CUSTOM

Custom is the oldest and most important source of law. The birth and growth of a custom is attributed to the natural consequence of organised living of people and the progress of human society. It is presumed that custom norms must have been followed on account of their utility of necessity and also because they enjoyed the express or implied sanction of the society.

Salmond has defined 'custom' as, "Custom is frequently the embodiment of those principles which have commended themselves to the natural conscience as principles of justice and public utility. The fact that any rule has already the sanction of custom, raises a presumption that it deserves to obtain the sanction of law also."

Custom means uniformity of conduct of people under like circumstances. Certain practices are accepted by the people as good as beneficial and they go on practising them which in course of time acquire the force of law. The growth of custom is not the result of conscious thought but of tentative practices. Informal patterns of behaviour began emerging in shape of customary practices to meet the then problems within a given community. Obedience to such law emanated from the popular faith in its ultimate utility.

All customs which have the force of law, are of two kinds,
(1) Conventional,
(2) Legal.

(1) Conventional Custom—A conventional custom is an established practice which is legally binding not because of any legal sanction, but because it has been expressly or impliedly incorporated in a contract between the parties concerned.

(2) Legal Custom—Legal custom is itself of two kinds, being either local custom or the general custom of the realm.

(a) Local Custom—It is that custom which prevails only in some particular locality and constitutes a source of law for that place only. As it clear from its name itself, these customs are law only for a particular locality, sect or family.

(b) General custom of realm—It is that custom which prevails all over the country and constitutes one of the sources of the general law of the country. It consists of the law that has been declared and created by the reported decisions of the superior courts of justice.

Distinction between legal custom and conventional custom

First,
Legal custom, in order to be valid, must have been supported by immemorial antiquity where as conventional custom does not require any antiquity as it is sufficient if it has been well established for a considerably long time.

SECOND,
Normally, Legal custom does not have any conflict with the statute where as conventional custom may face the conflict with the statute.

Essential of a Custom
As early as in 1918 the Privy Council held in the case Abdul Hussain Khan Versis Sona that,
"It is the essence of customs that they should be ancient and invariable, and it is further essential that they should be established by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, that they possess the condition of antiquity and certainty on which alone their legal titles of recognition depend."
In view of the above, the main essential of a custom are as follows,
1. Custom must be ancient, The custom must possess a sufficient measure of antiquity. As per Salmond "sufficient" means that it must have existed since before 1189. Azo regarded a custom as long if it was ten years old, very long if thirty years and ancient if fifty years.
The English rule is that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary." However, this rule does not apply to Indian conditions. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient, but it is not of the essence of this rule that its antiquity must, in every case, be carried back to a period beyond the memory of man—still less than it is ancient in the English technical sense. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of particular district. [as per Mt. Subhani & others Versis Nawab.]
2. Custom must be continuous, The second requisite of a valid custom is that it must have been in use continuously. This refers, not to the active use of custom, but rather to the claim of its usage.
3. It must have obligatory force, The custom, to be valid must have been enjoyed "as of right". Because without this it can not be said that it exerts obligatory pressure to conform.
4. It must be certain and precise, A valid custom should not be vague or indefinite. Its existence must be proved clearly and unambiguously.
5. Consistency—Custom must not be inconsistent with other customs in same area.
6. Conformity with statute law, A valid custom must be in conformity with the statute law. It can not be recognized as law if it conflicts with the written law enacted by the Parliament or other legislature.
7. Reasonableness, The last, but not the least, qualification of a valid custom is that it must be reasonable. Alien says that the rule regarding reasonableness is not that a custom will be

admitted if reasonable, but that it will be admitted unless it is unreasonable.

PRECEDENT

In Oxford Dictionary "precedent" has been defined as "a previous instance or case which is, or may be taken as an example or rule for subsequent cases or by which some similar acts or circumstances may be supported or justified". "A judicial precedent", says Keeton, " is a judicial decision to which authority in some measures has been attached." A precedent covers everything said or done, which furnishes a rule of subsequent practice. According to Salmond," a precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regard the world at large.
Kinds of Precedent
Precedents can be divided into two classes,
(1) authoritative,
(2) persuasive.

An authoritative precedent is one which judges must follow whether they approve it or not. Judges are bound to follow them and are forbidden to use their discretion for the future. A persuasive precedent is one which the judges are not bound to follow, but which they will take note of, and to which they will attach such weight as it deems to them, it deserves. The authoritative precedents are legal source of law, while persuasive precedents are merely historical.
The distinction between these two kinds of precedents can be seen from the fact that the decision of the Supreme Court of India is an authoritative precedent for all courts in India but for the Supreme Court of itself it has only persuasive value. Similarly the decisions of the High Courts of a particular State is an authoritative precedent for all the courts situated within the territorial jurisdiction of that court but it is simply a persuasive precedent for all the High Courts of other States. Likewise the decisions of English or any other foreign Courts are merely persuasive precedents for Indian Courts.

Circumstances destroying the binding force of precedent
1. Abrogative decisions, If a statute or statutory rule inconsistent with a particular decision is enacted subsequently, the decision ceases to be binding. After enactment of such a statute the precedent loses its authority completely, and the courts are guided by that statute and not by the precedent.
2. Affirmation or reversal on a different ground, It sometimes happens that a decision is affirmed or reversed on appeal on a different ground. A decision either affirmed or reversed on another ground is deprived of any absolute binding! force it might otherwise have had, but it remains an authority which may be followed by a Court that thinks the particular point to have been rightly decided.
3. Ignorance of Statute, A precedent is not binding if it was delivered in ignorance of statute or rule having a force of a statute.
4. Inconsistency with the earlier decision of higher courts, Sometimes in ignorance and sometimes with vested interests, some lawyers do not bring the latest decisions of

higher courts to the notice of the Court deciding a matter and as such the decision given over looking the earlier decision of higher courts will lose its binding force.

5. Decisions of equally divided courts, When an appellate Court is equally divided, the practice is to dismiss the appeal. Here, though there is no decision of the Court of Appeal in favour of the respondent, but the dismissal will have the same effect between the parties as any other dismissal. However, to overcome these difficulties the full Benches of the Supreme Court and the High Courts in India now a days consists of odd number of Judges.

Merits of Precedent

(1) It shows respect for the opinion of one's predecessors,
(2) Precedents are based on customs also and as such they should be followed.
(3) A question once decided should be settled and should not be subject to reargument in every case.
(4) Precedents bring certainty in law as well as flexibility in law.
(5) Precedents are judge made law and they are, therefore, more practical,
(6) Precedents bring scientific development in law.
(7) Precedents guide judges and prevent them to commit errors.

Demerits of Precedent

Precedents restrained to its proper use and understood as an instrument of logic, has proved itself one of the most valuable factors in our legal reasoning. But it has certain disadvantages and inconveniences too which may be briefly narrated as under,

1. There is always possibility of over looking authorities.
2. Conflicting decisions of superior tribunals throw the judges of subordinate courts on the horns of dilemma.
3. Developments of law depends on litigation.
4. Sometimes an erroneous decision is established as law due to not being brought before superior court.

The Legal Services Authorities Act, 1987

The Legal Services Authorities Act, 1987

The Legal Services Authorities Act, 1987, was enacted to give a statutory base to legal aid programmes throughout the country on a uniform pattern. The Act was brought into force with effect from Nineth September one thousand nine hundred ninety five, almost eight years after its enactment, after certain amendments were introduced therein by the Amendment Act of 1994. Hon. Mr. Justice R.N. Mishra (the then Chief Justice of India) played a key role in the enforcement of the Act.

National Legal Services Authority (NALSA) was constituted on 5th December, 1995. His Lordship Hon. Dr. Justice A.S. Anand, Judge, Supreme Court of India took over as the Executive Chairman of it on 17th July, 1997. By February, 1998, the office of National Legal Services Authority became properly functional for the first time. In October, 1998, His Lordship A.S. Anand then assumed the Office of the Chief Justice of India and thus became the Patron-in-Chief of National Legal Services Authority. His Lordship Hon. Mr. Justice S.R Bharucha, the senior-most Judge of the Supreme Court of India assumed the office of the Executive Chairman, NALSA.

A nationwide network has been envisaged under the Act for providing legal aid and assistance. National Legal Services Authority (NALSA) is the apex body constituted to lay down policies and principles for making legal services available under the provisions of the Act and to frame most effective and economical schemes for legal services. It also disburses funds and grants to State Legal Services Authorities and NGOs for implementing legal aid schemes and programmes. In every State a State Legal Services Authority is constituted to give effect to the policies and directions of the Central Authority (NALSA) and to give legal services to the people. State Legal Services Authority is headed by the Chief Justice of the State High Court who is its Patron-in-Chief A serving or retired Judge of the High Court is nominated as its Executive Chairman. District Legal Services Authority is constituted in every District to implement Legal Aid Programmes and Schemes in the District. The District Judge of the District is its ex-officio Chairman Taluk Legal Services Committees are also constituted for each of the Taluk or Mandal or for group of Taluk or Mandate to coordinate the activities of legal services in the Taluk and to organize Lok Adalats. Every Taluk Legal Services Committee is headed by a senior Civil Judge operating within the jurisdiction of the Committee who is its ex-officio Chairman.

Criteria for Legal Service/Aid

Section 12 of the Legal Services Authorities Act, 1987, prescribes the criteria for giving legal services to the eligible persons. Section 12 of the Act reads as under, -

"12. Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is-

(a) a member of a Scheduled Caste or Scheduled Tribe,

(b) a victim of trafficking in human beings or begar as referred to in Artical 23 of the Constitution,

(c) a woman or a child,

(d) a mentally ill or otherwise disabled person,
(e) a person under circumstances of underserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster,
(f) an industrial workman,
(g) in custody, including custody in a protective home within the meaning of clause (g) of Section 2 of the Immoral Traffic (Prevention) Act, 1956, or in a juvenile home within the meaning of clause (j) of Section 2 of the Juvenile Justice Act, 1986, or in a psychiatric hospital/nursing home within the meaning of Section 2(g) of the Mental Health Act, 1987, or
(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Govt, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Govt., if the case is before the Supreme Court' (Rules have already been amended to enhance this income ceiling).
According to Section 2(1)(a) of the Act, legal aid can be provided to a person for a 'case' which includes a suit or any proceeding before a court. Sec, 2(1) (aaa) defines the 'court' as a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions. As per Section 2(1)(c), 'legal service' includes the rendering of any service in the conduct of any case or other legal proceeding before any court/other authority/tribunal and the giving of advice on any legal matter.
Legal Services Authorities after examining the eligibility criteria of an applicant and the existence of a prime facia case in his favour provide him counsel at State expense, pay the required Court Fee in the matter and bear all incidental expenses in connection with the case. The person to whom legal aid is provided is not called upon to spend anything on the litigation once it is supported by a Legal Services Authority.
Schemes and Measures by NALSA
The following scheme and measures have been envisaged and implemented by the Central Authority- NALSA,-
(a) Establishing Permanent and Continuous Lok Adalats in ail the Districts in the country for disposal of pending matters as well as disputes at pre-litigative stage,
(b) Establishing separate Permanent and Continuous Lok Adalats for Govt Departments, Statutory Authorities and Public Sector Undertakings for disposal of pending cases as well as disputes at pre-litigative stage,
(c) Accreditation of NGOs for Legal Literacy and Legal Awareness campaign,
(d) Appointment of "Legal Aid Counsel" in all the Courts of Magistrates in the country,
(e) Disposal of cases through Lok Adaiats on old pattern,
(f) Publicity to Legal Aid Schemes and programmes to make people aware about legal aid facilities,
(g) Emphasis on competent and quality legal services to the aided persons,
(h) Legal aid facilities in jails,
(i) Setting up of Counselling and Conciliation Centers in all the Districts in the country,
(j) Sensitisation of Judicial Officers in regard to Legal Services Schemes and programmes,
(k) Publication of the Nyaya Deep", the official newsletter of NALSA,

(L) Enhancement of Income Ceiling to Rupee Fifty thousand per annum. for legal aid before Supreme Court of India and to Rupee Twenty Five thousand per annum for legal aid up to High Courts, and
(m) Steps for framing rules for refund of court fees and execution of awards passed by Lok Adalats.

In pursuance of the call given by His Lordship Hon. Dr. Justice A.S. Anand, Nineth of November is being celebrated every'year by all Legal Services Authorities as "Legal Services Day". NALSA has been providing and shall continue to provide funds to State Legal Services Authorities for the implementation of the Legal Aid Schemes and Programmes but the infrastructure has to be provided by the State Governments. NALSA has also called upon State Legal Services Authorities to set up 'legal aid cells' in jails so that the prisoners lodged therein are provided prompt and efficient legal aid.
"Legal Aid Counsel" Scheme which was conceived and introduced by His Lordship A.S. Anand has been well received all over country. Legal Aid Counsels have been provided in most of the courts of the Magistrates in the country to provide immediate legal assistance to those prisoners who are not in a position to engage their own counsel. Hon. Mr. Justice S.R Bharucha had emphasized that 'Counselling and Conciliation Centers' should be established in all the Districts in the country to bring about negotiated settlement of disputes between the parties. All the State Legal Services Authorities are taking steps to establish these Centers which would prove immensely useful for settling legal disputes at pre-litigative stage and would also help legal services functionaries to find out as to whether a person approaching them for legal aid has or not a prima facie case in his favour which is a pre-requisite for grant of legal aid.
NALSA is keen to develop and promote a culture of conciliation instead of litigation in the country so that the citizens of this country prefer to resolve their disputes and differences across the table in a spirit of goodwill and brotherhood. NALSA also wishes to ensure that even the weakest amongst the weak in the country does not suffer injustice arising out of any abrasive action on the part of State or private person.
Improving Legal Aid Quality - Role of Lawyers and Judges
Honourable Mr. Justice S.R Bharucha emphasised the need for improving the quality of legal aid that is being given by legal aid advocates. His Lordship observed that teeming millions of this country who live below poverty line looks towards Legal Services Authorities for help and support in resolving their legal problems. These poor and weaker sections must not remain under the impression that they are getting comparatively inferior legal assistance. His Lordship has called upon legal services authorities to revise the payment schedule for legal aid panel advocates and also compress the panels so that panel advocates get more work and better remuneration from legal services authorities and thus get encouraged to render effective legal assistance to aided persons.
The plight of poor litigants approaching Lok Adalats through the bastion of legal aid is quite deplorable. Lamenting on the poor quality of legal service extended under the rubric of legal aid the Supreme Court held that "right to defend includes right to effective and meaningful defence." To ensure quality legal assistance the Court directed the State to fix better remuneration for lawyers. The apex court has cautioned that legal aid must not be reduced to "patronizing gestures to raw entrants to the Bar," but the

practice of extending legal assistance through such inexperienced lawyers is continuing resulting into unequal and ineffective presentation or defence. Whereas "to have the assistance of a counsel" is to be construed as the "effective" assistance of counsel performing within a minimum standard of competency. Therefore, legal aid through a raw talent amounts to denial of legal aid and hits the equality clause of Article 14 of our Constitution.40

Sensitization of Judicial Officers in regard to legal aid schemes and programmes is also important. Legal Services Authorities must ensure that judicial officers are duly sensitized about the work NALSA is doing and its importance for the poor and illiterate. Once all the judicial officers in the country get property sensitized in regard to the relevance and importance of legal aid schemes they shall themselves start caring for the poor, backward and weaker sections of the society who are not in a position to engage their own counsel and look after their legal causes.

