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ESTABLISHMENT OF A NEW CRIMINAL LAW IN INDIA

DIXIT - 2

(not for publication)

ESTABLISHMENT OF A NEW CRIMINAL LAW IN INDIA

Some Selected Documents from
Bengal, Madras & Bombay
(1760-1830)

VIII

(Compiled : Dharampal)

1966-68

VIII.1

The principal black inhabitants of the place send in the following petition in favour of Radacharan Mitre under sentence of death for forgery (Bengal Public Consultations: 11.3.1765): Extract.

.....Your petitioners further beg leave to remonstrate that although the delinquent has been convicted of a great crime, yet such punishment was never known to have been inflicted for an offence of that nature in this settlement before. According to the laws of our country his crime is never punished with death, but with a fine, the delinquent was therefore ignorant of the heinousness of the offence. Having been brought up in the religion and opinions of Hindoos, he could form no other notions of things but from their maxims and customs. These rendered his offence not mortal and no instance had before occurred to inform him of the severity of the English Law, of the tenor and form of which the delinquent was so totally ignorant that he did not avail himself of circumstances which your petitioners are informed would have made greatly in his favour.....

Decision:

In order to give these people the fullest conviction of our lenity as well as justice and in hopes that this man's condemnation will alone be a sufficient example to deter others from the commission of the like offence which is not held so heinous in their eyes.

It is agreed to comply with their application and that he be accordingly respited till the King's pleasure is known.

Public Record Office: PRO/30/8/99/III: (Folio 164): Extract: The matter seems to be referred to in the General Letter from Bengal 11.3.1765, para 34 and Company's General Letter to Bengal 19.2.1766, para 100-1.

VIII.2

Copy of the Fortieth Paragraph of the Letter from the Governor and Council in Bengal, for the Department of the Revenues, to the Court of Directors, dated 3rd November, 1772.

The more regular Administration of Justice was deliberated on by the Committee of Circuit, and a Plan was formed by them, which afterwards met with our Approbation: We cannot give you a better idea of the Grounds on which this was framed, than by referring you to a copy of it, together with a Letter from the Committee to the Board, on the occasion, both of which make Numbers in this Packet, and we earnestly recommend them to your perusal, requesting to be assisted with such further orders and instructions thereon, as they may require for compleating the system, which we have thus endeavoured to establish, on the most equitable, solid and permanent footing. We hope they will be read with that indulgence, which we are humbly of opinion, is due to a work of this kind, undertaken on the plain principles of experience and common observation, without the advantages which an intimate knowledge of the Theory of Law might have afforded us; we have endeavoured to adapt our regulations to the manners and understandings of the people, and exigencies of the country, adhering as closely as we were able to their ancient usages and institution. It will be still a work of some months we fear, before they can be thoroughly established throughout the provinces, but we shall think our labours amply recompensed, if they meet with your approbation, and are productive of the good effects we had in view

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Extract of a Letter from the Governor and Council at Fort William, &c.

VIII-3

Copy of a letter from the Committee of Circuit, to the Council at Fort William, dated Cossimbuzar, 15th August, 1772

..

In the copy of our proceedings, which accompanied our letter of the 23th ultimo, we intimated our intention of communicating to you our sentiments in a future address, upon the subject of the Magistracy of the Province, which though an appendage of the Nizamut, we considered as not necessarily connected with the propositions which were then recommended to your attention, and of too much importance to be lightly, or only occasionally treated.

We now transmit to you the result of our Deliberations on this subject, in the enclosed paper entitled "A Plan for the Administration of Justice" and if it meets with your Approbation, we wish to receive your instructions for carrying it into immediate execution.

For the information of ~~the~~ honorable Your employers, it may be necessary to premise, what you will readily perceive, that in forming the inclosed Plan, we have confined ourselves with a scrupulous exactness, to the constitutional terms of Judicature, already established in this Province, which are not only such as we think in themselves best calculated for expediting the Course of Justice, but such as are best adapted to the understandings of the people. Where we shall appear to have deviated in any respect from the known forms, our intention has been to recur to the original principles and to give them that efficacy, of which they were deprived by venal and arbitrary innovations, by partial immunities, granted as a Relief against the general and allowed abuse of authority, or by some radical defect in the constitution of the courts in being, and these changes we have adopted with the less hesitation, as they are all of such a Nature, as we are morally certain will prove both of general satisfaction and general ease to the people.

The general principles of all despotic Governments, that every degree of power shall be simple and undivided, seems necessarily to have introduced itself into the courts of justice; this will appear from a Review of the different officers of justice, instituted in these provinces, which, however unwilling we are to engross your time with such details, we deem necessary on this occasion, in proof of the above assertions, and in justification of the Regulations, which we have recommended.

First. The Nazim, as supreme Magistrate, presides personally in the trials of Capital offenders, and holds a court every Sunday, called the Roz Adawlut.

Second. The Dewan, is the supposed Magistrate for the decision of such causes, as relate to real estates, or property in land, but seldom exercises this authority in person.

Third The Darogo, Adawlut al Aalea, is properly the Deputy of the Nazim, he is the judge of all matters of property, excepting claims of land and inheritance, he also takes the cognizance of quarrels, frays and abusive names.

Fourth. The Darogo Adawlut Dewannee, or Deputy of the Dewan, is the judge of property in land.

Fifth. The Phoujdar is the officer of the police, the Judge of all crimes not capital, the proofs of these last are taken before him, and reported to the Nazim for his judgment and sentence upon them.

Sixth. The Cazee is the judge of all claims of inheritance or succession; he also performs the ceremonies of weddings, circumcision, and funderals.

Seventh. The Mohtesib has cognizance of drunkenness, and of the vending of spirituous liquors and intoxicating drugs, and the examination of false weights and measures.

Eighth. The Muftee is the Expounder of Law. Memorandum, The Cazee is assisted by the Muftee and Mohtesib in his court: After hearing the parties and evidences, the Muftee writes the Fetwa, or the Law applicable to the Case in question, and the Cazee pronounces judgment accordingly. If either the Cazee or Mohtesib disapprove of the Fetwa, the cause is referred to the Nazim, who summons the Ijlass, or General Assembly, consisting of the Cazee, Muftee, Mohtesib, the Darogos of the Adawlut, the Moulavies, and all the Learned in the Law, to meet and decide upon it. Their decision is final.

Ninth. The Canongos are the registers of the Lands. They have no authority, but causes of land are often referred to them for decision, by the Nazim, or Dewan, or Darogo of the Dewannee.

Tenth. The Cootwall is the Peace Officer of the night, dependent on the Phoujdarree.

From this list it will appear, that there are properly three courts for the decision of civil causes (the Canogos being only made arbitrators by reference from the other courts) and one for the Police and Criminal Matters. The authority of the Mohtesib in the latter, being too confined to be considered as an exception: Yet, as all defective institutions soon degenerate, by use, into that form to which they are inclined, by the unequal prevalence of their component parts, so these courts are never known to adhere to their prescribed bounds, but when restrained by the vigilance of a wiser ruler, than commonly falls to the lot of despotic states; at all other times, not only the civil courts encroach on each others authority, but both civil and criminal often take cognizance of the same subjects; or their power gradually becomes weak and obsolete, through their own abuses, and the usurpations of influence. For many years past, the Darogas of the Adawlut al Aalea, and of the Dewannee, have been considered as judges of the same causes, whether of real or personal property; and the parties have made their application as chance, caprice, interest, or the superior weight and authority of either directed their choice. At present, from obvious causes, the Dewanee Adawlut is in effect the only Tribunal: The Adawlut al Aalea, or the Court of the Nazim existing only in name.

It must however be remarked in exception to the above assertions, that the Phoujdarree being a single judicature, and the objects of it clearly defined, it is seldom known, but in time of anarchy, to encroach on the civil power, or lose much of its own authority; this however is much the case at present.

The court in which the Cazee presides, seems to be formed on wiser Maxims, and even on more enlarged ideas of justice, and civil liberty, than are common to the despotic notions of Indian Governments.

They must be unanimous in their judgment, or the case is referred in course to the General Assembly; but the intention of this reference is defeated, by the importance which is given to it, and the insurmountable difficulties attending the use of it, few cases of disputed inheritance will happen, in which the opinions of three independent judges shall be found to concur: There is therefore a necessity, either

that one shall over-rule the other two, which destroys the purpose of their appointment, or that daily appeals must be made to the Nazim, and his warrant issued to summon all learned in the Law, from their homes, their studies, and necessary occupations, to form a tumultuous assembly to hear and give judgment upon them: The consequence is, that the General Assembly is rarely held, and only on occasions which acquire their importance from that of the parties, rather than from the nicety of the case itself: The Cazee therefore either advises with his colleagues in his own particular court, and give judgment according to his own opinion, or more frequently decides without their assistance or presence.

Another great and capital defect in these courts is the want of a substitute or subordinate jurisdiction, for the distribution of justice in such parts of the province, as lie out of their Reach, which in effect confines their operations to a circle, extending but a very small distance beyond the bounds of the city of Moorshedabad: This indeed is not universally the case but perhaps it will not be difficult to prove the exceptions to be an accumulation of the grievance, since it is true that the courts of Adawlut are open to the complaints of all men; yet it is only the rich, or the vagabond part of the people who can afford to travel so far for justice; and if the industrious labourer is called from the farthest part of the Province to answer their complaints, and wait the tedious process of the courts, to which they are thus made amenable, the consequences in many cases will be more ruinous and oppressive, than an arbitrary decision could be, if passed against them without any law or process whatever.

This defect is not however left absolutely without a remedy, the zemindars, farmers, Shicdars, and other officers of the Revenue assuming that power, for which no provision is made by the Laws of the Land, but, which in whatever manner it is exercised, is preferable to a total anarchy: It will however be obvious, that the judicial authority lodged in the hands of men, who gain their livelihood by the profits on the collections of the revenue, must unavoidably be converted to sources of private emolument, and in effect the greatest oppressions

of the inhabitants owe their origin to this necessary evil: The Cazee has also his substitute in the districts, but their legal powers are too limited to be of general use, and the powers which they assume being warranted by no lawful commission, but depending on their own pleasure, or the ability of the people to contest them, is also an oppression.

From this variety of materials we have endeavoured to form the plan of a more compleat, but more extensive system of judicature, by constituting two superior courts at the capital, the one composed of the United Magistracy of the Adawlut al Aalea, the Adawlut Dewannee and the Cazee (or Cazee's Office) for the decision of civil causes, the other corresponding to the Phoujdarree, for the trial of criminal cases. To prevent the abuse of the power vested in these courts, and to give authority to their decrees, each instead of a single judge is made to consist of several members, and their enquiries are to be conducted under the inspection and sanction of the Supreme Administration. To render the distribution of justice equal in every part of the province, similar but inferior courts are also proposed for each separate district, and accountable to the superior. The usurped power of the officers of the collections, and of the creditors over the persons of their debtors, is abolished.

The judicial authority, which by the Tenth Regulation is still allowed to the farmers of the Revenue, is a single exception to the General Rule, which we have laid down of confining such powers to the two courts of Adawlut; but as this is restricted to cases of property not exceeding Ten Rupees, and as they have no power of inflicting punishment, or levying fines, we think an ill use is not likely to be made of so inconsiderable a privilege, especially as they themselves are amenable to the courts of justice, which will be always ready to receive complaints against them, and some such means of deciding the trifling disputes of the Ryots upon the spot is absolutely necessary, as they cannot afford, nor ought to be allowed on every mutual disagreement, to travel to the Sudder Cutcherry for Justice.

The detestable and authorised exactions of the Phoujdarree Court, which had its exact imitators in every farmer and Aumil of the

Province, under the denomination of Bazee Jumma, have been prohibited, conformably to the wise and humane injunctions of our Honorable masters, who, from the same spirit of equity, have renounced the right hitherto exercised by the Country Government and authorised by the Mahometan Law, to a commission on the amount of all debts, and on the value of all property recovered by the decrees of its courts, a practice repugnant to every principle of justice, as it makes the magistrate a party in the cause on which he decides, and becomes a legal violation of the rights of private property, committed by that power, which should protect and secure it.

It has also been our aim to render the access to justice as easy as possible.

By keeping exact records of all judicial proceedings, it is hoped that these institutions, if they receive the sanction of your approbation, will remain free from the neglects and charges, to which they would be liable from a less frequent inspection.

We have judged it necessary to propose some exceptions to the order of the Honourable Court of Directors, for the total abolition of fines in the court of Phoujdarree. All offences are not punishable by stripes, and to sentence men of a certain rank in life, or of a superior cast to such a public disgrace, would exceed the proportion of the offence, and extend the punishment to all the relations and connections of the Delinquent; to suffer him to escape, with total impunity, would be an injustice in the other extreme, in such cases there is but the middle way, which we can adopt with an equal regard to the spirit of our honourable Masters' commands, and the rights of justice, and that is, by levying the fine upon the offender, but converting it to a reparation of the injury.

Our motives for the abolition of the fees of the Cazees and mustees, will best appear in the following extract of a minute of our proceedings at Kishen Nagur, relating to the haldarree, or tax on marriages, which, for the reasons therein assigned, we forbad to be levied any longer, and deductedfrom the settlement of Nuddea: Convinced of the pernicious effects of so impolitic a tax, we

we propose to grant the same exemption to the other districts subject to our direction, and submit to your consideration, whether it will not be proper to make it general throughout the province.

The same reasons which have induced us to abolish the Haldarree, operate with equal force against the fees of the Cazees and Mustees, which have always proved a heavy grievance to the poor, and an impediment to marriage: We have therefore determined on a total abolition of these, and of the other less dues hitherto allowed to these officers; and to put them on the footing of monthly servants with fixed salaries: We were led to this resolution, not only by the speculative advantages which it promised, but by the experience which this country has already had of its effects, from a similar institution of the Nabob Meer Cossim, about the beginning of the year 1763, which (as we are assured) was productive of more marriages than had been known to take place for years before; and instances have been even quoted of Men of Forty and Fifty years of age, who till then had led a life of celibacy, immediately availed themselves of this exemption to enter* of means to support the various expenses attending it.

*into a State, from which they had been before precluded, solely by the want

VIII·4

(13) A Plan, for the Administration of Justice,
Extracted from the proceedings of the Committee of Circuit, 15th August, 1772

I.

That in each District shall be established two courts of Judicature, one by the name of Mofussul Dewannee Adawlut, or Provincial Court of Dewannee, for the cognizance of civil causes; the other by the name of Phoujdarree Adawlut, or court of Phoujdarree, for the trial of all crimes and misdemeanors.

II.

That for the better ascertaining the jurisdiction of each Court, and to prevent confusion, and a perversion of Justice, the matters cognizable by each respectively are declared to be as follows.

All disputes concerning property, whether real or personal; all causes of inheritance, marriage and cast; all claims of debt, disputed accounts, contracts, partnerships, and Demands of Rent, shall be judged by the Dewannee Adawlut.(14) But from this distribution is excepted the Right of succession to zemindarrees and Talucdarrees, which shall be left to the decision of the President and Council.

All trials of murder, robbery and theft, and all other felonies, forgery, perjury, and all sorts of frauds and misdemeanors, assaults, frays, quarrels, adultery, and every other breach of the peace, or violent invasions of property, shall be submitted to the Phoujdarree Adawlut.

III

That in the provincial court of Dewanee, the Collector of each district shall preside on the part of the Company, in their quality of King's Dewan, attended by the President and Council, and the other officers of the Cutcherry; that the Court shall be regularly held on every Monday and Thursday, and oftner if necessity require, and that no causes shall be heard or determined, but in the open court regularly assembled.

IV

That in the Phoujdarree Adawlut, the Cazee and Mustree of the district, and two Moulavies shall sit to expound the Law, and determine how far the delinquents shall

be guilty of a breach thereof; but that the collector shall also make it his business to attend to the proceedings of this court, so far as to see that all necessary evidences are summoned and examined, that due weight is allowed to their testimony, and that the decision passed is fait and impartial, according to the proofs exhibited in the course of the trial, and that no causes shall be heard or determined, but in the open court regularly assembled.

V

That in the manx like manner, two superior courts of justice shall be established at the Chief Seat of Government, the one under the Denomination of the Dewannee Sudder Adawlut, and the other the Nizamut Sudder Adawlut.

VI

(15) That the Dewannee Sudder Adawlut shall receive and determine appeals from the Provincial Dewannee Adawlut; that the President with two Members of the Council shall preside therein, attended by the Dewan of the Khalsa, the Head Canogos, and other officers of the Cutchery, in case of the absence of the President, a third member of the Council to sit, that is to say, not less than three members to decide on an appeal but the whole Council may sit if they chuse it.

VII

That a Chief Officer of Justice, appointed on the part of the Nazim, shall preside in the Nizamut Adawlut, by the Title of Darogo Adawlut, assisted by the Chief Cazee, the Chief Mufftee, and three capable Moulavies; that their duty shall be to revise all the proceedings of the Phoujdarree Adawlut, and in capital cases by signifying their approbation or disapprobation thereof, with their reasons at large, to prepare the sentence for the warrant of the Nazim, which shall be returned into the Mofussul, and there carried into execution; that with respect to the proceedings in this court, a similar control shall be lodged in the Chief and Council, as is vested in the Collectors in the districts, so that the Company's Administration in character of King's Dewan

may be satisfied; that the Decrees of Justice, on which both the welfare and safety of the Country so materially depend, are not injured or perverted, by the effects of partiality or corruption.

VIII

That in order to preserve the dignity and importance of the two superior courts, there shall be two courts of Adawlut established at the seat of Government, exactly on the same plan as those of the districts. In that of the Dewanne, a Member of the Council shall preside, and in that of the Phoujdarree, another Member of the Council shall exercise the control, specified in the Fourth Regulation; these duties to be performed by the Members in rotation.

IX

(16) That as nothing is more conducive to the prosperity of any country, than a free and easy access to Justice and redress; the collectors shall at all times be ready to receive the petitions of the injured, and further to prevent their being debarred this access from Motives of interest, partiality, or resentment in the officers or servants of the Cutcherry, that a Box shall be placed at the door of the Cutcherry, in which the complainants may lodge their petitions at any time or hour they please, that the collector shall himself keep the key of this Box, and each Court Day have such Arzees as he may find in it, read immediately in his presence, by the Arizbeggy of the Cutcherry.

X

That in summoning from the Farmed Lands persons complained against, or evidences called on by the parties, the Rule laid down in the Ninth Article of the Public Regulations is to be strictly adhered to. The Collector ought further to avoid, as studiously as possibly, summoning any persons from the Mofussul, who are any way connected with the Revenue, during the months of Bhadoom, Assin, Aughun, and Poos, unless in cases which call for immediate enquiry and example.

XI

That in order to facilitate the course of justice in trivial causes, and relieve the Ryot from the heavy Grievance of travelling to a great distance, to seek for redress, all disputes of property, nor exceeding Ten Rupees, shall be decided by the Head Farmer of the Purgunnah, to which the parties belong; and his decree shall be final.

XII

(17) That the process observed for trying causes, in the Provincial Dewannee Adawlut, shall be as follows - First, to file and read the petition of the complainant. Secondly, to allot a limited time for the defendant to give answer, which when received shall also be filed and read - Thirdly, to hear the parties, viva voce, and if necessary examine evidences; and lastly, to pass Decree. That if in adhering to this order of process, the defendant shall evade or delay giving answer within the limited time, judgment shall pass against him.

XIII

That compleat records shall be kept in the Mofussil Dewannee Adawlut, in which shall be inserted the petition of the complainant, the answer of the defendant, the subsequent process, and examination of evidence, and finally the decree; that upon decree being passed, both parties shall be furnished with a copy thereof, free of expense, and that such copies shall be authenticated under the Public Seal, and the signing of the Collector: That a copy of the records entire shall be also transmitted twice a month, to the Sudder Dewannee Adawlut, through the channel of the President and Council

XIV

That each Collector shall also keep an abstract register of his Adawlut, in English, containing the Names of the Plaintiff and Defendant, the substance of the suite, the substance of the Decree, the Date of the cause being filed, and the date of the decree being passed; and this abstract also shall be transmitted twice a month, to the Sudder Dewannee Adawlut

XV

(18) That as the litigiousness and perseverance of the natives of this country, in their suits and complaints, is often productive not only of inconvenience and vexation to their adversaries, but also of endless expence and actual oppression, it is to be observed as a standing rule, that complaints ~~as~~ so old adult ~~a decree as~~ years shall not be actionable: And further, should they be found guilty, as is often the case, from the principles above mentioned of flying from the one court to the other, in order to prevent and protract the course of justice, the party, so transgressing, shall be considered as non-suited, and shall according to his Degree in Life, and the notoriety of the offence be liable to fine or punishment.

N.B: By the Mahometan Law, all claims which have lain dormant for twelve years, whether for land or money, are invalid.- This also is the Law of the Hindoos, and the legal practice of the country.

XVI

That the custom of levying chour, dussuttra, puchuttra, or any other Fee or commission on the account of money recovered, or Etlak on the decision of causes, as well as all heavy arbitrary fines, is absolutely and for ever abolished.

XVII

That as however cases may occur, in which it will be highly necessary, for the welfare of the community, to curb and restrain trivial and groundless complaints, and to deter chicane and intrigue, which passions amongst these people often work to the undoing of their neighbours, a discretion shall in such cases be left to the court, either to impose a fine, not exceeding five Rupees, or inflict corporal punishment, not exceeding Twenty lashes with a Rattan, according to the degree of the offence, and the person's station in life.

XVIII

(19) That in adjusting the claims of old debts, it shall be observed as a Rule, that they bear no further interest after such adjustment, but that the amount shall be payable by kistbundee, according to the circumstances of the party: And as the rates of interest, hitherto authorised by

custom, have amounted to the most exorbitant usury, the following rates are now established to be received and paid, as well for past debts, as on future loans of money viz., On sums not exceeding one hundred Rupees Principal, an interest of Three Rupees Two Annas per cent per mensem, or Half an Anna in the Rupee: On sums above one hundred Rupees principal, an interest of two Rupees per cent per mensem, the Principal and interest to be discharged according to the condition of the Bond; and all compound interest, arising from an intermediate adjustment of accounts, to be deemed unlawful and prohibited. When a debt issued for upon a Bond, which shall be formed to specify a higher interest than the established Rates, the interest shall be wholly forfeited to the Debtor, and the Principal only recoverable, and that all attempts to elude this Law, by deductions from the original loan, under whatever denomination shall be punished, by a forfeiture of one moiety of the amount of the bond to the Government, and the other half to the debtor.

XIX

That all bonds shall be executed in the presence of two witnesses.

