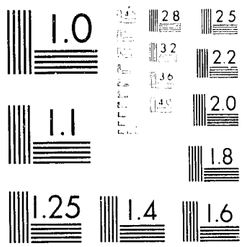

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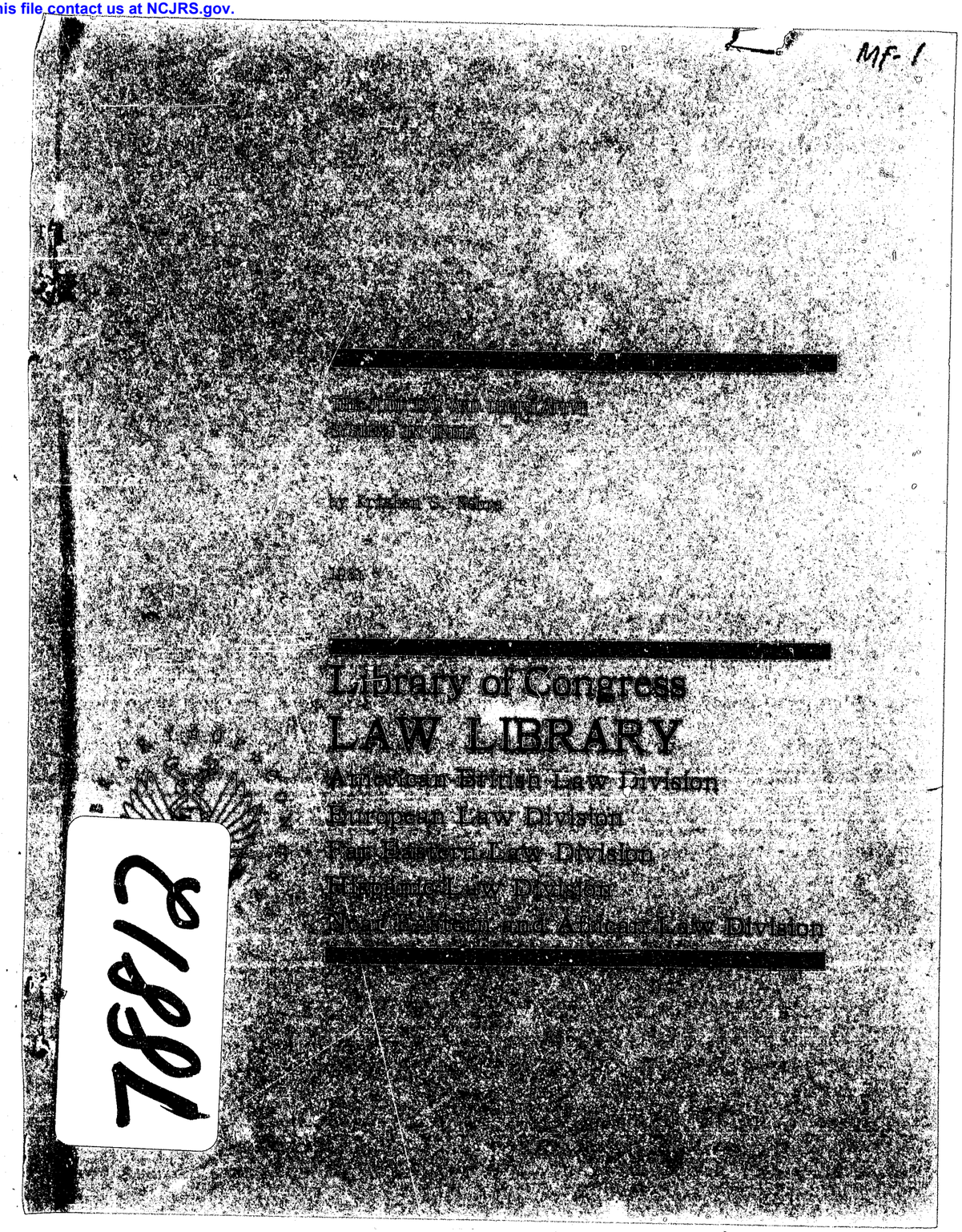

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THE JUDICIAL AND LEGISLATIVE SYSTEMS IN INDIA

By Krishan S. Nehra

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THE JUDICIAL SYSTEM

Historical Background

A historical perspective of the judicial structure of India reveals a gradual introduction of the common law concept to replace the former courts, which dealt only with law based on Indic and Islamic religious books. The law was uncertain, and legal practice depended more on the whim of the presiding authorities, who were not always honest. Therefore, the object in establishing new courts was to provide reasonable and definite law administered by an honest and efficient judiciary.

The present development and organization of the judicial system in India may be traced to the establishment of a court of record called the mayor's court and a court of record in the nature of the court of terminer and gaol delivery.[1/] These were formed in 1726 by a charter granted by King George I England. The mayor's courts were to adjudicate all civil disputes within Calcutta, Bombay, and Madras.[2/]

Provision was made for issuing of processes for procuring the appearance of the parties. The court had the authority to swear oaths and to make rules of practice, and also to appoint such other supportive staff as may be required for administering justice. The court was empowered to try, hear and determine according to justice and right, which was meant to be according to

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1/ H. Dubey, A Short History of the Judicial System of India 55 (1968).

2/ Id. at 83.

English common law and rules of equity. The Court of Oyer and Terminer was constituted "for the trying and punishing of Offenders and Offences (High Treason only excepted)"[3/] committed within any of the three towns. The trial was conducted in a manner similar to that prevailing in England. The Court was enjoined not to try suits or actions among the Indians unless both parties by consent submitted their disputes for determination by the mayor's courts. However, the Indians living in those areas frequently resorted to the jurisdiction of these courts.

Prior to the advent of British power in India, administration of justice in Northern India was in the hands of courts established by the Moghul emperors or other rulers and chieftains owing allegiance to them. These courts exercised both civil and criminal jurisdictions. After the Battles of Plassey in 1757, and Buxar in 1764, the British acquired the right to collect revenue from the vanquished Moghul emperors of Bengal, Bihar, and Orissa. What started in the beginning as a commercial and trading venture in the towns of Calcutta, Bombay, and Madras led to the assumption of far greater territorial responsibilities. Therefore, the East India Company in 1772 undertook the civil and judicial administration of the mofussil (i.e., rural) territory. To dispense civil justice outside the presidency towns, provincial civil courts, called mofussil dewanny adalats, were established, and appeals against their decisions were taken to the Sadar Dewani Adalat located in Calcutta.[4/] For criminal justice,

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3/ Supra note 1 at 61.

4/ M. Jain, Outlines of Indian Legal History 149 (1972).

criminal courts called foujdary adalats were established in each district. Appeals from them lay to the Suader Nizamat Adalat, also in Calcutta. Whereas the language in the King's Courts was English, Persian was retained for the Company's Courts in the mofussil areas. The Civil Courts were required to give judgment according to "Justice and Right" -- an expression used in the earlier charters establishing the Mayor's Courts. Bombay in 1793 and Madras in 1802 also modeled their system of judicature on a similar basis. Later on, the law of procedure of all the mofussil courts was simplified and consolidated by the Code of Civil Procedure of 1859 (Act VIII of 1859).

The Regulating Act of 1773 authorized the King, by charter or letters patent under the Great Seal of Great Britain, to erect and establish a Supreme Court of Judicature at Fort William in Bengal with "full power and authority to exercise and perform all Civil, Criminal, Admiralty and Ecclesiastical jurisdiction" and "to form and establish such Rules of Practice and such Rules for the processes of the said Court and to do all such other things as would be found necessary for administration of Justice."[5/] The Act also provided that on the establishment of the Supreme Court, the Mayor's Court would cease to function. Consequent to this enactment, the Supreme Court of Judicature at Fort William in Bengal was established in 1774 under a royal charter. The Supreme Court was directed to give judgment and sentence according to justice and right in accordance with English common law and rules of equity only. Similar

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5/ 13 Geo. III, c. 63.

supreme courts with the same jurisdictions and powers were also established at Bombay and Madras. All these courts were called the King's courts as opposed to the company's courts which operated in the mofussil area under the direction and authority of the Company.