The Gram Nyayalayas Act,

NYAYA PANCHAYATS, LOK ADALAT AND LEGAL AID NYAYA PANCHAYATS

The village panchayats constitute very old and traditional/administrative institution in India. With the decline of Mughal empire and advent of British power, this institution lost its prestige and importance. But, during the later part of the British period they made some effort to restore the condition of village panchayat with Village Court Acts of 1888. which created panchayat courts for the administration of justice.

The real effort, one can witness, was made only after independence, where a separate provision was made in Article 40 of the Constitution of India, which declares, "The State shall take steps to organize village panchayat and endow them with such power and authority as may be necessary to enable them to function as units of self government.

The aforesaid Article must be read with Article 39-A of the Constitution which directs the State to 'secure that the operation of the legal system promotes justice, on the basis of equal opportunity and shall in particular, provide free legal aid, by suitable legislation of scheme or in any other way, to ensure that opportunity for securing justice are not denied to any citizen by reason of economic or other disabilities". Thanks to the seventy third amendment Act of 1992 the village panchayats have been blessed Constitutional status.

Nyaya Panchayats are the judicial components of the panchayat system, which forms the lowest rung of our judiciary. They are created for the administration of justice at the local or rural level.

(a) Reasons for setting up Nyaya Panchayats

The rationale behind setting up the Nyaya Panchayat are,

1. Democratic decentralisation,
2. Easy access to justice,
3. speedy disposal of cases,
4. Inexpensive justice system,
5. Revival of traditional village community life,
6. Combination of judicial system and local self government, and
7. Reduction in pressure on Civil Courts.

However, according to the latest reports, this institution is functioning only in handful of states.

(b) Constitution of Nyaya Panchayats

Nyaya Panchayats constitutes a Sarpanch as its head and ^few panchai (generally it varies between10 to 30). Each member of Nyaya panchyat must be iterate and must be of minimum 30 years ofage. The appointment is based on1 nomination and election

(c) Jurisdiction of Nyaya Panchayats

It has judicial functions both in civil as well as in criminal fields. It can deal with several minor offences) like simple hurt, wrongful restraint, theft etc, and punish an accused to pay fine.

In civil matters nyaya panchayat have jurisdiction in cases like suits for money and

goods etc. The pecuniary limit of such cases is very low.
(d) Procedure in Nyaya Panchayats
The procedure laid down for trial of cases has been so designed as to avoid delays and technical difficulties. Therefore procedure followed in nyaya panchayats is very simple and informal. The procedure codes like Code of Civil Procedure, Criminal Procedure Code and Indian Evidence Act apply to the nyaya panchyats, But, they have power to call witnesses and the parties for recording their evidence
or producing any relevant document or fact. Unlike courts, they have the power to investigate the facts to find out the truth and at the same time they have the power to punish for its contempt. Lawyers cannot appear before a nyaya panchyat in anyl of its proceedings
(e) Advantages of nyaya panchayats over the regular courts,
(1) They provide a inexpensive and expeditious mechanism to settle disputes.
(2) They provide relief to the ordinary courts as they lift the part of burden of judicial work on their shoulders. In a way, they are emerged on solution to the problem of mounting arrears of cases before the courts.
(3) They provide justice at the door steps for the village folks,
(4) They provide protection to the local customs and traditions,
(5) Panchayat System has a great educative value for the villagers.

Disadvantages of nyaya panchayats
(1) They are faction ridden institutions manned by laymen. Justice provided by them is based on caste, community, personal or political considerations. Therefore, chances of injustice cannot be ignored,
(2) It has been seen that panchas are often corrupt, partial and behave improperly or rudely.
(3) They are laymen, therefore ignorant of law and they often give arbitrary and irrational decisions,
(4) One cannot ignore that casteism and groupings are major features of rural India and therefore the influence of these shades on the justice cannot be According to 77th Report ofthe Law Commission, wherein it observed that, it will be a backward step to revert to the premitive method of administration of justice by taking out disputes to a group of ordinary laymen ignorant of modern complexities of life and not conversant with legal concepts and procedures.

The Mehta Committee did not get very enthusiastic response on the continuation and working ofthe nyaya panchayat. It opposed the combination of judicial and executive functions in one body and also recommended qualified judges to preside over nyaya panchayat.

Suggestive Measures
Law Commission in its 114th Report concludedjiat, "with the safeguards designed to ensure nyaya panchayats proper working and improvement. These courts are capable of playing a very necessary and useful part in the administration of justice in the country."

In this Report the Law Commission presented a new model for the establishment of nyaya panchayats. The suggested model is as follows,

1. There should be a panchayat judge and two lay judges in a nyaya panchayat. Where the panchayat judge should be legally trained person belonging to the cadre of judges to be specifically set up for the purpose.
2. In order to select legally trained judge for nyaya panchayats the state shall constitute a special cadre of Judges that is panchayatiraj cadre of judges.
3. The lay judges should be nominated not elected.
4. The-local jurisdiction of the gram nyayala would be over villages comprised in a Taluka/Tehsil.
5. There would be no monetary ceiling on its jiirijdictjon. A broad civil jurisdiction should be given, and the criminal jurisdiction should be equal to that of a judicial magistrate of first class.
6. The nyaya panchayat would follow a simple procedure to dispose the cases.
7. Neither the Code of Civil Procedure, 1908, nor the Indian Evidence Act, 1872 is to be applied in its procedure.
8. In criminal trials, the Code of Criminal Procedure, 1973 is to be applied but Indian Evidence Act, 1872 should not applicable.
9. Lawyers should be permitted to appear before the nyaya panchyats.
10. No appeal shall lie in civil cases from the decisions of the nyaya panchayats But a revision petitionjtnay lie to correct errors of law which may have affected the decisibnof the nyaya panchayats to the district courts.
11. Ing criminal case, an appeal would lie to the sessions courts against the decisions of the nyaya panchayats in which it was imposed a substantive sentence of imprisonment^

Moreover, as was recommended by the Civil Justice Committee, each party may be allowed to choose its own pancha and the Sarpancha or the Presiding Officer of the Panchayat Court should have a casting vote. Yet another improvement to ensure impartiality can be to bring the dispute between two parties belonging to a particular village before the panchas belonging to another village. This is possible when a few closely situated villages decide to have one Nayaya Panchayat. The Panchas belonging to another village will have no interest in the case or the dispute and will be in a position to impart justice.

Even, otherwise, there should be regular inspection of the Nayaya Panchayat by the Tehsildar/Sub Divisional Officer or by the District Munsif himself to ensure that the proceedings of the Nayaya Panchayat are free from caste/faction consideration. There should bea provision for an appeal to the Munsif in case any party feels aggrieved by the decision. Such provision should be there to keep a check on the functioning of the Panchayats.

To ensure impartiality, the District Munsif should have the power to transfer a case from a Panchayat and decide it himself. It could be done on the request of a litigant who may feel that justice would be denied to him by the village Panchayat. Such provision will act as a good check on the function and performance of the Nayaya Panchayats.

Conclusion

When 65 percent of our population resides in rural India, there seems to be no escape from some form of nyaya panchayat. We need an effective institution which can provide justice near to the door steps for the rural India. Otherwise, the justice will remain to be

for the urban courts, which is far from the reach of poor rural people. Therefore, to provide a semblance of justice, Nyaya panchayats in some form have to be created on the basis of participation of the people. The Seventy third amendment of the Constitution has given right direction in this regard.

Gram Nyayalaya Act, 2008.
Access to justice by the poor and the disadvantaged remains a worldwide problem. Article 39-A of the Constitution directs the State to secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.
To give effect to the said mandate the Government has taken various measures to strengthen the judicial system by simplifying the procedural laws, incorporating various alternative dispute resolution mechanisms such as arbitranon, conciliation and mediation, conducting of Lok Adalats, etc., establishing Fast Track Courts, special Courts and Tribunals/and providing free legal aid to the poor. women and children.
To provide access to justice at the grass roots level, the Law Commission of India in its one hundred fourteenth Report on Gram Nyayalaya recommended establishment of Gram Nyayalayas so that speedy, inexpensive and substantial justice could be provided to the common man. Accordingly, the Government introduced the Gram Nyayalayas Bill, 2007 in Rajva Sabha on fifteenth July, 2007 to give effect to the said' recommendations of the Law Commissions.
4. The salient features of the present Bill are as follows,
(1) The Gram Nyayalaya shall be court of Judicial Magistrate of the first class and its presiding officer (Nyayadhikari) shall be appointed by the State Government in consultation with the High Court. The qualifications, salary, terms and conditions of service of the Nyayadhikari shall be the same as that of the Judicial Magistrate of the first class,
(2) the Gram Nyayalaya shall be established for every Panchayat af| intermediate level or a group of contiguous Panchayats at intermediate level in a district or where there is no Panchayat at intermediate level if any State, for a group of contiguous Panchayats,
(3) the Gram Nyayalaya shall be a mobile court and shall exercise the powers of both Criminal and Civil Courts. The pecuniary jurisdiction of the civil suits, etc shall be notified by the concerned High Court,
(4) the Gram Nyayalaya shall try criminal cases, civil suits, claims or disputes which are specified in the First Schedule and the Second Schedule to the proposed Bill,
(5) the Central Government as well as the State Governments have been given power to amend the First Schedule and the Second Schedule of the proposed Bill as per their respective legislative competence,
(6) the Gram Nyayalaya shall follow summary procedure in criminal trial as provided under sub-section (1) of Section 262 and Sections 262, 264 and 265 of the Code of Criminal Procedure, 1973 with certain modifications and as regards other matters which are not provided in the Bill, the provisions.of the Code of Criminal Procedure shall be applicable,
(7) the Gram Nyayalaya shall exercise the powers of a Civil Court with certain

modifications and shall follow the special procedure as provided in the Bill, as regards other matters which are not provided in the Bill, the provisions of the Code of Civil Procedure, 1908 shall be applicable,

(8) the Gram Nyayalaya shall try to settle the disputes as far as possible by bringing about conciliation between the parties and for this purpose, it shall make use of the conciliators to be appointed for this purpose,
(9) the judgment and order passed by the Gram Nyayalaya shall be deemed to be a decree and to avoid delay in its execution, the Gram Nyayalaya shall follow summary procedure for its execution,
(10) the Gram Nyayalaya shall not be bound by the rules of evidence provided in the Indian Evidence Act, 1872 but shall be guided by the principles of natural justice and subject to any rule made by the High Court,
(11) an appeal from the judgment, sentence or order of the Gram Nyayalaya in criminal cases, to the extent provided in the Code of Criminal Procedure, 1973 shall lie to the Court of session, which shall be heard and disposed of within a period of six months from the date of filing of such appeal,
(12) an appeal from the judgment and order of the Gram Nyayalaya in civil cases, to the extent provided in the Code of Civil Procedure, 1908 shall lie to the District Court which shall be heard and disposed of within a period of six months from the date of filing of the appeal,
(13) a person accused of an offence may file an application for plea bargaining in which such offence is pending trial and the same will be disposed of by that Gram Nyayalaya in accordance with the provisions of Chapter twenty one A of the Code of Criminal Procedure, 1973.

Concept of Law

QUESTION. 1. Critically discuss that 'Law is the command of sovereign'. How would you locate Austin's theory in India?

Answer. Positive approach to law concentrates on things as they are not as they ought to be. This approach is opposed to the theory of natural law and is the imperative theory of law, which found its most forceful expression in the workers of Austin.

In 1832 the lectures delivered by John Austin at the University of London were published under the title "The Province of Jurisprudence Determined.'' He was considered as father of English jurisprudence. According to Austin positive law is a proper subject of jurisprudence, He says "Every positive law, or every law strictly so called, is a direct or circuitious command of a monarch or sovereign in the character of political superior.... to person or person in a state of subjection to its author."

Thus the Austinian concept of law is characterised by four elements,

(1) command,
(2) sanctions,
(3) duty, and
(4) sovereignty.

The idea comprehended by the term 'command' are,

An expression of wish or desire conceived by a determinate person, body of person, that another person shall do or forbear from doing some act subject to an evil in the event of disobedience.

Sanction is the evil which is to follow in case of non-obedience. In other words, every sanction properly so called is an eventual evil annexed to a command.

Duty implies the obligation to comply with command. So every law is a command, imposing a duty inforced by a sanction.

Austin's notion of sovereign's if determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of given society, that determinate superior is sovereign in that society. The basis of sovereignty is thus the fact of obedience. The sovereign power is unlimited and indivisible (no division) of authority, the sovereign is not bound by any legal limitation or by his own laws.Austin's broad approach to law was to regard it as the command of the sovereign. The notion of command requires that there must be determined person to issue the command and that there is an implied threat of a sanction if the command is not obeyed. The aim of Austin was to separate positive law from such social rules as those of customs and morality. According to his theory international law lacking the power to impose sanctions, is not positive law but positive morality. Another aspect of the theory is that the sovereign is not bound by any legal limitation, whether imposed by superior principles or by his own laws.