XX

That whereas it has been too much the practice in this country, for individuals to exercise a judicial authority over their debtors, a practice, which is not only in itself unlawful and oppressive, ~~fac~~ing a Man thereby becomes the judge in his own cause, but which is also a direct infringement of the prerogative and powers of the regular Government, that Publications shall therefore be made, forbidding the exercise of all such authority (20) and directing all persons to prefer their suits to the established court of Adawlut, and that the Collector shall particularly attend to this Regulation, which it is apprehended, will prove a great means of relief to the helpless Ryot from his merciless creditor, the Money Lender.

XXI

That in all cases of disputed property, regarding lands, houses, land marks, & ..

where a local investigation is required, an Aumin shall be chosen with the mutual consent of the parties, or if they cannot agree in the choice of one person, each shall have the privilege of nominating his own, and the Collector is also to attend, that the Aumins do not accumulate expenses by unnecessary delays, but that their scrutinies and their wages be limited to the time he judges sufficient for performing the service in question. The expence of the Enquiry to be defrayed by the person who is cast.

XXII

That in all cases of disputed accounts, partnerships, debts, doubtful or contested bargains, non-performances of contracts, and so forth, it shall be recommended to the parties to submit the decision of their cause to Arbitration, the Award of which shall become a decree of the Dewannee Adawlut; the choice of the arbitrators is to rest with the parties, but they are to decide the cause without fee or reward. The Collector, on the part of Government, is to afford every encouragement in his power to inhabitants of Character and credit, to become arbitrators, but is not to employ any coercive means for that purpose.

XXIII

That in all suits regarding inheritance, marriage, cast, and other religious usages or institutions, the Laws of the Koran with respect to Mahometans (21) and those of the Shaster with respect to Gentoos, shall be invariably adhered to: on all such occasions, the Moulavies or Brahmins shall respectively attend to expound the Law, and they shall sign the report and assist in passing the Decree.

XXIV

That the Decree of the Provincial Dewannee Adawlut, on all causes, for sums not exceeding Five Hundred Rupees, shall be final, but that for all above that amount, an Appeal shall lie to the Sudder.

XXV

That the Court shall have a right of

DECREEING to the party, in whose favour judgment is given, any specific sum for costs within the real amount, or in general to decree with costs. The Bill in both cases to be taxed by the Court.

XXVI

That persons found guilty of preferring groundless, litigious or vexatious appeals, shall be punished at the discretion of the Sudder Dewannee Adawlut, by an enhancement of the costs, which shall be given to the respondent, as a compensation for the trouble and expence which he shall have sustained.

XXVII

That complete Records shall be kept and transmitted from the provincial Phoujdarree Adawlut, to the Nizamut Sudder Adawlut, twice every month, through the Channel of the President and Council. This exclusive of the proceedings in Trials for capital crimes, which are to be transmitted as soon as closed.

XXVIII

(22) That the Collector shall also keep an abstract register, in English, of the proceedings of this court, in which shall be inserted only the names of the prisoners, the crimes or offences of which they stand charged, and the sentence or acquittal, which shall be transmitted in like manner, twice every month, to the sudder Adawlut.

XXIX

That the authority of this court shall extend to corporal punishment, imprisonment, sentencing to the roads and fines, but not to the life of the criminal. In capital cases the opinion of the court, with the evidences and defence of the prisoner, shall be transmitted to the Nizamut Adawlut, and having obtained their confirmation, it shall be ultimately referred to the Nazim for his sentence, whibh shall be carried into immediate execution, as directed in the seventh Article.

XXX

That persons guilty of petty misdemeanors, whose rank, cast or station in life, shall be thought to exempt them from corporal punishment, may be made liable to fines; but

should such fines be laid for a larger sum than one hundred Rupees, they are not to be inforced or levied without the confirmation of the Nizamut Adawlut; for which purpose they are to be immediately reported, with a state of the case, and the cause of their being imposed.

XXXI

That as the forfeiture and confiscation of the property and effects of delinquents, sentenced to the loss of life may often occur, it is to be observed that such forfeiture and confiscation is not to depend on the provincial (23) Phoujdarree, but upon the Nizamut Adawlut: It is to be a standing rule therefore, to transmit, with the proceedings of the trial, an account of the property and effects of the delinquent, and wait the orders of the Sudder, whether they are to be surrendered to the Heirs, or confiscated to the State: In the latter case a sale is to be made, and the amount brought to Public Account.

XXXII

That whereas the Honourable Company from motives of tenderness and solicitude, for the peace and happiness of the ryots, have determined to abolish the Revenue, which has hitherto arisen from the collections of the Phoujdarree Bazee Jumma, the same is accordingly to be made public; the punishment for them than stripes or imprisonment, or damages to the party injured.

XXXIII

That the same motives of regard for the tranquility and happiness of the Ryots, having induced the Government to relinquish the revenue arising from the Nassooms, or fees of the Cazee and his inferior officers, of which the inhabitants have long complained as a severe grievance: The Cazee and Muftee are therefore introduced in the list of Adawlut officers at a monthly salary: In this capacity they are to continue to attest all writings, to perform all ceremonies of marriages, births and funerals, and to discharge all their other functions as was customary

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*Court is still to take cognizance of all such offences, but shall inflict no other

or fines, if they neglect the duties of their charge, and as an (25) encouragement for them, to exert themselves in the protection of the villages committed to their care, and in detecting, opposing and bringing to justice all decoits and other offenders against the Public peace, pecuniary rewards, grants of lands, or particular privileges and immunities, shall be granted them, proportioned to their deserts; and the services which they shall have rendered the State

XXXVII

That in addition to these general Regulations, the collector shall form such subsidiary ones, for promoting the due course of justice, and the welfare and prosperity of the Ryots, as the local circumstances of their respective districts shall point out and require, and that they shall report the same to the Committee of circuit, in order to their being communicated to the Board, for their final sanction and confirmation.

That they shall in particular, and without delay, regulate and transmit for confirmation, the fees to be received by all peons and pikes, employed in the service of the courts of Adawlut, which can only be done with Accuracy from information on the spot. And that they shall further establish such Rules, with penalties annexed, as may serve effectually to eradicate the practice among the officers and servants of the Cutcherry, of exacting and receiving bribes, from the parties who have causes in suit; a practice, not only criminal in the persons who are guilty of it, but which reflects discredit and reproach on the Government under which they serve.

A true Extract
Alexander Higginson, Secretary.

Revenue Department
Fort William, 3rd Nov.1772

VIII·5

The day before my arrival at Maidapore, I received the following letter from the Council:

"To the Hon'ble Warren Hastings, Esq.

Hon'ble Sir,

The number of Felons which have undergone their trials, before the several provincial Courts of Phougedarree Adawlut, and who now lye in confinement in the jails of every district, is a subject which calls for our serious consideration.

We are sensible of the attention which has been paid by you in superintending the several of those proceedings by the officers (15) of the Sudder Nizamul Adawlut, but the delay in obtaining the confirmation of the Nazim has hitherto prevented the sentences from being carried into execution. We cannot let slip so favourable an opportunity as your stopping at the city affords us for effecting a final determination on this point of public importance, and we request therefore that you will make application to the Nazim for him to pass his sentences on the trials which have been laid before him. Such of those as may condemn the criminals to death, we propose should be carried into immediate execution; but as many of them, such as thieves, robbers, and house breakers, known under the general appellation of decoits, will by the letter of the Mahommedan Law, only be punished in a manner, which without answering the end of example, renders them useless to <u>society</u> and drives them to the necessity of committing fresh crimes to (16) relieve their exigencies, we request to be favoured with your sentiments as to the nature and degree of the punishments, which ought in such cases to be inflicted that the force of example may operate to deter others from the commission of enormities, which are no less injurious to society and destructive to the peace of the country, than crimes of a more astrx atrocious dye.

We also embrace this opportunity to forward you a letter from the Resident of the Durbar, with the proceedings in two cases of Murder which appear to have been perpetrated with peculiar circumstances of savage cruelty. We request you will submit them to the Nazim for his confirmation.

Nat. Library of Scotland: Minto Papers: MS.508: Diary of Warren Hastings (Extract)

of the sentence, which if he passes, the same may be carried into execution without further reference or delay.

We are with esteem, Hon'ble Sir,

Your

29th June 73

(17)

To

The Hon'ble Warren Hastings Esq.
President and Governor, Members of Council
at Fort. St. William

Hon'ble Sir and Sirs,

I have herewith the honour to enclose you the surathauls of Culloo, Codabuksh and his accomplices tried at the Phousdarree Adawlut for muder of etc. of Chimroo and eight others tried for and convicted of the same crime, attended with the additional ones of plundering and decoiting.

I also transmit you an English translation of the depositions given in the case of Codabuksh and his accomplices, that even a slight inspection may evince to you the necessity there is for a speedy execution of justice upon an occasion where murder and savage cruelty have continued to aggrevate, if possible, the guilt of each.

I am

Hon'ble Sir and Sirs

Your most obedient and
Humble Servant. S.M.

22nd June 73

VIII '6

(18) I replied as follows.

Gentlemen,

I have had the honour to receive your letter of the 29th ultimo with its enclosures.

I have received a very sensible satisfaction from the testimony which you have been pleased to give to the attention paid by me in superintending the proceedings of the officers of the Sudder Adaulut; I am sorry it has hitherto been attended with so little visible effect. This has been owing to various causes, to the delays unavoidably incident to new Establishments, to the reference which it has been judged necessary to make of the proceedings of the Adawlut to the Nazim for his confirmation, and to the doubts which have arisen concerning some points of the Mahomeedan Law applied to the cases of which have occurred in the first proceedings.

It was not without much difficulty and great delay that I could prevail upon the officers of the Nizamut Adawlut to open their (19) new court, into which at their earnest solicitation I went in person to introduce them. I should have been better pleased to have dispensed with this ceremony, from the desire of precluding every appearance of the influence of our Government in the exercise of so sacred a charge.

On the same principle I have also cautiously abstained from every act of authority and that Court, except in requiring them to attend to their functions and in looking over their sentences, on which though I have ventured to offer them my opinion, and supported it by the strongest arguments which occurred to me; yet I have always left them at full liberty to follow the unbiased dictates of their own judgments; a delicacy which I esteem due to the characters of the persons who preside in that department, and which, the deference too servilely paid to authority in this despotic country renders yet more requisite in the proceedings of a Court of Judicature professedly acting in obedience to the strict (20) letter of the Law.

As the decree of the Sudder Adawlut in its first proceedings were likely to become a prudent ecc for all future cases to which they might be applied; I was at some pains and employed much time in revising them in the presence of the Daroga.

Such of its decrees as appeared to me disproportionate to the offences committed, or liable from their effects to prove hurtful to the peace and good order of society, I ventured to recommend to the Court for their consideration.

The Proceedings were returned to me, some with the former sentences confirmed, others with the different interpretations of the Law annexed to each, and a reference to the Nazim for his final decision upon them.

They were accordingly transmitted to the Nabob, by the Daroga of the Adawlut, and accompanied by a letter from myself, requesting that he would affix his warrant to them without more delay. At the same (21) time I sent Mr. Middleton an abstract of the proceedings with my own opinion and remarks upon each, and desired him to communicate them to the Begum, before the sentences should receive the Nabob's warrant for their execution.

I crave your indulgence in subjoining to this letter, copies of the said Abstract and of the letter which I wrote to Mr. Middleton on the occasion, which will best explain the nature and ground of my objections.

I have been thus particular in the above relation that I may not appear in the eyes of our Hon'ble employers to have been deficient in promoting the due course of justice, if it shall be judged that it hath, in any respect suffered by neglect or unnecessary procrastination. I again repeat that the Establishment is yet but in its infancy, and that with every other innovation it is liable to unavoidable delays (22) until the first difficulties are removed, and a channel opened for a regular and uninterrupted progress.

On my arrival at Moorshedabad, I made immediate enquiry concerning the proceedings which had been transmitted to the Nabob. I learnt that he had not yet affixed his warrant to them, but waited for that purpose till my arrival, chusing not to confirm such of the decrees as I had objected to without consulting with me upon the subject, nor to give any judgement different from them, being advised not to deviate from the law to which the first decrees were conformable. I desired that he would follow the advice which was

given him, and immediately sign the decrees. He did so, and I left them in the hands of Sudder Ally Cawn, the Daroga, who had accompanied me from the city, with strict injunctions, to cause them to bd carried into immediate execution/him to Mr. /referring Middleton in case he (23) should stand in need of any aid from his authority.

I have also put into his hands the original proceedings of the Moorshedabad Adawlut, which you were pleased to refer to me with Mr. Middleton's letter upon that subject. I should have complied with your instructions in delivering them to the Nabob for his warrant, but that it is necessary in point of form that they should first receive the Fetwas and decrees of the Sudder Adawlut, before the Nizam can pass sentence upon them.

The nature and degree of the punishments which ought to be inflicted on such convicted offenders as are known under the general appellation of Dacoits are worthy of serious consideration. I had already communicated my sentiments by letter in a cursory manner upon this subject to Mr. Aldersey since my departure from Calcutta with a view that it might be brought before the Board; and as you have been pleased to make a reference to me upon it, I shall deliver (24) them more at large.

The term decoit in its common acceptation is too generally applied to robeers of every denomination, but properly belongs only to robbers on the high way, and especially to such as make it their profession, of whom there are many in the woody parts of the district of Dacca, and in the frontiers of the province, a race of outlaws who live from father to son in a state of warfare against society, plundering and burning villages, and murdering the inhabitants. These were intended by the Board in the 25th Article of the Judicial Regulations which declares that all such offenders, shall suffer death, and their families be condemned to perpetual slavery.

Severe and unjust as this ordnance may seem, I am convinced that nothing less than the terror of such punishment will be sufficient to prevail against an evil which has obtained the sanction and ctr force of heriditary practice, (25) under the almost avowed protection both of the Zemindars of the country and the first officers of the Government. Yet if a careful

distinction be not made, the Ruat who impelled by strong necessity in a single instance invades the property of his neighbour, will with his family fall a sacrifice to this law, and be blended in one common fate with the professed decoit and the murderer. In the Foujdareey nothing appears but the circumstances of the robbery for which the prisoner is arraigned. That he is a decoit is taken upon presumption, and all the world are his enemies.

The Moulavies in the provincial courts refuse to pass sentence of death on decoits unless the robbery committed by them has been attended with murder. They rest their opinion on the express law of the Coran which is the infallible guide of their decisions. The Court of Nizamut under whose review the trials pass, and whose province it is to prepare the Fetwas (26) for the final sentence and warrant of the Nazeem, being equally bound to follow the Mahommedan Law, confirm the judgement of the provincial Court.

The Mahommedan Law is founded on the most lenient principles, and abhorence of bloodshed. This often obliges the sovereign to interpose and by his mandate to correct the imperfection of the sentence to prevent the guilty from escaping with impunity, and to strike at the root of such disorders as the law will not reach. It is worthy of remark that the sentences which are recorded in history of strict and exemplary justice in the Princes of that religion, are all of the most sanguinary kind and inflicted without regard to the law and frequently without any regular process or form of trial.

I should be sorry to recommend an example of such rigor for the practice of our Government. I mean only by this short discussion to show that it is equally (27) nefessary and conformable to custom for the sovereign power to depart in extraordinary cases from the strict letter of the law and to recommend the same practice in the cases now before us.

I offer it therefore as my opinion that the punishments decreed by this Government against professed and notorious robbers be litterally enforced

and where they differ from the sentences of the Adawlut, that they be super-added to them by an immediate act of Government. That every convicted Felon and murderer not condemned to death by the sentence of the Adawlut and every criminal who has been already sentenced either to work during life upon the roads, or to suffer perpetual imprisonment be sold for slaves or transported as such to the Company's establishments at Fort Marlbro: and that this regulation be carried into execution by the immediate order of the Board or by an office instituted for that purpose in virtue of a general (28) order or Commission from the Nazim.

By this means, the Government will be released from a heavy expense in erecting prisons, keeping guards in monthly pay and in the maintenance of accummulating crowds of prisoners. The sale of the convicts will raise a considerable fund, if those disorders continue; if not, the effect will be yet more beneficial. The community will suffer no loas by the want of such troublesome numbers, and the punishment will operate as an example even more forcible and more useful than imprisonment, fines or mutilation, the former to a people addicted to ease and who see in such a condition only an exemption from the necessity of daily labour losses much of its terror. Fines fall with an unequal weight on the wealthy and on the indigent; they are unfelt by the first; they prove equivalent to utter ruin or perpetual imprisonment to the last; and mutilation which is (29) too common a sentence of the Mahommedan Courts, though it may deter others, yet renders the criminal a burthen to the public, and imposes on him the necessity of perserving in the crimes which it was meant to repress.

I beg leave to subjoin the following queries for your determination as they have occurred to me in the proceedings of the Adaulat already referred to. I have annexed my opinion to each.

Query I. Whether Fetwa or Decree of the Nizamut Adawlut after it shall have received the confirmation of the Nazim shall be carried into execution precisely in the terms of his warrant, or whether this Government shall interfere in adding or commuting the punishment in cases wherein it shall appear inadequate to the crime or ineffectual as an example?

OPINION: Although we profess to leave the Nazim the final judgment in all criminal cases and the officers of his courts to proceed according to their own laws, forms, and opinions independent of the controul of this Government; yet many cases may happen in which an invariable observance of this rule (30) may prove of dangerous consequence to the power by which the Government of this country, is held, and to the peace and security of the inhabitants wherever such cases happen. The remedy can only be obtained from those in whom the sovereign power exists. It is on this that the inhabitants depend for protection, and for redress of all their grievances, and they have a right to the accomplishment of this expectation, of which no treaties, nor casuistical distinctions can deprive them. If, therefore, the powers of the Nizamut cannot answer this salutary purpose, or by an abuse of them, which is too much (31) to be apprehended and from the present reduced state of the Nazim and the little interest he has in the general welfare of the country, shall become hurtful to it, I conceive it to be strictly conformable to justice and reason to interpose the authority or influence of the Company who as Dewan have an interest in the welfare of the country, and as the governing power have equally a ripe obligation to maintain it. I am therefore of opinion that whenever it shall be found necessary to supersede the authority of the Nazim to supply the deficiencies and to correct the irregularities of his courts, it is the duty of this Government to apply such means as in their (32) judgement shall best promote the due course and ends of justice; but that this license ought never to be used without an absolute necessity, and after the most solemn deliberation.

In many cases, it may not be difficult to obtain the Nabob's warrant for such deviations from the ordinary practice as may be requisite and it were to

be wished that it could be always enforced by his authority, but I see so many ill consequences to which this would be liable both from his assent and from his refusal, that I am rather inclined to propose that every act (33) of this kind be superadded to his sentence by our own Government.

Although this is my opinion upon the question as it respects the rights of justice, and the good of the people, I am sorry to add that every argument of personal consideration strongly opposes it, having but too much reason to apprehend that while the popular current prevails, which overruns every sentiment of candour towards the Company and its Agents, it will be dangerous both to our characters and fortunes to move a step beyond the plain and beaten line, and that, laudable as our intentions were (34) we have already done too much.

My duty compells me to offer the advice which I have given, and to that I postpone every other consideration.

// Query 2. Whether the distinction which is made by the Mahommedan Law, between murders perpetrated with an instrument formed for shedding blood, and death caused by a deliberate act, but not by the means of an instrument formed for shedding blood shall be admitted, and whether the fine imposed on the latter shall be allowed as.....?

OPINION: If the intention of murder be clearly proved no distinction should be made with respect to the weapon by which the crime was perpetrated. The murderer shall suffer death and the fine remitted. I am justified in this opinion by good authorities, even among the Mussulmans, although the practice is against it. I will venture to appeal to the abstract of the proceedings which (35) accompanies this, for a proof of the inequality and injustice of the divisions founded on this strange distinction; besides, the evil tendency which it derives from the little dread which an indigent offender feels of a penalty which he knows can never be literally inflicted upon him, and which I fear is frequently the cause of murder, as it serves to screen the crime of robbery with additional consequences to the criminal. I beg leave to quote an instance in

the proceedings above referred to. A man held the head of a child under water till it was (36) suffocated and made off with his clothes and the little ornaments which she wore. It was evident that his object was no more than robbery, and murder the means both of perpetrating and concealing it. There is too much cause also to infer the extraordinary manner in which the murder was executed was suggested by the distinction made by the law in question, by which he was liable to no severer retribution than for the simple robbery whereas he would have been sentenced to suffer death had he killed the deceased with a knife or a sword, although (37) he might have been impelled to it by sudden passion, and not with a premeditated design. Yet for this horrid and deliberate act he is pronounced guilty of man slaughter only and condemned to pay the price of blood, which seems invariably fixed at the sum of3333.5.4.

Query 3. Whether the punishment decreed by the 35th Article of the Judicial Regulations, formed by the Board, shall be carried into execution without the sentence of the Court of Adawlut or the warrant of the Nazim, and in what manner?

OPINION: Upon this question I have already declared my opinion in the affirmative. I would recommend that every case to which this ordinance may be applied be laid before the Board, and their sanction obtained for its being carried into execution. I submit it to (38) their consideration whether it may not be expedient to appoint some office which shall have it's special charge to record such extra-ordinary proceedings, to prepare them for the judgment of the Board and to execute the orders upon them.

Query 4. Whether the priviledges granted by the Mahommedan law to the sons or nearest of kin to pardon the murderers of their parents or kinsmen shall be allowed to continue in practice, or in what manner the Government shall proceed in such cases of this kind, if it shall be judged expedient to make an example of the criminals in opposition to the letter of the law and the sentences of the Courts of Adawlut?

OPINION: This law though enacted by the highest authority which the profession of the Mahommedan faith can acknowledge pa appears to be

of barbarous construction and contrary to first principles of civil society by which State acquires an interest in every member who composes it, and a (39) right in his security. It is a law, which rigidly observed would put the life of every parent in the hands of his son, and by its effects on weak and timid minds which is the general character of the natives of Bengal, would afford a kind of pre-assurance of impunity in those who were disposed to become obnoxious to it.

If the Nazim cannot be influenced to abolish totally this savage priviledge which we know is not unanimously admitted or the courts of justice to disuse it; I am of opinion that this Government should interfere by its own authority to prevent (40) its taking effect, by causing the sentence to be executed without leaving an option in the children or kinsmen to frustrate it by their parden.

Query 5. Whether the law which enjoins the children or nearest of kin to the person deceased to execute the sentence passed on the murderers of the parents or kinsmen on account of its tendency to cause such crimes to pass with impunity shall be permitted to continue, or whether it shall not be abolished by a formal act of Government?

OPINION: This law though supposed of the same divine original is yet more barbarous than the former and in its consequence more important. It would be difficult to put a case in which the absurdity of it would be more strongly illustrated than in one now before us, of a mother condemned, to perish by the hands of her children for the murder of her husband. Their age is not recorded but by the circumstances (41) which appear in the proceedings, they seem to be very young. They have pardoned the mother. They would have deserved death themselves if they had been so « utterly devoid of every feeling of humanity, as to have been able to administer death to her who gave them life.