The Supreme Court, in its endeavor to provide impartial justice, expanded its activities and enlarged its jurisdiction to dispense justice for people outside the presidency town. This caused a rift with the executive, since the latter considered it an intrusion into its sphere of work. Also, because the Supreme Court tried to give relief against some of the highhanded acts of the executive in the countryside, the relations between the two branches of the government became so strained that the Parliament passed the Act of Settlement, 1781.[6/] The purposes of the Act, as stated in its preamble, were to remove doubts and difficulties regarding the true intent and meaning of certain clauses of the 1773 Act, and to support the lawful government of the country. The preamble and its provisions made it clear that the contest between the Court and the Government had been won by the latter. After all, it was the collection of the revenue that was at stake, and it was natural that the Act facilitated the executive authority. The Court's authority and jurisdiction, therefore, became restricted. The supreme courts in the presidency towns and the provincial civil and criminal courts in the mofussil coexisted and performed their respective functions. At times, however, questions of recognizing the decrees of mofussil courts and giving effect to them in the presidency

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6/ 21 Geo. 3, c. 70.

towns came up before the Supreme Court.[7/] The Supreme Court refused then to interfere with the decrees, observing that if the mofussil court had a right to adjudicate on merits, there was no right to intervene in these decrees.

The enactment of the Indian High Courts Act, 1862, authorized the British Parliament to create in the several presidencies, by letters patent, high courts in place of the supreme courts and the sadar dewani adalats and sadar nizamat adalats.[8/] With the establishment of these three high courts, all the courts in British India became "crown courts" and were brought, for the first time, under one unified system of control. In effect, the high courts were successors of the supreme courts as well as of the sadar adalats and combined in themselves the jurisdictions of both sets of old courts. The original jurisdictions were exercisable by the original side of the high courts, and the appellate jurisdiction was exercisable by the appellate side.

After the establishment of the high courts, civil courts were organized in Bengal, the North-Western Provinces, and Assam by the Bengal, Agra, and Assam Civil Courts Act, 1887 (No. XII of 1887). The Act provided constituting the Courts of the District Judge, the Additional District Judge, the Subordinate Judge and the Munsif. Similar civil courts were set up in other provinces.

7/ Kerry v. Duff, I Indian Dec. (O.S.) 711 (1841).

8/ 24 & 25 Vic., c. 104.

The Criminal Procedure Code of 1898 reorganized the criminal courts into five classes, namely, the courts of session, and presidency magistrates of the first, second and third classes. The high courts exercised a general power of superintendence over the civil and criminal courts in the mofussil. Then Punjab was finally annexed by the British in 1849. It was constituted into a Chief Commissioner's Province, and a Judicial Commissioner was appointed as the Head of the Judiciary, which was replaced by the formation of the High Court in Lahore in 1869.

The practice of appeals from the high courts to the Privy Council in England continued uninterrupted until 1939. The Judicial Committee, 5,000 miles away from India, worked under certain obvious handicaps. Its distance and composition unquestionably were a disadvantage both to the court and to the counsel since it lacked knowledge of local Indian conditions and mores. Moreover, the system put a wealthy litigant at an advantage, for he, by his capacity to take the case to the Privy Council, could coerce a poor opponent to surrender or compromise. More important than this was, perhaps, a sentimental objection to the continuance of the Judicial Committee as an ultimate court of appeal from India. The Government of India Act, 1935, therefore, sought to inaugurate a federal polity in India.[9/] As a result, a Federal Court of India was set up in 1937, which later became the present-day Supreme Court of India.

9/ 26 Geo. 5 & 1 Edw. 8, c. 2.

Organization of the Courts

The Supreme Court of India is the highest court of appeal and review in the country. This is comparable to the United States Supreme Court. Under the Supreme Court are the state high courts, like the supreme courts of the states in the United States. The high courts are supreme in their jurisdiction, but their judgments are reviewable by the Supreme Court. These two courts are constitutional courts and are set up under the Indian Constitution. However, at the district level, District and sessions judges are constituted under the respective state laws. The district court is the principal court of original jurisdiction in the district. All the subordinate courts, magistrates and courts of small causes, including the panchayats, function under the watchful eye of the district judge. Their jurisdictional details and operations will be discussed later.

Judicial Power

Division of Judicial Power

There is a constitutional division of judicial powers between the Central Government and the states.[10/] As a result of this division, the constitution, organization, and jurisdiction of the Supreme Court and the constitution and organization of the state high courts are subjects to federal legislative power. Additionally, Parliament has concurrent legislative power over jurisdiction and other powers of state courts on any subject in the Concurrent List.[11/] Thus, Parliament shares its

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10/ India Const. arts. 245 and 246, List I, entries 77-79 and 95.

11/ See discussion infra at p. 35.

legislative authority regarding jurisdiction and powers of all courts located in the states on subjects on the Concurrent List, but it does not share its authority in respect of the Supreme Court.

Independence of the Judiciary

To maintain the balance of power, the judiciary has been provided an independent status in the Constitution.[12] The integrated judicial system has a plenitude of powers at the top to meet the ends of justice in all matters. The Constitution also provides conditions for independent and impartial exercise of their powers. Security of tenure has been conferred by the Constitution on the judges of the Supreme Court and the High Courts.[13] The Supreme Court justices retire at the age of 65 years and the judges of the high courts at 62 years of age.

They cannot be removed from office except on proven charges of misconduct or incapacity. This is because they hold office, unlike the members of civil and military services of the Union of India, during good behavior and not at the pleasure of the President. The procedure for their removal requires that an order be made by the President after each House of Parliament has presented an address for removal.[14] The address is made by a House after a resolution to that effect has been passed by a majority

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12/ Sharna, "Judicial Independence and Impartiality in India," 39 Supreme Court Journal 24 (July-December 1968).

13/ India Const. arts. 124(2) and 214(1).

14/ The Judges (Inquiry) Act, 1968, No. 51.

of the total membership of the House, and, simultaneously, by the majority of two-thirds of the members present and voting on the resolution. Actually, the Speaker, on admission of the motion for presentation of an address, holds the motion pending and appoints a committee of three: one of the justices of Supreme Court, one of the chief justices of any of the High Courts, and a distinguished jurist. If the committee, after investigation in accordance with the principles of due process, finds the charges of misbehavior unsubstantiated, the report is laid before the Parliament and no further action is taken. However, if the charges are proven, and the motion is passed by the double majority, i.e., by the majority of the total membership of the House and the majority of two-thirds of the members present and voting, and similarly passed by the Council of States, an address can be presented to the President.[15] This procedure restricts interference by the executive and assures security of tenure to the judges. Moreover, the judges expenses are charged to the Consolidated Fund of India.[16]

Supreme Court of India

The Supreme Court of India is a constitutional court, empowered to interpret the Constitution, and to entertain and decide inter-governmental disputes that might arise in the form of cases and controversies. It is also the final court of appeal. The law declared by the Supreme Court is

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15/ India Const. arts. 124(5), 217(1)(b).

16/ Id. arts. 112(3)(b), 202(3)(d).

binding on all courts within the territory of India.[17] All authorities, civil and judicial, are under an obligation to follow the interpretations of the Supreme Court.

The Supreme Court consists of a Chief Justice and 17 other justices.[18] The Chief Justice is appointed by the President by a warrant under his hand and seal after consultations with such judges of the Supreme Court and high courts with whom he wishes to consult. Other judges are appointed in a similar manner but prior consultation with the Chief Justice is necessary.[19] A person who is a citizen of India and has been a judge of a High Court for 5 years, or an advocate of a High Court for an aggregate period of 10 years, may be appointed a judge of the Court. A person selected for appointment to the Court can also be a non-practicing lawyer who, in the opinion of the President, is a distinguished jurist. Selection as a judge usually depends on the legal experience of the incumbent. One of the salient features of the Supreme Court is that the ideological or partisan views of the judges have not been a significant criterion of their selection. In fact, there is a tendency to select judges of non-partisan politics. Because of their detachment from party politics and the fact that the basis of their selection is mainly on merit, the judges have generally upheld the rule of law and the

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17/ Id. art. 141.

18/ The Supreme Court (Number of Judges) Act, 1955, No. 55, as amended by the Supreme Court (Number of Judges) Amendment Act, 1977, No. 48.

19/ Id. art. 124(2) proviso.

constitutional rights of the people. Among many landmark cases, the well known "Privy Purse" case and the "Banks Nationalization" cases are noteworthy. In the former, the Government of India ordered abolition of the Privy Purses and stopped payment of the annual dues constitutionally guaranteed to the Indian Princes. The Supreme Court declared the action of the Government illegal by issuance of a writ of certiorari.[20] The Supreme Court showed the strength of its independence in the Banks cases when the executive tried to nationalize the private banks, under the garb of creating a socialist society. This attempted action was also quashed.[21]

For the federal judiciary, the Supreme Court is the court of last resort. It inherited the function of interpreting the constitution from the former Federal Court and the final appellate function from the Privy Council. It is, therefore, the successor to the great traditions of both these courts.

