CAMBRIDGE

Cambridge University Press
978-1-316-60371-0 - Background to Indian Law
Sir George Claus Rankin
Excerpt
More information

PART I: CIVIL LAW

CHAPTER I

CIVIL LAW BEFORE THE CODES

LAW IN THE 'FACTORIES'

THE first provision for the exercise of judicial powers by the East India Company was made by a charter of Charles II in 1661, and its responsibility for the administration of law in India was confined until 1765 to the 'factories' of the Company and their branches. That different authorities functioned as courts of law in Madras, Bombay and Calcutta after 1661[1] is only to be expected from the different times and circumstances in which the Company's authority at each of these places took its origin. It had come to exercise authority in Madras under grants from Indian rulers (1639); in Bombay as representing the King of England (1668) who had accepted the island of Bombay as part of his Portuguese bride's dowry; in Calcutta as a zemindar to whom the villages of Satanuti Govindpur and Calcutta had been granted (1698). But by charter of George I of 1726 there was introduced into all three Presidency towns a Mayor's Court, not a court of the Company as it had been in Madras but a court of the King of England, though exercising its authority in a land to which the King of England had no claim to sovereignty. That the law intended to be applied by these courts was the law of England is clear enough from the terms of the charter though this is not expressly stated; and it has long been accepted doctrine that this charter introduced into the Presidency towns the law of England—both common and statute law—as it stood in 1726. Thus arose, not for the first time but in an acute form, the problem whether the civil law of England was to be applied to Indians. After the capture of Madras by the French in 1746 and its restoration in 1749 a new charter for all the Presidency towns was granted by George II in 1753; and in this it was expressly provided that the Mayors' Courts were not to try actions between Indians, such actions being left to be determined among themselves unless both parties by consent

1 Cf. Sir Charles Fawcett, *First Century of British Justice in India* (1934).

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-316-60371-0 - Background to Indian Law
Sir George Claus Rankin
Excerpt
More information

submitted the same for determination by the Mayors' Courts. This provision is said by Morley (*Digest*, I, clxix) to be the first reservation of their own laws and customs to Indians, though he considers that it was never made effective in Bombay.

LAW IN THE PROVINCIAL COURTS OF THE LOWER PROVINCES, 1772

The principle of this provision—the word 'reservation' is not in all respects exact—was taken as a basis when in 1772 Warren Hastings came to set up civil courts for Bengal, Bihar and Orissa, pursuant to the Company's determination to 'stand forth as *dewan*' under the grant obtained by Clive in 1765 from the puppet Mogul emperor at Delhi. The 'Plan' of 1772 provided, in terms of which the substance regulates to this day the greater part of British India, that in certain matters Hindus and Mahomedans were to be governed by their own laws—namely, in 'suits regarding inheritance, marriage and caste and other religious usages and institutions'. This is the twenty-seventh article of what is called Regulation II of 1772, though the word 'Regulation' was to take on a more technical meaning after 1773 and 1781 when Acts of Parliament had conferred certain powers of legislation. It provided no specific directions for any suits other than those expressly mentioned; and when in 1781 Sir Elijah Impey added the word 'succession' to the word 'inheritance', and declared that where no specific directions were given the judges should act 'according to justice, equity and good conscience', the scheme was complete so far as regards the 'rule of decision' which the new courts were required to apply to the matters which might come before them. Hastings seems to have appreciated, as Cornwallis did after him, that this did not amount to 'a good system of laws', and that greatly to be desired was 'a well digested code of laws compiled agreeably to the laws and tenets of the Mahometans and Gentoos'. He realized that from the inhabitants of Bengal in his day 'a perfect system of jurisprudence was not to be expected'. With the other members of the 'committee of circuit' of 1772 he claimed that the plan was 'adapted to the manners and understandings of the people and exigencies of the country, adhering as closely as possible to their ancient usages and institutions'.