I am of opinion that the Courts ofJustice should be interdicted from passing so horrid a sentence, by edict of the Nazim, if he will be persuaded to it, by the Government if he refuses.

Query 6. Whether fines inflicted for man-slaughter shall be proportioned to the nature of the crime as Mahommedan law seems to intend, or both to the nature and degree of the crimes, and to the substance and means of the criminal ?

OPINION: Both. If the fine exceeds the means of the criminal, it must deprive the State of his service, and prove a heavier punishments (42) than the law has decreed him.

VIII.7

33

To

Samuel Middleton, Esq.
Collector of Rajeshahy.

Sir,

I must beg your leave to trouble you with a list of the trials for capital crimes at Moorshedabad and Kishen Nagar which have been submitted to the view of the officers of the Nizamut Adawlut, and I have subjoined to such sentences the opinion I have formed upon revising the trials. These remarks you will please to recommend to the attention of the Nabob at the same time that you present the enclosed letter from Sadder Ul Huc Cawn, Daroga of the Nizamut which contains the Fetwa, or decree of his court upon them.

The commuting of the punishment of death, which is due to high crimes, for a pecuniary composition appears to me very improper on every account; (43) but it becomes still more so from the indiscriminate manner in which this fine is imposed by the officers of the courts of justice. For instead of adapting the Forfeit to the circumstances of the criminal, by which alone it would be made in any degree proportionate to the offence committed, a precise sum is fixed which is levied upon each without distinction, and thus a fine which an opulent men would not feel becomes a punishment of extreme rigor to a man whose means would never answer it.

With regard to the deeut or price of blood imposed for homicide not accompanied by circumstances which denominate it murder or render it capital, as many such cases will occur, I believe I shall take the opinion of the Board upon this pooint as the fine will become an article of revenue and may be claimed by the Nabob, which may be attended with bad consequences if allowed, and the Nabob is to be the judge what crimes are to be (44) punished with death, and what redeemed by money.

It seems that by the opinion of Abba Haneefa, one of the great doctors of the Mahommedan Law, killing is not murder unless it is performed by an instrument formed for destruction, such as a sword or knife, but the disciples and many other learned men have adjudged that the intention and not the weapon constitute the crime, in which opinion I agree totally and think Abba Haneefa an old woman.

However, I have not been able to persuade our judges of the Nizamut to adopt this principle; all xxx I could do, has been to prevail on them to leave the opinion of the punishment to the Nazim, as you will observe, and I hope the Nabob will sentence the murderers to death. I wish you would read (from) the trials and if you agree with me recommend this point to the Begum. I have as much of the milk of human kindness as she can have, though a woman, and (45) follow that natural incentive, as well as the dictates of reason when I rather choose to put a murderer to death than let him live to perpetrate more murders.

In the remarks upon the trials you will observe I have proposed the acquittal of two persons adjudged to pay the price of blood, viz. Cawn Mahommed for striking his slave by which she died, and Yacoob for killing a man whom he found in his apartment at an unseasonable hour and struck, on the immediate alarm which he received from such an appearance on his waking from sleep. It is some days since I read the proceedings but I recollect that both appeared to be perfectly innocent. I refer you to the proceedings for your judgment on them.

On perusing the trials, I am struck with surprise to observe that almost every male-factor confesses himself guilty of the crime for which he is tried (47) although he thereby subjects himself to the loss of life. As this is a circumstance so extra-ordinary in itself, and so very repugnant to the principles of self interest, I cannot help mentioning (it) in hopes of obtaining from you some account of the manner in which this confession is procured, whether it is not made till after conviction, whether extorted or whether won by fix fair promises of forgiveness.

I am,

Yours etc.

24th May 73

Abstract of Trials for Capital Crimes at Moorshedabad and Kishennagur

Sl No.	Names of Accused	Crime	Sentence of Nizamut	Remarks by Warren Wastings
Moorseda-bad 1.a	Deeboo, Cudina, Mya, Shawkor Ally, Mustfa Alyy, Meerza, Dhunna	Decoiting	Death to be inflicted either first cutting off the hand and foot or without that punishment or by the sword	The families of the criminals ought to be enquired after and deprived of their liberty agreeable to the 35th Article of the Judicial Regulations.
1.b	Bannoo	-do-	To be punished with 30 strokes and confined.	As the crime is clearly proved, although attended with circumstances of extenuation, the confinement ought to be perpetual. (47)
2.	Ramnagaut and Mungle	Decoiting	None	Neither accused was formerly tried. By the confession of Bannoo, Ramnaut, charged with the crime of robbery and murder and of instigating the other to abate him in both the crimes. This charge is confirmed by the evidence of the prisoner himself where he declares that the confession of Bannoo is true. Notwithstanding, he appears thus to be the principal in this crime. He escapes because he has not acknowledged in express terms that he is guilty. He ought to undergo a farm trial.

National Library of Scotland: Minto Papers: MS.508: Diary of Warren Hastings: pp.14-50

Sl. No.	Names of Accused	Crime	Sentence of Nizamut	Remarks by Warren Hastings
3.	Ramranny of Bauga	Murder	Deeat	For killing the slave women of Khoomer (?) death ought to be inflicted for this crime.
4.	Ramnat	Murder	~~Death~~ Deeat at the option of the Nazim	The prisoner has confessed that he murdered the daughter of Kewal, an infant of 7 years of age by holding her (48) under water till she died and afterwards stealing the ornaments she wore. As the intention of the murder is clearly marked by the manner of the deceased's death and by the subsequent robbery, the punishment ought to be death.
5.	Koober ? Jiwandas of Booda-para	Decoiting	Stripes or imprison-ment	Tried for stealing 18 cows (in company with 15 persons) value from 2 to 10 rupees each, and in the opinion of the Court when the amount received by each accomplice is under 10 dersha (?) It is not reckoned decoiting. However, as the degree and the nature of the crime depend on the intention and first design of the criminal rather than on the issue of it, the criminal ought to have been sentenced to death as a decoit, not to a lighter punish-ment for petty larceny as it is adjudged by the Musselman Law. Since it is approved that he with a band of (48) /w robbers to a village with the design of plundering it, though unsuccessful and unattended with the bloody consequences which often accompanies such enterprises, he was not less a decoit then if he had met with an oppositi and had murdered half the inhabitants, or had come away with a richer booty. Nevertheless, as the sentence exten no farther than to imprisonment it ought to be perpetual as the man will hardly change his way of life by having suffered so little for it.

	Sl. No.	Names of Accused	Crime	Sentence of Nizamut	Remarks by Warren Hastings
	6.	Khaim Mahommed of Bazar (?)	Murder	Deeut	For beating his girl so that she died. But as it does not appear that there was any intention of murder an the Mahommedan Law as well as ours admits of moderate correction to a slave or even hired servant, the prisoner ought to be acquitted or forgiven.
Kishen nagur	7.	Dujee, wife of (?)	Adultery and an attempt to cut her husband's throat	Rajim (?) or stoning to death	No remarks
	8.	Kidwah	Adultry with the former	Rajim, if married or to receive 100 lashes	None remarks
	9.	Yacoob	Murder	Deeut	As he struck a man whom he found in his apartment in the night, he does not appear to be guilty.
	10.	Hirranee Moonchee (?)	Murder	Deeut	Merits death.
	11. a	Namdar (with 3 others)	Murder	Deeut Rs. 3, 333⅓	He confesses the crime and merits death.
	11. b	Pamchoo	Present when the body was taken away	Stripes	Just

Sl. No.	Names of Accused	Crime	Sentence of Nizamut	Remarks by Warren Hastings
12. a.	Loocha Peith, Raja Kaigh, Gocul " , Doonga, Gaurallee Kerrea Pythe, Daboa " , Chaund " , Ganga Moocha, Khezzor, Dhunnoo, Rananau Moocha and 26 others	For Decoiting and Murder	To have the right hand and left foot cut off and then to be put to death.	Just
12. b.	Mirjha Ramnaut.	Privy to the murder and shared in the booty	Stripes and imprisonment	None remarks

Fort William
24th May 1773

VIII.9

Cornwallis to Col Call, President General Court Martial

Chunar, 31st October 1787

Sir

On perusing the proceedings of the General Court Martial, of which you was president, upon the trial of Leonard Channing I found to my great astonishment an opinion given by the judge advocate general, that if the prisoner, was drunk, his intoxication should be considered as a alleviation of his crime.

As the judge advocate general has admitted that his opinion, in this instance, is contrary to that of all lawyers who have ever existed, it is unnecessary for me to explain how completely the adoption of this principle would destroy all civil society in the world. But as this doctrine does not appear to have been contravened by the court, I can not help entertaining more apprehensions lest it may have had an influence upon them, and that they might have conceived as military judges; they could assume a greater latitude and may think more philosphically, than all lawyers and divines (according to the judge advocate general) have hitherto done.

I must therefore desire that you will state in the strongest manner to the members, that such an idea would not only annihilate all military discipline, but it would put it in the power of any mutinous ruffian, who either was drunk, or had th out to pretend to be so, to take away their lives, and those of their brother officers, without any risk of attoning for the offence, by the forfeiture of his own.

I am Sir,
Your most obedient and
most humble servant
(signed) Cornwallis

Colonel Call

Lt Col The Call to Earl Cornwallis

To
The Right Hon'ble Charles, Earl Cornwallis, K.G.
Governor General and Commander in Chief

My Lord

I was honoured with your lordship's commands, dated Chunar October 31, 1787 and in consequence I requested Col Pearse to issue an order to reassemble the members of the General Court Martial who sat on the trial of Leonard Channing.

We met this morning when I laid before them your lordship's sentiments on the judge advocate general's opinion delivered to the court at the close of Channing's trial. I have the pleasure to assure your lordship that previous to our meeting I was convinced that not a single member of the court was in the smallest degree influenced by the doctrine held forth by the judge advoca-te general when they passed their sentence and they

PRO30/11/20 and 21 folio 60 and 26 respectively in the Public Record Office, London.

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now authorise me to assure your lordship they were not.

I beg leave to enclose for your lordship's perusal my address to the members by which your lordship will see our motives for adjudging so moderate a punishment to the prisoner. I have the honour to subscribe myself your lordship's very respectful and obedient humble servant.

Fort William 12 Nov 1787 — The Call (Lt Col)

(opinion of court follows on folio 28-9)

Collector, Chittagong to Earl Cornwallis

To — Chittagong, 16th Sept1788
The Right Hon'ble Earl Cornwallis
Governor General of Fort William &c &c

My Lord

Were I not fully convinced that the rectitude of your mind will put a liberal construction on this address, I should not take the liberty of presenting it to your lordship.

Having now been upwards of 20 years in the country, during which time famine at three different periods has brought on distress and death of many thousands, the cause of which being generally attributed to long continued drought, or long continued rain, which without doubt does sometime occur. But long experience has taught me that famine in Bengal greatly originates from another cause viz the long and expensive war in which Mr Hastings was engaged forced Government to strain every nerve to increase the revenue and in the year 1780 an increase in this province of three annas on each rupee revenue was imposed and has I believe ever since been levied. To this suffer me to add the tyrannical custom of the East still prevailing among the natives, the superior continuing to oppress his inferior to such an enormous degree, that the real cultivator of the land is often forced to fly from his home to seek ~~mmk~~ refuge in some other situation. From this undoubted cause large tracts of land lies waste and uncultivated. And I am humbly of opinion that in proportion to the degree of oppression, may be traced one great cause of famine, distress and death to so great a number of the inhabitants of this country.

I trust to your lordship's candour, and to the purity of my intentions that it may not be deemed presumption in me to add, should your lordship in your Government deem it eligible and expedient to make a new and more permanent settlement (than from year to year) of the landed revenue, whether it might not tend greatly to prevent future misery and famine in this country which with due respect, I humbly submit to your lordship's consideration and beg leave to subscribe myself,

My Lord, your very faithful and most humble servant

B. Cunningham

PRO 30/11/26 folio 103-4, Public Record Office, London.

VIII-11

Death by Poisoning in Contai 1789

H.M.W. Hewett, Magistrate of Contai to Remembrancer of Criminal Court, Fort William : 26.1.1789

Humanity requires that I should point out to you, with a request, that you will notice it to the Right Hon'ble the Governor General, the sentence of 39 stripes of a corah passed on Bydaachee (the sister of Govind Misser) a girl of not more than 14 years of age, as she appears to have fallen, it is to be hoped indesignedly, into the schemes of the other two prisoners, Nultee and Bonnee Misser. It is scarcely possible to believe that the human heart at so early an age , would be so entirely depraved, as knowingly to engage in aplot of murder, which brought her brother to the grave, as he was in fact the only protection she had to look up to in life.

Nawab's Order

Bonnee Misser to be punished with 39 stripes with the Korah; Bydaachee, and, Nultee to receive 39 stripes with the Korah each, and to be imprisoned.

Board's Opinion

The Board are of opinion that Bonnee Misser, Nultee and Bydachee, stand fully convicted, having contrived the death of Govind Misser.

Government Resolution

Agreed therefore that the sentence of punishment passed on them by the criminal court, be carried into execution, and that the Naib Nazim be further requested to give the necessary order for their being detained in prison for life.

Agreed also that the Magistrate be directed to apprehend Ramdoss Byragee, who appears to have furnished Bonnee with the poison for the purpose of taking away the life of Govind Misser, as stated on the deposition of the said Bonnee Misser, and to deliver him over to the Darogah of the criminal court to take his trial.

IOR:P/51/36 (15.5.1789) pages 13-27; above extracts from pages 14 and 26-7.

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VIII:12

Punishment for Forgery 1789

From Resident of Benares to Governor General: 28.4.1789

...From the enclosed opinions of the Adawlut of Ghazeepoor, and Benares, on the punishment suitable to such offences, your Lordship will perceive that the Mahommedan law, is exceedingly mild, with regard to the penalties attached to acts of this nature, which in our country, incur even the highest; all therefore, which I thought myself justifiable in doing was, to condemn those found guilty, to a confinement not exceeding four months, to any, and shorter to several, besides which I have ordered the lands of one, or two held under the forged deeds, and which had been procured with a view to strengthen the holders claim, to the same to be resumed, and I have directed one man (Ameer Ali) to be detained in confinement, till he produces the forged Pirmann, which he acknowledges to have procured, from the Cauzyship of one of the Pergunnahs, all which will be seen by the enclosed list, and abstract of the names of the parties; the charges against them, and the sentences passed.

But with regard to Dunnoo Laul, from the sentiment so generally entertained in this country, of the very slight degree of guilt, incurred by Forgery and the letter of the laws founded thereon, combined with my belief of the person in being a little wild, or disordered in his imagination: I really feel a degree of hesitation in allotting a fit punishment for him; and, referring therefore to the enclosed opinion, thereon delivered by the Magistrate at Ghazeepoor (which as far as regards the facts asserted in it, of the prisoner's species of folly and present total helplessness, I can fully corroborate) I beg to be favoured with Government's instructions on that head, as to how far the opinion of that Magistrate, in regard to Dunnoo's punishment, and future provisions, including that for his family, is to be confined to; meanwhile Dunnoo will remain in jail on the usual allowance.

28.4.1789 Jonathan Duncan

IOR:P/51/36 (15.5.1789) pages 35-58; above extract pages 37-9; In all 29 persons sentenced; Government Resolution page 58.

Punishment for Forgery 1789

Questions to the Adawlut of Benares(by Resident Duncan) with Answers

Question 1 What punishment is due, to that person, who from motives of gain, prepares and delivers to others, false sunnuds, and other vouchers for free lands, offices & c as from Government, and confesses his having done so ?

Answer Such a person is subject to Tazeer, and Tazeer is of various kinds. The Tazeer of the noble of nobles, that is the learned, and the descendents of Mahommed, is only giving them notice that they have committed such an improper act; and the Tazeer of the Ashrufer noble, that is of the class of the Omras, and the inhabitants of villages, is notice, and bringing them by force to the Cauzy's door; the Tazeer of the middling class of the people, that is shop and market people, is bringing them by force to the Cauzy's door, and confinement; and the Tazeer of the low class of people is (including all the above specified articles) beating or stripes, so as that such beating, do not extend to 40 stripes, and the fixing of the extent of the Tazeer for each person, depends on the discretion of the Hakim.

Question 2 What is the punishment for those persons who procured the said forged deeds, in their favour, and who confess the same ?

Answer When any such person confesses, he admits, his having committed a breach of the law, and the Tazeer is also to be inflicted upon that person, according to the law. The different kinds of Tazeers are mentioned in the first question.

Extract from the opinion of the Judge of Ghazeepoor, in respect of the sentence to be passed on Dunnoo Laul, found guilty of repeated forgery.

What I and the officers of the Adawlut of Ghazeepoor, after enquiry, think ought to be done to Dunnoo Laul, and the other imposters is as follows:

As I am informed by the Mussulman books of law, and the Hindoo Shaster and the historys of former kings, that there is no fixed punishment for crimes of deception; but that it rests/with the Resident. It is proved beyond doubt, that Dunnoo Laul has forged sunnuds, perwannahs, and bonds. The forged papers have been seen by the officers of the adawlut, and those who caused them to be forged have confessed their crime, and produced the papers, therefore they ought to be punished, and what the people of the adawlut think, they ought to suffer, is, that those who are of rank of a sacred character, and who from want of reflection committed the crime, their punishment should consist only in being brought as far as the adawlut, from the shame of which it is probable, that neither they, nor their children will ever be guilty of like practices; and those of middling rank, who though they should promise not to do the like again, I know are not to be effected by shame, and therefore till/be /they reprehended, and have their ears pinched, it is very likely

/entirely with the Magistrate for the time being, therefore I shall write what I advise, and think proper to be done. The execution of it rests

likely, that they may return to the old practices; and of those implicated in this cause, who are of the lowest rank, who would not mind having their ears pinched, or being reprehended, it will be necessary to confine them for some time, till they thoroughly repent, and others are deterred by their example from doing the like.

And as to Dunnoo Laul, who is the source of all these rogueries, he would be worthy of the severest kind of Tazeed, that is to lose his hand or fingers; but in consideration of his advanced age, and of the species of insanity with which he is affected, and the prevalence of this crime, according to the present mode in this country: and as he is needy and has a family of six daughters unmarried, and one little boy, and his lod mother living, and a sister unmarried who have no support, but from his hands; and having no other art than that of writing, and composition; the members of the adawlut after having well-weighed the subject think, that Dunnoo Laul ought to remain some years in prison, since as he is a kind of fool, and madman, his promises, and repentence cannot be relied upon, where it is probable, that if he were to be released he might be led again by others to commit the same crime; therefore he should be confined till his son arrive at years of discretion, or till one of his daughters be married, and that such person be responsible, and provide for the family, and enter into security in the adawlut for the action of the said person. But/till that time, according to the custom of the adawlut, he should have something settled on his family from the Company's treasury, not less than 4 annas daily, from the expenses of the jail of Ghazeepoor, to the end, that his family may not die, who have not committed any crime, and that all lands, villages or money, that has been procured by these forged sunnuds, should after enquiries be resumed, and that the rights of sundry poor people who have been deprived thereof, through the forged sunnuds, in question, may on proof be restored to the same.

RESOLUTION OF GOVERNOR GENERAL IN COUNCIL: 15.5.1789

Agreed that the Resident at Benares be directed to sentence Dunnoo Laul to perpetual imprisonment, making him the usual allowance, and that the setting the sum of 4 annas per day upon his family, as proposed by the judge of Ghazeepoor be left to the discretion of Mr Duncan. Agreed also that the sentences passed by the Resident on the accomplices of Dunnoo Laul be confirmed and that he be desired to state, whether it would not be advisable to oblige them to refund the amount of whatever pecuniary benefits they may have derived in virtue of their forged deeds.

IOR: P/51/36 (15.5.1789) pages 53-8.

VIII.13

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A Case of Koorh at Benares in 1789

Statement by brother

(On 18.6.1789)... I arrived near the aforesaid garden when the day was clearly set in. Who do I see but Beechuk, my brother, his mother, and three other women of our family, who were sitting on the ground near the garden. I cried out from afar "I am at liberty and coming to you. Do not touch the life of any of the women." When we meet I heard of the house being plundered and the women dishonoured, which did not happen in my presence. It made me angry. I told my brother that we were not fit to live. My mother who was near sixty years of age was then ready to offer up her life and said, that when she was dead she would not suffer Gowree and Poorunder to live after this. I and my brother carried our mother to the Walla at the village of Kutha. My brother struck her one stroke on the neck with his scimitar, and her head was at once separated. We killed our mother in vengeance (against) Gowree Chowry Poorunder, and Ram Pershad, zemindar of Kutha.

Statement by wife

...Afterwards we all went to the Wallah in the village of Kutha where my husband's mother cried out to the men of it, who were hardby, restore me what has been plundered or I will kill myself. No one attended to her. My husband killed his mother by the stroke of a scimitar, which severed her head from her body. When she was going to be slain she raised her voice, and said she would blast Gowree Chowdry and Poorunder. My husband slew his mother in vengeance to them.

...On the beforementioned date Baboo Roop Sing sent Girdhari Laul his Naib, and Ram Nawaz Kanoongoe to enquire into the above stated particulars. They arrived at the said village and attempted by caresses, and smooth speeches to prevail on the man, who slew his mother to permit her funeral rites to be performed. He said "as the Brahmins in their religion awaken their dead, so will I. The corpse shall be buried in the earth, and I will cause it rise again by the sound of a drum." The corpse is preserved in a garden situated to the southward of the village and Bichauk, his brother, and the other people of the village stand guard over it. Wherefore Girdhari Laul, and Ram Nawaz Kanoongoe had taken down and did bring the above representation.

Statement of Beechuck

... Gowree Brahmin altho the Aumil, had given them a Farikh Khutty and Pottah, had in this manner without rhyme or reason oppressed them.

...revenue according to the proportion of the full natural produce (kham or kutcha) instead of by the mode of Surbusta, or so much in the gross, as I had before been used to pay.

IOR: P/51/49 (dated 21.10.1789) pages 732-838. Also P/51/53 pages 614-23, Res:642. Above extracts pages 739, 746-7,747-8, 750, 788.

VIII. 14

PARDONING OF MURDER BY NEXT OF KIN

Magistrates Reply to Query by Government on its Rights

Resident at Benares to Earl Cornwallis: 18.12.1789

My Lord

I have now the honour to submit the enclosed translations of the answers to the query proposed by Government, to the criminal courts within the zemindary of Benares, relative to the discretion left to the Ruling Power in cases of murder, where the next of kin pardons the murderer.