Jurisdiction of the Supreme Court

The jurisdiction of the Court is comprehensive, extending to different causes, appeals, and matters. The nature of jurisdiction may be original, appellate, special, advisory and supervisory. It has, in addition, extraordinary jurisdiction to grant writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari. The role of the Supreme Court will be discussed under the following three functions: as a machinery of impartial

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20/ H.H. Maharajadhiraj Madhav Rao Jivaji Rao Scindia Bahadur v. Union of India, 58 All India Rptr. 530 (S. Ct. 1970).

21/ Rustom Cawasjee Cooper v. Union of India, [1970] S. Ct. Jour. 453.

arbitrament; as the final appellate authority; and as an advisory body to the executive.

It arbitrates impartially all inter-governmental disputes between the Federal Government and the states, or between one state and another. This is its exclusive and original jurisdiction. It may also exercise extra-ordinary jurisdiction granting relief whenever there is a violation of a fundamental constitutional right. In normal circumstances, the Court may require a petitioner to state reasons as to why he has not exhausted available remedies first in one of the high courts of competent jurisdiction. The Supreme Court interprets the Constitution in the most authoritative manner.

Original Jurisdiction

It has the exclusive original jurisdiction to hear any dispute between the Central Government and a state or states or between states inter se, any dispute which involves a question of law or facts affecting some legal right, or a recognized interest of any of these parties. The dispute must be of a civil nature and not merely political.

Jurisdiction in a political matter is barred. It has no original jurisdiction in cases affecting ambassadors and public ministers, nor in a dispute relating to any treaty, agreement, or covenant.

Appellate Jurisdiction

The Supreme Court is the ultimate tribunal for hearing appeals from judgments of all the high courts and other tribunals in the country, the object being to assure that injustice is not perpetrated by final decisions of any court

or tribunals under it. In this role, it decides all disputes and enforces the rights of the citizens and corporations.

The appellate jurisdiction extends to:

(i) all constitutional matters, questions of law as to the interpretation of the Constitution; and

(ii) civil and criminal matters.

As the interpreter of the Constitution, the Court plays an important role. Its interpretation of the Constitution is binding on all courts.[22/]

An appeal before the Supreme Court is available when the high court, whose judgment is to be appealed certifies that a question of law as to the interpretation of the Constitution is involved. An appeal may be granted by a special leave from the Supreme Court in a case in which a high court refuses to grant the certificate. In interpreting the provisions of the Constitution, the Supreme Court may declare any law void as being violative of the Constitution.

Civil matters relate to private rights in connection with the enforcement of property rights, rights arising out of contracts, and tort liabilities. A proceeding brought for the enforcement of any civil right is a civil proceeding irrespective of the special character of the tribunal deciding it. Therefore, proceedings arising out of an election petition, a writ of petition against an order of the administrative authorities, are civil proceedings. Judgments of the high courts in civil matters are

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22/ India Const. arts. 141 and 147.

appealable to the Supreme Court. There may be an appeal from a judgment, decree, or final order of a high court if the high court has granted a certificate stating that the case involves a substantial question of law and that in its opinion, said question needs to be decided by the Supreme Court.[23/]

In criminal matters, an appeal lies to the Supreme Court from any judgment, final order, or sentence of a high court if the court has reversed an order of acquittal of an accused person and sentenced him to death or has withdrawn any case from any court subordinate to its authority for trial before itself and has in such trial convicted the accused person and sentenced him to death. An appeal also lies when a high court grants a certificate that the case was fit for appeal in the Supreme Court. An appeal may also be filed against the sentence or order of the lower courts, e.g., a sessions court or if the Supreme Court in its discretion grants a special leave to appeal on a petition made to it.[24/] The certificate for special leave is not granted unless it is shown that exceptional and special circumstances exist in that a substantial and grave injustice had been done to the applicant, and that the case in question presents features of sufficient gravity to warrant a review of the decision against which the appeal is being made.

23/ Id. art. 132(1).

24/ Id. art. 136.

Advisory Jurisdiction

The Supreme Court has been given an advisory jurisdiction as well.[25/] When it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance, that it is "expedient" to obtain the opinion of the Supreme Court upon it, he may refer the matter to the Court for its consideration. The advisory nature of jurisdiction was much criticized. At one time, it was thought that it would involve the Court in too much direct participation in legislative and administrative processes. However, on the whole, the institution of the advisory opinion has functioned well in India and has been creative in value. This function has been invoked by the President on a number of occasions, and, as a result, serious crises have been averted.

In one case in March 1964, one Keshav Singh printed and published a paper derogatory to the Legislative Assembly of the State of Uttar Pradesh. On March 14, 1964, the Speaker of the Assembly administered a reprimand to Keshav Singh for having committed a contempt of the legislature and also for having committed a breach of the privileges of a member of the Assembly. Later, the Assembly directed the imprisonment of Keshav Singh for committing another contempt by his conduct in the Assembly when he was summoned to receive the reprimand and for writing a disrespectful letter to the Speaker. A warrant was accordingly issued directing the detention of Keshav Singh in the district jail

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25/ Id. art. 143.

for 7 days. In the meantime, the High Court of Uttar Pradesh, on a petition of habeas corpus on behalf of Keshav Singh, granted bail to the petitioner. The petition impleaded the Speaker, the Chief Minister, and the Superintendent of the Jail as defendants. On taking notice of such an order of the Court, the Assembly passed a resolution of contempt against the judges who granted the bail. The Court did not like the idea of its judges being arrested, so the entire Court of 28 judges sitting together issued a restraint order, staying the implementation of the legislative order of arrest of its judges.

To avoid a confrontation between the judiciary and the legislature, the President made a reference to the Supreme Court for its advisory opinion. The reference required resolution of the powers of the High Court and the powers and privileges of the Legislative Assembly. The Supreme Court upheld the validity of the High Court's orders and restrained the two bodies from causing such public confrontations.

The case fully justified an advisory opinion. It saved an embarrassment to the Federal Government and the deadlock was resolved peacefully. The matter would not have gone to the Supreme Court since the legislature had taken a serious view of the Court's interference in the proceedings of the Assembly, and, therefore, had no desire to approach the Supreme Court for an adjudication of the dispute.

Since the Supreme Court can hear appeals against the judgments of the lower courts, including the High Courts, and also exercise extra-ordinary powers in the issuance of appropriate writs against the judicial,

and semi-judicial and administrative authorities, it has power of general superintendence as well.[26/]

State and Local Courts

The state judiciary consists of a high court and a system of subordinate courts. The high courts come below the Supreme Court in judicial hierarchy. At present each state has a high court.[27/] Parliament may, however, establish by law a common high court for two or more states.[28/] The States of Punjab and Haryana and the Union Territory of Chandigarh have a common High Court in Chandigarh. The States of Assam, Nagaland, Meghalaya, Manipur, and Tripura have a common High Court called the Gauhati High Court. Currently, there are 18 high courts for 22 states and 9 union territories in India.

State High Courts

A high court consists of the Chief Justice and such other judges as the President may appoint from time to time.[29/] The judges are appointed by the President after consulting the Chief Justice of India, the governor of the state concerned and, in the case of appointment of a judge other than the

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26/ Id. art. 32.

27/ Id. art. 214.

28/ Id. art. 231.

29/ Id. art. 216.

chief justice of the high court, the chief justice of that court is to be consulted. A person to be appointed as a high court judge should be a citizen of India; he must have held a judicial office in India, or been an advocate of a high court for at least 10 years.[30/]

A high court judge (whether permanent, additional, or acting) retires at the age of 62 years.[31/] A high court judge may resign his office by writing to the President. He may be removed in the same manner, as the judge of the Supreme Court, i.e., on the two Houses of Parliament passing a resolution for his removal, by a special majority, for proved misconduct or incapacity. Parliament has enacted the Judges (Inquiry) Act, 1968,[32/] to regulate the procedure for investigation and proof of misconduct or incapacity of a judge of the Supreme Court or a high court.

The high court is a court of record and has all the powers of such a court including the power to punish for contempt. The fact that the high court is empowered to issue writs confers a significant power on it to enforce rights of the people, to administer justice, and to review administrative action.[33/] It can withdraw a case from a subordinate court if it is satisfied that the case involves a substantial question of law regarding the interpretation of the Constitution. This enables the Court to determine a constitutional point at the earliest opportunity.