Criticism of Austin's Theory

(a) Customs ignored, According to Maine, in the early times, it was not the command of superior but customs regulated the conduct of people. Even after coming of State system into existence, customs continued to regulate the conduct. As Austin has not included custom as law, this theory is not comprehensive. Austin definition of law as the

"command of sovereign" suggests that only the legal systems of the civilized societies can become the proper subject matter of jurisprudence because it is possible only in such societies that sovereign can enforce his commands with an effective machinery of administration.
(b) Law conferring privileges, Salmond has said that the Austinian theory of law is onesided because Austin has recognised only the formal sources of law and dis-regarded the ethical and material sources. The law which is purely of a permissive character and confers only privileges as the Wills Act, is not covered by Austinian definition of law.
(c) Conventions, Conventions of the Constitution, which operate imperatively, though not enforceable by law, shall not be called law. According to Austin although they are a subject matter of jurisprudence.
(d) International Law, Austin has put International Law under positive morality alongwith the law of honour and law of fashion. The main reason of his not calling International Law as "law" is that it lacks sanction, but this alone can not be sufficient to deprive it from being called "law".
(F) Sanction is not the only means to induce obedience, The Austinian theory says that it is the sanction alone which induces men to obey law. It is incorrect to define law in terms of sanction is like defining health in terms of hospital and diseases. Law is obeyed because of its acceptance by the community. Universal disobedience can destroy the whole basis of the legal order.
(0 Purpose of law ignored,Austin has been criticised for non-inclusion of the element of purposes in his definition. Paton says "Justice is the end of law and it is only benefiting that an instrument shall be defined by a delineation of the purpose which is its "raison detre"
Applicability of Austinian Theory in India
In modern democratic welfare State like India, no single determinate sovereign can be regarded as an absolute authority to enact law.
(1) The Parliament has an absolute power to amend the Constitution. On this absolute power of the Parliament, our judiciary has imposed certain restrictions with the series of decision started from Keshavnanda Bharti Versis State of Kerala, AIR 1973 SC 1416, wherein, it was held that the Parliament cannot amend the 'basic structure' of the constitution.
(2) In Austinian theory, the importance of custom was entirely neglected. But, the Supreme Court in Raj Kapoor Versis State, wherein, Justice V.R. Krishna lyer examined the connotation of the term 'law' and held 'custom' as a part and parcel of the law. He observed that, "Jursiprudentially speaking, law, in the sense of command to do or not to do, must be a reflection of the community's cultural norms, not the State's regimentation of aesthetic expression or artistic creation."
(3) Austin never believed in division of sovereign power. So far as India is concerned there is a sharp division of power between Union and State. Under the provisions of the Indian Constitution even judiciary and executive can make laws. e.g. under Article 141 of the Constitution, the law made by the Supreme Court to be binding on all courts throughout the country. Besides, we have Article 370 in the Constitution, wherein, even law made by the Parliament is sometimes not applicable in the State of Jammu & Kashmir, which is a part of this country.

The Mayor's Court

The charter of 1726 provided for the establishment of a corporation in each presidency town. The charter is considered to be an important landmark in the history of legal system in India as it introduced the English laws into the country.

factors Leading to the Establishment of Mayor's Court

Before 1726 there were different judicial system functioning in the British Settlement, which were increased in number by 1726. As a result the servants of the many, working at such different settlements were subject to different sets of courts. there was, thus a lack of uniformity in the British settlements, for the same offence wild entail different and sometimes Contrary Penal Consequence. There was also another factor which Compelled the Company to have a uniform law.

There were quite important distinguishing feature between the Company's Mayer's Court and the Crown's Mayor's Courts established under the Charter of 126. The main differences are.given below,

(1) the Mayor's Court under the Charter of 1687 was created by the Company while the Mayor's Courts under the Charter of 1726 drew their power directly from the Crown. Thus the latter were on a superior footing than the former

(2) The Charter of 1687 created only one Mayor's Court at Madras, it did not touch the judicial system prevailing in other settlements, presidencies under the Company. The Charter of 1726 created Mayor' Courts at all the three presidencies that is Madras, Calcutta and Bombay thus, for the first time, establishing a uniform judicial system.

(3) The Mayor's Court established under the Charter of 1687 enjoyed both civil and criminal jurisdiction. While the mayor's courts established under the Charter of 1726 mayor's Courts established under the Charter of (were given jurisdiction in civil matters including testamentary and probate of wills jurisdiction, Criminal matters were left to be decided by am within the jurisdiction of, Governor-in-Council which acted as a court i such matters.

(4) The Charter of 1726 made, for the first time, a provisions for a second appeal to the King-in-Council which became a precursor of the Privy Council later on. Thus under this Charter, the first appeal could be filed before the Governor-in-Council and the second (although in some cases) appeal could be taken to the King-in-Council in England. The Charter of 1687 did not make such provision. The appeal from the Mayor's court could be filed before the Admiralty Court.

(5) The Mayor's Court established under the Charter of 1687 made a provision for the representation of the natives on the court. The Crown's Mayors Courts did not have any such representation, though there was a provision I for the same in the Charter of 1726.

(6) No doubt, the Crown's Mayor's Courts established under the charter of 1726 were definitely superior courts so far as their status is concerned, but in strict judicial and legal manner, the Company's Mayor's Court was better equipped, for there was a provision for a lawyer-member who was to be called the Recorder. The Charter of 1726 although it purported to improve the judicial system in India, did not make any such provision. . Thus the Courts established in 1726 were mostly composed of Company's

civil servants who did not have sufficient experience in legal matters.
(7) There was yet another important distinction between the two Mayor's Courts. The Company's Mayor Court evolved its own procedure and dispensed justice in accordance with the rules of common sense, equity and good conscience. It avoided the intricate procedural technicalities. But the Charter of 1726 which introduced the British laws into India brought all the legal technicalities of the British Courts of law. Thus the entire gamut of British laws and its procedure were foisted on the Courts. established under the Charter of 1726.
(8) The Charter of 1726, in a way, did away with the concept of separation between the executive and the judiciary in criminal matters. The Governor-in-Council acted as the criminal court while the Mayor's Courts handled only the civil matters and testamentary and probate of wills cases. On the other hand, the Mayor's Court at Madras was invested with power to handle all civil and criminal matters and appeals from its decisions went to the Admiralty Court rather than the Governor-in-Council.
The Charter of 1726 also constituted a Mayor's Court for each of the presidency towns consisting of a Mayor and nine Aldermen. Three of them i.e., the Mayor or senior Alderman together with two other Aldermen were required to be present to form the quorum of the Court. The Mayor's Courts were declared to be present to fan the quorum of the Court. The Mayor's Courts were declared to be Courts of record and were authorized to try, hear and determine all civil actions and pleas between party and party. The Court was also granted testamentary jurisdiction id power to issue letters of administration to the legal heir of the deceased person. It was authorized to exercise its jurisdiction over all persons living in the presidency own and working in the Company's subordinate factories.
Appeals from decisions of Mayor's Court were filed in the Court of Governor and Council. A second appeal in cases involving 1000 pagodas or more could be made to king-in-council in England. The court of Governor and Council also decided criminal cases.

Mayor's Courts under the Charter of 1687 and 1726: Comparison.—
In Chapter 1 we have noted that the Charter of 1687 had also established a Corporation and Mayor's Court in Madras. But apart from the apparent similarity of names there was a vast difference between the two Charters. The main differences may be enumerated as under:
(1) The Charter of 1687 applied to Madras only while the Charter of 1726 applied to all the three Presidencies.
(2) The Mayor's Court established under the Charter of 1726 had the jurisdiction in Civil matters only in addition to its testamentary and probate jurisdiction, while the court under the Charter of 1687 had the jurisdiction in criminal matters also.
(3) Appeals against the judgments of the Mayor's Court under the Charter of 1687 went to the Court of Admiralty while from the Mayor's Court under the Charter of 1726, to the King-in-Council.
(4) The Mayor's Court of 1687 was a Court of the Company while the court established under the Charter of 1726 was the Court of the Crown.
(5) The Mayor's Court under the Charter of 1687 was better in one respect that it had a lawyer-member called Recorder while in the Court under Charter of 1726 there was no

provision for any lawyer-member.
(6) In procedural matters, the court under the Charter of 1726 had to observe the technicalities of the courts in England while the Court under Charter of 1687 was guided by its own procedure of convenience.
(7) In the Court under Charter of 1687 there was good representation of Indians while under the Charter of 1726 in spite of the provision for two Indian members none was ever appointed in practice.
(8) Under the Charter of 1726 the criminal jurisdiction was completely assigned to the executive, *i.e.,* the Governor and Council, while under the earlier Charter it belonged to the Mayor's Court and the Admiralty Court.

The Adalat System, Reforms of Warren Hastings

The Adalat System , Reforms of Warren Hastings

In 1765, the company entered into an agreement with the Emperor whereby it obtained the diwani of the three provinces of the Bengal, Bihar and Orissa. In Warren Hastings prepared the first judicial plan. It was the first step to regulate machinery of administration of justice and the plan being a landmark in the ial history become famous as Warren Hasting's plan of 1772. The main features of the plan were as follows,
Firstly, all the three provinces were sub-divided into districts which were placed Collectors. These collectors were responsible not only for the collection of revenue, but also for looking after the general administration of the district, judicial system was sought to be overhauled and separate civil (diwani) and (nizamat) courts (adalats) were established at various levels. Secondly, it should be remembered that in the presidency towns, Mayor's established under the Charter of 1726 continued to function as usual. In fact, the Mayor's Courts had been established to handle cases which involved or concerned the Englishmen serving under the Company or foreigners. These Courts, therefore, did not touch upon matters which concerned the natives living in the areas beyond the Presidency towns. The Adalat System which was introduced under the Judicial Plan of 1772, therefore, covered the mofussil areas under the Company. Thus the judicial plan covered the natives living in the mofussil areas.
The Adalat System, thus, introduced, can be discussed under the following main heads,
Courts of original jurisdiction
The Provinces of Bengal, Bihar and Orissa, were divided into various units for the purpose of administration, both judicial and civil. These units were called districts.
(1) Mofussil Diwani Adalat, At the level of each district, a mofussil diwani adalat was established. It was a court of original jurisdiction in civil or diwani matters. This court was headed by the Collector who functioned as a judge. The laws applied by this court were those embodied in the Shastras in case of the Hindus and in the Koran in case of the Muslims. This court handled all cases relating to property, inheritance, succession, marriage, castes, contracts and related matters. The Collector was assisted by the learned Pandits and Kazis who were well versed in the Hindu and the Muslim laws respectively.
(2) Mofussil Faujdari Adalats, Corresponding to the diwani adalat at each district, Mofussil Faujdari Adalat was established at the level of each district. This court handled all criminal cases. The law applied by this court was the Muslim law. This Court was presided over by a learned Kazi and a Mufti who were assisted by two maulvis all well versed in the Muslim law. The supervisory control on this court vested with the Collector. This court had the power to decide all criminal cases and punish the criminals except in the case of capital punishment. The proceedings of such cases had to be submitted to the Sadar Nizamat Adalat for confirmation of the sentence of death passed by this Court. There was a further provision for appeal to the Nawab or the Subedar who finally confirmed, commuted or reduced the punishment.

(3) Adalats of Small Causes, At the level of village or a small town, a Small Causes Adalat was established under the Head Farmer who decided the cases upto the value of Rupees ten. His decision in cases upto the value of Rupees one hundred seven were final. In other cases, the matter could be taken up higher to the Muftissil Diwani Adalat.

Courts of Appeal

(1) Sadar Faujdari (Nizamat) Adalat, This was an appellate court in all criminal matters and was presided over by a Daroga who was aided in his work by the Chief Kazi, the Chief Mufti and three Maulvis. The overall supervisory control on this court was exercised by the Governor General and his Council.

(2) Sadar Diwani Adalat , This Court was in fact the Governor General and his Council who all sat as judges in all diwani cases. This court heard all appeals from the Mofussil Diwani Adalats beyond the value of Rupees five hundred.

The Diwani & Nizamat Adalats were established under the judicial plan oi Warren Hastings. For the first time, these adalats were directed to apply personal laws of the natives. The law of the Shastras in the case of the Hindus, and the Law of the Koran in respect of the Muslims were to be applied to cases of marriage, caste, inheritance etc. The Pandits and Maulvis were to expound the personal laws of the natives.

In the field of criminal justice, the Muslim criminal law which was prevalent since long was to continue. Some improvements were however made from time to time with a view to imparting impartial justice.

In some cases and disputes the parties were allowed to resort to arbitration, and after the award, get a decree of the Mofussil Diwani Adalat.

Defects in the Plan

Though the judicial plan of 1772 was the first of its kind for the administration of justice within the framework of the country, after its working certain major defects came to light. The plan provided for a civil and a criminal court in each district.

(1) Less number of Courts, The head farmers were given power to decide petty cases up to Rupees ten. In fact it was necessary to have more subordinate courts keeping in view the population and the area of each district.

(2) Concentration of power, Another defect was the concentration of power—administrative, tax collection and judicial, in the hands of the Collector. The Collector was the Civil Judge as well as supervisor of the criminal courts. It was impossible for the Collector to devote time and energy to regulate all these affairs. Evils of the combination of executive and judicial powers in one person were bound to follow. When the private trade done by Collectors and the misuse of powers by them and their officials came to the notice of Warren Hastings, he gave a second thought to the original plan and prepared a new judicial plan on November 23, 1773 which was implemented from 1774. As expressed by Jois, the plan, however, brought great credit and honour to (Warren Hastings because it was the proof of his intense desire to ensure impartial 'and less expensive justice to people in the Moffiisil. Similarly it laid a second foundation for future development.

Working of the Court - Raja N and Kumar, Patna , Cossijurah, cases

THE PATNA CASE

In the words of Dr. M. P. Jain, the Patna case exposed the judicial administration of the Company. In fact the Patna case is an illustration of various defects and weaknesses in the adalat system in Bengal, Bihar and Orissa. The facts of the case were as given below,

One Shahbaz Beg, a soldier in the Company's army, had no son and so he called his nephew Bahadur Beg from Kabul to live with him. He expressed a desire to adopt Bahadur Beg and to hand over his property to him. But before he could do so, he died in 1776. Thereafter, a struggle ensued for property between Bahadur Beg and Shabhaz's widow Nadira Begum. The Begum claimed entire property on the basis of gift said to have been executed in her favour by her late husband. Bahadur Beg claimed the entire property as the adopted son of the deceased, he filed a suit against the Begum in the Patna Provincial Council which also functioned as a Diwani Court for the town.

The Patna Council remitted the entire case to its law officers Kazis and Muftis md required them to make an inventory of property of the deceased, to collect the property and seal it, and according to "ascertained facts and legal justice" to transmit to the Council a written report specifying the shares of parties. Under the Regulations then prevailing, the law officers were neither to perform any executive functions nor were they to concern themselves with deciding the questions of fact, their only function was to expound the law applicable to the facts of the case.