The two persons Bhakry and Khush Hall, on whose cases this question was put, remain in custody till your Lordship's commands be received regarding them.

I remain with respect &c

Benares at Ashruff Ghur
the 18th December 1789.

Jonathan Duncan

Translation of a Letter from the Nabob Ali Ibrahim Khan Magistrate of Benares, to the Resident of that Place

Your letter of the 14th of September arrived; you have mentioned that on consideration of the trials of Khush Hall, and Bakhri, one of whom, killed his wife; and the other his neice by the sword; the orders of the Right Hon'ble the Governor General in Council have been issued, that a requisition be made to the criminal courts within the districts of Benares, to know whether in the cases of the legal claimants on the part of the murdered women having forgiven , and spared the lives of the murderers, kessas, or capital punishment may, or may not take place, and be inflicted on them in the view of preventingthe frequency or recurrence of murder, consistently with the practice of the emperors of the race of Timoor ?

My kind Sir, I have in pursuance of your writing, inspected several historical books, to enable me to write a clear and satisfactory answer, but up to the 21st of September 1789 I have not been able to trace, that after the pardon of the murdered perron's relations any of the emperors of the Timoorian race have ordered capital punishment to be inflicted, on the culprit; yet I am still in search, and whenever I shall find, such a thing in the Books, I shall advise you. In the book called Hudeekut ul Sufa, which is a book of credit, and records the acts of Timoorian princes &c down to the time of those now in paradise, the emperors Allumgeer, and Behadur Shah, there are two instances of judicial orders passed by two kings, who reigned in Delhi before Timoor, or Tamerlane; of which I have extracted the terms, as related in the said book, and send the same enclosed. But these judicial orders, are not conformable to the question proposed by the Governor General. If I can find an answer applicable to the question I shall represent it.

IOR:P/51/53 (14-30.12.1789) Pages 540-600

Translation of the Enclosure (with letter of Benares Magistrate)

A certain person represented privately to Sultan Mahmood, that the king's nephew came every night to his house, and putting him out of it, spent the whole night with his wife, in pleasure, and revelry, whilst no one had the courage to set forth the circumstance. The Sultan commanded him to keep this secret veiled, and that when the young man should again enter his (the representant's) house he should advise his majesty thereof, and that if the porters refused him admittance, he should proceed to such a place, and there gently complain, which should bring the king to him. In this way, when one night, the king's nephew had according to his wonted custom, gone into that man's house, and was immersed in delight, the complainant taking the king only along with him, shewed the state of the case; upon which the king seeing both parties asleep together, did, lest a compassionate regard to, or view of his nephew, might impede or bar the kissas, or capital punishment, first extinguished the lights at their bed-head, and then separated the prince's head from his body, and as the Sultan had in his own mind made a fixed determination not to taste of water till he had killed the said prince, and that from the day of such resolve, till the date of the execution several days had elapsed; the Sultan was so urged by thirst, that he first allayed it by water from a Fakeer's house immediately after killing his nephew and then departed.

Secondly

One of the confidential slaves of the Sultan Ghyassuddin, named Hybut Khan having when intoxicated killed a Fraush, (a servant of that denomination); the Fraush's wife complained, whereby upon Hybut Khan having received 500 stripes was committed to the complainant; the Sultan saying, he was hitherto my slave, now he is thine, and thou mayest either put him to death, or spare him as thou shallst wished.

I OR:P/51/53 pages 540- 600

Translation of the Reply of Fakhruddin Mahommad Khan, Judge of the Moolky Fouzedarry Adawlut

On the 14th of September 1789, a precept was issued to the officers of the provincial courts of criminal justice established in each of the four divisions of Benares, purporting, that the Governor General in Council, on consideration of the cases of Khush Hall and Bakhree who had slain, the former his wife, and the latter his neice, upon the plea of incontinence had commanded, that a qustion should be put to the courts of criminal justice in the zemindary of Benares, whether the law of retaliation could be enforced agreeably to the practice, that has prevailed in the reigns of the emperors of the Timurian Dynasty in Hindustan with a view to repress, and prevent the commission of murders; notwithstanding, that the next heirs of the deceased had, remitted, and pardoned, the offence of the murders.

On the 5th of October following an order was also issued to me desiring, that I would transmit an answer to the question aforesaid.

Hon'ble Sir; to the best of my knowledge, and that of the sages of the criminal court, none of the emperors of the Timurian Dynasty, has ever caused the law of retaliation to operate, where the next heirs have pardoned the offender, nor have I met with any instance of the kind in the different historical records, or annals to which I have had accoess.

I have thus represented whatever was within my knowledge.

Translation of the answer from Lalla Dukshy Sing Magistrate of Mirzapoor, 6.10.1789

I have been honoured by the receipt of your two orders of the 14th of September and 5th of October 1789 as received on the 19th of September and 6th of October.

You have been pleased to mention that in respect to the causes of Khushhall , and Bakhry, one of whom killed his wife, and the other his neice by the sword on suspicion of incontinence the Right Hon'ble the Governor General in Council order has been issued to this effect, that information be requested from the criminal courts within the districts of Benares, whether notwithstanding the heirs of the deceased have spared the lives, and forgiven the blood or murder of the murderers kessas, or retaliation may not be inflicted according to the practice of the kings of the race of Timoor on the latter, in the view to prevent the frequency of murder ?

My honoured Sir, the legal Fetwas, which according to the books Shorah Vokaya, and Hedaya have been caused to be written by the Molavy Abdussibhan are sent enclosed and the particulars will thence become known to you. In a case of this kind where the heirs of the murdered shall have spared the lives, and forgiven the blood of the deceased, kessas, or retaliation is not proper, according to law; and the administration, or manner of the Dynasty of Timoor were not contrary to the Shera, or Law. In time to come the ruler of the country is, in the way or for the sake of punishment, ort discipline authorised, or has a discretional authority.

I

Enclosure being the Law Opinion on the Question
(with letter of Mirzapoor Magistrate)

Kessas is barred by the death of the Katail, or slayer, or by the relations of the deceased pardoning the murder, or by their compromising for a greater , or less property. If a man pardonn another for a crime, as for instance for striking off the others hand, and the possible consequences thereof such as death; should that other person die by the loss of his hand, the pardon is to extend to the said effects.

Again, a man having smote off another's hand, who pardons that act, and thereafter dies thereof, the person who struck off the hand, is to pay Deeit according to the opinion of Huneefa, but Yusif, and Mohummud, have said, that he who struck the hand off, is not justly liable for anything because the pardon of the first act involves, or comprehends the consequences being simply a cutting off, if further bad consequences, such as mortification do not ensue; and slaying if/further /such fatal consequences do ensue. Abu Huneefa grounds his opinion upon this, that he whose hand was smote off pardoned only that much and that by the ensuing bad consequences which ended in death, it appeared, that this cutting off of the hand, was in reality killing, and not simply amputation; yet that kessas, or capital retaliation does not ensue, because of the doubt in respect to the pardon, for cutting off the hand for Hudood, and kessas are barred by reason of doubts about the pardon.

Again a person struck off another's hand, which the latter pardoned and thereafter died. In which case Deeit is to be exacted from the property, but if the pardon was general, that is, from cutting off the hand and its consequences, then Deeit doth not ensue.

Again when one of the heirs pardons a murder, or compromises for a valuable consideration, then the rights of the other heirs become barred as to the exaction of kessas, but they are entitled to their share of the Deeit.

IOR:P/51/53 pages 596-600.

Translation of the Reply of Kermullah, Mufty Magistrate of Jaunpoor : 15.10.1789

I have been honoured by the receipt of your commands, under date the 14th of September 1789, purporting that the Governor General in Council on consideration of the cases of Khushhall and Bahrree who had slain, the former his wife, and the latter his neice upon the plea of incontinence, had demanded, whether the law of retaliation could be enforced agreeably to the practice of the emperors of the Timurian Dynasty, with a view to prevent the commission of murders, notwithstanding that the next heirs had remitted, and pardoned the offence of the murders.

Honoured Sir I have examined the annals of the Timurian Dynasty, which are received as authentic in this country such as the Timurnamah, and Acbernamah; but have not met with any instance of an emperor of the Timurian race, having enforced the law of retaliation with a view to the prevention of crimes, when the heirs of the deceased had remitted, and pardoned the offence of the murders. The emperors of the Timurian Dynasty were professors of the holy faith and the apostolic law; and they regulated their practice thereby, for no instance appears in the books, in which their actions are fully detailed of their having ever acted in contravention of the holy law.

An Earlier Decision on Khushhall (pages 230-45 of P/52/6 ?)

(proceedings in case) ... your wife is dead, and this is the English Government. Khushhall will be put to death. "Why do you occasion his death? Do you give a Razynama". Nihal answered by saying "I will bring Oudan Patik, of the village of Nisahpoor, and get the said Patik to become surety for the prisoner on his being released. "... ..."They did not desire kissas for the death of Sakronia but only that Khushhall, the murderer be banished from the four sircars of Benares."...."I desire nothing from Khushhall in exchange for the murder of Sokronea; but this much I do desire that Khushhall the murderer of Sokronea aforesaid may be ~~banished~~ expelled from the four sircars of Benares."

Order: Resident at Benares be directed to sentence Khushhall to perpetual imprisonment and hard labour.

IOR/P/51/53

Translation of the Reply of (Omer) Amaullah, Magistrate of Ghazeepoor

On the 6th of October I received the honour of your command bearing date of the 5th of the same month, and requiring me to transmit my answer, without delay to the precept which had been previously directed to me in the case of Khushhall and Bakhree.

Honoured Sir, I certain had received the former order purporting, that in consequence of the murder committed by Khushhall, and Bakhree on the wife, and neice respectively the Governer General in Council had commanded, that a question should be put to the courts of criminal justice in the zemindary of Benares, whether the law of retaliation could be enforced, agreeably to the practice of the emperors of the Timurian Dynasty in Hindustan with a view to prevent the commission of murders, notwithstanding that the heirs of the deceased had remitted and pardoned the offence of the murders.

Honoured Sir, the ~~xx~~ solution of this question is not to be found in the law books, but in histories, such as the Tsurnamah, Shajjehannamah, Aalamgeernamah &c. As I have not thought it proper to submit any reply to the above question without previous enquiry, and examination some delay has unavoidably happened.

...The emperor Jellaluddin Acber has in the regulations which he sent to the magistrates of his dominions, in India, set forth, that the administration of justice, and of the duties of government, depended on watchfulness, since in like manner, ask by the want of vigilance in the shepherd the flock, and herd strayed and separated so did the negligence of the Magistrate occasion the heaviest injuries to the subjects. Therefore it was the duty of the Magistrate to weigh and appreciate, the state of men, and things, and to look on all with an eye of benignity, and to punish, or chastise all classes of men according to situations, since to look coldly on a man of merit, was to such a person equal to death, whilst to those of inferior or low qualities even blows, and drubbing and stripes were ineffectual. That some were to be put to death for one crime, which others for sundry offences were only to be beaten and chastised by way of discipline. The offences of others again, were in a thousand instances, to be overlooked. That in short the duty of administering justice, and the trust of inflicting punishment were the most arduous of all duties, which could only be duly effected by the aid, and grace of the almighty, and that more especially in what regards the putting to death and shedding the blood of mankind, who are the work of the hand of God, the greatest and most mature consideration was necessary, since to restore life is not in our power.

I come now to the ultimate purpose of this address, which is to submit my own imperfect opinion on the cases which form the subject of reference.

It appears to me nececsary for a just judge to ascertain from the neighbours and from their relations who may be

IOR:P/51/53 (30.12.1789) pages 540-600. The above extract is from pages 549-51 and 587-94.

most depended on, (as in every class some such are to be found) the circumstances and situation of the parties in these causes, that is, of the murderer, and the murdered. Let the state of circumstances be then weighed in the scales of sagacity. If the murderer be considered in a respectable worthy point of you, and as a man of prudence and discretion by his relations, and those of the tribe, and that heretofore he shall never have been guilty of any fray, contention or unjust homicide or deceitful practice, and that before this murder , the men never had no ground of discussion, or ill-will towards the murdered, and that no interested or other personal view, shall appear to have influenced him, or if the murdered person be defamed, and spoken of disrespectfully by the vicinity, and her relations for her indecent and loose life, and fornication, in such case according to the legal institutes, as well as to common sense, the slayer has nothing against him for having put to death such person even altho her death, since it may be that the murderer or slayer having in his sound judgement be a spectator of the parties, in their act of criminal intercourse, was unable, from the excess of his regard, to bear such a sight, and was therefore excited to kill both parties, but may have been prevented from laying his hand on the fornicator, and have been able to effect his purpose on the woman only. Such a slayer shall not be questioned for such slaying; as is contained in the Fetava Serajeea. If on the contrary that murderer or slayer be an evil-doer, who has often committed such evil deeds, and acts of perfidy, and deceit, and of blood shedding, and promotion of quarrels, or that he had before any strife or contention with her, and the same be known to their connections, or if that murdered woman was known to be pure, innocent, and of good fame among her neighbours; under these circumstances it is the duty of a just judge to put to death such an evil murderer; notwithstanding that the heirs shall from worldly consideration have pardoned , and forgave the kessas, and spared the life of the murderer; and the extirpation,and rooting up of a weed of such infamous groth, is to be viewed as an act of incumbent duty, in like manner as is written in the Futeva Talee. That the Imam Abul Cola, being questioned about the punishment of evil doers , who are proved and addicted to evil deeds, and who diffuse among mankind strife and enmity, and make reports thereon to His Majesty; the said Imaum answered, that the putting to death of such a person was among the duties that are incumbent, for the purpose of removing the evil of appeasing strife and promoting the general welfare. The Imaum Shiya of Bulkh said, that in the case of an evil doer who prided himself, on unjust homicide, and bent his whole views to schemes of overthrowing others, and in contention; and raised strife among those who were attached to each other by bonds of amity and who threw suspicion and distrust on the people of God, reported his own invention to the ruling powers, and followed evil machinations to the general disquiet, and disturbance, the killing of such a one, was allowable, and he might be put to death wherever met; and the act would be meritorious at the last day.

The above is what appears to me, Molavy Omerulla, on the question propounded relative to the two murderers, one of whom has killed his wife, and the other his neice. The order now rests with you.

For the rest, to make a just judgement, and to hit upon what is truly most right, proper, and fittest, which are

points concealed behind the veil of obscurity; is not likely, or easy to be in any case attained; whether by the most learned and enlightened Doctors, who are the pillars of religion of the Prophet, or by the followers , or adherents of the sucessors of the Prophet who have laboured for a length of years to ascertain the truth, and to walk in the paths of righteousness. The above being written in a few moments, and hastily, in the beginning of the month of Moherem at Heram, and the commencement of the Hegery year 1204, it is possible that I may hereafter meet with some law book in which clear example, or cases may be found exclusive of what hath been here committed to writing and from which I myself may profit, and in that event I shall report the same.

Note by Resident on Opinion of Omerullah

On perusal of the original of the above, a letter was by the Resident written to the author, Molavy Omer Ullah, judge and magistrate of Ghaseepoor expressing his thanks to the said Molavy for the pains he has taken, in reporting the above information, in reply to the question transmitted to him, and mentioning his (the Resident's) belief, that the perusal would even prove satisfactory to the Right Hon'ble the Governor General in Council; at the same time requesting, that the Molavy would mention to the Resident, the book, or authority (as he has not quoted it) from which he relates the case of the son-in-law of Sultan Ahmed of Guzerat (as being a case in some respects greatly in point to the causes under consideration) specifying also the date when Shah Ahmed reigned and his family or dynasty.

Read the answer as received to the above question:

On the 18th of December promising shortly to collect and transmit all the particulars about Sultan Ahmed Guzerati, as far as the same can be traced from books of history.

Resolution of Government: 30.12.1789

Ordered that Bhakry and Khushhall be sentenced to perpetual imprisonment and hard labour. That should any objection occur to keeping them to hard labour, the Resident be directed to report the same to the Governor General in Council for his further orders.

IOR:P/51/53 The last three are from pages 595-6 and 601.

VERDICT IN CASE OF ATTEMPTED POISONING 1789

VIII.15

Benares Resident to Governor General: 8.5.1789

...Although in the lenity in the law, be in matters of a criminal nature, preferable to rigor; yet as it seems to me doubtful, whether the punishment awarded in this instance (in conformity no doubt to the Mahommedan law) for an acknowledged attempt tp poison, may not be considered, as following short of what is required by the fundamental principles of justice; I am therefore desirous of obtaining your Lordship's approval, before I sanction the present sentence; and I wish also to bring under the cognizance of Government, that usage of the Mahommedan law courts, which (as appears from the trial) admits of men, (standing, for instance, in such situation as Salyar Khan) to purge themselves, by swearing to their own innocence.

Decision of Benares Court (enclosed with above)

... Salyar, who has however, been acquitted by the court, on his making oath to his innocence; and as to Azeez Ulla, and Laul Mahomed, they are in the opinion of the court , liable only to Tazeer, or chastisement, not affecting life or limb, altho there seems no doubt but they meant to cut short the life of Zeman Khan.

Resolution of Governor General in Council: 29.5.1789

Azeez Ulla and Laul Mahomed, who have admitted the guilt, and design to poison Zeman Khan at the instigation of Sialar Khan, be kept in confinement for two years, at which time they may be released and permitted to remain in the district of Benares, upon condition, that proper security has been previously given for their good behaviour, otherwise they are at the end of their confinement to be banished from the district of Benares and the Company's other territories.

With respect to Talyar Khan his guilt is so evident to the Governor General in Council, that he must be banished forthwith, ... under a warning, that if he should ever be found afterwards in either, he will subject himself to perpetual imprisonment.

IOR:P/51/36 (29.5.1789) pages 611-44. above extract pages 614-5 and 644 (?)

VIII. 16

BENARES RESIDENT URGES MODIFICATIONS IN MAHOMMEDAN LAW

Resident, Benares to Governor General

...It cannot perhaps be too often repeated or seriously considered, that the Mahommedan criminal law is in many respects very ill adopted to this country, and state of society; and that some of its institutes, lead evidently to the encouragement of crimes; and more especially of the greatest of all, viz, murder; by the facility with which the ~~kinsm~~/of the deceased are in general /heirs induced to pardon the criminal.

I flatter myself that your Lordship's administration will be distinguished, by a reform in this, as well as in the other departments of government; an abrogation of this single law, by which the pardon of murder is left to the option of the nearest of kin, would I am persuaded alone save many lives.

Resolution of Government: 10.6.1789

Ordered that the Resident at Benares be directed to cause the sentence of death passed on Ramzanny to be carried into execution, and that he be acquainted the Governor General in Council does not require him to transmit capital sentences to him previous to their being carried into execution. That should any cases of a capital nature occur upon which he may be desirous of receiving the orders of the Board, he is at liberty to refer the sentence to them, and suspend the execution of it till such time as he shall receive their sanction for that purpose.

That he be further informed that the Board are fully convinced of the end tendency of that part of the Mussulman law by which the pardon of murder is left to the option of the next of kin, and that they will hereafter take into consideration the propriety and expediency of abrogating it.

IOR:P/51/36 (15.5 to 15.6.1789) pages 948-58. Extracts pages 950 and 957-8. Resident also states that he has made arrangements for the public execution of those sentenced to death (?).

VIII·17

Questions to Magistrates and Collectors on Criminal Justice asked by Earl Cornwallis: 1789

1. What length of time is ordinarily consumed between the commitment and sentence on prisoners? This is to be illustrated by instances of the shortest and longest periods within each Magistrate's knowledge.

2. Do Murder and Robbery such as, Dacoity, generally meet with the punishment of death when apparently inviting it? Instances in a like manner to be added on this question.

3. Are the officers of the provincial courts regularly paid their allowances or otherwise ?

4. Are the officers in general qualified by education, and principles, for the trial of prisoners ?

5. Are their allowances adequate to their situation ?

6. Are the prisoners well or ill-treated whilst in confinement ?

7. Do the principles of Mahommedan law as applicable to criminal cases appear well adopted to the suppression of crimes, or otherwise; and if not, what points stand most in need of amendment ?

8. What effectual means can be devised for the suppression of Dacoitee and Water Robbers ?

9. What are the most effectual means of reforming the general mofussil police at the least expense to Government ?

IOR: P/52/22 Replies pages 305-905; Resolution: pages 1137-94

VIII. 18

Reply No.2 (pp.312-5):

Not having seen any translation of the code of Mahomedan laws, I am unable to answer this question generally; but there is one objectional principle in it which I shall point out.

It is agreeable to the law, and a maxim likewise among Hindoos, that in cases of murder, if the perpetrator confined, means to satisfy the next heir of the murdered, and obtain from him what is called a Razeenamah, no prosecution cause, or ought to be carried on against him.

The mischief that must attend this law will strike every one who gives it a moment of consideration. By it not only the passions of anger and revenge may be indulged in their most dire extremes with impunity, but the foundation of the rights of society are undermined; by making the property of another the means of safety to the invader.

To explain my meaning I will state a case, which though an imaginary one will not appear improbable.

A person is in possession of a considerable property belonging to another. He believes that if the owner of it was dead he could retain it as his own, he is tempted thereby to compass the death of the proprietor, having no doubt that by giving a part of it to the next heir he shall procure a Rauzeenamah. If the heir be a son, or brother, a nephew, or any one, who from his feelings for his loss in the deceased, or for the circumstances that attended the perpetration of the murder, or from whatever cause, refuses to accept satisfaction, and determines to prosecute the offender, he thereby places himself in immenent danger; for the aggressor will then be impelled by

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India Office Records: Bengal Consultations: P/52/22: Consultations 3rd September, 1790 on the New Criminal Code; Annexures to the Cornwallis Minute: Replies to Governor-General's queries from Collectors, Magistrates and Judges.

motives of self preservation to seek the death of the prosecutor. This law therefore holds out strong temptation to the invasion of property by the aggravated means of murder, and seems but too surely to lead the way from crime to crime till the invader finds the necessity of his bloody career stopped, and the certainty of his own safety; in the survivor holding out to him a Rauzeenamah.

