the appeals from the Hi. Co.. The certain appeals can directly go to the House of Lords (It is called a leapfrog appeal).

6) **Court of Appeal (Criminal Division)**
   This Division hears the appeals from the Crown Courts.

7) **The House of Lords**
   House of Lords is the second organ of the Supreme Imperial Parliament.
   a) The Crown b) The House of Lords c) House of Commons