The law officers locked and sealed the house of the deceased. The widow of the deceased was insulted and humiliated to such an extent that she left the house and took refuge in a mosque. They rejected her claim holding that ^itt deeds were forged. As Muslim law does not recognise adoption, Bahadur Beg's claim was also rejected. The deceased's property was thus to be divided according to the Muslim law of intestate succession.

The widow approached the Supreme Court and filed an action against Bahadur Beg, the Kazis and Muftis for assault breaking and entering her house and taking away her property, and claimed damages amounting to Rupees 6 lakhs. Bahdur Beg, Kazi and Mutis were arrested and brought from Patna to Calcutta and were lodged in prison.

The legal issues raised in trial, which started in November 1078, were, (1) Whether Bahadur Beg, who lived outside Calcutta was subject 10 the jurisdiction of Supreme court, and (2) Whether the law officers could be prosecuted for acts done in their judicial capacity?

On the first issue, the court said that Bahadur Beg was a farmer of land revenue and he was not different from the revenue Collector and therefore was 'directly or indirectly in the services of the Company'. On the second issue, the court held that although the Patna council was a legally constituted court having jurisdiction to decide the civil disputes between the Indians, it had no jurisdiction to delegate its functions to the law officers, the Kazi and Muftis.

The court criticised the manner in which the Kazi and Muftis had acted for ascertaining facts. All the proceedings in the Council were ex parte without any I notice being given to the Begum. No regular trial was held and witnesses had not ibeen examined on oath. Thus, the law officers were tried not for what they had jdone in the discharge of their regular functions, but for something outside thereto
tid the court had an undoubted jurisdiction over the Company's servants.
The Supreme Court awarded damages of Rupees 3 lakhs to the widow which was
quite inproportionate. The Patna case brought to light the inherent defects in the Dmpany's judicial system (that is Adalats and Councils). Also, the case involved he question of the Supreme Court jurisdiction and its relationship with the officials Of the Adalats. A lesson was perhaps learnt, which became the basis of further eforms in administration of justice carried out later.
COSSIJURAH CASE
The Cossijurah Case illustrates another aspect of the administration of the Company in India. This case is known for the fact that it brought out the defects in the Charter which created the Supreme Court at Calcutta. The Charter did not demarcate either the jurisdiction of the Court or the position of the Governor-General-in-Council. As a result of this confusion, there were occasions, when the Supreme Court issued writ of capias against the directions of the Council. In the Cossijurah case the confrontation between Supreme Court and the Council became evident to the highest degree. This case in brief as follows,
One Zamindar, the Rajah of Cossijurah was heavily indebted to Cossinaut Baboo. When Cossinaut requested for the return of his money, the Zamindar showed reluctance by making one excuse or the other. The Baboo therefore approached the Revenue Board where also his efforts brought no result. Finally he sued the Rajah in the Supreme Court at Calcutta. In his affidavit, he stated that the Rajah was in the service of the Company having been employed in the collection of the revenues. The affidavit also stated that the Rajah was subject to the jurisdiction of the Supreme Cc art. The Supreme Court issued a notice to the Rajah directing him to appear before the Court. In the meantime the matter was referred to the Council at Calcutta which referred the matter to the Advocate-General for his advice on the point whether the Zamindar was amenable to the jurisdiction of the Supreme Court. The Advocate-General advised that the Supreme Court had no jurisdiction over the Zamindar. Thereupon the Governor-General-in-Council issued instructions to all the farmers and landholders that they were not subject to the jurisdiction of the Supreme Court and that they could ignore the process of the Court.
The Rajah of Cossijurah had gone into hiding to avoid the process of the Supreme Court. The Supreme Court issued another notice to the Rajah who did I not pay any attention to the notice in view of the instructions from the Governor-General-in-Council. In fact the men of the Zamindar drove away the Sheriff and other officers who had come to arrest the Zamindar on a writ of capias. Thereupon the Supreme Court issued another writ for the confiscation of the property of the Rajah. The Court sent the Sheriff along with some armed constables.
The Council also came into motion, it decided to protect the Zamindar. Accordingly it despatched a much larger armed force to prevent the arrest of the Zamindar. In the meantime the Sheriff and officers caught hold of the Zamindar physically, assaulted

him, insulted the ladies, and did many acts of sacrilege in respect of the idols of the gods placed in a room. By that time the Commander of the army which had been despatched already reached the spot under the orders of the Governor-General-in-Council. He arrested the Sheriff and his men and took them to Calcutta, where they were released. Thereafter the Supreme Court issued a writ for the arrest of the Commander. This writ was also prevented by a similar show of armed force.

When all efforts to recover his money failed, Cossijurah decided to file a suit against the members of the Council. Accordingly he brought an action against the Governor-Gerieral and the other members of the Council in the Supreme Court. The Governor-General and his Councillors appeared in the Court in the first 'instance. Soon they discovered that the plaintiff had brought an action against them in their official capacity. Then they decided not to appear before the Court.

The Council issued instructions to all the Zamindars, landholders and the persons residing outside Calcutta not to pay any attention to the process of the Court and that in the case the Supreme Court persisted in issuing writs against them, the Council would protect them.

The show down between the Supreme Court and the Council brought out the inherent weaknesses and defects in the Regulating Act which did not specify the areas and the persons which were under the jurisdiction of the Supreme Court. The language of the Act was vague enough for various interpretations. These defects, however, were removed to a great extent by the passing of the Act of Settlement 1781.

Working of the Court - Raja N and Kumar, Patna , Cossijurah, cases
ACT OF SETTLEMENT 1781

The Act of Settlement 1781 was intended to remove some of the most obvious defects in the working of the Supreme Court at Calcutta. These defects came to light soon after the court started functioning and the situation was precipitated, by the famous Patna and Cosijurah cases (ap per next chapter). The following were its provisions,

(1) The Governor-General and the members of his council were made completely immune from the jurisdiction of the Court,

(2) Revenue matters were taken out of the jurisdiction of the Supreme Court,

(3) the Act clarified that no person was subject to the jurisdiction of the Supreme Court by being a landowner, landholder, fanner, or engaged in the collection of revenue.

(4) no person employed by the Governor-General or the members of his Council or by any servant of the Company was under the jurisdiction of the Supreme Court merely for his being so, except where he submitted in writing to its jurisdiction. The only cases where the Court could assume jurisdiction in case of such persons were of trespass or other wrongs,

(5) The Act also made provision for the release of the various officers of the jail by the orders of the Supreme Court in connection with the Patna Case (ap per next Chapter). The Act further provided that no action was to be entertained by the Supreme Court against the judicial officers of the Company. Even in the case of corruption, a notice was to be served on the person concerned, but no such person could be arrested until the person refused to appear before the Court after the notice was duly served. This provision gave much relief to the judicial officers of the Company who were under fear of the Supreme Court and were reluctant to function at the Adalats.

(6) The Act also made it clear that in cases involving the natives, the personal laws of the natives should be applied. Where the dispute arose between natives of two different communities, i.e., the Hindus and the Muslims, then the law of the defendant would be applied.

(7) It was made clear that the officers of the native Courts that is adalats were not liable to the jurisdiction of the Supreme Court for any act done in their judicial capacity. However, if there were charges of corruption levelled against them, then the Supreme Court could proceed against them after giving them one to three month's notice depending upon the distance where the officials so charged were residing. In that case, the officials were not liable to arrest or detention.

(8) the Sadar Diwani Adalat was declared a Court of Record in Diwani cases and to be a court of final jurisdiction in civil matters of the value of Rupees five thousand beyond which appeals could be taken direct to the Privy Council. Thus the Diwani adalat was not a Court, in any way, subordinate to the Supreme Court.

Thus, it would be clear, the Act of Settlement of 1781 clarified a lot of ambiguities in the Regulating Act of 1773 and also settled once for all the jurisdictional issue which had become a cause of conflict and hostility between Supreme Court and the Governor-General in council as also had created lot of apprehension in the minds of the judicial officers of the natives' Courts such as the Adalats. Now the Sadar Diwani Adalat was

itself a Court of Record, with a final jurisdiction in civil or Diwani matter upto the value of Rupees five thousand and now the appeals from the decisions of the Diwani Adalat could be taken direct to the Privy Council without any reference etc. being made to the Supreme Court.

Reforms of Cornwallis

QUESTION. 2. Discuss the reforms under Lord Cornwallis.

Answer. The Governor -Generalship of Lord Cornwallis (1786-1793) constitutes a very remarkable and a highly creative period in Indian legal history. He thoroughly reorganised the judicial system. He introduced for the first time the principle of administration according to law. He made very important and far-reaching reforms in the judicial administration, some of the basic principles of which exist even upto now. The reforms were made by Cornwallis in three stages in 1787, 1790 and 1793.

Judicial Plan of 1787

On the instructions from Court of Directors, Lord Cornwallis introduced his first plan in 1787 to combine revenue and the judicial functions in a single authority called the Collector. Thus, the Collector collected the revenue as well as decided the revenue disputes. This was done to avoid the conflict of jurisdiction and to save expenses. The revenue court was called as 'Mal Adalat'. The appeal against the decisions of the Collector went to the Board of Revenue at Calcutta and a second appeal to the Governor-General and Council. Thus there was provision for two appeals in revenue cases.

For deciding civil disputes, Diwani Adalat with Collector as the sole judge were established. The Collector was also given some magisterial powers. As Magistrate he had the powers to arrest the criminals, hear evidence against them and commit the case to the criminal court to be tried by it. In petty matters, he was given power to inflict 15 days imprisonment.

The plan was a retrograde step in the administration of justice. Whatever goods had been done by Warren Hastings by separate revenue and judicial functions was undone by this plan. In Civil cases, appeal from Mofussil Diwani could be preferred in the Sardar Diwani Adlent if the subject matter of the suit exceeded Rupees one thousand and in cases more than £ 5000 a further appeal by to the king in council. The Sadar Adalat consist of the Governor General and all the members of his council assisted by the Chief Kazi, Chief Mufti and two Moulvis for Muslim law and Hindu Pandit for Hindus law.

Judicial Plan of 1790

The administration of criminal justice was suffering from various defects before the reforms of 1790,

(1) The criminal administration of justice was completely left in the hands of Muslim officers. With no proper control over them, they misused their powers e.g. accepted bribes,

(2) The Moffussil Faujdari Adalats had unlimited powers, and with absence of proper control these courts became autocratic,

(3) There was no relation between the severity of the crime and the punishment provided for that. Full freedom was given to the courts to given punishment as they liked. Thus, even in the crime of murder, the criminal went unpunished,

(4) In many cases the protection was afforded to the criminal by Zamindars

and by their influence over the Muslim judges, they could get the criminals
escape from the clutches of the judiciary. In this way, crimes were
encouraged,
(5) The Nawab who had the power to control the criminal justice
administraction, was very careless.
Lord Cornwallis circulated a questionnaire to all the magistrates to ascertain their views and the existing facts about the criminal justice system. The replies given by the magistrates painted a very bad picture of the then existing system. The 1790 reforms eliminated the name of Nawab from the criminal jsutice administration. The administration was entrusted to Company's servants who were to be assisted by Muslim law officers.
Three types of Courts were created in the Mofiissil area,
(1) Court of District Magistrate continued as before that is 1787 Plan,
(2) Circuit Courts—It was a moving court which visited every district twice a year to try the persons charge-sheeted by the Magistrate. It consisted of two Company's servants assisted by kazi and mufti. The salaries of the court officers were increased so as to reduce their lure for bribes,
(3) Sadar Nizamat Adalat-It was tansferred to Calcutta where the Governor-General and Council sat as its judges, assited by Muslim law officers. The system created in 1790 worked very well, the only defect revealed in the system was that the Courts of Circuit were called upon to handle huge amount of work. Therefore, in 1792 Cornwallis empowered Magistrates to give punishment in cases punishable upto one month's imprisonment. This reduced the pressure on Circuit Courts. Lord Cornwallis also made some humanitarian reforms viz provisions for allowance to the presecutors and witnesses who came to the law courts, abolition of the provision for attachment of property, provisions for the rehabilitation of criminals after their release from the jail.
Judicial Plan of 1793
The scheme of 1787 had many defects. The Collector functioned practically without any control from the above. He very soon became an autocrat and neglected his judicial functions. Actually, his main function was the collection of the land revenue on which his future promotions and his remunerations depended. The disputes in the Mal Adalat generally related to the collection of land revenue which mean that the Collector was a judge in his own cause. From a purely administrative point of view, the scheme was convenient, simple and economic, but it was hardly conducive to secure people's liberty, protect property and promote their general welfare.
The 1793 scheme forms the high water mark in the Indian legal history, as it was based on certain postulates which are regarded as essential and fundamental for the organisation of the judicature in any civilised country. The scheme provided for a system of administration of justice which may secure and protect people's liberty and promote their general welfare.
The basic or general features of the scheme are as follows,-
(1) Separation of executive and judiciary, Henceforth, the Collector was to be responsible only for collection of revenue. The power of administering civil justice was given to the diwani adalats.
(2) Control of judiciary over executive, The Collectors and all executive officials were made amenable to the diwani adalats for their official acts. They were to be personally

liable, and could be required to pay damages to the injured party, for violations of the Regulations. Thus, for the first time a privilege was given to the people to get remedy against the Company's officers who committed any wrong agaisnt them.
(3) Governmental liability, Any person could file a suit for damages in the diwani adalat against the Government in the same way as he could file suit against a private person.
(4) British subjects and diwani adalats, The position upto now was that native could obtain redress against the British subjects only in the Supreme Court at Calcutta. It was very difficult for natives to reach the Supreme Court because of their poverty and long distance. To avoid this, the diwani adalat was given a power not to allow any British subject to live beyond 10 miles from Calcutta unless he executed a bond that he shall be liable to the jurisdiction of the court upto value of Rupees five hundred.
Reorganisation of courts-The courts were ftilly reorganised by the 1793
Scheme
(1) Civil Judiciary—A complete "hierarchy of courts" was established to deal with civil matters.
(a) Sadar diwani adalats—The highest court in the judicial hierarchy consisted of Governor- General and Council. It heard appeals against the decision of Provincial Courts of Appeal on matters exceeding Rupees 1000. These courts now had the supervision and control over the lower judiciary. The court could receive any original suit to be referred to it if the Provincial Court or the Diwani Adalat had neglected to entertain the matter. It also heard and decided charges of corruption and incompetency against the judges of lower courts.
(b) Provincial courts of appeals—Till now the only appellate court was the Sadar Diwani Adalat, functioning in Calcutta. The provincial courts of appeals were established in four divisions which had the jurisdiction to try civil suits referred to it by the Government or the Sadar. Diwani Adalat, to hear appeals against the decisions of diwani adalat etc. The courts consisted of three Company's servants as judges.
(c) Diwani Adalat—A civil servant of the Company was appointed as the judge of diwani adalat (previously the Collector was the judge) who had no work except deciding the civil and revenue disputes.
(d) Registrar's Courts—The Diwani Adalat could refer the suits upto Rupees two thousand to the court of registrar which was held by the servant of Company.
(e) Munsif's Courts— Zamindars, Tehsildars, etc appointed as Munsifs to try suits upto the value of Rupees fifty.
(f) Ameen's Courts—It had the same composition and powers as the court of munsif, however, it could not entertain a case directly unless referred to it by the diwani adalat.
(2) Criminal Judiciary— Most of reforms had been introduced under the Scheme of 1790. Under 1793 plan, only two important changes were made-in the place of Collector, the judge of Diwani Adalat was appointed as the Magistrate, and the work of the Circuit Court was transferred to the provincial court of appeal.
Other Reforms
(1) Abolition of court fee—The court fee was abolished so that the people could easily reach to the court for securing justice.
(2) Legal profession—The Sadar Diwani Adalat was authorised to appoint pleaders to the persons having some legal knowledge.
(3) Cornwallis code—The Regulations made by Governor- General and Council had to

have a preamble and title by which the nature and purpose of the Regulation could easily be ascertained. The Regulations were to be produced in the form of sections and clauses to be numbered serially. The Regulations introduced by the Cornwallis were collected together and later on come to be called as Cornwallis Code. A step was thus taken towards making law certain, definite and easily accessible to all.