Reply No.3 (pp.336-40):

In answering this question which strikes immediately at the root of the present system or ground work, of the Nizamut Criminal Court jurisdiction affecting life and limb, I feel myself from facts that have occurred within my own knowledge warranted in declaring that the ~~Military~~ Mahommedan Law is in by no means adopted to the suppression of the heinous crime of murder. For instance A murders B and C the father and mother of D. A is taken up, tried and convicted. D being in needy circumstances, or overcome by the sum offered him, accepts the same, and delivers in a Rauzeenamah, declaring that he D being satisfied, pardons and acquits A of the murder of his, D's, parents, which totally stops all further progress of the law and A is accordingly discharged. Again in cases of stabbing, maiming and wounding, the rauzeenamah of the victim, should he or she survive, or in case of death the Rauzeenamah of the nearest relations obtained by pecuniary means or otherwise, puts a total stop to further process. To elucidate this I beg leave to state a recent case. Meer Mendey in a fit of jealousy at Midday laid wait for Bijllaussy Rawn, stabbed and wounded him in the inhuman manner described by the report transmitted to me by particular desire by Mr. Charles Kegan the surgeon of this station, of whose humanity and readiness to assist with, his medical abilities anyone in any situation whatever, I cannot sufficiently admire or do justice to. Copy of his letter, I beg leave to subjoin No.2. That remorseless villians of this denomination should

escape punishment for such enormities, by the Rauzeenamah of the aggrieved, sufficiently points out the incompetency of the Mahommedan ~~Military~~ Law to every subject of a civilised nation.

Reply No.4 (pp.368-71):

Though the occasional severity of the Mussulman law, and the shocking and unnatural punishments, which it prescribes (such as impaling) seem well adapted to the suppression of crimes, yet to a mind acquainted with the equitable principles of European legislation; it presents numberless vices and imperfections; amongst the principal of which may be reckoned the following.

1. Its being optional with the nearest relation of the murdered person, to accept a pecuniary compensation from the murderer, in lieu of the punishment prescribed by the law, which, of course makes the punishment of this most atrocious of crimes, depend upon the caprice, venality or indifference of the prosecutor. Were that excellent principle of the British law introduced, which inculcates, that a criminal is not guilty with respect to the injured individual and his relations only, but against the community at large, and the state it would, in my opinion, be productive of the happiest effects, by removing the shameful advantage which the vices of the great, derive from power of riches.

2. A father does not suffer capitally for the murder of his own child; nor a master for that of his slave.

The pernicious effects of these injudicious distinctions are too glaring to require being pointed out. The study and application of such law, must rather tend to narrow and darken, than to enlighten or expand the human mind, and must moreover contribute to destroy those ideas of Natural Justice, according to which, as well as according to the laws which prevail in more enlightened nations, criminality levels all distinctions which owe their origin to human convention.

Reply No.5 (pp.397-405):

In answer to this question, I do not hesitate to declare, that in my opinion, the ~~Military~~/Mahommedan system of penal jurisprudence is, in some instances inadequate to the suppression of crime, and in other instances unnecessarily sanguinary and cruel. To the first point, because I consider it incumbent for the prosperity of a free government, and to secure the liberty of a free subject, that a particular punishment should be specified for every particular crime, so that no arbitrary decisions should be supposed to flow from the capriciousndss or corruption of the judge, for the object of punishment in its political necessity, is not so much intended, as retribution to the injured party, as to society in general; which is injured by the violation of a system established for the peace and security of the whole body, and I conceive it of course a very great defect in those laws, which sanction by a private compromise the most atrocious offences, and whether this compromise be made between the injured and the injurer, or through the influence of the judge, it tends to affect the personal safety of every individual member of that community, and is of course injurious to the state. The particular practice to which I allude, is that power of pardon in cases of murder, sanctioned by the law to the next in kin, by which the price of blood under the appellation of Khoon Bhavee becomes established, for if the criminal is able to accede to the demands of the prosecutor, he is thereby allowed to embrace his hands in blood with impunity. From this existing principle, a further inference may be justly drawn; I do not assert that it often happens, but it is a stated conclusion possible to exist. The nearest in kindred, the heir to a large estate may in security, hire an assasin to remove the only obstacle to his sordid or ambitions views, by an assurance to the villain, that the forfeit of his life to the law, shall be effectually evaded by his unlimited pardon and thus by a fictitious compromise, both the assassin

and the instigator, escape all risk of punishment, for this most heinous crime. If a case similar to this, is only admitted possible to exist, it certainly behoves the wisdom of Government both in regard to the security of the life, and property of its subjects, that even this possibility to deprive them of either, with impunity should for ever be prevented, and that henceforward the criminal be considered as offending against the state, rather than against the injured individual.

To the second point, I cannot pretend to be sufficiently conversant with the Mahommedan ~~Military~~ code of penal laws, so as to be enabled to give a distinct opinion on the several classes of crimes for which the life of the subject is deemed forfeit, but as mercy is the attribute of a free government, I do not hesitate to recommend the entire abolition of all mutilations, more particularly, as experience evinces, that it does not lessen criminality, and absolutely prevents reformation, by precluding the delinquent from all possibility of exerting honest means for his future support. Of course, it is incumbant on the state to provide a maintenance for those victims who may have already suffered by the existence of this barbarous law, as they from necessity are obliged to return to their former associates in iniquity, and the crimes they may be subsequently guilty of are in effect, crimes committed by the state. I would further recommend the entire abolition of all punishment, in which the life of the unhappy criminal is suffered to linger in excruciating torments (perhaps for days) before the despotic sentence of death can be satisfied, but such barbarous spectacles of the sufferings of our fellow creatures makes humanity shudder, and ought for ever to be exploded by justice.

Reply No.6 (pp.422-8):

It is with great diffidence that I feel myself urged in conformity to the order of the Governor-General, to deliver an opinion on so important a subject; I shall be happy if the observations I have made on this subject, can, by being reduced to practice, have in the smallest degree a favourable influence on the publick welfare, though I must at the same time, expect to see them rejected, for the adoption of thers, which are the fruit of greater reading, more leisure, and more extensive abilities. Crimes according to the ~~Military~~ Mahomedan persuasions are of two sorts. 1st against God, as drunkenness and adultery, as being in themselves deemed crimes of a deeper and more atrocious dye; 2ndly against man, as murder and robbery, under certain limitations, and the whole catalogue of offences that militate against the peace and happiness of society; what is the greatest peculiarity, and that which rendered the above observation necessary, is, that the former description of crimes, only, are deemed worthy of the public vengeance; and the latter, though in fact equally serious to the peace of society, are giving up to the discretion or caprice of individuals. I cannot make myself so well understood as by an example, and as no supposition can carry the weight and conviction of a real case, I have selected one of many hundreds from the records, that may be seen by a reference to the enclosure.

Such a system of criminal jurisprudence, cannot but excite the indignation of every man who has once escaped from the tramels of prejudice and ignorance. What is it in fact, but to make a wanton sacrifice of public justice, to the caprice or avidity of (as it must frequently happen) the lowest and most abandoned individual, With the better and more principled part of mankind; few can carry their resentment, or what ought in such cases to be the only rule of action, the love of justice, so far as to urge the death of an offender, when their single voice can save him, and with people of a more depraved character they are not more frequently induced to suffer real crimes to escape, than from private malice or resentment, or motives of avidity, to prefer groundless and vexatious complaints. Every thing is thus weighed in golden scales, and what little shadow of justice remains is converted, from being by seasonable and exemplary punishments, a

prevention of crimes, an instrument of private revenge, or a call to execute avarice and litigation. I am very well aware that even in respect to that description, of crimes, which in a general sense, are considered only as private injuries, the Military code imposes many Mahomedan legal restrictions, as in the case of notorious offenders etc. in which case, the law itself, exacts the penalty of the prisoner. But whatever the law be, it is evident that in practice at least, the injury to the public is swallowed up, in a pecuniary compensation for the private wrong, and this is extended to cases of murder. Now if we allow the principle the greatest latitude, it can with any degree of reason claim, in right of individuals to require personal satisfaction by punishment or reparation, in damages for injuries that affect their own property or persons, it is not easy to conceive, why one man more than another, or how any men whosoever; considered as individuals, have a right to private satisfaction, when the person injured is no longer alive to claim it. I am very well aware, that a native would demand to whom is justice due, if not to the immediate heirs, and relations of the deceased. To this, a man might reply, that as the end of punishment is the prevention of crimes, and not the gratification of private resentment or revenge, it becomes an object of the highest importance to the interests of society in general, to consider, how this end is with the greatest possible certainty attainable. This I conceive, may partly be affected in two ways. 1st by the nomination of a proper officer to prosecute such offences in the name of government which might exclude the real plaintiff from any participation, further than was necessary for procuring evidence. 2ndly by inflicting punishment, either by fine or imprisonment, where complaints were preferred, and not supported by evidence. I do not mean in such cases as the testimony of the fact fell short of legal proof, but in such cases as there was reason to apprehend a collusion, and invasion of the rights of public justice. Whether

either or both these modes, would entirely suppress the evil, cannot now be determined; but if the principle were no longer sanctioned by public authority, and if the practice were severely punished, it must tend, if not to secure a perfect administration of the penal laws at least, to a suppression of the present systematic evasion of public justice.

This is the principal defect (if indeed that which is subversive of the end of punishment may be called a defect) that I have noticed in the theory of the ~~Military~~ Mahommedan Laws. In other cases neither the measure nor mode of punishment is perhaps the best that could possibly be devised, but as it is not the particular method, nor the severity, but the certainty of the punishment that tend to the prevention of crimes, one might fairly on the whole attribute to them the power; if executed with vigour, of securing the peace of society - and they cannot I think, in any instance be accused bf being sanguinary.

Reply No.7 (pp.458-65):

The principles of the ~~Milat~~ Military Mahommedan law operating under a British Government can never be well adapted to the suppression of crimes and is by no means so as administered at this period. The law itself is considered by those of the ~~Military~~ Mahommedan persuasion to be derived from the Prophet and consequently has suffered no amendment since first promulgated; yet when compared with our system of jurisprudence, it seems defective in all its parts, and appears entirely calculated for an arbitrary power; indeed it can never be of much efficacy under any other, nor even then unless that power, is happily lodged. To illustrate this position I need not go further than simply to state that the punishment of all offences of an enormous nature is almost entirely left to the will and pleasure of the ruling power which at once stamps the character of its principles, and as long experience has in a number of instances

afforded very apparent and glaring proofs of the abuse of that authority where it is now placed, I presume that this is one of the first points in the Military/Mahomedan law that requires consideration and amendment.

The Military/Mahomedan law also in the case of murder is particularly defective in admitting of pardon at the instance of the prosecutor or on his receiving a compensation which ought or no consideration ever to be allowed, and even when the act is only manslaughter, the tribunal, at which the prisoner is tried, are the best judges of the attending circumstances, and the mitigation of the punishment a pardon should rest with them. Nor does it sentence an accomplice to capital punishment, aiding and assisting in the very act of murder, such as holding a man's hands whilst another strikes the fatal blow, of which there is an instance directly in point, in the case of Shaik Papoocha quoted in my answer to the 2nd question. If too there are several ~~Inglish~~ intrusses/witnesses and one does not agree with the rest in any matter of evidence whether material or not, the prisoner either escapes or his punishment is mitigated. Likewise though a murder is amply proved, if there is no prosecutor or heir to the deceased, it is left to the determination of the Hakim to make it capital or not.

With respect to robbery and burglary it also leaves the disposal of the law to the Hakim, to inflict what punishment he thinks proper with this exception only that the culprit cannot be punished with death, unless he has been often convicted of the same crime.

There are many laws for the punishment of theft and crimes of an inferior nature and I have known various sentences passed on offences of equal magnitude, are fully as well established as the other, yet different expositions of the law have been applied and justice has been sometimes too lenient at others too severe, such as cutting off a limb etc. But in all cases, it allows the dependants answer to invalidate and in a great measure to overrule points clearly ascertained and substantiated by evidence.

But, besides these defects, there is another circumstance, it may be proper to

remark here, The Military/lawyers are but /Mahomedan
partial in their studies, hence as there
are numberless expositions, the several
commentators of the Military/code have /Mahomedan
given the world, many of which bearing
different construction to each other and
some ambiguous or deficient in perspicuity;
much misrepresentation and abuse may arise,
from the sense these men may choose to
give of it on points submitted to them.
That the Military/Law is not applicable /Mahomedan
to the distribution of justice is I think
pretty evident, and from the observation
my situation daily gives me an opportunity
of making, I am of opinion a new code
framed on the principles of our own would
be the best that could be desired.

Reply No.8 (pp.489-90):

I humbly conceive, that the princi-
ples of the Military/law, are well calcu- /Mahomedan
lated to suppress crimes, if duly carried
into execution, except indeed, in the
indulgence of the Rauzeenamah before men-
tioned, which ~~has~~ opens a large field for
abuse, to profligacy and occuption; this /corruption
stands highly in need of reform as does
another principle of the Military/Law, the /Mahomedan
barbarous mutilation of limbs which fortu-
nately for the cause of humanity, has
grown latterly much into disuse. Murder
is punished ~~with~~ death, as is also robbery
when attended with atrocious circumstances.

Reply No. 9 (pp.500-1):

The principles of the Military/law /Mahomedan
appear to me to be in general well adapted
to the suppression of crimes. One only of
the principles of the Musilman Code as
applicable to criminal cases, strikes me
as necessary to undergo amendment, that
is the power vested in the prosecutor for
murder, to commute the sentence of death,
by what is termed Deyut, or for a pecuniary
consideration. The principle of blood for
blood, termed kissaas, in cases of wilful
murder, should be the only rule in this
case, to guide the judge in passing sentence.

Reply No.10 (pp.517-20):

The bulk of the natives are Hindoos, and totally ignorant of the language. Few indeed of the Musulmans know Arabic. The Koran is often incorrectly copied, and besides a learned and discerning traveller has justly remarked that "who ever reads the Koran must be obliged to confess that it conveys no notion either of the relative duties of mankind in society, of the formation of the body politic or of the principles of governing, nothing, in a word, which constitutes a legislative code.

Mutilation appears improper, as criminals are debarred thereby from gaining an honest livelyhood by labor, moreover as the mind actuates the body, the deprivation of the offending limb seems founded in barbarism.

Under the 2nd article alluding to murder, and the 6th upon imprisonment, I have ventured to suggest two defects in criminal justice. The trial for rebellion should not I think be left with the Fouzdar, since the Mussulmans must be partial to the spirit, which attempts to restore that power of which they now regret the loss. I trust that this observation is only founded on human nature, and government will admit the necessity of forming some process for offences against the state, that dangerous combinations may not be formed in the security of a partial judicature.

When any other points hereafter occur I shall submit them to attention, but as every proposal for amendment should receive careful and repeated consideration, I will not risk the forfeit of favourable opinion by hasty remarks on so serious a subject.

The trial by ordeal is exploded since the British administration, but I am not acquainted with any formal prohibition.

Reply No. 11 (pp.534-5):

From the general tendency of the Mahommedan laws in criminal cases, as far as I am capable of judging, they seem calculated to restrain the commission of the more atrocious crimes by the severity of the sentences which usually follows the proof of them.

Reply No. 12(pp.544-5):

The principles of the Mahommedan Law, with respect to criminal cases, as far as regards the general process of justice in the courts from the first apprehension of the criminal to his trial, appear to me to stand in need of no alteration or amendment. The punishment however, though they exceed in variety and severity those inflicted by a British Court of justice, do not appear at all adequate to the suppression of crimes and of this Foujedarree Records to the present hour will bear a melancholy testimony; as will with regard to the number, as the nature of offences always to be found in the calendar.

The partiallity of the natives of this country to a profession they have once embraced, and their extreme reluctance to quit it, are notorious. The same principles and inherent prejudice which attach the Mechanic to his particular line of profession, operate equally upon the robber, house breaker or murderer who desperate and abandoned as his occupation,is, cherishes it as much, holds it as dear, and follows it as systematically as the peaceful merchant his easy and lucrative are.

Besides this, the constitutional apathy of the natives of this country and the patience with which they endure pain and even resign life, render them for the most part regardless of corporal sufferance and principally to this cause may be ascribed the reason why crimes of all descriptions still continue to be perpetrated, although such frequent sacrifices are made to the offended laws.

Of the effects produced by the different modes of punishment in this country we have frequent experience. It may be needless to particularise the milder ones inflicted for trifling offences, as their efforts may be judged of from what we see produced by those of a greater magnitude and more severe nature.

Perpetual imprisonment, is I think improperly regarded as a punishment of a higher order. To British minds the idea it conveys is indeed dreadful, but there is nothing in it so terrible to a native of Bengal, to whose natural indolence and inactivity, a life of this nature is perfectly congenial and whilst the necessaries and comforts of law are within their reach, the restraint they are under is a circumstance of no great hardship to them, being seldom, or never so close as to debar them from intercourse with the rest of the world. The effects therefore of this punishment are I apprehend never such as must evidently have been expected from it, as being in rank immediately the next to a capital one.

Loss of a hand or foot is undoubtedly a punishment of a very severe nature, as being not only a painful and dangerous operation, but at once depriving the body of a most useful limb and stamping mark of indelible infancy upon it. And yet this is so little regarded that many an offender or apprehension is found to have already forfeited a limb (and sometimes even two) to the laws.

Death, the last, and in the general opinion of mankind, the greatest of all punishments, fails here greatly of its intended effect.

Fortified by their strong religious prejudices and notions of predestination, and not unfrequently elated with the idea of suffering as martyrs to the cause and amidst the prayers and applauses of their confederates, criminals in this country meet death with perfect indifference and composure.

It might then be feared that there was left no punishment adequate to the suppression of crimes. There is one however, which in my opinion, would prove more terrible to the natives than any which the laws have hitherto devised, I mean transportation beyond sea. The idea of being separated for ever from the land of their religion and forefathers, carried away into a distant and unknown country where the exercise of their religion, wanting every essential to give it effect, must be of no avail, and the certainty of being deprived, when their existence shall terminate, of the

many circumstances of consolation which in their native soil divest death of its terrors. These ideas to people of such weak minds, and such powerful religious prejudices, would convey terror and apprehension to which they are yet strangers, and which when brought home to their minds would, it may be presumed operate more successfully towards deterring them from the perpetration of villainy, than punishment at present held out by the laws.

Should government be inclined to adopt this idea, I would beg leave to offer it as my opinion, that all offenders coming under the sentence of perpetual imprisonment or loss of limb, should be disposed in this manner with the exception only of those cases, where it may be judged more expedient to make an immediate sacrifice on the spot.

There are a great number of Dekoits in confinement at this place in Irons for life, who now work upon the roads. They might perhaps be made more useful at the Prince of Wales Island by being there employed in some serviceable labour unfettered, if not unguarded and without any additional expenses to Government further than that of transportation.

Reply No. 13 (pp.572-4):

Having pursued with attention the code of Mahommedan laws, in conformity to which sentence is passed on criminals, I think them well adapted to the suppression of crimes, that the punishments there assigned are fully adequate to the nature of the offences, and by no means too lenient. There is however part of the Mahommedan law which allows of a discharge to murderers upon their making a compensation in money or affects to the heirs of the murdered person provided the former may be willing to accept of such compensation, and express their satisfaction by written declaration delivered to the judge. I know not whether this will be looked upon as defeating in any degree the ends of vindictive justice or to stand in need of amendment.

14:

Reply No. 14 (pp.582-3):

The office Magistrate in this city does not admit of his obtaining a practical knowledge of the mode of proceedings in criminal cases according to the principles of the Mahommedan law. His duty consists only in apprehending culprits and delivering them over to the Foujedarree for trial, but, as far as my knowledge extends they seem well adapted to the suppression of crimes as the punishment adjudged thereby are in general severe, and consequently calculated to strike terror.

Reply No. 15 (pp594-5):

I believe the principles of the Mahommedan law, in cases of murder, to be sufficiently rigid, but, as remarked in my answer to the 2nd query the punishment of confinement and flogging, appears to me inadequate to the suppression of the crime of robbery or Decoyetee - and in almost all cases mitigation, or increase of punishment, is in the heart of the judge; yet, while the amendment of these points appears necessary many of these penal laws require mollification, such as the deprivation of limbs etc. but the above question upon the principles of the Mahommedan law, I must confess, embraces a system, which I am ill qualified to deliver an opinion upon that could convey any important suggestions to Government while deliberating upon so serious a determination.

Reply to Q. 2 (pp.589-90):

Many instances occur in the office of the Magistrate in which from the dispositions delivered in, it would seem that the persons accused merited death, but when tried at the Fouzdarry Court, the circumstances may be denied, varied or not established, therefore punishment must depend wholly upon matter that may come out in the course of the trials, the proceedings in which are not transmitted to the Magistrate. From the accompanying calendar, no crime appears to have been punished with death, but murder. The sentence upon robbery and burglary or decoytee, is confinement and flogging, too mild a punishment in my opinion, for the dispositions of those of the natives who are brought up in the practice of robbing. Patient and often content, under confinement, and unused to hardships beyond the probability of standing in any awe of the temporary punishment of flogging.

Reply No. 16 (pp.646-54):

Persons convicted of Decoytee, where no murder has been committed, either on their own confession, or by the testimony of two or more credible witnesses, who shall have ~~forfeit~~ participated in the plunder to a certain amount, are sentenced (Hudar) or according to the established law, to lose their right hand, and left foot, but the judge may condemn them (seasuttan) or for the sake of example, to die. For Decoytee where murder has been committed, the sentence is (Hudar?) death to all concerned, and this the judge cannot in any respect alter. For breaking into houses and stealing property therefrom above a certain value, the sentence for the first offence is (Hudar) to cut off the offender's right hand, for the record his left foot and if it should still be repeated, the judge I believe may (seasuttan) condemn him to die. From this it appears the judge has in certain cases a discretionary power to exceed the established law, though it does not appear he ever has it in his power to mitigate the sentence it pronounces. With a wise, upright, and humane judge, the exercise of this authority might be attended with good effects, and by one of a different character it might possibly be abused. In general however there are many more inducements to soften the sentence, than to exceed the letter of the law, and it is not much to be apprehended that self interest can ever prompt a judge to pass sentence of death on a man that is not deserving of it. If no alteration should be made in the Mahommedan Penal laws, as far as they apply to Decoytee and theft, I think it would be advisable to discontinue the exercise of this authority, as the punishments now inflicted for these crimes are sufficiently severe and in some cases I think too much so; but if they should in general be rendered less rigorous, it might in that case be judged expedient perhaps to continue it, for the sake of exhibiting an example in particular cases of guilt for which the common sentence of the law might not be sufficient; and I confess I should be happy to see the cruel punishments by mutilation, put a stop to. It ought also to be considered how far the evidence of women, and the accusation of accomplices in capital cases, neither of which are now of any validity, might be admitted.

But that part of the Mahommedan law which appears to me to stand in most need of amendment is that which authorises the nearest relation of a person murdered (excepting in the act of theft and robbery) to pardon the murderer; for the object in this case is to render private satisfaction, without any consideration of what is due to publick justice, and indeed I think the power an injured person may possess in any other case, to remit, or mitigate the punishment prescribed by the law, should be annulled. There are also some distinctions which I think it necessary to mention between the same crime intentionally committed but by different means. If for instance a person should kill another with a stick, or by blows with his fist, or throwing stones at him, or strangling him, or by any other mode which it would appear improbable that death should have been occasioned, the Deeot or price of blood only must be paid, but if a man murders another with a sword, dagger, spear, or any other sharp or pointed weapon, or a large club, the offenders' blood must be forfeited, except the nearest of kin of the deceased should pardon him.