30/ Id. arts. 217 and 224.

31/ Id., §§ 4(a) and 7 of the Constitution (Fifteenth) Amendement Act, 1963.

32/ No. 51 of 1968.

33/ Id. art. 227.

Power of Superintendence

Every high court has the power of superintendence over all courts and tribunals except those which are constituted under a law relating to the armed forces.[34/] This includes the power to call for returns from them; to make or issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and to prescribe the forms in which books, entries, and accounts are to be kept by the officers of such courts. This power of superintendence is broad. It is both administrative and judicial in nature. The object of this power is to keep the courts and tribunals within the bounds of their authority rather than for correcting mere errors of law or facts. Article 227 enables the high courts to stop the exercise of arbitrary power while article 226 helps eradicate illegalities or errors of law in the orders.

Independence of the High Courts

The Constitution safeguards and preserves the independence and impartiality of the high courts in the same way as in the case of the Supreme Court. The high court judges are appointed by the President for a fixed tenure. The process to remove them from office, before the age of retirement, is similar to the one followed in the case of the judges of the Supreme Court. The expenses of a high court are charged to the state's consolidated fund. The Constitution specifies the judges' salaries, and they cannot be varied without amendment. The allowances, leave, and pension for judges may also not be varied to their disadvantage after their appointment.

34/ Id. art. 226.

Jurisdiction

The Constitution does not contain detailed provisions to define the jurisdiction of the high courts. It merely declares that their jurisdiction, the law administered by them, the respective powers of the judges in relation to the administration of justice by the courts, and their rule-making power are to be the same as were enjoyed by them immediately before the Constitution.

A high court exercises jurisdiction over the territories of the state in which it is situated. This jurisdiction may be extended by parliamentary legislation. All appeals from the district judges are to the high court, and the high court has the power to decide by its rule-making authority whether the appeal is to be heard by one or more than one judge.

Lower Courts

Appointment and Tenure

The Constitution makes a few provisions to regulate the organization of these courts and to ensure independence for the judges.[35/] Appointments, postings, and promotions of the district court judges in a state are made by the governor in consultation with the high court. A person not already in "service of the State" is eligible to be appointed as a district court judge only if (1) he has been an advocate for not less than 7 years, and (2) is recommended by the high court for such appointment. These constitutional provisions gave

35/ Id. arts. 233-237.

rise to several controversies. In one case, the Supreme Court held unconstitutional the selection of a district court judge by a selection committee of two high court judges and the judicial secretary on the ground that the selection was not based on consultation with the high court as a whole.

Below the district courts, there are other subordinate courts. Appointment of persons, other than the district court judges, to the state judicial service are made by the governor in accordance with the State Public Service Commission and the high court. Here consultation implies the making of rules and not the actual selection of the appointees.[36/] In any case, the high court bears the ultimate responsibility of judicial administration. Therefore, the Law Commission has proposed that persons appointed to the subordinate judiciary may be persons recommended by the high court.[37/] Control over the district and subordinate judiciary is vested in the High Court, including posting, promotion, leave, and transfer. The high court is not authorized to deal with any such person, however, other than in accordance with the conditions of service prescribed under the law. Therefore, the power to discipline these persons lies with the high court. The subordinate judiciary have to retire at the age of 58 years and are entitled to a pension.

36/ Id. art. 234. Farzand v. Mohan Singh, 55 All India Rptr. 67 (Allahabad 1967).

37/ Law Commission of India, Fourteenth Report 218 (1958).

Criminal Courts

The following classes of criminal courts have been established on a uniform basis for all the states:[38]

- court of sessions;
- judicial magistrates of the first class, and in any metropolitan area, the metropolitan magistrates;
- judicial magistrates of second class;
- executive magistrates

These criminal courts lie on separate levels of an ascending ladder, so the hierachical order is magistrate second class, first class and the court of sessions. Under state law, each state (territory) is divided into several districts, and each district is under the charge of a court of sessions. Its presiding officer is titled the sessions judge. A sessions judge is appointed by the high court which may also appoint additional sessions judges and assistant sessions judges, as required, to exercise the powers of a court of sessions. Judicial magistrates are appointed by the state government in consultation with the high court. Since the separation of the judiciary from the executive, executive magistrates work under the supervision of the executive, and try offenses relating to the maintenance of law and order. The judicial magistrates are supervised by the sessions judges and the high court, and try other criminal offenses.[39]

38/ The Code of Criminal Procedure, 1973, No. 2 of 1974, § 6.

39/ A diagram of the Indian Court Hierarchy is found at page 53.

Judicial magistrates may pass any sentence authorized by law. A sentence of death passed by a sessions court is subject to confirmation by the high court. Orders of the sessions judge, original or appellate, are subject to review by the high court.

A high court may pass any sentence authorized by law. But the main function of the high court is to hear appeals, revisions, and references. A high court is generally the final court of appeal in all criminal matters except in cases where there has been a failure of justice owing to the misapplication of law or a defect in procedure. In such cases, an appeal lies to the Supreme Court with the leave of the high court, or otherwise special leave may be granted by the Supreme Court to file an appeal.

Panchayats

By far the largest number of small courts exist in the villages in India. These are called "panchayats." Most of the states in India have set up these bodies in small villages whose remoteness makes it difficult for their inhabitants to travel to the regular law courts located in the cities. A panchayat is a body of elected officals called "panches." After the election, the panches elect their presiding officer who is designated as a "sarpanch," and another to act in place of the sarpanch, in the latter's absence, titled "naib sarpanch." A panch may be removed by the government for various reasons, such as misconduct, insolvency, or failure to perform his duties.

Since 75 percent of India's population live in the villages, a panchayat serves the useful role of dispensing quick justice for petty offenses. They do not observe strict rules of criminal procedure,but must conform to the principles of natural justice. On the criminal side, the panchayats deal with several minor offenses such as committing an affray, giving false information about an offense, defiling the water of a public spring or reservoir, committing a public nuisance, stealing property not worth more than 100 rupees ($8.00), singing obscene songs in public and causing damage, etc. The district magistrate is required to exercise general supervision over the work of the panchayat and may, on review, cancel orders of the panchayat.

Civil Courts

The civil courts in the states (district courts) are set up by state laws because the constitution and organization of these courts are within the jurisdiction of the state government concerned. The district court, the principal civil court of original jurisdiction, is located at the district headquarters. The district court judge is also delegated the authority of a sessions judge for purposes of a criminal trial. He is therefore titled district and sessions judge. He has several subordinate judges under him, known as subordinate judge first class, second class, and third class. In addition, a court of small causes hears cases in which the valuation is limited to 500 rupees (approximately $70). This court deals with a large number of petty civil cases. The procedure is summary and quick and is mainly aimed at the expeditious disposal of minor disputes about money. Their judgments are revisable by the superior court if a failure of justice has arisen from a defect in legal procedure.

The district judge and the subordinate courts are courts for all other civil matters. A judgment of the subordinate court is appealable to the district whose order can be reviewed by the high court in a second appeal on a point of law only.[40/] Additionally, the district judge exercises original jurisdiction in important matters, such as insolvency, company matters, and matrimonial jurisdiction.

Special Courts

Special courts and quasi-judicial tribunals were established under the federal and state statutes to provide quick relief for citizens' grievances. These tribunals include the accident claims tribunals, income tax tribunals, and the labor and industrial courts. Their decisions may be reviewed by the high courts. These quasi-judicial bodies are bound to give notice, an opportunity to defend, and an unbiased hearing. Finally, the tribunals are required to pass "speaking orders" dealing with different grounds argued. Failure to comply with these may result in the issuance of a writ of certiorari by the high court quashing the decision.

40/ The Code of Civil Procedure, 1908, No. 5, §§ 100-101.

THE LEGISLATIVE SYSTEM

The legislative development in India began in 1858 after the assumption of power by the British Crown.[41/] As a result, all the territory of India, on divestment of the East India Company, became vested in the Government of Great Britain. The Governor General became the Viceroy of India. An office of the Secretary of State for India and a Council were created in England, and the secretary was made a member of the Cabinet. The Act of 1861 was an important measure in the development of the Central Legislative Council.[42/] The policy of mutual association was also given effect.

The 1861 Act created Legislative Councils in Bombay and Madras. The powers of these Legislative Councils were restricted since the laws could be promulgated only with the assent of the Governor General. It made the latter, therefore, omnipotent, and the powers of control were vested in him. The members of the Councils were appointed by the government rather than elected.