(4) Native law officers—The position of native law officers improved by requiring that they shall be appointed by the Governor-General and Council from amongst the people of good character and having the knowledge of law. They could not be dismissed except for incapacity or misconduct in their public duty.

Critical appraisal of 1793 Plan

Lord Cornwallis perfected the process started by Warren Hastings. The 1793 Plan was very logical, comprehensive and well planned. The new system was based on the principle of checks and balances, the executive officers were amenable to courts and were personaly liable for their official acts, on the judicial side an elaborate system of supervision and appeals was introduced. The courts worked with more efficiency, independence and judicial outlook. For the first time the 'rule of law' was estbalished in the Mofussil area.

However, the new system was not completely free from defects,

(1) The provisions for two-three appeals made the judicial machinery complicated and slow moving. Thus, large number of cases remained pending in the courts for long period.

(2) The Indians were totally excluded from the judiciary except at very low level of munsif. Cornwallis started with a wrong premise that the Indians from their character and bearing were unworthy of holding any position of responsibility. This distrust shown towards the Indians generated the dissatisfaction among the native people as well as made the system less efficient and to some extent superficial as the English servants did not know and understand the customs, usages, etc. of the people,

(3) Cornwallis did everything on procedural side but he could not reform the substantive part of law mainly the criminal law which was based on Muslim law and had many defects.

Establishment of High Courts

In one thousand eight hundred sixty one, the British Parliament passed the Indian High Courts Act which provided for the establishment of the High Courts at the Presidency Towns. The Act also authorised the Crown to establish more High Courts by Letters Patent whenever the Crown (the Queen) deemed fit. The constitutions of the judges and their number etc., were laid down in the Act itself. As the provisions of the Act, any one whether Englishman or an Indian could be appointed a judge of the High Court provided he fulfilled the qualifications laid down therein. Thus for the first time, channels "were opened to the natives to become judges of the highest court in India. Prior to this Act, no Indians was ever allowed to sit as a judge of Supreme Courts at the Presidency Towns of Calcutta Madras and Bombay.

After the establishment of the High Courts at the three Presidency towns, the Act of 1861 did not specify or clarify their power to issue the prerogative writs. It simply stated that the powers of the erstwhile Supreme Courts would vest in the High Courts.

In 1858 the administration of the country had passed on to the Crown -who became responsible for governing the country through the Secretary of State of India. The distinction between Indian subjects and the British subjects or the Crown's subjects came to an end for all Indians automatically became British subjects. What happened to the High Court's power to issue writs outside the local limits of the presidency town? Some High Courts asserted that since the administration had come under Crown, so their power to issue writs was extended to the mofussil areas also. Cases fifteen,

In 1935, In Re National Corbon Company, Calcutta High Court issued a writ of prohibition to the Controller of Patents and Designs. The Court held that it had the power to issue the writ because it had, vide clause 4 of the Charter, inherited the powers vested in the judges of the erstwhile Supreme Court. The judges of the Supreme Court enjoyed the power like the judges of the King's Bench.

In the Matter of Ameer Khan, the Calcutta High Court issued the writ of habeas corpus even beyond the local limits of the town. The High Court held that since the power of governance had been transferred from the Company to the Crown, the power to issue writs against the Company's servants was now extended to the servants of the Crown throughout the province. After the transfer of power, there was now no limit on the power to issue writs.

In re Govindan Nair, 1922, the Madras High Court followed the Calcutta precedent and issued the writ of habeas corpus directing the government officials to release the man detained illegally.

In Indumati Chowdhurani Versis Bengal Courts of Wards, the Calcutta High Court issued the writs of certiorari and prohibition to the Bengal Courts of Wards at Calcutta which had declared the applicant a disqualified proprietor.

In a Bombay case Alcock & Company Limited. Versis Chief Revenue Authority of Bombay, the Privy Council held that the Bombay High Court had the jurisdiction and power to issue writs directing the Revenue Authority to perform a duty under the Income

Tax Act.
In the Banwari Lal Roy the Calcutta High Court held that it had the power to issue the writ of quo warranto to the Administrator of the Howrah Municipality although it was outside the local limits of the presidency town. The facts of the case were as follows,
The Government by an order superseded the Howrah Municipality and appointed an administrator to carry out the functions of the municipality. A petition was filed in the High Court praying for a writ of quo warrant to question the validity of the appointment of the administrator. The High Court before issuing the writ went into the question whether it had the power to do so even when the cases arose outside the local limits of the town.
It was stated that in 1858 power of the Company stood transferred to the Crown. This transfer also changed the status of the Indians as now they all became the subjects of the Crown. Earlier there was a clear distinction between the subjects of the Crown, the servants of the Company and the natives. The Supreme Court was empowered to issue the prerogative writs to the subjects of the Crown and the persons in the service of the Company throughout the provinces of Bengal, Bihar and Orissa or the Mofussil areas, but in the case of the natives the power to issue the writs was restricted to the local limits of the town. This distinction was no more. As all Indians had become the subjects of the Crown, the power of the Court to issue writs was enlarged to cover the mofussil areas.
But on appeal to the Privy Council the case Hamid Husian Versis Banwari Lal Roy the judicial committee held that the High Court had no power to issue the writ, because its original civil jurisdiction did not extend beyond the local limits of the presidency town. In the opinion of their Lordships, with the transfer of the governmental functions of the Crown the earlier distinction between the subjects of the Crown and the natives was blurred. The distinction could now be interpreted as between the British Nationals and the Indian nationals although all were now British subjects. The power of the High Court to issue writs would still extend to the mofussil in the case of the British nationals, but in the case of the Indians, this power was limited to the local limits of the presidency towns. And as the Howrah municipality was beyond the local limits of the town, the High Court had no power to issue the writ.
In 1943, the Privy Council finally clinched the issue. The case before their Lordships was Ryots of Garbandho Versis Zamindar of Parlakimedi (appeal case). The facts of the case were follow,
The appellants were the ryots of three villages in Ganjam District of Madras province. Sometimes before 1943 the revenue of those villages was enhanced and the Board of Revenue approved the enhancement. The ryots sought to quash the order of the Revenue approving the enhancement of the land rent, by a writ of certiorari. Their Lordships held that Madras High Court had no power to issue the wit merely on the basis of the location of the office of the Revenue Board. If it were so, the jurisdiction of the High Court could be avoided by changing the location of the office. The cause of action arose in Ganjam District which was outside the local limits of the Presidency town of Madras. The power of the High Court to issue writs did not extend beyond the local limits. , Note, The appellants had to go in for appeal because the Madras High Court, although it held that it had power to issue the writ, had refused to issue the it because in its opinion the Revenue Board had not exceeded its authority.

QUESTION. Growth of Legal Profession in India. (Short Notes)

Answer. The complex legal system of today cannot exist without its experts. A lawyer is a person who possesses expert knowledge of law and has practical skill in its working. In India lawyers are officers of the court helping judges in the administration of justice. A well organized and independent legal profession is not only a pre condition for proper administration of justice, but it is also a necessary ingredient and guarantor of the rule of law.

The first time an attempt was made to organize the legal profession was by Lord Cornwallis in one thousand seven hundred ninety three, who by Regulation VII authorised the sadar Diwani Adalat to enroll pleaders for the Company's courts in Bengal, Bihar and Orissa.

The Charter of one thousand seven hundred seventy four empowered the Supreme Court at Calcutta to enroll advocates and attorneys. However only English and Irish barristers and attorneys were allowed and no Indian had the right to appear before the Court.

The Legal Practitioners Act, one thousand eight hundred seventy nine was a comprehensive legislation to consolidate and amend the law relating to legal practitioners. The Act gave wide powers to the High Courts to enroll lawyers for different courts and also to take disciplinary action against them. They had the powers to make rules with respect to the qualifications and admission of proper persons as advocates and vakils of the courts. The High Courts were also authorised to make rules with respect to qualifications and admission of pleaders and mukhtars for the subordinate courts. An important provision of the Act which continues to exist even now, empowered the District Judges, Session Judges, District Magistrates etc. to publish the list of courts.

The dissatisfaction over the distinction between vakils and advocates with respect to appearance on the original side of the High Courts and also a demand for an All India Bar, led to the appointment of the Indian Bar Committee, one thousand nine hundred twenty three under the chairman ship of Sir Edward Chamrier. Committee recommended the establishment of a Bar Council for each High Court. It became the basis of the passing of the Indian Bar Councils Act.

Indian Bar Councils Act, one thousand nine hundred twenty six established a Bar Council for each High Court consisting of fifteen members, one of whom was the Advocate-General as the ex-officio Chairman. The roll of all the practitioners enrolled under a High Court was to be maintained by that High Court which had the power to enrot them and also of taking disciplinary action against them. The Act still left much of that what was desired Legal practitioners were still dissatisfied as no active autonomy had been given to the profession. The Bar Councils were simply advisory bodies and the real powers vested in the High Courts. Another grouse was against the distinction between advocates and attorneys and restrictions on advocates of one High Court to appear in another High Court.

After Independence, the Advocates Act, one thousand nine hundred sixty one gave a right to every advocate of the Supreme Court to practise in any High Court. Lawyers community still wanted a unified autonomous body with no class distinctions among lawyers. In view of their

demand, an All India Bar Committee was appointed in one thousand nine hundred fifty one, under the Chairmanship of Justice S. R. Das. The committee recommended creation of an all India Bar Council with common roll of all advocate and also the Bar Council for States with larger autonomy. It also recommended that only law graduates should be enrolled as advocates. These recommendations were endorsed by the Law Commission in one thousand nine hundred fifty eight, and they became the basis of the Advocates Act, one thousand nine hundred sixty one.

Dissatisfaction with this kind of arrangement continued to mount among the legal practitioners. They got a new stimulus on the establishment of the Supreme Court in 1950. The Supreme Court Advocates (Practice in High Courts) Act, one thousand nine hundred fifty one, gave a right to every advocate of the Supreme Court to practice in any High Court. But that was not enough. Lawyer community wanted unified autonomous bar with no class distinctions among lawyers. In view of their demand, in one thousand nine hundred fifty one the Government of India appointed the all India Bar Committee under the Chairmanship of Justice S.R. Das to report on the desirability of an all India Bar Council and a separate Bar Council for the Supreme Court, abolition of the distinction between counsel and solicitors existing in Calcutta and Bombay High Courts, abolition of different classes of lawyers, consolidation of the existing laws on the subject, and all other connected matters.

The Advocate Act, one thousand nine hundred sixty one was passed to redress long standing demands of the Indian Lawyers Community. The main provisions of the Act are,
(1) The Act which extends to the whole of India provides a federal structure for legal profession. It provides for a number of State Bar Councils and Bar Councils of India.
(2) It provides for only one category of lawyers to be known as advocates.
(3) An advocate is initially enrolled with a State Bar Council and a common roll of all the advocates in the Country is maintained by the Bar Council of India. No advocate can get himself enrolled with more than one State Bar Council, though he can get himself transferred from one State Bar Council to another and is also entitled to appear before any court or tribunal throughout the country.
(4) State Bar Councils consist of 15 to 20 members, elected by the advocates. The Advocate General of the State concerned is the ex officio Member. Every State Bar Council has the following committee,—

(a) Executive Committee
(b) Enrolment Committee
(c) One or more Disciplinary Committees
(d) One or more Legal Aid Committees
(e) Committees for Special Projects

The function of a State Bar Council are,

(1) To admit advocates on its roll,
(2) To entertain and determine cases of misconduct against advocates on its roll,
(3) To safeguard the rights, privileges, and interests of advocates on its roll,
(4) To conduct seminars, organize talks and publish legal periodicals,

(5) To organize legal aid for the poor,
(6) To perform any other functions conferred on it under the Act,

5. The Bar Council of India is the National body of lawyers. It consists of,
(a) The Attorney General of India
(b) The Solicitor General, and
(c) One member elected by each State Bar Council from amongst its members.

The Bar Council of India has the following committees,
(a) Executive Committee
(b) Legal Education Committee
(c) Disciplinary Committee
(d) One or more Committees for the purpose of carrying out the provisions of the Act
The functions entrusted to the Bar Council of India are,
(1) Laying down standards of professional conduct and etiquette for advocates and the procedure to be followed by its Disciplinary Committee and the Disciplinary Committees of each State Bar Council,
(2) Promotion of law reform,
(3) Supervisions and control over State Bar Councils,
(4) Promotion of legal education,
(5) Recognition of universities whose degree will qualify a person to be enrolled as an advocate as well as recognition of foreign qualifications for the same purpose,
(6) Conducting of seminars and talks on legal matters and publishing of legal journals,
(7) Organizing legal aid for the poor,
(8) All other functions conferred by the Act.

The Advocates Act, one thousand nine hundred sixty one, materializes a long dream of the members of legal profession to have an all India Bar and professional autonomy. The Act also achieves other connected objectives such as the improvement of legal education and uniformity of standards.