Reply No. 17 (pp.684-7):

As far as my knowledge of them extends; I think them by no means adapted to the suppression of crimes. I have answered this pretty fully in my reply to the 2nd question and it is out of nature they should operate to the prevention of crimes. When private malice can be so often gratified by the admission of compromise in cases of murder. Within the nearest of kin has no interference with the prosecution, unless, and that with care; he is admitted as a witness. With them as I have described, he stands directly as prosecutor of the person arraigned. In regard to any points that may need amendment it is difficult to suggest any particular ones; where men from disposition and education harbor so strong a propensity to the laws in which themselves and ancestry have been born and framed, and as the dispensation of the strict letter of the law in peculiar cases is admissible, the injunction of the governing power to the Naib Nazim to do it rigidly, seems the only amendment requisite. If any after this explanation

was still thought requisite I know of none more effectual than where mitigation is adopted, the persons instead of being released, and thereby again endangering the community, should be directed to work upon the roads, receiving for life or a certain period, according to the enormity of the crime, a maintenance or subsistence during imprisonment.

Q. 2 (pp678-82): In this province Decoytee is little known. For crimes such as robbery and murder, the sentence depends entirely on the nature of the act and the punishment annexed to it by the Mussulman law. The Dhirogha tries accordingly assisted by the Moluvees who explain the case, pronounces, and the confirmation and enforcing of it is with the Naib Nazim. The Mahometan criminal law allows even of murder being compounded. It expressly says, that where the nearest relation does not demand blood for blood, an accommodation may take place. With them also are the distinctions between premeditated and accidental murder, and instead as with us being left in the breast of a jury, their law defines the punishment that should attend intentional murder, or manslaughter. Frequent instances are to be seen in the reports, where prisoners adjudged guilty of murder have been from reasons in their law; the perfection or imperfection of which depends on the consideration of their manners, habit and customs; released, upon security being given against such offence being recommitted. When such offenders again occur; it is in the power of the Naib Nazim, and in other instances also; where the act may have been flagrant, to set aside the Moleevees opinion and sentence of the law, and direct the punishment of death as an expediency of state.

Within these two years five instances of this kind have happened. I have annexed and stated them at length for the information of Government that they require on this subject.

Reply No. 18 (pp.696-9):

Whether the principles of the Mahommedan law appear well adapted to the suppression of crimes or indeed if always the punishment is agreeable to the Mahommedan law appears to me a doubt, as I should conjecture the mode of punishment for the crime of murder would be always the same, but too much depends on the will of him who may hold the office of the Naib Nazim. Murder though perpetrated by the same gang of Decoytes, yet the Futwah will order one to be hanged, another decapitated and a third shall be impaled, but seldom the last; I must observe the greatest villain in general supposed with reason to be the head of the Board; I learn does not always meet the severest punishment, but too often the contrary. In crimes of robbery where no murder has been committed the sentence is having a hand and foot cut off or only one hand, or sometimes 30 strokes of a corah and a limited time of imprisonment, the only amendment requisite is that fixed modes be adopted for each crime, and not to be deviated from either by leniety (which may extend to partiality) or rigor which may be excited by avarice or revenge in the breast of him who may have the power to change the sentence.

Reply No. 19 (pp.713-5):

The punishments denounced by the Mahommedan laws are indeed sufficiently severe but from the difficulty of proof, the law is not usually enforced, very direct proof is in cases required and the circumstances which set aside evidence are many. There are four sects of the Sunis by whose rules criminal justice is administered and in each sect the opinions of different authorities are very dissimilar; when the molivies are disposed to favour the criminal, they easily select from a variety of contradictory opinions such as will set aside the evidence or do away the crime.

The Mahommedan law seems more adapted to afford redress to party aggrived than to inflict chastisement on the criminal and make an example to deter others. The prosecutor even in cases of murder is at liberty to withdraw his prosecution and accept of a compensation by which the purposes of justice are defeated and the most heinous crimes remain unpunished.

Reply No. 20 (pp.757-9):

I do not think the principles of the Mahommedan Law as applicable to criminal cases do appear well adapted to the suppression of crimes particularly in instances of murder in consequence of affrays which frequently happen among individuals where if the heirs or relations of the deceased will accept the Deeut (or a pecuniary compensation from the party offending) it is followed by his release and in some cases I have heard that the relations of the deceased weary of the length of the trial have felt themselves compelled to accept the Deeut instead of having that punishment inflicted upon the prisoner which inclination on their part and the end of justice rendered necessary to be carried into execution. This appears to me one of those points which stand most in need of reform and amendment.

Reply No. 21 (pp.767-9):

I think not, because in many cases of murder it is left to the option of the heirs of the deceased whether the criminal shall be punished with death or not thereby constituting it an offence against an individual instead of society at large and because they do not allow of Decoytee or robbery being punished with death unless in cases of the greatest notoriety or where murder has been committed or blood drawn in the perpetuation of them.

Reply No. 22 (pp.793-803):

The principles of the Mahommedan law however well they at first may have been in general adapted to prevent private injuries seem now to be deficient in several points and especially in cases of murder where the mode in which the crime is committed is sometimes considered as constituting the degree of the offence, if for instance a man beats another with his fist in such a manner that he dies or if he kicks him to death or if a man murders his child or his slave and in many other cases the offender is not to suffer death but only to pay the price of blood.

The Deeyut or price of blood as originally fixed by the Mahommedan law, was very considerable and could only be accepted of in some cases*, but at present the circumstances of the offender are attended to more than the magnitude of the crime and provided a Rauzeenamah can be procured from the next of kin to the deceased which is frequently done for ten, twenty, or thirty rupees capital punishment is seldom or never inflicted.

In cases of robbery or murder when the crime has been committed at the instigation of another the perpetrator is alone deemed deserving of capital punishment and though the instigator may have gained the ends he proposed to himself by the crime having been committed he is not considered as a principal unless when he shall have made use of threats to affect his purpose in which case it is necessary that he shall be proved to have had the power of putting his threats in execution.

The punishment for thieves and robbers excepting highway men, is to deprive them of a hand, or of a hand and foot, but before this punishment can be inflicted it is necessary to be proved that the person convicted received the value of two and a half rupees for his own share of the plunder. So that by fifty or sixty people going in a gang a very considerable property may be carried off without any of them being punished, otherwise than by strikes and confinement. The mode of inflicting the above mentioned punishment for persons convicted of having taken more than the value of 2½ Rs. also appears to me to be cruel in the highest degree. The culprit is tied down and the executioner takes off the hand by the joint of the wrist and the foot by the joint at the ankle with an instrument in the form of and not much sharper than the Jaw or bill made use of in chopping trees or splitting bamboos and the bleeding stump is immediately immersed into a pot of boiling ghee with an intention of stopping the effusion of blood from the arteries. This operation however is not always attended with the desired effect and it may be safely asserted that two out of ten do not survive it.

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* 1000 Dinars = about 2733 rupees

Reply No. 23 (pp.828-9):

Having already said in my answer to the 2nd question that the criminals deserving death suffer the "infliction in a small proportion," I will not hesitate to add that the principles of the Mahommedan law as applicable to criminal cases does not appear to me well adapted to the suppression of crimes and those parts of it which relates to the cases of murder and theft stand in need of amendment.

2nd Question: Murder is the most enormous offence and the whole polity injured by its perpetration. Its punishment ought to be indispensable, but as the Mussulman law used in the criminal courts makes murder pardonable by the plaintiff I cannot but remark, that the criminals deserving death suffer its infliction in a small proportion.

Reply No. 24 (pp.836-40):

Wilful murder though forbidden by the Koran under the severest penalties, to be inflicted in the next life, is yet by the same books allowed to be compounded for, on payment of a fine to the family of the deceased. But it is in the election of the next of kin, either to accept of such satisfaction, or to refuse it. He seems in this particular to have had respect to the customs of the Arabs in his time, who being of a vindictive temper, used to revenge murder in too unmerciful a manner. If the Mahommedan laws seem too light in cases of murder they may perhaps be deemed too rigorous in cases of man slaughter or the killing of a man undesignedly, which must be redeemed by fine (unless the next of kin shall think fit to remit it out of charity) and the freeing of a captive. But if a man be not able to do this he is to fast two months together by way of penance. I imagine that Mahomet by these regulations laid so heavy a punishment on involuntary man slaughter, not only to make people beware incurring the same, but to human in some degree the revengeful temper of his countrymen. Theft is ordered to be punished by cutting off the offending part, but stealing being generally the effect of indigence, to

cut off the limb is to deprive the culprit of the means of getting his livelihood in an honest manner.

As to injuries done to men in their persons, the law of retaliation is approved by the Koran, but this law, being neither strictly just, nor practicable in many cases, is seldom put in execution. In injuries and crimes of an inferior nature, where no particular punishment is provided by the Koran, and where a pecuniary compensation will not do, the Mahommedans have recourse to stripes and drubbing.

From the above extracts it is I think, manifest that the principles of the Mussulman code are not well adapted to the suppression of crimes and I am sorry to be able to conclude this article, by remarking a deplorable fact, that the evidence of one Mussulman is equivalent to that of two Hindoos, a custom which originated in victorious bigotry, and will I trust, be shortly terminated by the benevolent interference of an enlightened nation.

Reply No. 25 (pp.861-3):

I consider the execution of the laws whatever they be, as the direct road for the suppression of crimes; therefore I deem the principles of the Mahomedan Law sufficiently adapted to that purpose and if not, an amendment I suppose could not with propriety be recommended, by many persons in the Company's service.

To revise laws that have subsisted for ages requires strong mental powers and a knowledge of the subject, which is only to be acquired by a long course of study solely directed to that object.

The criminal laws of England, though the execution of them and mode of trial are the admiration of foreigners, are very far from being deemed perfect: still succession of men of great acknowledged legal abilities, have wished their improvement without being willing to undertake the arduous task.

The mode of conducting the Fauzdaree business in Bengal, is what has ever appeared defective. Though I approve the system on this subject I can more properly speak in the answer to the 9th question.

Reply No. 26 (pp.901):

Punishments awarded by the Mahommedan law to thefts and murders are generally known, and government in most competent to determine where an alteration can be made with advantage.

VIII·19

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Earl Cornwallis: Minute: December 3,1790

1. The regulation of justice in criminal cases, although constituting one of the most requisites of good government, yet never appears (as far as can be traced) to have received the attention it so well merits, under any system either of the Mogul or Hindoo administration in India. Hence, when when our Government first interposed, they were obliged to establish a system of their own formation, which having since undergone various important alterations, a brief notice of the principal heads of that system, and of the proposed successive amendments to it, preceded by such authentic traces as are to be found, concerning the ancient criminal jurisprudence under the native government, may be usefully premised, as the foundation of such further measures as shall appear necessary for giving the greatest possible efficacy and regularity to the criminal jurisdiction throughout the provinces.

2. The earliest authentic traces which are now to be met with of the administration of criminal justice in Bengal, under the native government, are inserted in the sixth report of the Committee of Secrecy, appointed by the House of Commons in 1773, to enquire into the state of the East India Company, and, in the proceedings of the Committee of Circuit, which make part of that report; from all which it appearsthat the native judicature, as in force to that period was (as the report to the House of Commons expressly states) liable "(even during the vigor of the ancient constitution) to great abuse and oppression, that the judges generally lay under the influence of interest, and often under that of corruption, and that the interposition of government from motives of favour or displeasure was another frequent cause of the pervertion of justice."

3. The same report shews, that very soon after the Company's acquisition of the Dewanny, the influence of their servants was exerted with a view to provide remedies for the defects above alluded to, and several important instances of their interference are cited by the Committee of Secrecy "as the strongest evidence of the absolute sway and control , to which the whole administration of government, and particularly the courts of justice have submitted to the Company's officers even before the first formal code of judicial regulations had been enacted."

4. The Committee next proceed to enumerate the principal heads of that first code, as approved and established by the President and Council on the 21st of August 1772, After premising (from the observations of the Bengal Government, which precede the regulations in question) that the Nazim, "as supreme magistrate presides personally in the trial of capital offenders, and holds a court every sunday called the Roz-Adawlut, and that crimes not capital are tried before the Foujdar, but reported to the Nazim for his judgement and sense".

5. These primary regulations of the British Government in Bengal established as far as regards the criminal jurisdiction, that in eachdistrict there should be an

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established court for the trial of all crimes, and misdemeanours, and that "in this court the Cauzy and Moofty of the district and two Molavies shall sit to expound the law, and to determine how far the delinquents shall be guilty of a breach thereof, but that the collector (a Company's covenanted servant) shall also make it his business to attend to the proceedings of the court, so far as to see that all necessary evidences are summoned and examined, that due weight is allowed to their testimony, and that the decision passed is fair and impartial."

6. The code in question being professedly constituted on, "as close an adherence as was possible to the ancient usages and institutions of the country government", a separate and superior court of criminal jurisdiction was in this view established under the denomination of Nizamut Adawlut, in which was to presidea chief officer on the part of the Nazim, assisted by Doctors of the Mahommedan Law, for revising all the proceedings of the provincial courts, and in capital cases by signifying their approbation, or disapprobation thereof, to prepare the sentence for the warrant of the Nazim, which was to be returned into the Mofussil, and there carried into execution; and with respect to proceedings in the court, a similar controul was ordered to be lodged in the chief and council at Moorshedabad (then considered as the capital of the province) as is already specified to have been vested in the collectors over the provincial courts.

7. By the 35th article of these regulations, the punishment of Decoyts was extended not merely to the infliction of death on the immediate offender, but subjected the village where he dwelt to be fined, whilst his family were to become the slaves of the state, and to be disposed of at the discretion of Government.

8. On the above lawthe President and Council remark in their letter to the Court of Directors of the 3rd of November 1772 that "it is dictated by a spirit of rigor a nd violence very different from the coution and lenity of these other propositions, as it in some respects involves the innocent with the guilty". They confess at the same time that the means thus laid down can in no wise be reconciliable to the constitution; but added "that till that of Bengal shall have attained the same perfection, no conclusion can be drawn from the European law that can be properly applied to the manners or state of this country".

9. The Comptolling Council of Revenue at Moorshedabad having been abolished nearly at the formation of the preceding regulations, the Nizamut Adawlut was established at the Presidency before the close of the year 1772, and the sentences or opinions of this court on the proceedings of the inferior Foujedary Adawluts were for some time ~~it~~ transmitted to Moorshedabad, to obtain the Nabob's warrant, but as much delay was bound to be occasioned by this mode, it was thought expedient to procure from the Nazim a delegation of his authority to the Darogah of the Nizamut Adawlut (or president of the principal criminal court) both in regard to revising the proceedings of the provincial adawluts, and to the issuing of the Nizamut warrants thereon, for which purpose the great seal of the Nazim was lodged with Sudder-ul-Huc Cawn, the Darogah in question, whereby the president of the Supreme Board (as remarked in the Consultation quoted in the margin) obtained ~~with~~ (in the manner hereafter more fully noticed) an entire

vide Rev Cons: 23.11.1773

controul over "this department, and became enabled to revise the sentences of the officers of adawluts, and to correct the imperfections of the Mahommedan law by the warrant of the Nazim, which was now to pass under the immediate inspection of Government."

10. This last of correcting the imperfections of the Mahommedan law, was founded on the conviction entertained by the Board from the instances laid before them by the President, and the established practice of the native government "of the absolute necessity that a power should exist to revise the proceedings of the criminal courts, and where the letter of the law was clearly repugnant to the principles of good government and common sense, to apply such a remedy as the case might require". Since "otherwise" (as the Board remark on the 31st of August 1773) "the most atrocious criminals might escape with impunity, by means of a precaution in the manner of perpetrating the crime, by the privelege enjoyed by individuals of remitting the punishment, and by the many nice distinctions which the expounders of the Koran have introduced", adding that, "in order to prevent these abuses, and to provide a remedy for extraordinary evils, the sovereign power in every Mahommedan state, has reserved to itself the right of interposing with its authority and of issuing such mandates as are evidently necessary for the benefit of society, and for that personal security which every member of the community is entitled to, and that in this country it has not only been the custom, but seems to be a maxim interwoven in the constitution, that every case of importance where the precise letter of the law would not reach the root of the evil, should be submitted to the judgement of the Hakim or ruler of the country, by an express reference added to the sentence."

11. On these principles, the Board, after delivering the seal of the Nizamut to Sudder-Ul-Huc Cawn on the 23rd November 1773, requested their president to superintend him in the exercise of this office, "as well in revising sentences of the adawlut, as in passing the warrants and affixing the seals" whereby the Governor became infact the superintendent of the administration of criminal justice, in which Foujedary courts, to which he continued to pay an assiduous and regular attention, on the English records of the department (now deposited in the office of Preparer of Reports) abundantly testify at the same time that they exhibit sundry necessary instances of the beneficial operation of the conteul above provided, to be exercised by our Government, in correcting some of the most glaring and dangerous defects of the Mahommedan law, such as those, whereby murder, if perpetrated in a particular manner tho with the worst intentions, is noty by the most received opinions, held to be capital or, where the relations improperly remitthe sentence of the law on the criminals.

12. In the course of this superintendency, it was however found by the President, that the institution of the foujedary courts did not produce the benefits expected from them, for which Mr Hastings assigns several causes in the Minute of the 19th April 1774 as

First the abolition of the former native foujedary jurisdiction and the tannadarries dependent on it,
Second the resumption of the Chackeram lands, allotted to the tannadars and pykes guarding the villages,
Thirdly the farming system, and
Fourthly the regularity and precision observed in the new courts, rendering the conviction of offenders more difficult.

13. Some foujedary stations, or tannahs, were therefore reestablished by way of experiment, under which mode and with the additional establishment of a covenanted servant, as an assistant to Mr Hastings in this branch of the duty, he continued as President and as Governor General to conduct the criminal jurisprudence of the provinces till the 14th of April 1775, when he desired to relinquish his trust, as feeling the duty of it too heavy to discharge, and the responsibility attached to it to dangerous for him to have any further concern in it.

14. This application lay for consideration till the 18th of October 1775, when the office of Naib Nazim being conferred on Mahomed Reza Cawn, the branch of it, comprehending the administration of criminal justice, was vested in him, and he was authorised to regulate the courts, and to propose such alterations, as seemed necessary; one of the principal of which was the extension of the system of Foujedars for apprehending and bringing to trial all offenders against the public peace.

15. The system continued with little material variation till the 6th of April 1781 when upon the assigned cause, that the institution of native Foujedars had not answered the good purposes intended to be derived from the institution, the Board took an opportunity to abolish the general establishment of both Foujedars and Tannadars, instead of whom, the Civil Judges (being Company's covenanted servants) were invested with a power as magistrates, of apprehending Dekoits, or persons charged with the commission of any crimes or acts of violence, within their respective jurisdictions, and thereupon to send them immediately to the Darogah of the nearest Foujedary court, with a charge in writing, setting forth the grounds on which they have been apprehended, and the better to enable Government to watch over the administration of criminal justice throughout the provinces there was reestablished, at this time, under the controul of the Governor General, a separate department at the Presidency, to receive from the magistrates, and also from the Naib Nazim, monthly returns of proceedings of the Foujedary courts, and for the assistance of the Governor General in this duty, a covenanted servant was appointed under him with the official appellation of Remembrancer to the Criminal Courts.

16. The establishments of the foujedary adawluts were on the 5th July 1782 regulated and reduced to a very low standard, in so much that occasional additions, have been since found necessary to some of them, and from the inefficacy of the authority of the British Magistrate over the zemindars, and other landholders (as from April 1781 till June 1787, those Magistrates held no charge of the Revenue) the course of criminal justice throughout the country seems to have still remained in a very weak state, at the same time that the degree of greater regularity introduced by vesting the apprehension of all offenders in the Magistrates without permitting them to interpose the least, in respect to the trials, became the cause of a new evil, by obliging those gentlemen to deliver over to the Darogah of the Foujedary court, and to that officer's prison, all parties charged with ever so slight a breach of the peace, the consequences ensuing from which were often, that several of the lowest and most indigent classes of the people were liable to remain for a long period in confinement, where the length of their sufferings, from the delay in their trial, must very often have much

more than equalled their demerit, and therefore the Magistrates were on the 27th of June 1787 vested with authority themselves to hear and decide on petty causes of affray, abusive names and the like, and to inflict corporal punishment on such offenders to the extent of 15 stripes, and 15 days imprisonment or by fine not exceeding 200 rupees.

17. The authority of the Magistrates has also been rendered very effectual and complete, by their having since June 1787 become the Collectors of the Revenue in the respective divisions so that they/now, as far as /ought regards their magisterial functions, to be fully competent to the discharge of them.

18. But still the general state of the administration of criminal justice throughout the provinces is exceedingly and notoriously defective; with a view to ascertain more particularly the nature and causes of the defects, and to collect the necessary information for remedying them, I directed some queries to be stated to the Magistrates of the several districts, from their answers (Appendix Nos 1-25) to which it will appear that the evils complained of proceed from two obvious causes:

First the gross defects in the Mahommedan Law, and
Secondly the defects in the constitution of the courts established for the trial of offenders.

19. A provision against the first of those defects cannot otherwise be made, than by our correcting such parts of the Mahommedan law, as are most evidently contrary to natural justice and good of society.

20. That this Government is competent to such an amendment of that law as may appear thus essentially necessary cannot I think admit of a doubt; since being intrusted with the government of the country, we must be allowed to exercise the means necessary to the object, and end of our appointment; besides that we appear to profess a sufficient legal recognition of the right in question, from this, that the alterations made in the established Mahommedan law of the country by the first code of judicial regulations of 1772, and more particularly that entire alteration, and new and very severe provision therein contained for the punishment of Decoyts, together with the superintendence and controul over all the new criminal courts, which the said regulations vested in the Company's covenanted servants, stand both fully submitted to Parliament in the Sixth Report of the Committee of Secrecy already quoted, as a discretional act of legislation by the President and Council in the year 1772, and yet so far was the Parliament from disapproving thereof, or limiting in any respect the authority of our Government in India, that with this information before it, and having these reports as the groundwork of the law, then passed, the Act of the 13th George the Third, Chapter 63 and section 7 vests, the ordering, management and government of all the territorial acquisitions, and revenues in the kingdoms of Bengal, Behar and Orissa in the Governor General and Council, for such time as the territorial acquisitions and revenues shall remain in the possession of the said Company, "in like manner" as the said Act recites "to all intents and purposes whatever, as the same now are, or at any time heretofore might have been exercised by the

President and Council, or Select Committee in the said kingdom", and as it was then before the legislature that the President and Council had interposed, and altered the criminal law of this country, such alterations and all future necessary amendment thereof, appear by the above clause to be legally sanctioned and authorised,

21. As we thus appear to profess authority to introduce any necessary amendments in the laws of the country, it is surely incumbent on us not to allow any longer the flagrant abuses in the Foujedary Department, or exercise of criminal justice, according to the Mahommedan law throughout the provinces, by the most received opinions among the native distributors of which, a murderer is not liable to capital punishment, if he commit the act by strangling, drowning, poisoning, or with a weapon, such as a stick or club on which there is no iron, or by such an instrument, as is not usually adopted to the drawing of blood.