The scheme of civil justice which was thus brought into force had two main features; first, that it did not apply English law

© in this web service Cambridge University Press www.cambridge.org

Cambridge

Cambridge University Press
978-1-316-60371-0 - Background to Indian Law
Sir George Claus Rankin
Excerpt
More information

to the Indian provinces; secondly, that Hindu law and Mahomedan law were treated equally. As early as 1772, Alexander Dow, a lieutenant-colonel in the Company's service, in his *Enquiry into the State of Bengal*, had maintained that 'to leave the natives to their own laws would be to consign them to anarchy and confusion', since they were divided into two religious bodies almost equal in point of numbers and 'averse beyond measure to one another' (p. cxliii):

> 'It is therefore absolutely necessary for the peace and prosperity of the country that the laws of England in so far as they do not oppose prejudice and usages which cannot be relinquished by the natives should prevail. The measure besides its equity is calculated to preserve that influence which conquerors must possess to retain their power.'

This view was not accepted by Hastings who, as a new Governor, was in 1772 carrying out the decision of the Company 'to stand forth as *dewan*'. What could the law of England have to do with the exercise of the *diwani*? In due course, no doubt, Hastings was to show how little he would let the Company's power be trammelled by the notion that it was a mere vice-gerent of an emperor at Delhi. But he could hardly begin in the spirit of the gallant Dow:

> 'The sword is our tenure and not the firman of an unfortunate prince who could not give what was not his own. The thin veil of the commission for the Dewanny is removed....It is an absolute conquest and it is so considered by the world' (p. cxvi).

Before ten years had passed Hastings was to have some experience of the impact of the law of England upon the Lower Provinces, and before the beginning of the nineteenth century it was the accepted view of Indian administrators that the law of England was not suitable to Bengal. Harington in his *Analysis* (1805)[1] carefully defends this conclusion—stressing the differences in the genius of the peoples and the fact that property had been acquired by Hindus and Muslims under settled and indeed written laws of their own.

To place the Hindu and the Mahomedan laws upon the same footing, notwithstanding centuries of Muslim rule, was another act of enlightened policy. There had, of course, been times of massacre and persecution, but it does not appear that Hindus under the Mogul empire had of late been refused the enjoy-

[1] *Analysis of the Laws and Regulations*, by John Herbert Harington, p. 11.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-316-60371-0 - Background to Indian Law
Sir George Claus Rankin
Excerpt
More information

ment of their own family and religious laws and usages. Still, as another lieutenant-colonel in the Company's service was to point out (*Observations on the Law, Constitution and Present Government of India*, by Lieutenant-Colonel Galloway, 1st ed. 1825, 2nd ed. 1832) the law of the Mogul empire upon this subject was to be found in the *Fatawa Alamgiri*, a collection of decisions made in the reign of Aurungzebe which had ended in 1707—only fifty-eight years before the grant of the *diwani*. In the course of centuries practice might have become more tolerant than theory, but in theory the position of the Hindus was at best that of *zimmis*—infidels who inhabited a country which had fallen to a Moslem conqueror but who had been left in comparative freedom on terms of a land tax and a poll tax. Thus, Galloway maintained, the *Fatawa Alamgiri* allowed the progeny of a Hindu marriage to inherit, but as to the parties themselves the marriage was illegal if it was illegal by Moslem law. We need not take Galloway as a final authority on the Mahomedan law as to marriage and inheritance among *zimmis* (cf. *Dictionary of Islam*, by Hughes, 1885, art. 'Zimmi', and authorities there cited) but he was right in that under the Moguls Mahomedan law was the law of the land as Hindu law was not. He followed James Mill and others in thinking very meanly of Hindu law and complained that its 'ashes had been raked up'. This brings home to us that the decision to treat the two laws as 'co-existing and co-equal', to borrow Macaulay's phrase, was far-sighted policy—not matter of course.

And if it does not, we may refer to the protest by the Naib Diwan forwarded in May 1772 by the Council of Revenue at Murshidabad to the President and Council at Calcutta. It is to be found in the seventh Report of the Committee of Secrecy on the state of the East India Company dated 6 May 1773, and was referred to in the Lex Loci report of 1840. There the Naib Diwan strongly remonstrates against allowing a Brahmin to be called in to the decision of any matters of inheritance or other dispute of Gentoos, saying that since the establishment of the Mahomedan dominion in Hindostan the Brahmins had never been admitted to any such jurisdiction; that to order a magistrate of the faith to decide in conjunction with a Brahmin would be repugnant to the rules of the faith, and an innovation peculiarly improper in a country under the dominion of a Mussulman Emperor. That where the matter in dispute can be decided by

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-316-60371-0 - Background to Indian Law
Sir George Claus Rankin
Excerpt
More information

a reference to Brahmins, no interruption had ever been given to that mode of decision; but that where they (*sc.* Gentoos) think fit to resort to the established judicatures of the country, they must submit to a decision according to the rules and principles of that law by which alone these Courts were authorized to judge. That there would be the greatest absurdity in such an association of judicature, because the Brahmin would determine according to the precepts and usages of his caste and the magistrates must decide according to those of the Mahomedan law: in many instances the rules of the Gentoo and Mussulman law, even with respect to inheritance and succession, differ materially from each other.