An analysis of the functioning of Bar Councils reveals that even though they have been effective in matter of rights of lawyers, their attitude towards duties of lawyers has been lax, Growing indiscipline among the lawyers community in India, and lack of action by the Bar Councils is a serious matter which needs immediate action. Lawyers are the pillars of rule of law, and their declining public image does not augur well for the future.

Abolition of Dual Judicial System

The 1857 revolt/mutiny opened the eyes of the British Parliament to the corrupt administration of the Company and to the total lack and complete dissatisfaction of the natives with the administration of justice in India. It was felt that more and more natives should be allowed to participate in the governance of the country if the British were to have a firm hold in India. Thus, the company's government in British India was replaced by the direct rule of the Crown in one thousand eight hundred fifty eight. It was also accepted, in principle, that more and more Indians would be inducted into the superior civil and judicial service and to make the participation of the Indians more and more effective.

The efforts were made to abolish the *dual* system of courts which was defective in many respects. The respective jurisdiction of the Company's Courts (that is Sadar Adalats and other inferior native courts) and the Supreme Courts was not clearly marked out nor was a clear relationship established between the two sets of courts. One followed the English law and the other followed the regulations made by the Company. Therefore, the dispute with respect to jurisdiction frequently arose which put the parties and the Government in awkward position. Very often the two courts would assume jurisdiction on the same persons/ subject-matter and would even give conflicting judgments.

In *Morion Verses Mehdi Ali Khan,* for instance, the plaintiff, a resident of Calcutta, brought a suit against Khan, a resident of Oudh, in the Supreme Court for recovery of certain debts alleged to have been contracted by Khan's servants at Calcutta. Khan was subjected to Court's jurisdiction and his goods and properties in Calcutta seized The Court assumed jurisdiction on the basis of 'constructive inhabitancy' which meant that if the person resident in mofussil had some property, agent or commercial transaction in Calcutta he was held to be a 'constructive inhabitant' of the town and thus amenable to the jurisdiction of Supreme Court in addition to that of adalats.

In 1829, Sir Metcalfe advocated merger of the two systems. Lord Bentick observed, 'Existence of two concurrent jurisdictions with the same limits is an *anomaly* which was productive of very considerable inconvenience as there had been cases in which opposite decisions had been come to by the Sadar Diwani Adalat and the Supreme Court on the same rights, supported *by* the same evidence.'

Sir Grey, Chief Justice of Calcutta Supreme Court said 'Lamentable as it is that such a feeling should exist, the exercise of the powers of one system is viewed with jealousy by those who are connected with other. In one thousand eight hundred thirty four, the Court of Directors observed, 'A judicature utterly uncontrollable by the

Government and on the contrary controlling the Government, recognizing the highest authorities of the State only as private individuals, and the tribunals which administer justice in all its forms to the great body of the people only as foreign tribunals, is surely an *anomaly* in the strictest sense of the word.'
Thus, opinion was slowly building up that in the interest of better administration of justice in India, it was desirable to *consolidate* the two judicial systems into one so that the legal knowledge of the English lawyers might be united with the intimate knowledge of the customs, habits and laws of the natives possessed by the judges of the adalats. Process of codification and the resultant Indian Penal Code, Criminal Procedure Code, and, Civil Procedure Code paved the way for unification of the two systems.
In one thousand eight hundred fifty eight, the *Second Law Commission* was authorised to examine the judicial system working in India and to make suggestions to establish a uniform judicial system by amalgamating the dual system of courts. On the recommendation of the Commission, the Parliament passed the Indian High Courts Act, one thousand eight hundred sixty one, providing for the establishment of High Courts in the three presidencies (Bombay, Madras and Calcutta) in place of Supreme Courts and the Sadar Adalats.
HIGH COURTS AND THE PRIVY COUNCIL
After the abortive attempt of the people of India in 1857 to regain independence, the Company's government in British India was replaced by the direct rule of the Crown in one thousand eight hundred fifty eight. An immediate and quite significant effect of this political change in the administration of justice was the move to abolish the duality of the courts that existed under the Company. The Sadar Adalats, which were the Courts of the Company, and the Supreme Courts, which were the Courts of the Crown, were proposed to be replaced by the High Courts.
The then existing system was defective in many respects. The respective jurisdictions of the Company's Courts and the Supreme Courts were not clearly marked out. Nor a clear relationship was established between the two sets of courts. The procedures and laws applied by them were quite different — one following the English law and the other following the local regulations made by the Company. Therefore, dispute with respect to jurisdiction frequently arose which put the parties and the Government in awkward position and to difficulty. The criticism of the existing system began to stem from the very beginning of the 19th century, but nothing could practically be done till the Second Law Commission of one thousand eight hundred fifty eight was authorized to suggest the ways and means for amalgamation of the two systems. On the recommendation of the Commission the Parliament passed the Indian High Courts Act, one thousand eight hundred sixty one providing for the establishment of the High Courts in the three Presidencies in place of the Supreme Courts and the Sadar Adalats.
HIGH COURTS
The Act of one thousand eight hundred sixty one, titled as "an Act for establishing High Courts of judicature in India", was a short legislation of 19 sections only. It authorized Her Majesty the Queen of England to establish High Courts by issuing Letters Patent to Presidency towns wherever and whenever She deemed fit. The High Court was to consist of

a Chief Justice and the other puisne Judges not exceeding 15 in number. The qualifications of the Judges were laid down in the Act. A person could be appointed Judge of High Court if he was either:—
(1) a barrister of not less then 5 years standing, or
(2) a member of the covenanted civil service of at least 10 years standing who had served as Zila Judge for at least 3 years in that period, or
(3) a person having held judicial office not inferior to that of Principal Ameen or Judge of a Small Cause Court for at least 5 years, or
(4) a person who had been a pleader of a Sadar Court or a High Court for at least 10 years.
At least one third of the Judges of the High Court, including the Chief Justice, had to be barristers and the other one third of the Judges had to be members of the covenanted civil service. The Judges held their office during the pleasure of Her Majesty.
The jurisdiction of each High Court depending on the Letter Patent issued by Her Majesty. She could give them power to exercise all civil, criminal, admirality and vice-admirality, testamentary, intestate and matrimonial jurisdiction. She could also confer on them original and appellate jurisdiction and all such powers and authority with respect to the administration of justice in the presidency, as she thought fit. The Letters Patent could restrict the original jurisdiction of the court to the Presidency town. Unless the Crown (the Government of England) otherwise provided the High Courts had to exercise the jurisdiction of the courts abolished by the Act of one thousand eight hundred sixty one.
The High Courts were given supervisory powers on all courts subject to their appellate jurisdiction. The High Courts could call for returns from any court subordinate to them or could transfer any suit or appeal from one court to another and could make general rules for regulating the procedure of lower courts.
Her Majesty was authorised to establish the High Courts even beyond the territory of Presidency limits and could also transfer any territory from the jurisdiction of one High Court to another High Court. After issuing one Letter Patent Her Majesty could rescind it within three years and could issue new Letters Patent to bring change in any High Court.
Under the Act of one thousand eight hundred sixty one, the Crown established High Courts by issuing Charters on fourteenth May, 1862 for Calcutta and on twenty sixth June, 1862 for Madras and Bombay. These Charters were further modified by issuing fresh Charters on twenty eighth December, 1865. The three Charters contained identical provisions and established the High Courts with like powers and jurisdiction. The jurisdiction of these Courts could be understood by considering the illustrative case of Calcutta. The High Court of Calcutta was given the following original and appellate jurisdiction.

A. Original jurisdiction

The Court had original jurisdiction in the following matters—
(1) Civil jurisdiction—The original civil jurisdiction of the Court was of two types ordinary and extraordinary. The ordinary civil jurisdiction extended to the town of Calcutta or to such local limits as from time to time could be prescribed by law of a competent legislature in India. All suits of the value of Rupees one hundred or more and which were not cognizable by the Small Cause Courts at Calcutta were cognizable before the High Court under this jurisdiction. The original jurisdiction could be invoked only if—
(a) the immovable property was situated within the town of Calcutta; or

(b) the cause of action wholly or partly arose in Calcutta; or
(c) the defendant was dwelling, or carrying on business, or working for gain in Calcutta.
Under its extra-ordinary civil jurisdiction the High Court could call a case pending in any lower court subject to its superintendence and could decide that case itself. This jurisdiction could be exercised in a case where the parties agreed to such exercise or the High Court thought it proper to impart justice.
(2) Criminal jurisdiction—The ordinary original criminal jurisdiction of the High Court was almost the same as that of the Supreme Court which was replaced by the High Court and extended to the local limits to which civil jurisdiction of the High Court extended. However, an extra-ordinary original criminal jurisdiction was given to the High Courts which was not available to the Supreme Court. Under that jurisdiction the High Court could hear any criminal case against any person within the cognizance of any court, which was subject to the superintendence of the High Court, if such case was referred to the High Court by the Advocate-General or by any Magistrate or any other officer specifically empowered for that purpose.
(3) Revenue jurisdiction—The High Court was given jurisdiction to hear revenue cases also, which were precluded from the jurisdiction of the Supreme Court, by the Act of Settlement, 1781.
(4) Admirality jurisdiction—The Admirality and Vice-Admirality jurisdiction was also given to the High Court. It could hear all civil, criminal, maritime and prize cases.
(5) Testamentary and Miscellaneous jurisdiction—The High Court was given similar testamentary, intestate and probate jurisdiction as was enjoyed by the Supreme Court. It also worked as the Court of Wards for the administration of the estate and person—lunatics, idiots, and minors.

B. Appellate jurisdiction

The appellate jurisdiction of the High Court was of two types—
(1) Civil jurisdiction—The High Court could hear appeals in all cases authorised by any law or Regulation. It could also hear Letters Patent Appeal against the judgment of a single Judge of the High Court, dr a Division Bench of the High Court in which the views of the Judges were equally divided.
(2) Criminal jurisdiction—The High Court had criminal jurisdiction in all cases decided by the courts subordinate to it. It could also entertain revisions against the decisions of the lower courts and references from them.

Law to be Applied

The law which the High Court applied was same as applied by the Supreme Court That is English law. However, the High Court was allowed to use the principles of 'justice, equity and good conscience' on the appellate side. In criminal law, it followed the Indian Penal Code, one thousand eight hundred sixty. The procedural laws which the High Court followed were Civil and Criminal Procedure Codes.

Appeals from High Courts

An appeal to Privy Council lay from judgment of High Court in *civil cases,* when the amount involved was Rupees ten thousand or more, or, if the High Court certified that the case is fit one for appeal, *criminal cases,* from its original jurisdiction, or, if

the High Court certified that the case is fit one for appeal. In addition, the Privy Council could entertain appeal by Special Leave,

Subsequent Changes

Gradually, more and more High Courts were established as the territorial limits of the British India extended- Allahabad (one thousand eight hundred seventy five), Patna (1916), Lahore (1919) and Nagpur(1936).

The Indian High Courts Act, one thousand nine hundred eleven, increased the number of judge 1 to 20. This was considered necessary keeping in view the volume of work before the High Courts and the fact that the High Courts were few In one thousand nine hundred fifteen, the Government of India Act prohibited the jurisdiction of High Courts relating to revenue matters.

The Government of India Act, one thousand nine hundred thirty five, besides establishing a Federal Court, contained provisions for the High Courts-

(1) Limitations on the number of judges was done away, the number of judges could be increased from time to time by the Governor-General of India.

(2) Quota system fixed by the High Courts Act, one thousand eight hundred sixty one, for the appointment of judges from different categories of persons was abolished.

(3) The age of retirement for the judges was fixed at 60.

(4) Indian advocates (possessing law degrees of Indian Universities) with 10 year's practice were declared qualified to be the judge of High Court.

(5) High Courts were placed under the administrative control of provincial governments, but these governments could not make any rule or law affecting the position or service conditions of a High Court judge unless such law was given prior assent by the Governor-General.

Thus the Act provided security of tenure to High Court judges and also the discriminatory qualifications for barristers and advocates were dispensed with.

Evaluation of the Working of High Courts

The creation of one judicial institution replacing the dual system of courts was the fulfillment of a long cherished ambition in the interest of simplicity, harmony, convenience and efficiency for those who sought justice. The historical anomaly of over 90 years, thus, came to an end.

While in the area of criminal law, total uniformity was achieved with the application of I.P.C. and Cr. P.C. by all courts in British India, the substantive civil law continued to be differently applied by the High Courts. On the original civil side, English law was to be applied (as was done by the Supreme Court), and on the appellate side the court was to apply the same law and equity as the mofussil court lid as the court of first instance. It was only in due course of time, with the gradual progress in codification that the disparities in law on original and appellate sides of the High Court were removed.

High Courts (direct successor to Mayor's Court) occupy a place of pride in administration of justice in the country. And since the law and practice governing e High Courts admits of little doubt, the Constitution of India, one thousand nine hundred fifty does not corporate detailed provisions relating to these.