22. That this part of the law should be abrogated, and the apparent intention of the criminal, in such ~~cases~~ instances, made to regulate his sentence, instead of the mere mode of the commission of the crime, seems evidently to follow from the plainest principles of natural reason; it need therefore be only further observed, that we have the greater encouragement for this alteration, from the consideration that even the Mahommedan law itself is not entirely settled upon this important distinction. For although the Doctor Aboo Huneefa, (by whose sentiments proceedings in criminal cases are generally regulated in India) is of the opinion, which I wish to see corrected; yet his immediate disciples and sucessors Yussuf and Mahomed (who were lawyers of the greatest eminence) gave a very different judgement, contending and laying down as a rule of law, that the intention, and not the mode or instrument, should be considered in cases of deprivation of life, by the act of second person. Shareef, a great lawyer, and a follower in general of Aboo Huneefah, says in the beginning of the Shareefuyah, that "the punishment of retaliation, or death for death, is denounced against those who commit homicide with an intention apparently malicious as by wounding with a drawn weapon or other dangerous instrument, by which the parts of a body may probably be divided, as with a sharp stone or by using fire which acts as ~~powe~~ powerfully as any weapon, but a merht or expiation or penance is the legal punishment of those man-slayers, whose intent is not apparent as if they struck with an instrument which does not generally occasion death, as a wand, or a whip, or a small stone." He makes the intent the criterion, and so reasonable well-grounded has this last opinion been found; that both the Mahommedan Government, and our own, have from time to time availed themselves of it to award capital punishment against such offenders, as will appear in the late correspondence with the Resident of Benares, and from the proceedings of the President and Council in the year 1773, as already quoted.

23. The next alteration I would propose is, that already alluded to, in regard to the option left to the next of kin to remit the sentence of the law, and pardon the criminal. The end consequences and the crimes which hereby escape punishment, are so manifest and frequent, that to take away the discretion in the relations seems absolutely requisite, to secure an equal administration of justice, and will constitute a strong additional check on the commission of murders and other crimes, which are now no doubt often perpetrated under the idea of an easy escape,

through the notorious defect of this part of the existing law, which at first perhaps was confined to appeals, or private prosecutions by the next of kin, and had no application to public prosecutions in the name of the sovereign; and which is besides peculiarly inapplicable to the country (however it may have suited the society it was originally intended for) because where Brahmins commit murder, or any person of the Hindoo religion, they know that they do so with almost perfect impunity, since in most cases, it cannot be expected that any Gentoo will ever desire, or be consenting to the death of a Brahmin: of which,a case exactly in point is now depending before the Board, from Benares; where a Brahmin having wantonly killed his wife, has, althe confessing and convicted of the crime, been pardoned by her relations.

I therefore propose:

First That the doctrine of Yusuf and Mahomed, in respect to trials for murder, be the general rule for the officers of the courts to write the Futwas or law opinions, applicable to the circumstances of every such trial, and that the distinction made by Aboo Huneefa, as to mode of the commission of murder, be no longer attended to, or in other words, that the intention of the criminal either evidently or fairly inferable, from the nature of the case, and not the manner or instrument of perpetration, (except as evidence of the intent) do constitute the rule for determining the punishment; a proposition which cannot even be said to be any violation of the law of the Mussulmans, but only a rational preference given to the opinions delivered by two of their most learned Doctors, in contradiction to that of their master, from whom after full consideration they both dissented; and we have it in evidence before us that the best subsequent, or more modern law authorities among the Mahommedans, do expressly, in cases, where Aboo Huneefa and his said two disciples differ leave it to the Hakim or ruling power to make an option between their varying sentiments, upon which ground I think it is plainly our duty to adopt in all such cases, the opinion of either, that shall appear most rational and fitted to promote the due and impartial administration of justice.

Secondly That the relations be in future debarred from pardoning the offender, and that the law be left to take its course upon all persons convicted, without any reference to the will of the kindred of the deceased.

Thirdly I think that where the Mahommedan law prescribes amputation of legs or arms, or other cruel mutilation, we ought to substitute temporary hard labour, or fine and imprisonment, according to the circumstances of the case. I am of opinion also, that a rule should be made for allowing Decoits and other criminals to become witnesses against each other, in the manner of king's evidence, as in England, care being always taken that no person be ever convicted on the sole testimony of accomplices, unless their credit be supported by circumstances.

24. Having suggested the modifications in the law which appear to me indispensably necessary, I shall now proceed to the second cause of the imperfect state of the administration of criminal justice throughout the provinces viz the defects in the constitution of the courts established for the trial of offenders,

25. It has been already noticed, that the exclusive controul over these courts and their proceedings, is now vested in the Nabob Mehomed Reza Khan. The judges and officers are appointed by him, and are removable at his pleasure, without reference to Government. The sentences passed by the Nizamut Adawlut, or chief criminal court, in which the Nawab Mahomed Reza Khawn presides, (and to which all cases of importance are referred from the courts subordinate to it established in the several collectorships) are final, and are not even notified to Government, until after they have been carried into execution (and then only the name of the prisoner, and the nature of the punishment inflicted is reported), so that numbers of our subjects are daily condemned to suffer death, the most cruel mutilation or perpetual imprisonment, whilst the most notorious offenders often escape with impunity, without Government being acquainted in either case with the grounds of the sentence.

vide Foujedary Regulations 27.6.1787 Art 19.

26.

31. But it is unnecessary to have recourse to the testimony of the Magistrates to prove the abuses practiced in these courts. The multitudes of criminals with which the jails xre in every district are now crowded, the numerous murders, robberies, and burgalaries daily committed, and the general insecurity of person and property which prevails in the interior parts of the country, are melancholy proofs of their having long and two generally existed.

32. Having experienced therefore the inefficacy resulting from all the criminal courts, and their proceedings, being left dependant on the Nabob Mahomed Reza Khan, and from the objections which he may be naturally disposed to feel on the ground of his religionto any innovation in the prescribed and customary rules and applications of Mahomedan af law, we ought not, I think, to leave the future controul of so important a branch of government to the sole discretion of any native, or indeed of any single person whosoever; with a view therefore that the trials of offenders may be conducted, with expedition and impartiality and that the supreme Government may be enabled to superintend the general system, I am of opinion as follows.

33. That the Nizamut Adawlut or chief criminal court be again removed from Moorshedabad and established at Calcutta.

34. That this court instead of being superintended by a native judge, subject to the controul of the president of the Board, as heretofore, do consist of the Governor General and members of the Supreme Council, assisted by the Cazee-ul-Cozaat, or head Cauzy of the provinces, and two Muftis.

35. That the court do meet once in every week, or oftener if the state of business shall require, and that a regular diary be kept of all their proceedings.

36. That the court do take upon themselves the exercise of all the powers, now vested in Mahomed Reza Khan, as superintendent of the Nizamut Adawlut, leaving the declaration of the law, as applicable to the circumstances of the case, to the Cazee-ul-Cozaat, and the other law officers,

agreeable to the practice which now prevails in the Nizamut Adawlut, as established at Moorshedabad.

37. That for the conduct of the executive business of the court there be appointed a Register, with the official appellation of Register to the Nizamut Adawlut, and that he be sworn to the faithful discharge of his trust.

38. That the Cazee-ul-Cozaat and the Muftis, before they enter upon office, be sworn to the uncorrupt and faithful discharge of the duties of their respective offices; and since the violation of a promissory oath, is considered by the Mahommedans as a venial prejury which may be expiated by a certain penance, it will also be expedient that at the end of every half year, or oftener, an oath should be administered to them, (of which they would hold the breach to be inexpiable) that they actually have discharged their several duties with integrity and impartiality.

39. That the decision of the court be in all cases regulated by the Mahommedan law, as at present, with the modificationx already suggested.

40. That Cazee-ul-Cozaat and the Muftis, be required to meet at the office of the Register, three times every week, or oftener if the state of the business shall require, and that the Register do submit to them the Persian copy of the proceedings in all trials, that may be referrred for the final decision of the Nizamut Adawlut from the provincial courts of circuit (as hereafter proposed to be established) and after duly considering the same that they write at the foot of the proceedings, before they leave the office of the Register, whether the Fatwah or sentence passed on the case by the law officers of the circuit, is consistent with the evidence, and conformable to the Mahommedan law, with the modification above proposed, and subscribe their names, and affix their seals to their respective opinions.

41. That the register do submit the proceedings in the cases so revised by the Cazee-ul-Cozaat and the Muftis to the Nizamut Adawlut, at the next meeting, and that the court, after perusing the proceedings of the court of circuit, the sentence pronounced by the law officers of that court, and the opinion of the Cazee-ul-Cozaat, and the Muftis of the Nizamut Adawlut, do pass the final sentence...

47. The regulations of the police of the country, is one of the first object to which I conceive, the court should direct their attention. The materials now submitted, and the replies of the Magistrates to the orders on this subject, issued to them on the 20th October, together with the information which they will occasionally (receive) from the judges of circuit, whose duty it will be in their progress through the districts to attend to the police, and to see that the magistrates discharge this part of their trust with vigilance and activity, will enable the court to frame regulations, which in a course of time will doubtless be productive of the desired effect...

48. The number of persons now in confinement in the foujdary jails, either under sentence or for trial amount I understand to some thousands. I would recommend that an account of these be prepared, and that some regulations

be adopted for employing those who are condemned to perpetual imprisonment. The immuring of criminals for life is liable to many objections, and it is much to be wished that transportation to some distant country could be substituted for this punishment. The labours of the criminals are lost to the community, many parish from the unwholesomeness of the prisons, or other accidents, whilst others find opportunities of escaping and resume their former malpractices.

Cons 16.12.1789
Jud Pro 10.11. 90

50. With regard to the subordinate courts for the trial of offenders,..... I am of opinion therefore it should be committed to Company's servants, of approved ability, and qualified by a knowledge of the languages; I therefore propose:

51. That the criminal courts now attached to the several collectorships be abolished, and that in lieu thereof be established four courts of circuit for the trial of criminal causes, three for the province of Bengal, and one for the province of Behar.

59. That the appointment and removal of the moonshees, mohrers, and other native officers of the courts of circuit be left to the judges of the respective courts.

66. With regard to the Magistrates, in addition to their former duty of apprehending offendersand superintending the police of the country, they will have the charge of the prisoners confined under sentence, or for trial (and who are now very improperly in the custody of the native judges who try them) and also the superintendence of the execution of the sentences passed by the courts of circuit. The following regulations for their guidance are submitted.

82. That the following collectors and judges do exercise, as at present, the authority of Magistrates, and that the establishment, now allowed to them be continued:

1. Burdwan: Mohurers and Akrajaut of the cutcherry and 1 Jemmadar, 20 Chuprassis @ Rs 4 each
2. Rajeshahy: Mohurers & Akrajaut, 1 Jemmadar, 4 Chuprassis @ Rs 4 each
3. Dinajepre: As at Burdwan
4. Nuddea: " "
5. Purneah: " "
6. Rungpore: " "
7. Chittagong: " "
8. 24 Purgunnahs: " "
9. Beerbhoom: " "
10. Boglepore: " "
11. Jessore: " "
12. Midnapore & Jellasore " "
13. Moorshedabad As at Rajeshahy
14. Dacca Jelalpore " "
15. Dacca Momensing " "
16. Tumlook " "
17. Hidgelee " "
18. Ramgur As settled originally
19. Sylhet: Mohurers, 1 Jemmadar, 20 Chuprassis @ Rs 3 each
20. City of Moorshedabad: Cutwally
21. City of Patna: "

23-26. In Behar: 4 Collectorships @ Rs 250 each.

83. That the Magistrates shall transmit a monthly account of the receipts and disbursements of their establishments, with vouchers for the latter, to the Register of the Nizamut Adawlut, at the end of each month prepared in the following form: ...

84. That the diet money be issued to the prisoner by the magistrate under the orders of the 17th June 1789.

85. That the Magistrates be directed to correspond with the Nizamut Adawlut on all matters relating to the duties of their office, in the same manner as theynow correspond with the Sudder Deanny Adawlut in their capacity of judges of the courts of Dewanny Adawlut.

86. Having suggested the principles upon which I think it would be advisable to regulate the department for the administration of criminal justice, it remains to observe upon the additional expence that will attend the adoption of the proposed arrangements.

87. The importance of the duties of the judges of circuit tenders it necessary that these offices should be put upon a footing, in point of emolument, with stations of trust and responsibility in other lines of the service; otherwise it cannot be expected that men of character and abilities will continue in these offices, or qualify themselves for the discharge of the duties of them, by acquiring a knowledge of the languages and the criminal law.

88. I have proposed that each court of circuit shall be superintended by two judges, in consideration of the nature and importance of the trust, and the additional weight and authority which the courts will derive from being superintended by two persons, forming a public body, and further, because one of the judges in the event of the occasional absence or indisposition of the other, will be able to carry on the trials, which, were the courts to be superintended by only one judge, would be entirely at a stand, or often as sickness or other cause might prevent his attending business, a circumstance that would not only operate as a great oppression upon the prisoners, but also prove injurious to the interests of the community.

89. Liberal allowances also should be made to the law officers of the Nizamut Adawlut and the courts of circuit in order that men of character duly qualified by education and abilities may be induced to accept of them, and that their necessities may not influence them to a deviation from the line of their duty.

90. Agreeable to the above principles, I recommend that the following salaries, allowances, and establishments be fixed for the Nizamut Adawlut, and the courts of circuit.

Nizamut Adawlut and Courts of Circuit

Nizamut Adawlut

Register	per month	Rs 1,200		per annum Rs	14,400
Establishments					
2 writers @ 40 ..	Rs	80			
1 Head Moonshee	Rs	60			
3 Mohurers @ 25	Rs	75			
4 peons @ 16	Rs	64			
1 Dufterbund	Rs	5	284	Rs	3,408

Cazee-ul-Cozaat	per month	Rs 600	per anum	Rs	7,200
2 Muftis @ 300		Rs 600	per anum	Rs	7,200
Total (Nizamut Adawlut)		Rs 2,684		Rs	32,208

Calcutta Division

Senior Judge	per month	Rs 2,916.10.8	Rs	35,000
Junior Judge		Rs 1,666.10.8	Rs	20,000
Register & Persian & Bengal Translator		Rs 500	Rs	6,000
1 Cauzy		Rs 200	Rs	2,400
1 Mufty		Rs 200	Rs	2,400
1 Head Mufty		Rs 50	Rs	600
4 Meherers @ 25		Rs 100	Rs	1,200
1 Mullah @ 10		Rs 10	Rs	120
10 Peons @ 4		Rs 40	Rs	480
Total (Calcutta Div)		Rs 5,683.5.4	Rs	68,200

Moorshedabad Division	the same as Calcutta	Rs	68,200
Dacca Division	" "	Rs	68,200
Patna Division	" "	Rs	68,200

District Establishments

Dacca Jellalpore

1 Mirdah for the jail & Hallicoonah	per month	Rs 25
30 Durkundarrs @ 3 each		Rs 90
1 Tubbeb		Rs 4
1 Tazemaburdar		Rs 4
1 Jellaud		Rs 4
1 Corekund		Rs 4
Total per month (Dacca District)		Rs 147.

(same for other districts except Higelee where it is Rs 70)

total judicial
(Former/establishment expenses total Rs 16,394 per ~~year~~month. Moorshedabad is Rs 3,469, others mostly between Rs 495 - Rs 535. Data provided in annexure 28 to Minute)

IOR:P/52/22. Extracts reproduced are from pages:
Paras 1-25: pages 191-227; paras 31-41: pages 238-244;
paras 47-8: pages 247- 251; paras 50-1: pages 254-8;
paras 59: page 262; para 66: pages 268-9; paras 82-90: pages 283-29 .

VIII·20

92

Lord Cornwallis to Sir William Jones: 17.11.1790

No 185 Calcutta November 17,1790

Sir,

I take the liberty of sending the Fouzidarry propositions according to your obliging permission, and earnestly request that you will use no ceremony with them, but scratch out and alter every part that you do not approve.

I shall consider it as a great favour, if you will give them as early a perusal as possible, for I am very anxious to put themsein a way of coming forward, before I embark for the coast, and I have fixed Saturday or Sunday fortnight for my departure.

I am, with the greatest esteem, Sir, your most obedient and faithful servant

Sir William Jones Cornwallis

Lord Cornwallis to Henry Dundas: 23.11.1790

No 49 Calcutta November 23,1790

Dear Sir

I transmit a copy of my intended propositions for regulating the criminal justice, and of Sir William Jones letter to me after he had read them.

I am with very great regard, dear Sir
Most faithfully yours

Right Hon'ble Henry Dundas Cornwallis

93

VIII·21

Court House 20 Nov 1790

My Lord

The adjournment of the court having given me a whole day of leisure I have spent the morning in reading with great attention your Lordship's Minute on the administration of criminal justice in the provinces, and in perusing the papers which accompany it. I read them all with my pen in hand, intending to write without reserve all objections that may occur to me: but I found nothing to which I could object, and did not meet with a single paragraph to which, if I were a member of the council I would not heartily express my assent. The power of pardoning which(in para 44) is reserved to the court should be always exercised, I think, by the Governor in council in his executive, not his judicial, capacity, and in para 61 the phrase which is always to be received with circumspection and tenderness are applied to the accusation, though, I presume, they were intended for the prisoner's confession. Those are trifling remarks, but I cannot start one serious objection; and think the whole Minute unexceptionably just, wise and benevolent.

I am with great respect,
Your Lordship's, ever faithful servant

(signed) W. Jones

National Library of Scotland: MS 3386: ff207-8 listed as 'copy of a letter from Sir W.Jones to Lord Cornwallis dated Nov 20, 1790 (enclosed in Lord Cornwallis's letter to Mr Dundas No 49, dated 23 Nov 1790)'. Received by Mr Dundas 20 April 1791. Numbered as Appendix No 31.

VIII ,22

94

CONSIDERATION OF THE LEGALITY OF INDIAN REGULATIONS 1793-4.

P.Russell: 24.4.1794

Bail in Suits in the Court of Conscience at Calcutta

In my researches for information on matters in India requiring an amendment of the law my notice was particularly attracted by a bye-law or standing order of the year 1757 whereby defendants in suits in the court of requests at Calcutta are held to bail. Astonished at this discovery of a rule and practice so directly repugnant to the laws of England, and particularly of the provisions of the Acts of the 12th Geo I, 21st of Geo II, and 19th Geo III; which forbid that bail be demanded for a less sum than £ 10 (a sum greatly exceeding the jurisdiction of the court of requests) I was led to examine further in expectation of finding that this order had been repealed, but on the contrary I discovered sufficient to prove that it was continued to be acted upon by that court so lately as October 1791. ... Care will certainly be taken to correct by the new charter a practice which appears to be so directly repugnant to the laws of England; but in the mean time it might be right for the Company to revoke the order which by the charter of justice of 1753 they have clearly a right to do.

J.Anstruther: 10.12.1793

(Legal argument as to right of Company; right lie in king)

Proceedings against officers under 21 Geo III Cap 70- XXII

Whereby the Governor General and Council are declared to be a court to hear and determine all offences, abuses and extortions committed in the collection of the revenue or of severities used beyond what shall appear to the said court customary or necessary to the case and to punish the same according to sound discretion provided the said punishment does not extend to death or maiming or perpetual imprisonment....

IOR: Home Misc. The above from Russell is from his "Third Report on Judicial Matters" pages 9-10, in No 418. Rusell's three reports are in No 416(pages 1-110), No 417 (pages 1-65), and No 418 (pages 1-12). The extract from Anstruther is from his "opinion on Lord Cornwallis' regulations of 1793' page 71 of No 414(pp57-78)

95

VIII·23

Right Honourable Sir,

In the course of this season, I have done myself the honour of addressing you several times, the last by the sugar cane, lately dispatched, requesting your patronage and recommendation to succeed the late Sir William Jones, as Judge.

The object of the present letter is chiefly to submit to you two innovations, which I have as Justice of the Peace, ventured to introduce; and which though considered by some as not perfectly legal, have already been attended by very salutary effects.

The native inhabitants of Bengal are beyond all conception addicted to every species of dishonesty. The numbers brought ~~to~~ before the Justices charged with petty thefts under the value of a rupee is astonishing, although certainly not now so numerous as formerly. To suffer such offenders to go unpunished is an idea not to be endured; but to commit them for ~~trust~~ trial before the Supreme Court has ever appeared to me to be a hideous deformity in our jurisprudence. I have heard (2) some arraigned, who have been in gaol from five to near twelve months, on a charge of stealing a pan, a turban, a koprah or some such trifle. Imprisonment is really no punishment to a Bengallee. So long as he is fed, and does not work he is satisfied. Pillory, the stocks, and other punishments according to the English mode, which are merely ignominious, they do not value; as they have no sense of honour or shame, and their neighbours think not the worse of them for having been so punished. A fine, where the party is able to pay, and corporal punishment, where he is not, are the only real terrors which affect the minds of these men. I accordingly resolved to adopt that system, and it has been followed by my brethren. The first day I sat as Justice, a man was brought before me for stealing a turban worth about half a rupee. The fact being proved I ordered him ten strokes with a small Rattan, and dismissed him to follow his employment. The legality however of this summary mode of punishment has been doubted by some and denied by others; although all agree that it (3) would certainly be salutary, if expressly sanctioned by

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Parliament. I admit, that there is no statute which literally empowers Justices of the Peace to proceed in cases of petty larceny in such a summary manner, yet as they have power to proceed so against all rogues, I think it is rather a narrow construction to say that petty thieves are not rogues, because not nomination included in the catalogue of those who are usually in the statutes described as such; especially am in this country, where the difficulty of procuring the attendance of Jurors is so sensibly felt even in the Supreme Court; where so much time must unavoidably elapse, before a Parliamentary explanation can be obtained; and where the sort of punishment is so perfectly consonant to the genuis of the natives, and to the old mode of chastisement in the Citcherrie Courts. Whether you may judge it expedient to remove all doubts by extending the same powers which the Justices have in England in regard to rogues to the Justices in this country, (4) and to include under that description all petty larceny thieves and other inferior offenders, for whom no definite mode of summary punishment is pointed out. I beg leave, after having thus simply stated the fact, to submit to your superior understanding.