The 1892 Act enlarged the functions of the Legislative Councils. The members, though only nominees of the government, were authorized to discuss the annual financial statement under certain conditions and restrictions. Thus, an opportunity to indulge in fair criticism of the financial policy of the government was given to the Councils even though there were no elected members. The numbers of members of the Councils to be nominated by the Governor General

41/ 21 & 22 Vict. c. 106, § 1.

42/ The Indian Councils Act, 1861, No. LXVII.

were later increased. The central council membership could not exceed 16 nor be less than 10; in the case of Madras and Bombay, it could not be more than 20 nor less than 8. The maximum number for Bengal was fixed at 20.

In 1909, the size of the legislative councils were increased: the Governor-General's Council to consist of not more than 60 members, those of Madras, Bengal, Uttar Pradesh, Bombay, Bihar, and Orissa to a maximun of 50; and Punjab, Burma and Assam to 30.[43/] In each Council, a small number was to be elected but the remaining members were either nominated or ex-officio. The majority in any case were nominated non-officials. The members had the right to ask questions and supplementary questions to have any point clarified.

More changes were introduced in 1919.[44/] A bicameral legislature of two Houses, called the Central Legislative Assembly and the Council of States, was set up in place of one Assembly. The life of the Assembly was to be 3 years and the Council 5 years, but the same could be extended in both cases by the Governor-General. The latter also had the power to prorogue or dissolve the legislatures. The size of the provincial assemblies was also enlarged by raising the number of their elected members to 70 percent. Legislative subjects were divided between the provinces and the center by providing two separate lists for them.

43/ The Indian Councils Act, 1909, 9 Edw. 7, c. 4.

44/ The Government of India Act, 1919, 9 & 10 Geo. 5, c. 101.

Since the people were not satisfied with the working and composition of the assemblies, the government, in order to satisfy the public demand, created a Statutory Commission to examine the constitutional set-up under the 1919 Act. In 1932 the government accepted the Commission's report, and implementation of the recommendations of that report.[45/] This Act created a federation of provinces consisting of a Federal Assembly and a Council of States at the center, each of which was to have a life of 5 years. This statute later became the basis of the present Constitution of India. There were two safeguards in this Act: (1) the legislative power of the legislature was very restricted as it was denied powers regarding a large number of subjects, (2) the Governor-General and the provincial governors could frustrate even this legislative authority by their over-riding authority and by assumption of absolute dictatorial powers in the event of the breakdown of the Constitution. Finally, on August 15, 1947, the sovereign Constituent Assembly framed the present Constitution--a very elaborate document outlining the powers of the branches of the government.

Present Organization

No country with the diversities of ethnic, religious, and linguistic background such as those found in India could be governed adquately by a unitary form of government. The founding fathers of the Indian Constitution, therefore, wanted to create some unity in this diversity. Their choice was for a federal form of government. The largest democracy of the world, India is a union of 22 states

45/ The Government of India Act, 1935, 25 & 26 Geo. 5, c. 42.

and 9 union territories, the latter being directly administered by the central Union Government. The elections for the selection of members comprising the country's legislatures are based on universal adult suffrage.

The Central Parliament

The Central Parliament consists of the President and two Houses, known as the House of the People or the Lower House (Lok Sabha), and the Council of States or the Upper House (Rajya Sabha).[46/] The Council of States consists of not more than 250 members; 238 elected representatives of the States and the Union territories and 12 members, having special knowledge or practical experience with respect to such matters as literature, science, art, and social service. The latter are selected by the President.[47/] The members of the Council are elected indirectly by members of the state legislative assemblies in accordance with the system of

46/ India Const. art. 79.

47/ Id. art. 80.

proportional representation by means of a single transferable vote.[48] This secures representation of all groups or interests in the electorate in proportion to their respective strengths. The Council of States is not dissoluble. One-third of its members retire at the end of every other year. The Vice President of India is the ex-officio Chairman of the Council of States.[49]

48/ This procedure means that every voter has only one vote irrespective of the number of seats to be filled. If, for instance, there are five seats to be filled, the voter does not cast five votes but indicates five successive preferences, as first preference, second preference, etc., on the ballot paper which gives the names of the candidates.

The total number of valid ballots is then divided by a number which exceeds by one the number of vacancies to be filled, and the resulting number increased by one, disregarding any fraction or remainder, is the number of votes that is sufficient to secure the return of a candidate. This number is known as the quota. Thus, suppose that there are 100 valid ballots and three seats to be filled, 100 is divided by 3 plus 1, i.e., 4 and the quotient arrived at is increased by 1, so that the quota is 26. After the quota is fixed, any candidate who secures a number of first preferences equal to the quota is declared elected. The surplus first preferences marked in his favor on the ballots cast for him are then distributed proportionately among the candidates who are marked as second preferences on the ballot papers in which he has been marked as first preference.

If on such distribution, it is found that the aggregate number of first preference votes, including the first preference votes originally obtained by him and the first preferences subsequently allotted by distribution, for any such candidate reaches the quota, he is declared elected.

49/ India Const. art 89.

The House of the People consists of not more than 525 members, elected directly from the constituencies in the states, with not more than 25 members to represent the union territories. Each state has a certain number of members allotted to it, making the ratio between population and the number of members the same. The life of the House of the People, unless dissolved earlier, is 5 years.[50]

During its first sitting, the House elects a Speaker and a Deputy Speaker to preside over its meetings.[51] Since the House is composed of directly elected members, it wields greater legislative and fiscal power than the Council. The Prime Minister is generally a member of this House. Of the four Prime Ministers serving to date, three were elected Prime Minister while they were members of the Lower House. Mrs. Gandhi, at the time of becoming the Prime Minister, was a member of the Council of States. She was, however, elected to the Lower House within 6 months after becoming the Prime Minister.

A private member's bill sought to amend the Constitution to provide explicitly that the Prime Minister should be a member of the House of the People. It was defeated after the Minister concerned, while agreeing with the spirit of the bill, assured the Parliament that Mrs. Gandhi was of the same view but did not wish such a tradition to be made law.[52]

50/ Id. art. 83.

51/ Id. art. 93.

52/ Shakder, "Prime Minister as a Member of the Lower House: Position in Various Countries," XII The Journal of Parliamentary Information 15-20 (1966).

State Legislatures

Every state legislature consists of a governor and either two houses, a legislative assembly and a legislative council, or a legislative assembly alone.[53/] A legislative assembly, unless dissolved before, continues for 5 years from the date of its first meeting. The state legislative council is a permanent body and is not subject to dissolution. One-third of its members retire every second year. On a proposal, supported by a resolution of the legislative assembly concerned, the Parliament may create a new, or abolish an existing legislative council.

The legislative assembly consists of not more than 500 members and not less than 60 members chosen by direct election from within the state territorial constituencies.[54/] The total number of members of a legislative council consist of not less than 40, but in no case does it exceed 1/3 of the total number of members in the legislative assembly of that state.[55/] The purpose of the legislative council, as its composition would indicate, is to get special interests involved in the law-making process. The composition of the legislative councils are as follows:

(a) one-third of the members are elected by electorates who are members of municipalities, district boards, and such other local authorities, as the Parliament may by law provide;

53/ India Const. art. 172.

54/ Id. art. 170.

55/ Id. art. 171.

(b) one-twelfth are elected by persons who have been for at least 3 years, graduates of any university in the territory of India and residing in that state;

(c) one-twelfth, elected by the electorate, consist of persons engaged in teaching in educational institutions;

(d) one-third are elected by the members of the legislative assembly of the state from among the persons who are not members of the assembly; and

(e) the remainder are nominated by the Governor.

The Division of Powers and Privileges

The Parliament has full plenary powers to make laws on all subjects and matters not given to the state legislatures.[56/] Subject to the provisions of the Constitution, the Parliament can make laws for the whole or any part of the state concerned. Beside the express limitation, there are no restrictions on the legislative powers possessed by the Parliament. It has full discretion to frame its laws in any form. Laws enacted may be absolute or conditional. They may be prospective or retroactive and, if so declared, extraterritorial.

Like any other federal constitution, the Indian Constitution provides for a division of state authority between the Union and the states. The state governments do not need to look forward to the Union Government for devolution of power. They derive their powers--legislative as well as executive--from the Constitution as is true in the case of the Union.

56/ Id. art. 246.

Under the scheme of distribution of powers, a state legislature can pass laws "for the whole of any part of the State" in matters expressly assigned to it. Parliament may pass laws "for the whole or any part of the territory of India" concerning matters which are put under its jurisdiction or over which the state legislatures cannot make law.