A.1 Writ Jurisdiction of High Courts

A *writ* is a quick remedy against injustice, a device for protection of the rights of citizens against any encroachment by the governmental authority.
In Britain, writs were the King's or Queen's *prerogative* writs and were commands to the judicial tribunals or other bodies to do or not to do something. Since writs carried the authority of the Crown they were to be obeyed. Later, writs came to be enjoyed by the judges of the King's Bench. By Regulating Act one thousand seven e hundred seventy three, the judges of the Supreme Court were given the same powers and privileges as were enjoyed by judges of King's Bench. When in one thousand eight hundred sixty one, the Supreme Courts were abolished and the High Courts were established, the power to issue writs descended upon the judges of High Courts at Presidency towns. However, there was no mention in the High Courts Act, one thousand eight hundred sixty one about writ jurisdiction of the High Courts. It simply stated that the powers of the erstwhile Supreme Court would vest in the High Courts,
It may be noted that during the period one thousand seven hundred seventy four to one thousand seven hundred eighty one, the Supreme Court made frequent use *of habeas corpus to* protect Indians in the diwani area from unauthorized and illegal confinement at the hands of revenue officers.
'In the matter of Streenauth Roy (1840), servants of a Rajah carried off from his house in Calcutta a Hindu inhabitant of Calcutta. The Supreme Court issued *habeas corpus* against Rajah, on the ground that the Hindu inhabitant of Calcutta was entitled to the protection of the court, and as an offender within the limits of Calcutta, Rajah was amenable to its jurisdiction.
It is, however, doubtful whether the court issued any other writ than *habeas corpus.* There was always confusion about the power to issue writs and as to the jurisdiction of the courts to do so. The Supreme Court's power to issue writs was confined to the territorial limits of the Presidency and beyond those limits the writ was issued only to a person who was otherwise subject to the jurisdiction of Supreme Court (that is Company's subjects or British subjects). The Supreme Court also expounded a new doctrine of 'constructive inhabitancy' under which it assumed jurisdiction over persons who conducted business in Calcutta through their servants although they themselves resided outside the limits of the presidency town.
In one thousand eight hundred fifty eight, the country's administration had passed on to the Crown (from the Company). The distinction between Indian subjects and the British subjects or the Crown's subjects came to an end for all Indians automatically became British subjects. Regarding the High Court's power to issue writs outside the local limits of the presidency town, some High Courts asserted that since the administration had come under Crown, so their power to issue writs was extended to the mofussil areas also.
Thus, the Presidency High Courts from the very beginning interpreted their power to issue writs *outside* the presidency town limits.
'In re National Carbon Co.' (1935), the Calcutta High Court held that it had the power in its ordinary original civil jurisdiction to issue the writ of *prohibition* against the

Controller of Patents and Designs. The court reasoned that it had the power to issue the writ because it had inherited the powers vested in the judges of the erstwhile Supreme Court.
In *the matter of Ameer Khan* (1870), the Calcutta High Court held that it could issue *habeas corpus* in the mofussil to set free Indians detained illegally. Since the power of governance had been transferred from the Company to the Crown, the power to issue writs against the Company's servants was now extended to the servants of the Crown throughout the province After the transfer of power, there was now no limit on the power to issue writs.
In *re Govindan Nair* (1922) the Madras High Court followed the Calcutta precedent and issued the writ of *habeas corpus* directing the government officials to release the man detained illegally.
In *Mahabelshwarappa Verses Ram Chandra Row* (1936), the Madras High Court issued *certiorario* quash the decision of the Election Commissioner in the district board elections.
But how inhibited the power of the Presidency High Courts to issue writs was, and how helpless these were in this regard is best illustrated by the cases discussed below,
In *Ryots of Garabandho Verses Zamindar of Parlakimedi* (1943) PC., the Privy Council held that even if the Board of Revenue had exceeded its powers in enhancing rent, the High Court had no jurisdiction to issue writ of *certiorari.* It said that the jurisdiction to issue writ did not depend upon the location of Board (the Board was situated within the Presidency town of Madras) but on the fact whether the subject-matter of dispute was such which fell within the jurisdiction of High Court. And since the High Court did not have the jurisdiction over revenue matter concerning parties and property situated in Ganjam district (where the cause of action arose), it could not issue writ only because the Board was situated within Madras (the Ganjam district was outside the local limits of Madras). If it were so, the jurisdiction of the High Court could be avoided by changing the location of the office of the Board. The Madras High Court had held that it had power to issue the writ, but it refused to do so because in its opinion the Revenue Board had not exceeded its authority.
The question whether the writ could be issued to British subjects or company's servants outside the presidency limits on the ground that the Supreme Court had personal jurisdiction over such subjects or servants still remained open.
The question was settled by the Privy Council in *Hamid Hasan Verses Banwari Lal Roy*. In that case, the appellant, a Deputy magistrate was appointed administrator of Howrah Municipality after superseding the Chairman and Commissioners of that municipality. The respondents applied for a writ of *quo warranto* in the High Court of Calcutta, which issued the writ. Appellant filed an appeal in the Privy Council on the ground that the High Court did not have jurisdiction to issue a writ to person in Howrah because Howrah was beyond the territorial limits of Calcutta Presidency The Privy Council held that the High Courts had not inherited the personal jurisdiction of the Supreme Courts and therefore they could not issue writ against a

person unless he fell within the ordinary original civil jurisdiction of those courts Howrah being outside the presidency limits of Calcutta was outside such jurisdiction of High Court and writ could not be issued simply because the appellant was a Company's servant.

In the opinion of their Lordships, with the transfer of the governmental functions of the Crown the earlier distinction between the subjects of the Crown and the natives was blurred. The distinction could now be interpreted as between the British nationals and the Indian nationals although ail were now British subjects. The power of the High Court to issue writs would still extend to the mofussil in the case of the British nationals, but in case of the Indians, this power was limited to the local limits of the presidency towns. It may be noted that earlier in *re Banwari*

Lal *Roy,* the Calcutta High Court held that it had the power to issue the writ of *quo warranto* to the administrator of the Howrah Municipality. The court reasoned that with the transfer of power to the Crown, the status of the Indians was changed as now they all became the subjects of the Crown. Earlier there was a distinction between the subjects of the Crown, the servants of the Company and the natives. The Supreme Court was empowered to issue writs to the subjects of the Crown and the persons in the service of the Company throughout the provinces of Bengal, Bihar and Orissa or the Mofussil areas, but in the case of the natives, the power to issue the writs was restricted to the local limits of the town. This distinction was no more. As all Indians had become the subjects of the Crown, the power of the Court to issue writs was enlarged to cover the mofussil areas.

Legislative Provisions

Section 45 of the Specific Relief Act, 1877, provided that the writ of *mandamus* could be issued by High Courts of Presidency towns only within the local limits of their ordinary original civil jurisdiction to a public officer, corporation or an inferior court of justice.

Section 491 of Criminal Procedure Code, 1898, gave general powers to *all* High Courts to issue the writ of *habeas corpus* within the territorial limits of their original as well as appellate jurisdiction (it may be noted that other High Courts, then those at Presidency towns, not being the successor of any Supreme Court did not had any writ jurisdiction).

Thus, only the High Courts of Calcutta, Bombay and Madras had the power to issue all writs, viz. *habeas corpus, mandamus, certiorari, prohibition* and *quo warranto.* Thus, before 1950, various High Courts in India did not enjoy co-equal authority to issue writs.

Further the jurisdiction of High Courts to issue writs was limited to the territorial limits of their ordinary original civil jurisdiction and that too with respect to those matters which fell within that jurisdiction. The *habeas corpus* could be issued beyond Presidency towns also within their territorial jurisdiction.

Post-Constitution Position

In 1950, the Constitution of India gave equal powers to all the High Courts to issue the writs (Article 226). The power to issue writ is co-extensive with the territory of State over which the High Court has jurisdiction. By an amendment of Article 226,

now the High Courts can issue writs to any governmental authority *outside* its territorial jurisdiction, provided the cause of action arises within their territorial jurisdiction.
Article 226 empowers each High Court to issue directions, orders or writs n the nature of *habeas corpus, mandamus, quo warranto, prohibition* and *certiorari* for the enforcement of fundamental rights, or for any other purpose The Constitution has vested in each High Court a very wide power to issue writs - even wider than the Courts in England. In addition to the five prerogative writs, High Court can Issue directions and orders or even frame additional and new writs to meet any unprecedented situation.

THE ADVOCATES ACT, one thousand nine hundred sixty one

To implement the recommendations of the All India Bar Committee (fully endorsed by fourteenth Report of the Law Commission in 1955), the Advocates Act, one thousand nine hundred sixty one was enacted. The Act extends to the whole of India, except the State of Jammu and Kashmir. The Act provides for amending and consolidating the law relating to legal practitioners and to provide for the constitution of State Bar Councils and an All India Bar Council (for the first time in India). The Act took away the powers till then vested in the Courts, in the matter of admission of advocates and the maintenance of the rolls, and their disciplinary conduct (subject to an ultimate appeal to the Supreme Court). These powers now vest in the Bar Councils. Every Bar Council constituted under the Act is a body corporate having a common seal, and may, by the name of which it is known sue arid be sued.
The main features of the Act are,
(1) Establishment of an All India Bar Council and a number of State Bar Councils - a *federal* structure for legal profession. An advocate is initially enrolled with a State Bar Council and a common roll of all the advocates in the country is maintained by Ail India Bar Council. An advocate on common roll has a right to practice in any court of the country including the Supreme Court.
(2) Integration of the bar into a single class of legal practitioners known as *advocates.*
(3) A uniform qualification for the admission as advocates viz, degree in law.
(4) Division of advocates into senior advocates and other advocates based on merit.
(5) No advocate can get himself enrolled with more than one State Bar Council, though he can get himself transferred from one State Bar Council to another.

Bar Council of India

Composition - The Bar Council of India consists of
(a) the Attorney-General of India *ex-officio*
(b) the Solicitor-General, *ex-officio,*

(c) one member elected by each State Bar Council from amongst its members.
There are elected Chairman and a Vice-Chairman of the Council, and, a Secretary and an Accountant The Bar Council of India has been authorised to constitute one or more of the following *committees,*
(1) Legal Aid Committee
(2) Disciplinary Committee
(3) Executive Committee
(4) Enrolment Committee
(5) Legal Education Committee,
Every Disciplinary Committee is to consist of three members, two persons to be elected from amongst its members and one other to be co-opted from such members as have at least ten years' practice. The senior-most advocate from amongst its members is to be chairman of the committee. The Legal Education Committee consists of ten members of whom five persons elected by the Council from amongst its members and the other five are those who are not members of the Council.
The main source of income of the Bar Council of India is the contribution of forty per cent out of the fee of Rupees two hundred fifty paid by each applicant for enrolment to the State Bar Council.
Functions - Main functions of the Bar Council of India include,
(1) To prepare and maintain a common roll/roster of all the advocates in the country.
(2) To lay down standards of professional conduct and etiquette for advocates and rules regarding enrolment, suspension, etc., of advocates.
(3) To safeguard the rights, privileges and interests of advocates.
(4) To exercise general supervision and control over State Bar Councils, to deal with and dispose of any matter arising under Act, which may be referred to it by a State Bar Council.
(5) To promote and support law reforms.
(6) To promote legal education and to lay down standards of such education in consultation with Universities and State Bar Councils.
(7) To recognize Universities whose degree will qualify a person to be enrolled as an advocate and to recognize foreign law degrees,
(8) To conduct seminars and talks on legal matters and to publish legal journals.
(9) To organize legal aid to the poor.
(10) To manage and invest the funds of the Bar Council.
(11) To provide for the election of its members.
Powers -Apart from the powers already enumerated, the Bar Council of India (BCI) has been specifically conferred special powers,
(1) *Power to remove name from the rolls*- The BCI is empowered, either on a reference made to it or otherwise, if it is satisfied that any person has got his name entered in the roll of the Advocates by misrepresentation, to remove such person from the roll after giving him an opportunity of being heard. Besides, the name of advocate may be removed from the roll as punishment for misconduct in disciplinary

proceedings.
(2) *Revision-* Apart from the power vested in it to remove the name of an advocate in certain cases, and the power vested in the disciplinary committee to hear and dispose of the disciplinary matters whether by way of original hearing or on appeal, the BCI has the power at any time to call for the record of any proceeding under the Act, which has been disposed of by a State Bar Council or a Committee thereof, and from which no appeal lies, for satisfying itself as to the legality or propriety of such a disposal and may pass such orders thereon as it deemed fit.
(3) *Directives-* Section 48B empowers the BCI for the proper and efficient discharge of the functions of a State Bar Council or any Committee thereof, to give such directions to the State Bar Council or its Committee as may appear it to be necessary, and the latter has to comply with the directions. Where a State Bar Council is unable to perform its functions for any reason whatsoever, the BCI may give such directions to the ex-officio member thereof as may appear to it to be necessary, and such directions shall have effect, notwithstanding anything contained in the rules made by the State Bar Council.
(4) *Rule-making power-* Section 15 enumerates the powers of the State Bar Councils/BCI to make rules relating to the Bar Councils. Section 28 gives power to the State Bar Councils to make rules on some matters connected with the preparation of rolls, training and examination for admission as advocates, form of application for enrolment, and conditions for enrolment. Any rule made by State Bar Council shall have effect only if it has been approved by the BCI. Section 49 confers on the BCI a general power to make rules for discharging its functions under the Act. Rules include rules the statement of the grounds in support of the refusal to the Bar Council of India, and has to dispose of the application finally in conformity with such opinion.

Qualifications for Admission as an Advocate

The person has to be a citizen of India and has completed the age of 21 years, and has obtained a degree in law (LL.B.) from any university in India or of any university outside India considered equivalent to Indian degree, A person eligible to pursue the course in law (LL.B.- Three Year Course) should be a graduate of a university or have other equivalent academic qualification.

The requirement of practical training is now abolished. A law graduate is required to pay an enrolment fee of Rupees two hundred fifty 250 to the State Bar Council (in case of SC and STs, fee is Rupees one hundred twenty five).

With regard to a barrister also, the Bar Council of India has specified the same requirement as to a degree in law. It may be noted that the Advocates Act, one thousand nine hundred sixty one has done away with the distinction between advocates and *vakils.* Now all members enrolled shall be called 'advocates'. But among advocates, there shall be Senior Advocates also. Those who were senior advocates as on 1 12.one thousand nine hundred sixty one shall be deemed to be senior advocates. Besides, power has been conferred under Section 16 of the Act to the Supreme Court and the High Courts to designate any advocate as senior advocate if in its opinion by virtue of his ability, experience (10 years' practice) and

standing at the Bar, he is deserving of such distinction. Senior advocates are governed by the rules of the Supreme Court applicable to them, and are also subject to the restrictions laid down by the Bar Council of India in the interest of the legal profession.

Disqualification for Enrolment

No person shall be admitted as an advocate .f he is convicted of an offence involving moral turpitude, if he is convicted of an offence under the provisions of Unsociability (Offences) Act, 1955, Section 28 of the Advocates Act generally prohibit the enrolment of a person who, though he may be otherwise qualified, is in full or part-time service or employment (except when he is a law officer) or is engaged in any trade, business or occupation (except when he is a sleeping partner). An advocate may edit legal books at a salary, coach pupils for legal examinations and subject to the rules against full-time employment, engage in journalism, lecturing and teaching subjects both legal and non-legal,

Right to Practice

Every advocate, whose name is entered in the State roll, shall be entitled as of right to practice throughout the territories to which the Act extends-
(1) in all courts including the Supreme Court
(2) before any tribunal or person legally authorised to take evidence (Section 29).
Under Section 33, advocates alone are entitled to practise in any court. However, this right to practice is subject to rules framed by the High Court under Section 34. Persons illegally practising in Courts or before other authorities when they are not entitled to practise under the provisions of the Act are liable for punishment with imprisonment for a term which may extend to six months.

Distinction between Panchayat and Lok Adalat

FIRST,
A Panchayat is a full fledged court which is established to entertain disputes of both civil and criminal nature. It collects and takes evidence and gives a decision on the case before it where as **Lok Adalat** is not a full pledged court, rather it is an institution for handling disputes by conciliation. It aims at arriving at a settlement or compromise between the parties.