But a negative if noticeable feature of the scheme was its limited character. No law at all was prescribed save for special topics—inheritance, marriage, caste, religious institutions. The entire scheme was conditioned by the fact that the persons available for appointment as judges knew no law. It was intended that the ordinary run of disputes about contracts and debts should be dealt with by referring them to arbitrators of the parties' own choice, while for cases to which the Mahomedan and Hindu law applied the judge was given the assistance of 'law officers' to declare the rule of law applicable to the case. These officials represented an adaptation of the Mahomedan system which provided a *mufti* to expound the law for the benefit of the *kazi* who administered it; but the similarity was more apparent than real, since in many cases the *kazi* was himself a man learned in the Muslim law. The initial workings of this system came before Impey and his colleagues on the Supreme Court in the case known as 'the *Patna Case*'; it was found that the 'law officers' were left to take the evidence and even to pass orders. Though it seems now to be accepted that in no other way could the work have been got through, the practice was illegal and the law officers were cast in heavy damages (*Nuncomar* v. *Impey* by Fitzjames Stephen, vol. II, ch. 12). But independently of any irregularities in its working the system was far from satisfactory. Its defects were obvious enough. 'This as a judicial system can be approved by no intelligent being', was Galloway's verdict. But on the whole its defects were unavoidable defects. It was right to aim not at completeness but at taking due account of the British administrator's ignorance of the habits and character of the people. Certain advantages were

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-316-60371-0 - Background to Indian Law
Sir George Claus Rankin
Excerpt
More information

secured by the defects. It was a greater service to postpone the problem of a 'common' law than to adopt any of the solutions then available.

Yet a fourth feature of the scheme of 1772 deserves attention. The laws to be applied to succession, marriage, caste, etc., were described in the Regulation as 'the laws of the Koran with respect to Mahomedans and those of the Shastras with respect to Gentoos'. Though these phrases had been changed when the rule was restated in section 15 of Regulation IV of 1793, which spoke of 'Mahomedan laws' and 'Hindoo laws', these laws were conceived of as religious laws ascertainable by study of the sacred books. Neither Hastings, nor in all probability anyone else, appreciated that, while both were religious laws, the religions were very different, and the part played in each by law and by usage was not the same. Thus certain chapters (*suras*) of the Koran may be said to contain the fundamentals of Mahomedan law on basic subjects, e.g. the second, fourth, fifth and sixty-fifth; but most of its detailed rules and even of its principles cannot be found in the Koran alone. Three other main sources are recognized—tradition (*hadis*), consensus of the learned (*ijma*) and analogical reasoning (*kiyas*). Shia and Sunni law are widely different, but till 1810 or later the former was almost ignored in Bengal.[1] There are at least four schools of law among the Sunnis. There are, moreover, cases where custom has trenched upon the sacred law, e.g. to provide for single-heir succession, or in the case of converts to retain the law of succession which governed them before conversion to Islam, or in the case of agriculturists to conform to the life of village communities. Until so late as 1913 it was in doubt whether the rules of the Mahomedan law as to succession could be altered by custom so far as regards the provinces of Bengal, Bihar, Agra and Assam; though the Madras Civil Courts Act (III of 1873) contained an express provision giving effect to custom. The High Court of Allahabad refused for a long time to recognize usages in derogation of the sacred law until the decision of the Judicial Committee of the Privy Council in *Muhammad Ismail* v. *Lale Sheomukh* (1913) 17 Calcutta Weekly Notes 97.