The Seventh Schedule of the Constitution has three Lists: the Union List (List I), the State List (List II), and the Concurrent List (List III).[57/] The Union Parliament has exclusive power to legislate with respect to matters in List I which includes the subjects of the Defense of India, the military forces, atomic energy, foreign affairs, foreign jurisdiction, citizenship and naturalization, emigration and extradition, railways, airways, post and telegraphs, inter-state trade and commerce, banking, and inter-state migration. The use of the word "exclusive" is most categorical and leaves no doubt that the Parliament may make laws with respect to these enumerated subjects to the exclusion of the state legislatures. Parliament may also legislate with respect to matters in List III. Its authority in so legislating overrides the states' authority. A state legislature can legislate exclusively on matters assigned to it in the State List (List II). The subjects enumerated in List II include public order; police; administration of justice; the constitution; and organization of courts, other than the high courts and the Supreme Court; education; public health;

57/ Id. art. 246.

agriculture; and foresty. Over this List the state legislature has the same plenary power as the Union Parliament has over List I. The Concurrent List includes criminal law and procedure, civil procedure, trade and commerce in essential commodities, price control, factories, and economic and social planning.

Parliament makes laws on subjects in the Concurrent List just as do the state legislatures. However, in case of the over-lapping of two laws on the same subject, the inconsistent state law shall be repealed.[58/] The only time the inconsistent state law is allowed to stand is when such a law, after being passed by the state legislature, is reserved for consideration of the President and has received his assent. In that case, the law stands in spite of any inconsistency with the parliamentary law until Parliament expressly repeals it, or otherwise amends it.[59/]

No law made by Parliament shall be considered invalid on the ground that it will have extraterritorial operation. The Parliament retains the residuary powers of legislation under the Constitution, as is the case in Canada while not in the United States or Australia where it rests with the states. Further, when a proclamation of emergency is in operation, the Parliament has the power to make laws for the whole or any part of India with respect to any matter enumerated in any list. However, on the expiration of 6 months after the proclamation of emergency this power ceases

58/ Id. art. 254.

59/ Id. art. 254(2).

to operate, and such laws also cease to have effect.[60] An emergency is proclaimed whenever there is an internal or external danger to the security or integrity of the country. The residual power of parliamentary legislation for the whole of the country, therefore, helps focus the public mind to fight the danger to the country by a concerted effort.

As a consequence of the three lists, points of order have often been raised questioning the competence of Parliament to legislate on a particular matter before the House. The Speakers have consistently refused to give rulings on these points of order, and, while holding that the validity of a bill is a matter for the House to decide, have allowed a discussion whenever an issue has been raised. At times, the Attorney-General has addressed the Houses on the legal and constitutional issues of bills before them as, for example, was done in the case of the Preventive Detention bill in February 1950 and the Sales Tax Validation bill in February 1956.[61]

Legislative Procedure

Legislative procedure in the Parliament has no marked distinction from any other parliamentary government. In fact, the rules are substantially based on the British model. All legislative proposals must be brought before the Parliament in the form of bills, whether government bills or private members' bills. A bill has to pass through three stages, called the three readings

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60/ Id. art. 250.

61/ N.N. Mayala, Indian Parliament 133 (1970).

of the bill.[62] At the first reading, a motion for leave to introduce it is made, and on its adoption, the bill is introduced and subsequently published in the Gazette.

The second reading of the bill consists of two stages. In the first stage, any one of the following motions may be taken into consideration:

(a) that the bill be considered; or

(b) that it be referred to a select committee of the House; or

(c) that it be referred to a joint committee of both the Houses; or

(d) that it be circulated for eliciting opinion.

The second stage of the second reading is a clause-by-clause consideration of the bill as introduced or as reported by a joint or select committee. The third reading of the bill refers to the discussions on the motion that the bill as amended be passed.

A minister desiring to introduce a bill has to give 7 days' notice of his intention,[63] at which time two authenticated proof copies of the bill are simultaneously sent from the Ministry of Law which drafted the bill. The bill is numbered and is circulated at least 2 "clear days" ahead of the day when it would be included in the day's List of Business. After the introduction of the bill, unless done before, it is published in the Gazette.

62/ Rules of Procedure and Conduct of Business in Lok Sabha 34 (1962).

63/ Supra note 25 at 135.

At the second reading, the Minister may make any of the previously stated motions. If the House agrees, it proceeds to discuss its general principles and provisions. Details of the bill are not usually discussed at this stage. There are, of course, cases of appropriation bills which have been introduced and passed the same day. Circulation of a bill for eliciting opinion may include reference to state legislatures, public bodies, selected officials, or high courts. The replies received are circulated among members as "papers to the bills."

A motion to refer a bill to a committee must set out the names of the members of the House who may be appointed on that committee. It would also indicate the date by which the committee would be expected to submit its report to the House. After the committee has reported, the bill, as reported, is taken into consideration. It will then be considered clause by clause. Amendments to clauses are allowed. After discussion of a clause is over, the Speaker puts all the amendments to a vote collectively, unless a member has requested that his amendment be voted on separately.

At the third reading, the member in charge can move that the bill be passed. Once such a motion has been made, no amendments, except those of a formal, or inconsequential nature, can be considered.

After the passage of the bill through the two Houses of Parliament, it is presented to the President for his assent. The President may either assent to the bill, or withhold his assent. He may return the bill, if it is not a money bill, with a message requesting a reconsideration of the

whole or any specified provision of it, or for consideration of a suggested amendment.[64/] If the bill after reconsideration is passed by the two Houses, it is again presented to the President for his assent. He can no longer withhold his assent.

Money Bills

Subject to the provisions of a joint sitting of the two Houses, an ordinary legislative bill must be passed by the two Houses in the same form. Nevertheless, the powers of the two Houses are not the same in the case of money bills and bills relating to financial matters. The Constitution provides a specific procedure for money bills and financial bills, which is somewhat different from the other legislative bills. In such matters, the powers of the House of People are greater than those of the Council of States.

A financial bill is distinguishable from a money bill. A financial bill contains proposals for imposition of a charge as subordinate or incidental parts of its legislative proposals and does not deal with raising or appropriating of public monies. For instance, a bill providing for the fixing of fees and allowances for the President and officers of a tribunal to be set up under the enactment when passed is a financial bill. Such a bill requires recommendation of the President for introduction, since it involves expenditure from the Consolidated Fund of India, but it may be introduced in either House of Parliament. Further, it is passed by following the ordinary legislative procedure.[65/]

64/ India Const. art. 111.

65/ India Const. art. 113-117.

A money bill has been defined in article 110 of the Constitution as a bill dealing with matters mentioned in clause (1) of the article. For instance, a bill incorporating provisions dealing with the imposition, abolition, remission, alteration, or regulation of any tax is a money bill. When a question arises as to whether a bill is a money bill or not, the decision of the Speaker of the House of the People is final. A money bill is not introduced in the Council of States. If a bill is introduced in the Council which, following an objection, is found to be a money bill, all proceedings in connection with it are stopped, and it is transmitted to the House of People. After it is passed by that House, it goes to the Council of States. The latter can make recommendations with regard to the bill within 14 days, starting from the date when it was first received in the Council. In default of the recommendation within the period, it is deemed passed as it had emerged from the House, and therefore passed by the two Houses. In case the bill is returned without recommendations, it is still deemed passed by the two Houses, and is presented to the President for assent. If the Council returned it with suggested amendments, the House is free to accept them or reject However, the bill would be considered passed by the two Houses as it emerges from the House of the People, and it is not sent to the Council a second time. On presentation, the President may either assent to it or withhold his assent but he cannot return it to Parliament with a message for reconsideration. The reason for this is obvious. The bill is a Government bill, and is endorsedby the President's recommendation before its introduction. Therefore, unless there is a change of Government in the meanwhile, it must not fall.

THE LEGAL PROFESSION

The Charters of 1726, which established the mayor's courts, did not contain any specific provisions laying down any particular qualification to be possessed by a person who would be entitled to act or plead as a legal practitioner for suitors in those courts. Presumably the matter was to be regulated by the rules of practice which the court was authorized to frame. However, the Charter of 1774, constituting the Supreme Court and abolishing the Mayor's court, allowed only (1) "Advocates," which expression referred to English and Irish barristers and members of the Faculty of Advocates in Scotland, and (2) "attorneys," that is to say, British attorneys or solicitors to practice before the courts. It further provided that "no other person whatsoever" would be allowed to appear, plead, or act. The Court was, therefore, at its inception a close and exclusive preserve for members of the British legal profession. Indian legal practitioners had no entry into this Court.