SECOND,
Panchayat decides the case on merit where as **Lok Adalat** does not decide the case on merit except PLA.

THIRD,
A Panchayat would be a representative judicial body of all sections of the society within its jurisdictional territory WHERE AS A Lok Adalat is not a representative judicial body or committee. It is organised by appointments by the authorities under Legal Services Authority Act within their respective jurisdiction

FOURTH,
A Panchayat has no power to summon witnesses to produce documents where as **Lok Adalat** has been conferred powers for summoning witnesses, discovery and production of documents.

FIFTH,
A Panchayat can conciliate the parties and came to a compromise between them and order accordingly where as A **Lok Adalat** acts as conciliator only when the parties come mutually to a compromise it shall pass a compromise decree.

Conclusion
In the working of the LSAA, it is clear that the major area of activity has been the organising of lok adalats on a periodical basis. While in many states, the authorities have laid down detailed provisions in the regulations for the holding of lok adalats, some states have seen this as a separate area for rule making. The pattern, however, is largely similar in most states. In many respects, the lok adalats are planned as an activity closely linked to court proceedings. They$_v$arc held within the Court premises and the 'benches' comprise adjudge, a lawyer and a social worker. A reference to the lok adalat can be made by any one of the parties to the litigation. There are no appeals from the decisions of the lok adalat that record a compromise. Lok adalats can dispose of compoundable criminal cases. The term *'lok'* adalat is perhaps a misnomer since there is little involvement of the people in the actual decision-making process. This distinguishes lok adalats from the traditional modes of mediation and informal dispute resolution mechanisms. There have Iveu criticisms that the system of lok adalats does not address the concerns of the litigants for getting quality justice as much as it is seen as a device in caseload *management by* the judiciary. Tliis criticism points out that the reasons offered for persuading the litigant to participate in the lok adaiat delay, prohibitive costs and uncertain result actually acknowledge the failure of the justice delivery system. Secondly, the legal aid institutions and legal aid lawyers are themselves part of the exercise of holding criminal courts inside jail premises. In sittings held periodically as part of the legal aid programme, petty criminal cases involving offences punishable with short sentences of three years and less are sought to be disposed of in bulk. At the hearing, legal aid lawyers appear for the accused but go along with the object of quick disposal of the cases by encouraging guilty pleas. The prospect of immediate release after beiug sentenced to the period of detention already undergone, is enough of an incentive to an accused to admit to guilt. The institutions of the LSAA thus help deal with the problem of pendency of criminal cases where the period of detention undergone by the accused without a trial can exceed the maximum sentence that would normally be awarded if the accused was convicted at the end of a trial. This manner of disposal does not answer the demand of the accused for a fair just and reasonable procedure but perhaps answers the need to preserve the legitimacy of the legal system that is beleaguered by lack of infrastructure and resources.

Lok Adalats at a Glance

Lok Adalats are para-judicial institutions and, as the name suggests it is people's court which is meant for the general masses like middle class people and poor people. This institution is the product of modern judicial reforms and characterized as constituting people's programme for speedy justice. In strict sense the Lok Adalats are not the Courts, since the technical court's procedures are not followed in it. E.g.,

1. No court-fee is being paid;
2. There is no limitation period;
3. Decision in Lok Adalats are final and binding and the parties have no right to appeal.

What these adalats seek to do is to reach decision through reconciliation and mutual settlement of disputes.

Normally, the Lok Adalats are organized by the social workers and the disputes are decided by the Lok Adaiat judges, who come from amongst retired judges, public spirited lawyers etc.

(a) Models of Lok Adalats

In India there are four models of Lok Adalats: (i) Lok Adalats organized by legal Aid Board of the States; (ii) Lok Adaiat in Anand Niketan Ashram in Rampur District of Gujarat. (iii) Lok Adflats in Himachal Pradesh Courts (iv) Lok Adalats founded by Sampat lyengar in Bangalore.

Rule of Law

QUESTION. What is Rule of Law? To what extent do you think the Rule of Law is protected (or not protected) in the Indian Legal system today?

Answer. Social life requires cooperation and order, and order requires laws. It is possible to have order of some sort, by submitting to the rule of a leader, a dictator who is able to coerce the non-cooperative into obedience. But such submission to the rule of men could involve loss of freedom and subject the people of whims of men. The ideal solution thus lies in the rule of law, which guarantees both order and freedom.

'Rule of law' means that the government in all its actions is bound by rules fixed and announced before hand. It protects the citizen from arbitrary decisions and arbitrary coercion.

Justice Coke of England is said to be the originator of this concept. However, concrete shape was given to it by A. Versis Dicey in his book 'Law of the Constitution' (1881). He stated his conception of the rule of law in the form of three principles,

(1) that no man is punishable or can be lawfully made to suffer in bad or good, except for distinct breach of law established in the ordinary legal manner before the ordinary courts of law.

(2) that no man is above the law.....every man whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals,

(3) that the general principles of the Constitution (for example right to personal liberty, right to public meeting etc) are the result of judicial decisions determining the rights of private persons in particular cases brought before the court.

Dicey's third meaning of the rule of law applies only to the British Constitution, yet his

formulation is regarded as a beginning point for discussion on the subject of rule of law. Dicey laid down his principles in the 19th century. In the 20th century the ideas of individual liberty and human rights have gained prominence, and the conception of rule of law has accordingly expanded. An international Congress of jurist assembled in New Delhi in 1959 and characerized rule of law in the following words,
"The rule of law implies that the functions of the government in a free society should be so exercised as to create conditions, in which the dignity of man as an individual is upheld. This dignity requires not only the recognition of certain civil orpolitical right but also creation of certain political, social, economic, educational and cultural conditions which are essential to the full development of his personality."
The Congress emphasized that the rule of law has two aspects,
(1) substantive, and
(2) procedural.
The substantive aspect of the rule of law recognizes certain rights of the individual which he is entitled to enforce against the state. The procedural aspect of the rule of law is concerned with giving practical effect to its substantive aspect. While the Congress did not go into the details of the substantive aspect of the rule of law it elaborated the procedural aspect through for committees whose recommendations may be summarized as below,
(1) The legislature and the rule of law-
(a) the legislature should not pass discriminatory laws,
(b) the legislature should not interfere with the freedom of religion, speech, assembly, or association,
(c) the legislature should not pass retroactive laws,

(2) the executive and the rule of law -
(a) the executive must provide an effective government capable of maintaining law and order
(b) the powers conferred on the Executive must be subject to proper w safeguards and judicial review.

(3) The criminal process and the rule of law-
(a) there must be certainty of the criminal law,
(b) there must be presumption of innocence of accused,
(c) there must be a public trial and fair hearing,
(d) the power of arrest must be strictly regulated by law,
(e) the accused should have the freedom to have the counsel of his choice.

(4) The judiciary and the legal profession under the rule of law-
(a) the judiciary must be independent, such independence implies freedom from interference by the executive of legislature in the exercise of judicial function,
(b) there must be an organized legal profession free to manage its own affairs,
(c) legal aid programs must be devised to provide equal access to the law for the rich and poor alike.
Even though the concept of rule of law has expanded to new areas, the basic value of the rule of law remains the same. It is the fullest possible provision by the ommunity of

the conditions that enable the individual to develop into a morally and intellectually responsible person, it is inherent in the concept that it is an ideal tate, attained to varying extends by nations of the world.
The rule of law has its bearing in India from the very beginning of civilization. There are instances in Indian History of kings being punished for the violations of the laws of their own kingdom. But this concept of the rule of law did not resemble the concept as it developed in the west during the 18th and 19th centuries. The biggest factor undermining the existence of rule of law was the existence of institutionalised inequality in the form of the caste system. The Constitution of India came into force on 26th January, 1950. This document abolished the caste system and became the embodiment of rule of law in India.
The Constitution embodies the concept of rule of law. It guarantees equality before the law or equal protection of the laws to all citizens, and every citizen is protected from arbitrary exercise of power by the State. We have a judicial system which works impartially and free from all influences. The Rule of law pervailes over the entire field of administration and every organ of the state is regulated by the rule of law.
It has been held by the Supreme Court in Indira Nehru Gandhi Versis Raj Narain, S.P. Gupta Versis Union of India, Sambhamurthy Versis State of A. P., that the Rule of law is abasic feature of the Constitution and cannot be taken away even by an amendment of the Constitution. This was also reiterated when the Supreme Court invalidated a clause of the 39th Amendment of the Constitution on the ground of the violation of the rule of law, Smt. Indira Gandhi Versis Raj Narain, Minerva Mills Ltd. Versis Union of India.
A significant role has been played in the development of rule of law by our Supreme Court by the underaoted landmark decisions it has extended the reach of the concept of rule of law.
With Maneka Gandhi Versis Union of India, it has begun recognizing certain judicially enforceable fundamental rights, flowing from Article 21 of the Constitution.
Thus in Hoskot Versis State of Maharashtra, it recognised a fundamental right to legal aid. Similarly,
— Speedy trial, Hussainara Khatoon y. State of Bihar.
— Freedom from torture in the jails, Sunil Batra Versis Delhi Administration.
— Right to minimum wages, People's Union for Democratic Rights Versis Union of India.
— Rehabilitation of the bonded labourers, Bandhua Mukti Morcha Versis Union of India.
— Compensation for unlawful detention, Rudul Shah Versis State of Bihar.
In conclusion, it can be said that the constitution has all the machinery necessary for the development and maintenance of the rule of law. Yet it cannot be said that the rule of law has been firmly established in India. Some disturbing developments are,
(1) Increasing violence in the Indian Society
(2) The all pervasive corruption
(3) An estimated two hundred million cases pending before the courts of the country. Rule of law cannot be established merely by enacting laws and giving rights to the people. The desire for it must be a goal of every citizen of his country.

Concept of Law

QUESTION. 1. Critically discuss that 'Law is the command of sovereign'. How would you locate Austin's theory in India?

Answer. Positive approach to law concentrates on things as they are not as they ought to be. This approach is opposed to the theory of natural law and is the imperative theory of law, which found its most forceful expression in the workers of Austin.

In 1832 the lectures delivered by John Austin at the University of London were published under the title "The Province of Jurisprudence Determined.'' He was considered as father of English jurisprudence. According to Austin positive law is a proper subject of jurisprudence, He says "Every positive law, or every law strictly so called, is a direct or circuitious command of a monarch or sovereign in the character of political superior.... to person or person in a state of subjection to its author."

Thus the Austinian concept of law is characterised by four elements,

(1) command,
(2) sanctions,
(3) duty, and
(4) sovereignty.

The idea comprehended by the term 'command' are,

An expression of wish or desire conceived by a determinate person, body of person, that another person shall do or forbear from doing some act subject to an evil in the event of disobedience.

Sanction is the evil which is to follow in case of non-obedience. In other words, every sanction properly so called is an eventual evil annexed to a command.

Duty implies the obligation to comply with command. So every law is a command, imposing a duty inforced by a sanction.
Austin's notion of sovereign's if determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of given society, that determinate superior is sovereign in that society. The basis of sovereignty is thus the fact of obedience. The sovereign power is unlimited and indivisible (no division) of authority, the sovereign is not bound by any legal limitation or by his own laws.Austin's broad approach to law was to regard it as the command of the sovereign. The notion of command requires that there must be determined person to issue the command and that there is an implied threat of a sanction if the command is not obeyed. The aim of Austin was to separate positive law from such social rules as those of customs and morality. According to his theory international law lacking the power to impose sanctions, is not positive law but positive morality. Another aspect of the theory is that the sovereign is not bound by any legal limitation, whether imposed by superior principles or by his own laws.
Criticism of Austin's Theory
(a) Customs ignored, According to Maine, in the early times, it was not the command of superior but customs regulated the conduct of people. Even after coming of State system into existence, customs continued to regulate the conduct. As Austin has not included custom as law, this theory is not comprehensive. Austin definition of law as the "command of sovereign" suggests that only the legal systems of the civilized societies can become the proper subject matter of jurisprudence because it is possible only in such societies that sovereign can enforce his commands with an effective machinery of administration.
(b) Law conferring privileges, Salmond has said that the Austinian theory of law is onesided because Austin has recognised only the formal sources of law and dis-regarded the ethical and material sources. The law which is purely of a permissive character and confers only privileges as the Wills Act, is not covered by Austinian definition of law.
(c) Conventions, Conventions of the Constitution, which operate imperatively, though not enforceable by law, shall not be called law. According to Austin although they are a subject matter of jurisprudence.
(d) International Law, Austin has put International Law under positive morality alongwith the law of honour and law of fashion. The main reason of his not calling International Law as "law" is that it lacks sanction, but this alone can not be sufficient to deprive it from being called "law".
(F) Sanction is not the only means to induce obedience, The Austinian theory says that it is the sanction alone which induces men to obey law. It is incorrect to define law in terms of sanction is like defining health in terms of hospital and diseases. Law is obeyed because of its acceptance by the community. Universal disobedience can destroy the whole basis of the legal order.
(0 Purpose of law ignored,Austin has been criticised for non-inclusion of the element of purposes in his definition. Paton says "Justice is the end of law and it is only benefiting that an instrument shall be defined by a delineation of the purpose which is its "raison detre"
Applicability of Austinian Theory in India

In modern democratic welfare State like India, no single determinate sovereign can be regarded as an absolute authority to enact law.

(1) The Parliament has an absolute power to amend the Constitution. On this absolute power of the Parliament, our judiciary has imposed certain restrictions with the series of decision started from Keshavnanda Bharti Versis State of Kerala, AIR 1973 SC 1416, wherein, it was held that the Parliament cannot amend the 'basic structure' of the constitution.

(2) In Austinian theory, the importance of custom was entirely neglected. But, the Supreme Court in Raj Kapoor Versis State, wherein, Justice V.R. Krishna Iyer examined the connotation of the term 'law' and held 'custom' as a part and parcel of the law. He observed that, "Jursiprudentially speaking, law, in the sense of command to do or not to do, must be a reflection of the community's cultural norms, not the State's regimentation of aesthetic expression or artistic creation."

(3) Austin never believed in division of sovereign power. So far as India is concerned there is a sharp division of power between Union and State. Under the provisions of the Indian Constitution even judiciary and executive can make laws. e.g. under Article 141 of the Constitution, the law made by the Supreme Court to be binding on all courts throughout the country. Besides, we have Article 370 in the Constitution, wherein, even law made by the Parliament is sometimes not applicable in the State of Jammu & Kashmir, which is a part of this country.