As regards the Hindu law, to regard it as ascertainable in any given case from 'the Shastras' was to forget that the root of that law is custom; that the Bengal and Benares Schools went upon

1 See *Mt Hayat-un-Nissa's* case (1890) L.R. 17 I.A. 73.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-316-60371-0 - Background to Indian Law
Sir George Claus Rankin
Excerpt
More information

very different lines of family law; that many races of different origin had become imbued with Hinduism; and that in different places and times Hindu law or usage meant different things. As Elphinstone was to write in 1823:

'The Dhurm Shaster, it is understood, is a collection of ancient treatises, neither clear nor consistent in themselves, and now buried under a heap of more modern commentaries, the whole beyond the knowledge of perhaps the most learned pandits, and every part wholly unknown to the people who live under it. Its place is supplied in many cases by known customs, founded indeed on the Dhurm Shaster, but modified by the convenience of different castes or communities and no longer deriving authority from any written text.'[1]

The standpoint of the Regulation of 1772 is well seen in the attitude adopted towards the custom of 'impartibility' or single-heir succession which was abrogated by Regulation XI of 1793. Section I of that Regulation states:

'This custom is repugnant both to Hindu and Muhammadan laws which annexed to primogeniture no exclusive right of succession to landed property and consequently subversive of the rights of those individuals who would be entitled to a share of the estates in question were the established laws of inheritance allowed to operate with regard to them as well as all other estates.'

It should be noted, however, that in 1800, by Regulation X of that year, a local custom of single-heir succession obtaining in the jungle mahals of Midnapore and other entire districts, as distinct from individual zemindaries, was recognized as long established and 'founded on certain circumstances of local convenience which still exist'.

SUPREME COURT AT CALCUTTA, 1773–1781

In the town of Calcutta the Supreme Court had in 1774 superseded the Mayor's Court, and by 1781 had so applied the powers —wide and ill defined—with which its Act and Charter had endowed it, as to create an impasse. The Governor and Council had in the *Kasijura* case employed the military to prevent execution of the process of the Court by apprehending the sheriff's officers with all their followers. As Lord North put it in the House of Commons the judicial and political powers were in arms against each other. In their petition to Parliament,

1 Minute of 22 July 1823. *Life of Elphinstone*, by Sir T. E. Colebrooke, 1884, vol. II, pp. 111 *et seq.*

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-316-60371-0 - Background to Indian Law
Sir George Claus Rankin
Excerpt
More information

Hastings, Francis and Wheeler claimed that they had been 'obliged to yield their protection to the country and people... from the controul of a foreign law and the terrors of a new and usurped dominion'. They objected to 'the attempt to extend to the inhabitants of these provinces the jurisdiction of the Supreme Court of Judicature and the authority of the English law, and of the forms and fictions of that law which are yet more intolerable because less capable of being understood'. Certain Europeans in Calcutta protested in like manner against 'giving to the voluminous and intricate laws of England a boundless retrospective power in the midst of Asia'. These protests were by no means free from exaggeration, and Macaulay in his narrative of these events was to carry their extravagance still further, painting a reign of terror throughout the land.[1] As regards civil law at least, there is no reason to attribute to Impey and his colleagues any intention to depart from the general principles which the Mayor's Court had theretofore applied to the ordinary affairs of life in Calcutta. It is not shown that they were minded to disregard native customs as to marriage or succession. Indeed, in Morton's Reports (p. 1) we find Impey, Chambers, Lemaistre and Hyde in 1776 granting administration to the goods of Hindus with directions that they be administered according to Hindu customs. But it is true that the Act of 1773 was silent as to the law which the Supreme Court should administer and contained nothing effective to restrict its jurisdiction over Indians. After all that Fitzjames Stephen had to say in defence of the Supreme Court, we may agree in the view, which was clearly taken by the Parliament of 1781, that its interference with the courts and authorities established by the Company throughout the Lower Provinces, whether it was or was not within the terms of the Act of 1773, was tolerable neither in method nor in substance. It was pointedly demanded in the Commons debate which resulted in the appointment of the committee over which Burke presided and thus in the Act of 1781: 'What is the object of public expediency in presenting native Indian subjects with English Courts and laws? Is it on the supposition that they have no laws of their own?' 'I think', said one hon. member, 'it has been held as a maxim that it is only to an unpolished people that a legislator can give what laws he pleases.' And Lord North explained on behalf of the

1 Essay on Warren Hastings, *Macaulay's Essays*, 7th ed. 1852, p. 279.

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-316-60371-0 - Background to Indian Law
Sir George Claus Rankin
Excerpt
More information

Government that the Regulating Act of 1773 had not been intended 'to extend the British laws in their unintelligible state (for so might they appear to the natives of a country in which they never had been promulgated) throughout that vast continent'.