At the same time in the mofussil courts of the Moghul emperors, there existed a class of persons called vakils who acted more as agents for principals than as lawyers. The litigants used their services in those indigenous courts. When the East India Company established its courts in the mofussil (outside the presidency towns), these vakils appeared in the courts there. The Bengal Regulation of 1793, 66/ for the first time, mentioned the "appointment of Vakils or native pleaders in the courts of civil judicature in the Provinces of Bengal, Bihar and Orissa." It empowered the Sadar Dewani Adalat to enroll pleaders for all company's courts and to fix the retaining

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66/ No. VII of 1793.

fee for pleaders and also a scale of professional fees based on a percentage of the value of the property. The Bengal Regulation of 1814[67/] consolidated the law on the subject, and pleaders were empowered to act as arbitrators and to give legal opinions on payment of fees. None of these pleaders was qualified to appear in the kings's courts in the presidency towns, and the barristers and solicitors were not permitted in the mofussil courts.

The Legal Practitioners Act, 1846[68/] introduced three changes, namely:

(1) that people of any nationality or religion became eligible to be pleaders, where formerly only British subjects--implying British born--were eligible;

(2) attorneys and barristers enrolled in any of Her Majesty's Courts in India were made eligible to appear in the Sadar Courts in Calcutta; and

(3) pleaders were allowed to enter into agreements with their clients for their fees for professional services.

Later, British barristers and attorneys of the Supreme Court were permitted to plead in any of the courts of the Company which were subordinate to the sadar courts. While barristers and attorneys were thus permitted to practice in the Company's courts, the local Indian legal practitioners were rigorously kept out of the three Supreme Courts. After the Company weathered the political upeaval against it in 1857, the British Crown took over the administration of the territories governed by the Company, and the latter was left with a formal existence to complete its financial liquidation.

67/ No. XXVII of 1814.

68/ No. 1 of 184.

The Letters Patent, creating the High Courts of Calcutta, Bombay and Madras in or about 1865, empowered the Courts to approve, admit, and enroll as many advocates, vakils, and attorneys as those high courts deemed appropriate. With respect to other high courts, not established by Royal Charter, the Legal Practitioners Act, 1879[69/] authorized the high courts, with the previous sanction of the Provincial Government, to make rules setting out the qualifications for admission of a person to be an advocate of the Court. The Punjab Chief Court Act, 1866[70/] also contained a similar provision. Later, under the 1879 Act which repealed the 1866 Act, the Chief Court framed rules establishing that any person who was a member of the English Bar or the Faculty of Advocates in Scotland was eligible for admission as an advocate. In addition, it created two classes of pleaders:

- pleaders of the first grade entitled to practice before the Chief Court, and
- pleaders of the second grade entitled to practice before the subordinate courts.

The qualification for admission as a second grade pleader was a diploma for having passed the "Licentiate-in-law" examination of Punjab University which was open to students who had completed a course of teaching in the law college extending over three years. After practicing for two years, pleaders of the second grade were eligible to be enrolled as pleaders of the first grade. Rules were also framed for enrollment of the mukhtars. Under the rules, mukhtars of the first grade in the Punjab, unlike those in Bengal, were permitted to appear

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69/ No. XVIII of 1879.

70/ No. IV of 1866.

in the Chief Court. Another feature was that, unlike those in Bengal and other provinces, a mukhtar in the Punjab could appear before the subordinate civil courts and also in criminal courts. Although recruitment of mukhtars was stopped in the Punjab in 1914, the right of those already permitted to appear in those courts was not restricted, and they were allowed to practice as before.

The chartered high courts and the others established in different states framed rules under the relevant provisions of their Letters Patent. Generally speaking in the high courts, there were, apart from the attorneys, two classes of lawyers.

One class, called advocates, consisted mainly of barristers of England or Ireland or Members of the Faculty of Advocates of Scotland. Essentially these were persons who had been called to the Bar in England. Additionally, the high court rules required some further study from them in the chambers of a practicing barrister in England and a certain number of years' education in England. The high courts, other than Calcutta, also permitted non-barristers to be enrolled as advocates. In Bombay, the requirement was to obtain the degree of Bachelor of Laws of the Bombay University and pass an examination held under the direction of the High Court; in Madras, advocates of Calcutta, Bombay, and Allahabad, or Masters of Laws of the Madras University who had studied for 18 months with an advocate of the High Court of Madras were eligible for enrollment. In Lahore (Punjab), in addition to the barristers, first grade pleaders who had practiced for not less than 10 years, including

5 years within the jurisdiction of the High Court, or who were Doctors of Laws of the Punjab University were made eligible for enrollment as advocates.

The other class of lawyers was the vakils. The qualification required for a vakil in the Calcutta High Court was a degree of Bachelor of Laws, after passing the Bachelor of Arts degree course, and two years' service as an articled clerk to an approved practicing vakil of 5 years' standing. The holder of a law degree from an Indian university was also admitted after 4 years of bona fide practice as a pleader in the subordinate courts. In Bombay, a matriculate of the Bombay University or an attorney could be admitted as a vakil on passing an examination prescribed by the High Court, but a Bachelor of Laws was eligible without further qualification. In Madras, for enrollment as a vakil, one was required to have a Bachelor of Laws degree and pass an examination in procedure and practice and also serve one year's apprenticeship with a practicing advocate, vakik, or an attorney. A Bachelor of Laws of Allahabad or Calcutta was also admitted as a pleader in Madras provided he had practiced for 5 years as a pleader in a district or a subordinate court. The Rules of the Lahore High Court admitted English, Scottish, and Irish solicitors, vakils, or attorneys with 3 years' practice in the chartered High Courts who passed an examination in the revenue law, procedure, and customary law of the Punjab. Persons who obtained an Honors in Law at the Punjab University were also enrolled as vakils. Second grade pleaders of 2 years' standing, if they had a law degree from the Punjab University, or were of 5 years' standing if they had no degree could also be admitted as vakils.

At that time, some of the high courts, particularly those of Calcutta and Bombay, prescribed varying qualifications for attorneys. The attorneyship examinations were held under the auspices of the high court and were well known for their application of high standards. In Calcutta, attorneys served as articled clerks for 5 years and in Bombay for 3 years. Those in Calcutta had to pass three examinations and those in Bombay had one.

Besides the advocates, attorneys, and vakils of the high courts, there were other classes of legal practitioners in the districts and other subordinate courts in the mofussil. One of the reasons for the presence of such legal practitioners was the paucity of law graduates. Under the high court rules, law graduates who did not possess the additional qualifications required for enrollment as a vakil of the high court and non-graduates who could pass the pleadership examination held by the high court were given certificates entitling them to act and plead in the district and other subordinate courts. These pleaders had no entry into the high court, unless they became enrolled as high court pleaders after a certain number of years' practice in the lower courts.

Yet another class of legal practitioners was the mukhtars who, after passing the entrance examination, also passed the mukhtarship examination of the high court. They generally practiced in the criminal courts in the mofussil.

All these different grades of legal practitioners were subject to the disciplinary jurisdiction of the high court in which they were enrolled.

An advocate or a vakil was free to practice in any subordinate court of the high court or any revenue authority. He could act and plead in any other high court as well, and in another high court, with the permission of the latter. However, a proviso to § 4 of the Legal Practitioners Act, 1879,[71] barred his power to appear on the original side of high court in a presidency town. An attorney could practice in any high court where he was enrolled and also in the subordinate courts and in any high court in British India other than the one in which he was enrolled.

In the Calcutta High Court, the advocates, i.e., the barristers of England and Ireland and the advocates of Scotland, were all entitled to appear and plead on the original side on the instructions of an attorney. They could similarly do so on the appellate side of the high court. But the vakils of the Calcutta High Court were not entitled to act or plead on the original side or in appeals from the original side. This restriction, maintained until as late as 1932, was resented by Indian legal practitioners.

The Madras High Court, by amending its rules in 1886, allowed the vakils and attorneys to appear, plead, and act for suitors on the original side. The attorneys challenged these rules but they were held to be valid.[72] In Madras, therefore, there was no distinction between advocates, vakils, and attorneys with regard to their right to appear and plead on the original side. In Bombay, too, the distinction among the aforestated was removed when non-barristers became eligible for enrollment as advocates on passing an examination

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71/ Supra note 69.

72/ In the matter of the petition of the attorneys, 1 Indian L.R. Madras Ser. 24 (1875).

of the High Court. The only distinction then left in Bombay was that the advocates of the original side--barristers or non-barristers--had to be instructed by an attorney before they could appear and plead on the original side.

In the other high courts, there was no original side in the high court, and consequently there was no substantial distinction between the advocates, who were mainly barristers and the vakils of the high court, in respect to their right to appear, act, and plead in those high courts.

The Calcutta High Court in particular, and other presidency high courts generally, maintained the distinction between barristers and vakils. Therefore, the indigenous legal profession brought pressure for unification of the bar and a uniform educational system. As a result of the recommendations of the Indian Bar Committee in 1923 for a unified bar, the Indian Bar Councils Act of 1926 was enacted.[73/] The Act did not provide an autonomous bar which had been strongly demanded. Moreover, it did not apply to the original side of the presidency high courts. It, therefore, did not meet with the demand of the indigenous lawyers. Finally, the Government of India, in order to give statutory expression to the aforesaid need and implement the recommendations of the All-India Bar Committee on the subject of reform of judicial administration, accepted the recommendations of the Law Commission relating to the Bar and legal education, and enacted the Advocates Act, 1961.[74/]

73/ Act No. 38 of 1926.

74/ Act No. 25 of 1961.

The 1961 Act made sweeping changes in the law of legal practitioners. The main features of the Act are:

- the establishment of an All-India Bar Council and a common roll of advocates, an advocate on the common roll having a right to practice in any court and in any part of the country, including the Supreme Court;
- the integration of the Bar into the single class of legal practitioners known as "advocates";
- the prescription of an uniform qualification for the admission of persons as advocates;
- the division of the advocates into senior advocates based on merit; and
- the creation of autonomous Bar Councils--one for the whole of India and one for each state.

The Act did not abolish the continued existence of the dual system of barristers and vakils in the High Courts of Calcutta and Bombay. However, its provisions authorized the two High Courts, if they so desired, to discontinue the the system at any time. The Act is a comprehensive measure and repeals by stages the Indian Bar Council Act of 1956 and all other laws on the subject. The creation of the All-India Bar Council, known as the Bar Council of India, constitutes an important milestone in the history of the Indian legal profession, i.e., there shall be only one class of legal practitioners, the "advocates," divided into senior and other advocates.

Legal education comes to the fore by the provisions for the constitution of a Legal Education Committee by the Bar Council of India. The Bar Council of India, a body corporate, is required to prepare and maintain a common roll of advocates, to exercise general supervision and control over state bar councils, to promote legal education, and to set standards of education in consultation with the universities in India. The seniority of no advocate is affected by his decision to practice in another state, and a provision is made for the determination of seniority in cases of dispute. The law relating to professional conduct remains untouched.

Legal Education

Before the advent of independence in 1947, a large number of students from India, intending to practice law, used to go to England to study law. Such education was available to only a few because of the high cost. Law schools in India were, therefore, started as a matter of necessity.

There are about 130 law schools in India today.[75/] In most cases they follow the conventional lecture method of instruction. In some of the universities, legal education had been a 2-year degree course, after one obtained a degree of Bachelor of Arts or Sciences. However, the Bar Council of India, under its statutory authority, ruled that the course be changed from 2 years to 3 years, effective in July 1968. This in fact has been done and a Bachelor of Laws degree course all over India is now a 3-year program. There is an examination at the end of each year.

75/ Bakshi, "Legal Education in India," 1(1) Delhi Law Review 49-75 (1972).

The course of instruction in the first year generally includes a study of Indian Legal History, Contracts I and II, Torts, Family Laws I and II, Crimes I and II, and Indian Constitutional History.[76/] The second year includes Legal Theory I and II, Property I and II, Constitution of India, Criminal Procedure, Civil Procedure, Evidence, Limitation, Administrative Law, Legal Writing, Arbitration, and Bankruptcy. Practical courses like Interpretation of Statutes and Principles of Legislation, Pleadings and Conveyancing, Public International Law, Company Law, Comparative Law or Private International Law, Land Laws, Taxation, and Labor are left for the final year.

Other faculties of law in different universities, like Delhi, have switched from the conventional method of teaching to the Socratic method. This case-method of study is well set in the Delhi University and is more in keeping with the American law schools. It is also a 3-year (six term) course. The courses have been increased to 30 and must be taken five in a term. External assessment has been abolished and the teachers assess their own students. A large number of new courses, like the Indian Legal System, International Trade, and Election Laws have been added.

A person is qualified to be admitted as an advocate on a state roll if he fulfills the following conditions, namely:

(a) he is a citizen of India; however, subject to other provisions of the Act, a national of another country may be admitted to practice law if citizens of India are permitted to practice law in that country;

76/ Jain, "Content of Legal Education for the First Law Degree Course." IV Jaipur Law Journal 29-38 (1964).

(b) he has completed the age of 21 years;

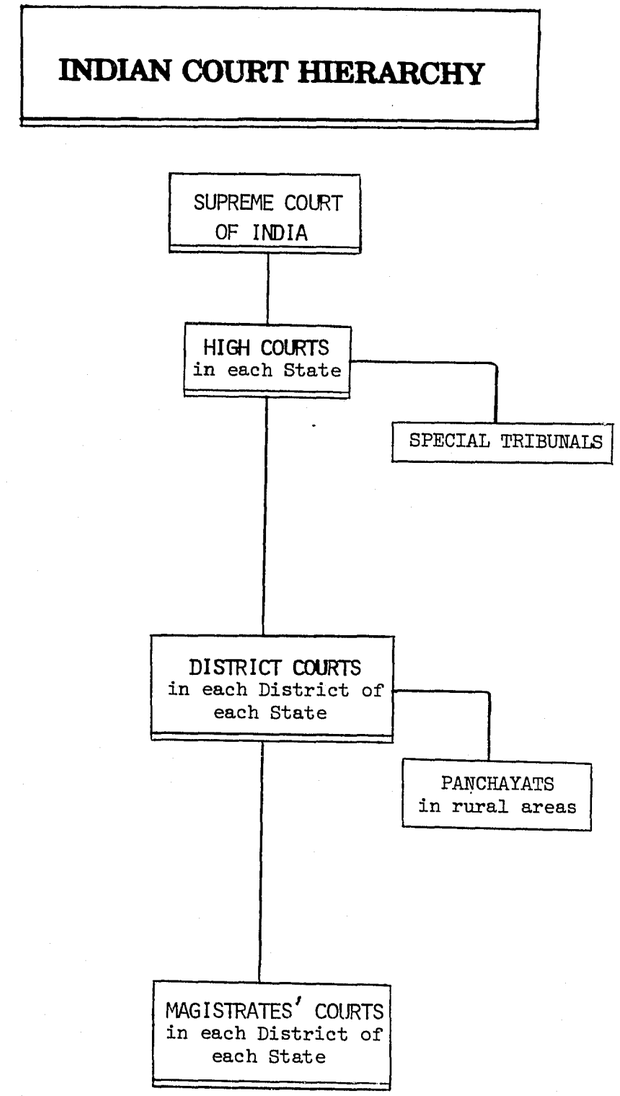
(c) he has obtained a degree in law; and

(d) fulfills such other conditions as may be specified in the rules made by the State Bar Council under this Act.

Under the 1961 Act, an advocate is liable to be disciplined for breach of rules of professional conduct by the "disciplinary committee" of the state bar council. Section 35 authorizes the state bar council to dispose of all cases of misconduct of a lawyer. Thus, the high court no longer possesses any power to discipline a member of the Indian Bar. The state bar council hears complaints against a lawyer in accordance with the principles of natural justice (procedural due process). On an order of the disciplinary committee of a State Bar Council, and within 60 days of the order against him, he may appeal the decision to the Bar Council of India. An appeal against the decision of the latter body lies to the Supreme Court of India. When an order of punishment is made against an advocate, a record of the punishment is entered against his name accordingly.

In 1965, the Bar Council of India, by its resolution, made rules prescribing the Standards of Professional Conduct and Etiquette to be observed by advocates.[77/] Prior to these rules, the advocates had been guided by the principles of professional ethics well established in the country during the course of many decades, partly as a result of judicial decisions by the Supreme Court and the high courts, and partly by the adoption of some of the rules or rulings of the General Council of the Bar of England and Wales regulating the conduct of the professionals there.

77/ N. Majumdar, Advocates Act & Professional Ethics 29 (2d ed. 1975).



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