THE ACT OF 1781

As Parliament's considered judgment upon the applicability of the English law to Indians in Calcutta the Act of 1781 is worth a careful scrutiny, all the more that its provisions were to be extended to the other Presidency towns of Madras (1800) and Bombay (1823) and have governed all three Presidency towns to the present time. It gave civil jurisdiction to the Supreme Court over Indian inhabitants of Calcutta, but directed (section 17) that 'their inheritance and succession to land rent and goods and all matters of contract and dealing between party and party' should be determined in the case of Mahomedans and Hindus by their respective laws and where only one of the parties should be a Mahomedan or Hindu 'by the laws and usages of the defendant'. This provision, in the view of Sir Courtenay Ilbert (*Government of India*, 2nd ed. p. 249), 'constitutes the first express recognition of Warren Hastings' rule in the English statute law'. But two ways of giving expression to the same principle could hardly show more variety. 'Marriage, caste and other religious usages and institutions' are not mentioned in the Act of 1781: 'matters of contract and dealing' were not mentioned in the Regulation of 1772. The Act where one party only is a Hindu or a Mahomedan introduces for the first time the law of the defendant: the Regulation had left such a case to justice, equity and good conscience—that is, to the good sense of the court. And between the two provisions there was an underlying difference—namely, that within Calcutta the residual law, the law to be applied whenever no express direction required some other law to be applied, was the law of England—not *ius naturale* nor the unfettered discretion of any judge. Calcutta in 1726 was neither a ceded nor a conquered territory, nor was it an unoccupied or savage country in which Englishmen had founded a plantation; but the Charter of 1726 and the principles laid down by Lord Mansfield in *Campbell* v. *Hall* (1774) 1 Cowper 204, 208 operated to make all persons within Calcutta amenable *prima facie* to the English law. True, well-known cases (*Mayor of Lyons* v. *E.I. Company* (1836) 1 Moo. P.C. Cases 175; *Advocate General*

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-316-60371-0 - Background to Indian Law
Sir George Claus Rankin
Excerpt
More information

v. *Rani Surnomoyee* (1863) 9 M.I.A. 387) were later to place it beyond controversy that the English law administered in Calcutta, whether to Indians or others, was not the whole English law but so much only as was not 'inapplicable to the circumstances of the settlement'; as was, for example, the rule against aliens owning land, the forfeiture of a suicide's property or the mortmain statutory law.

English law had not been treated as having any claim to a say in the Company's Courts where the judges acted in the exercise of the *diwani*. Hence it was possible in the interior of the province under the Regulation of 1772 to apply the Hindu law of contract to a case between Hindus as a matter of good conscience, though contract was not one of the subject-matters mentioned in the Regulation; and the Mahomedan law of gift and of pre-emption came to be extended on this principle to Mahomedans. Outside the Presidency town there was no *lex loci*. But to the Supreme Court it was in theory at least more difficult to extend the native laws beyond the matters indicated in section 17 of the Act of 1781, and these matters were really only two—inheritance and contract. No doubt, in section 18 there were words saving the rights of fathers and masters of families and excepting from the criminal law 'any acts done in consequence of the rule and law of caste respecting the members of the said families only'—provisions prefaced by the words 'in order that regard should be had to the civil and religious usages of the said natives'. There was therefore some ground in the Act itself for giving a benevolent construction to section 17, particularly since the word 'caste', as is generally agreed, was not used in any strict sense which would make it inapplicable to Mahomedans.

Arguments to a like effect but manifestly defective have been drawn[1] from the words 'justice and right' in the clause which appeared first in the Calcutta Charter of 1772 as clause 14 (afterwards clause 26 of the Madras Charter of 1801 and clause 33 of the Bombay Charter of 1823); but the clause has no bearing upon the law to be applied by the court, being directed only to the duty of the court to give judgment on a consideration of the merits of the case notwithstanding the state of the pleadings, the absence of any of the parties and so forth.

1 *Re Kahandas Narrandas* (1880) I.L.R. 5 Bom. 154; *Mool Chand* v. *Alwar Chitty*, I.L.R. 39 Mad. 543, 552–3.

© in this web service Cambridge University Press www.cambridge.org