The other matter to which I have alluded above is in relation to the recovery of debts above 20 rupees, which do not amount to a sum considerable enough to warrant an action in the Supreme Court. To remedy this, I have adopted a fiction of law, similar to the *acitam* clause in the Bill of Middlesex, which gives the Court of King's Bench, in civil suits, that jurisdiction which they have not by any positive law.

Some of the latest Madras papers having announced a resolution of the Justices there to decline for the future taking cognizance of any suits respecting property, Mr. Joseph Barnard Smith, one of the Company's senior servants, and one of my most useful co-adjutors, proposed that a similar resolution should be adopted by the Justices of Calcutta. Upon all such occasions when anything new is recommended or any alteration (5) is proposed, it is produced in writing and every other Justice individually gives, also in writing his approbation or dissent, the whole of which is entered on our books. The following is

the opinion which I gave, and it is now unanimously our determination to proceed as we have begun.

20th August 1794. "The experience of above six months leaves us, in my opinion, no reason to regret, or a wish to alter the system, which we have hitherto pursued in regard to deciding incidentally on matters of property.

"To lay down a positions that the poorer Europeans, as well as natives, should be either without a remedy in all questions of property from 20 to 100 or 150 rupees, or that the only remedy they could resort to should be worse than the disease, appears to me to be a doctrine neither consistent with lawnor sound policy; as it defeats that great maxim, that there is no injury without a remedy.

"But, to refer complainants in such suits, to the Supreme Court, would be a mere mockery of (6) Justice. It would, in other words, be to tell them, what they could have no redress whatever, as the unavoidable casts there would ruin even the successful party. Whilst to leave them to the mercy of the Court of Requests, who, after all, could take no cognizance of such matters, but by the oppressive and illegal fiction of splitting the demand into sums under twenty rupees, and thereby making four or five actions upon one contract, would be tacetly to sanction proceedings which cannot be vindicated upon any principle of law or public convenience. But the mode hitherto persued by the Justices, even where the Breach of the Peace complained ⊗ by a similar fiction in the practice of the Court of King's Bench, who have no jurisdiction in Civil Contracts but what is founded upon the usual complaint of trespass in what is called the actum clause in the Bill of Middlesex.

"As the legislature therefore have omitted to provide any specific Court in this place for the recovery of such debts, and as the Justices have (7) an unquestionable jurisdiction in all breaches of the peace, they seem to me to have a clear right to take into consideration whatever damage a party may have sustained in consequence of such breach, either on persons or in property,

⊗ If has been a misprision, is countenanced

and to measure the remedy accordingly; it being an undoubted rule of law, that where a Court has jurisdiction of the principal cause of action, it has also jurisdiction over all the incidental matter; as nothing could be more inconsistent with reason and convenience, as well as with law, than to divide between two distinct jurisdictions one entire act.

"I am therefore, for these and other reasons which might with better consideration be advanced, against all innovation, being not only satisfied in my own mind of the legality as well as utility of such systems, but convinced that our conduct, if properly understood, instead of censure, must meet with approbation, for having, without the least personal benefit, incurred a considerable degree of additional trouble in successful establishing a summary and cheap remedy, which Parliament (8) had either accidently omitted to attend to among their other regulations, or, for want of precise local knowledge were uncertain how to apply it."

John Richardson.

As it is now near seven months since we have acted as Justices, during which time thousands of suits have been determined, without any action having been brought against us; as the people at large seem to be so perfectly satisfied with our administration of Justice that they crowd to us with complaints of every description, and appear to wish for no other tribunal; as about 1200 people who act under us, are kept in such strict discripline that they cannot, without discovery extort an anna from any person; as our punishments though certain, have never been severe, and the police of Calcutta, from being the worst, is now perhaps the very best in his Majesty's dominions; a fair presumption seems to arise that our proceedings will not be condemned, even by the most rigid lawyer, because there may appear a slight deviation from the strict letter of the [English] (9) Law; and that they will even be of opinion, that, in such summary proceedings, even a direct deviation in points not material, where substantial justice is still observed, may, upon experience, be better suited to the understandings and prejudices of such a mixture of inhabitants, differing from each other in their civil and religious opinions, than an over rigid adherence to matters, the reason of which they could not comprehend. I have the honour to remain

Right Honourable Sir

Your most faithful and obedient
Servant
John Richardson

Calcutta
25th August 1794

The Right Honourable
Henry Dundas, etc. etc.

.....All here is as settled as Devaux. Barons. These are infinite details but little general politics and all my leisure (except what is wasted in eating and drinking, talking and yawning at others taking etc. etc.) is spent in considering what is to be done in judicial and revenue matters especially the former. My first plan and it certainly was the insist/as well as the/earnest, was to leave everything as I found it and make no innovation until I saw how the land lay; but when I did begin to see how the land lay, I found the navigation rather (p.) more intricate than I had expected. I left civil and criminal justice as I found them (as I found them in theory and name at least) the former administered by Punchayets, the latter by the Collectors (to which in one province (Candeish) I ventured to add a Punchayet as a sort of attempt at a jury). The police was managed and not ill by the revenue officers assisted by the Village establishments, the Beels in our pay and the rest of Sebundies whom we kept up that they might neither rob nor starve. I have no great fault to find with the criminal justice or police but in the civil I found that Punchayets could never be assembled without much difficulty. When they did assemble they did not get on; if the ~~course~~/were intricate they were puzzled, even if simple they were lazy, until some one member perhaps bribed into activity by one of the parties, would exert himself a little, look into the case, lay down the law, draw upon/award and get the rest of the members to sign it. It also became a trade to sit on Punchayets, (p.) although there was no fee or other emolument; Notwithstanding all this, the Punchayets gave tolerably fair decisions, but they gave them very slow and it became obvious that on this system of administering justice there would be no uniform and known system of law throughout the country, each punchayet acting on its own principles. This seems likely to be a futile source of litigation and what is the remedy? One man recommends a few short and simple regulations which every

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India Office Records: Elphinstone Papers: MSS European F88/ /9/B/6/No.4: Elphinstone to Strachey: Extract. (9/B/7/No4 : 28.2.1919)

person can understand and which will apply to all cases likely to arise, but this is exactly what all the wise men of the earth have been endeavouring at without the smallest success for the last 30 centuries. Another recommends a Digest of the law as it stood at the conquest. The written law was that of the Hindoos, always vague and unknown to the bulk of the people, often abused, and still often entirely disused. The unwritten law was composed of the maxims that occur to people of commonsense (p.) in a country not remarkably enlightened, modified by Hindoo Law and Hindoo opinions and constantly influenced by the direct and lawful interference of the Prince who was fountain of all law and by the weight of rank and wealth and interests. Indeed the practice of the country was in a great measure the law of the strongest. A powerful claimant sent a guard and confined his antagonist till the ~~his~~ claim was adjusted, a weaker one had recourse to patrons and connections. If he had none of these, his claim was never thought of. I have been attending a funeral since the above was written and shall not attempt to pick up the subject where I left off. I have stated the evils of Punchayets. They are cumbrous machines to apply to simple causes and their Ameens would be better; but without laws to administer, it is idle, to fix, the mode of administration. If we had a simple intelligible code, Punchayets would see their way and might be joined to Ameens, (p.) or Ameens might be trusted alone when the parties knew the law and could appeal. In all cases English Judges ought I think to be employed in keeping the machine going and preventing abuses rather than executing the detail. But how is a code to be got. In fact it is wanted for all India, not only for my province. Are we to hammer on, making and unmaking regulations as chance directs, or shall we venture to make a code of laws for a people we do not half know, and if we are to make it, who is to undertake a task that would require a dozen Jeremy Benthams and as many Henry Stracheys? I have serious thoughts of proposing as an experiment the appointment of a Committee

to superintend the administering of justice and power from the Shastras and the Maratta customs, whetted by common-sense and natural justice, a code for these provinces. They talk of giving me a Council like Henry Wellesley (Bengal Civil Servants) and if they are clever (p.) fellows, we might see what could be done. They would find legal knowledge and experience, and I, some knowledge of the Marrattas and above all that impartiality to any particular system of law which must be produced by a total ignorance of all laws human and divine. Between ourselves I am by no means inclined to rate this last qualification low.....

VIII. 25

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.....I was delighted with the satisfaction you express at my resolution to keep up the native system. It ought however to meet with your approbation, as it was from your opinion at Benares that I was led to think well of the plan. It is certain that under good kings the native system was sufficient to keep the country in a very high state of prosperity. A few weak monarchs were enough to throw it into complete disorder; but as our government might possess the consistency which is unattainable in a despotic monarchy, it (p.) follows that the native system under us ought to produce permanent happiness to our subjects. It has the advantage of having been tried and found to answer in circumstances such as we ought to be able to secure. I am by no means of opinion that it is not capable of improvement or that improvement ought not constantly ~~be~~ to be made but I think they ought to be made gradually, continuously and experimentally for we hardly see our way well enough to know how anything will turn out till we have something of its operation. The plan which I have adopted is not however without considerable inconveniences and some of them are not very easy to remove. The greatest is in the administering of civil justice. Our plan is for the Patail or head of a village to make up disputes by fair means if he can and if he fails, to assemble a Punchayet in the Village. The same process is adopted by the native collector in cases that cannot be settled in a village and the same process is again adopted by the collector in cases that from their importance or distrust of the local authorities by the parties are brought before him. But he not only accomodates matters by pursuasion like the natives but decides on simple causes and refers them to his first ant assistant and to shastras of whom (p.) there are three in Poona and one in the other districts who enquire into the cause and report it with their decision. Causes settled in these ways are soon done and give great satisfaction because impartial justice is a novelty. The Punchayets

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India Office Records: Elphinstone Papers: MSS European F88/ /9/B/7/No.72: Elphinstone to Davis dated 17.6.1819 (Extract).

do not as yet answer so well which is very unlucky as they are I think our great standby. In former times the members had often the stimulus of a bribe from one or other of the parties and worked hard to earn this reward. Still they were very tedious and did not always come to any decision. Now, when a man has no inducement to serve in Punchayets but public spirit, the members cannot be got to attend and when they do meet their inexperience prevents them getting rapidly through business. The sickness of a member or the death of a relation has thus time to intervene and the court adjourns sine die. The great judicial duty of the collector and his assistants is to keep the Punchayets moving and when by dint of constant messages and expostulations they keep a punchayet together, the danger is that the members get ~~many~~ weary and readily sign their names to any sort of decision which one of their number (perhaps bribed into activity) may draw up. This might be remedied by giving fees on causes decided to the members but (p.) (besides that I think there are strong arguments against law fees in general) this would be no spur to a man who only served on a punchayet once a twelve month and it would increase the tendency to the foundation of a profession of Punchayetee of which there are already indications. Another evil strikes me which (is) that as long as each punchayet forms its decision on grounds of its own, there will be no uniform or known system of law. This may be corrected in time by forming from the Shastris and the decisions of a great many Punchayets, some general rules for the guidance of future members, and likewise for the information of disputants; for if there were short and intelligible laws that people could consult; there would be little need of courts of justice. In the meantime this last evil exists in theory rather than in practice for I see no want of a known system of law among the people, on the contrary it seems to me that the Hindoos know their own law on all points that concern themselves much better than the English. The other evil (delay) is much more real and although the people are far from litigious it already occasions arrears on the file. The number is quite

insignificant at present; but I am alarmed at the prospect of the future. The number of complaints (p.) will doubtless increase because the people will find many channels through which they used to get some sort of justice, shut up, such as the summary decision of a great military chief, the court influence of a relation or neighbour (which might be strong enough to carry through a just claim, though not to support an unfounded one) etc. etc. The people will also get more litigious when they find the courts open, and perhaps even less honest when they find society can hold together without honesty; for certainly there is a great deal of honour in native dealings which one can only ascribe to the same motive that makes the Spainish smugglers so honest; the knowledge that they and those they deal with are out of the law and have nothing but mutual honour to trust to. It would be a remedy to have many native commissioners (you will doubtless have observed that it is by them and not by the Punchayets that all the Madras files have been cleared) but commissioners without fees will be quite inefficient and with them they are certainly too active, stirring up strife and sending out emissaries to bring trials to their tribunals. I am therefore lying on my oars and endeavouring by sending (p.) queries to the collectors and calling for reports and opinions, to find out some remedy in time to meet the apprehended evil. In criminal justice and police our situation is far more agreeable. The village establishments are all entire within provinces (except Candeish where they have been destroyed by the calamities the province has suffered and will I hope be restored by an expensive measure which Lord Hastings has sanctioned). Our host of irregular sibundies gives the means of checking disturbances besides employing the very men who would probably excite them. It is chiefly to this that I ascribe the tranquility of these conquests, which surpasses anything I have ever seen. Crimes are few, murders for jealousy or village rivalry and petty thefts are the most frequent. Forgery is confined to village accounts.

7. The system of Punchaet in Candeish as applied to criminal offences being neither consistent with former usage nor attended with any manifest advantages should be discontinued and the mode of trial adopted in other districts should be substituted.

8. In trivial cases of a criminal nature the authority of the Moomulatdar may be augmented, so as to allow his punishing petty affrays or other misdemeanours. For this purpose he may be permitted to fine to the extent of ten Rs. and to impr imprison for two days; but he must be strictly enjoined to proportion the punishment to the circumstances of the party; and the Patill may be permitted to exercise a similar authority to such a limited extent as may be requisite to keep up his influence in the Village.

9. In the administering of civil justice the Punchaet must still continue to be our principal instrument,.....

India Office Records: Elphinstone Papers: MSS European F88/Box 14/E/18: Circular letters to collectors etc. Circular dated 25.10.1819: 42 paras: Capt. Brigg.

VIII·26

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Bombay, November 23, 1821

My dear Strachey,

I believe I wrote to you before enclosing a copy of the minute on which our new digest of the Regulations is founded. The Committee appointed in consequence has produced a great portion of its work and I have shown it to Sir W. Evans our Recorder whom you may perhaps know as a translator of Pothier, a digester of the statutes, a great civilian and a great admirer of Bentham's though not an acquaintance of his. His opinion is particularly favourable to the success of the Committee, but their code has (8) yet to run the gauntlet through all the courts (the opinion of every Judge being requested) before it passes the ordeal of the Council. I was 6 or 7 months in Guzerat in the end of last year and the beginning of this and wrote full minutes on 1 Kathiawar, 2 Cutch, 3 the Petty states onthe N.W. Frontier, 4 Mahee Caunta (a country of Cooley Chiefs and Rajpoot Rajwara), 5 the districts of Ahmedabad and Kaira, 6 Baroda, 7 the district of Broach and 8 of Surat. They all were sent to the Court of Directors and 5,7 and 8 will give you an idea of the internal management of Guzerat chiefly revenue. Our Fourts go on as in Bengal but I think they pay more attention to native Mamool. As to the Deckan it is still as I left it, but we shall soon have general reports on it from Mr. Chaplin and the Gentlemen under him and shall consider what changes are required. All the difficulties anticipated in my report are found in the Punchayats but they have scarcely had a fair trial from the want of liesure in our officers. By the by I have read (9) the opinions of the Company's servants published by the Directors. I do not agree with you that yours is Pooch nor I must own do I agree in your opinion of Sir Henry's: being used to the mild, thoughtful and dispassionate manner of his dispatches in this country; I was disappointed at the levity and the sarcastic tone of his present answers which reminded me of the Edinburgh Review in its bitterest mood cutting up a political enemy. I think both you and Sir Henry lay too much stress on the errors of Panchayats arising from their superstitions and their religion. before you pronounce those who condemn witches or killers of bullocks to be incapable of judging you should remember that our own judges and juries have often punished for witchcraft and that

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India Office Records: Elphinstone Papers

sadoo if he had doubted the would a very few years ago have met with as little toleration from an English Court as he is supposed to have done in your answer. Yet were those Courts very competent to try all other causes. You need not be afraid of my getting (10) attached to the doctrines of Madras Collectors. I am neither and all I am afraid of is the versatility described on the next line for unless one's opinions are founded in knowledge they must always fluctuate.

Your young friend Monecreiff, I am sorry to say, has turned out very ill. He lived with me for a short time and was perfectly quiet and well behaved but afterwards he broke loose, run in debt, swindled in the most shameful manner and is now in jail notwithstanding the exertions of Sir C. Colvill who knew him family and of Sir W. Keir who is his relation. If I often see one of the young Macans who seems a very fine lad. Malcolm is here now very much broken but quite as good humored and often as lively and as loud as ever. He is to go home on the 1st and we are giving him great entertainments public and private and making speeches to him. It is time I were going home too. Indeed I have already stayed too long. In 3 years, I shall march. I have (11) now 1,50,000 sicca rupees. I hope in three years to have 3,00,000 and more I shall never have unless the Court of Directors pay my Caubul money and add to my salary. I wish I were at home reading old poets (and new publications likewise), comparing old chancers descriptions of spring with the reality and perhaps chaunting an ode of Hafiz with you as if we were in the choultry at Poondee I dread the listlessness and depression of idle life but I have great confidence in the climate and it cannot be worse than this; I also dread, but less, the inconveniences of poverty,

(Signed) M. E.

VIII.27

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Bombay, May 13, 1822

My dear Sir James,

I had the pleas ure of receiving your letter by Captain Morison to whom I shall in consequence attend as far as may be in my power. As yet I do not know his views or his claims precisely.

You will long ere this have heard of the melancholy fate of poor Mr. Rich. After he had escaped all the dangers of Baghdad he fell a sacrifice to the epidemic cholera at Shirauz. Mrs. Rich will be with you before this reaches you. Her claims have been strongly recommended by this Government to the Court of Directors and they are in themselves so perfectly reasonable (67) that I cannot have a doubt of their success. Erskine is recovering but certainly very slowly from the effects of his late illness. I do not know whether he ever writes to you about his present employment, framing a new code of Regulations for this Presidency. He and his colleagues are greatly restricted in their proceedings but laws, customs and prejudices which must be respected and in many instances are only putting the old Regulations into a more convenient and more intelligible shape. Even where they are so limited, their execution of the task has been admirable and drew forth the applauses of Sir William Evans who, I believe was a very competent Judge on such subjects. In some cases they take a wider range and I hope they will be able to make a complete code of Criminal law. At present we profess to administer the Mahomedan and Hindoo laws modified by the custom of the country. Those laws are often the absurd to enforce and much oftener they leave the punishment at the discretion of the Judge and one Judge is sever and another lenient so that nobody can (68) guess before hand what the punishment of a particular offence will be. The Regulation Committee will now form a scale of punishment founded on the law and practice of the country adopted where it can legally be done (which I fancy will be in most cases) to their own notions of justice. The Criminal Law will then

India Office Records: Elphinstone Papers

be clearly known and probably it will also be a rational code. I have not by any means forgotten your anxiety for Captain Campbell's success but I find some difficulty in doing anything to serve him. I made him an acting Pay Master at one time meaning him to rise in that line which is one of the best at my disposal; but he was inexperienced and alarmed at the responsibility and applied to be relieved so that what I ~~went~~ has as a benefit to him turned out only a source of anxiety and uneasiness. Most of the Military appointments in which my gift belong to departments in which there are already many claimants who have been filling temporary situations. I have lessened my means of providing for friends by abolishing or transferring to (69) the invalids various little offices and commands and as Captain Campbell is not a very smart officer, it is not every place that he will suit. I must, therefore, wait till something turns up and in the mean time I think it best to hold out no hopes to him. There is no news in India and if there were you have correspondents who would tell it better than I can.

Believe me my dear Sir James, yours most faithfully,

(Signed) M. Eliphinstone

Sir James Mackintosh, M.P.

VIII·28

The advantages of the Adawlut system appear to be the settled principles of justice on which decisions (judicial selections) are founded and the purity of its administration:- objections are raised to the 1. encouragement to litigation and 2. expense and delay, amounting often to denial of justice. In many parts of India, these evils are far less felt than in others; they arise from intricacy of law, a series of appeals and perhaps contradictory decisions, multiplicity of forms, large extent of Zillahs and x especially from the exaction of fees and the employment of professional Vakeels.

Under the Bengal Government, the only native judicature appears to be 1. Panchayat of Cast, in many places exploded and unsanctioned by public authority. 2. Arbitrators, under recommendation of the Judge, agreeably to the regulations. 3. Moonsifs, who decide suits of ~~linked~~ limited amount, with salary and fees, under appeal to the Judge. A native judicature has all the merit of simplicity of form, freedom from expense and intelligence; and all the evil of delay, partiality and corruption; an option or appeal is generally thought necessary and useless under vigilant superintendance and stimulated by rank and emolument, the Judge has to decide on the appeal itself and on the corruption of the native tribunal.

In 1816, the Madras Government, subsequent to the investigations of Col. Munro and after considerable discussion promulgated Regulations for the appointment of Moonsifs and the encouragement of panchayats. The amount of property in suits before Moonsifs was very limited; but they were authorised under razinamah of both parties to order a Panchayat for personal (and in districts for real and personal) property to any amount. While village moonsifs were prosecutable for partiality or corruption and an appeal lay from district moonsifs to the Zillah Courts, the award of a panchayat could only be annulled by the Judge on petition, and proof of gross partiality and corruption; corruption only begi being punished by fine, and reversal of the award generally discouraged.

The effect of these regulations was greatly to increase the number of decisions, and to reduce the causes on the Adawlut files. Above

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India Office Records: MSS Eur F.88, Box 15/4(23)(c)
12-10-1822

10,000 suits were decided in 1817 by the Village Moonsifs, and between 3 to 400 by Panchayats; the cause of this disproportion is explained either by the long disuse of the latter institution, or by their decision having been made final. Complaints were made of the ignorance and partiality of V. Moonsifs, but few appeals were brought from D. Moonsifs.

Under the late Paishwa's Government, civil suits, if not determined summarily, were usually referred to a Punchayat by choice or consent of parties. It is unnecessary to repeat their mode of defision, their acknowledged benefits, and under a (venal) Government their ? more than counterwailing defects. Corruption was common and unpunished; partiality is a fault common to all Tribunals where the parties have choice of members, and in an inferior degree where they possess the right of challenge, and local judgments are more remarkable for intelligence than purity. Agreeably to the instructions of the Hon'ble the late Commissioner, in the Deccan panchayats have been encouraged and revision of their decisions discountenanced, unless corruption, gross partiality or injustice were evidently proved.

Of the small number of civil suits in Khandesh, the greater part have been decided by Panchayat. Captain Briggs concludes from the general dislike evinced to the/jurisdiction, the frequent appeals during and after trial to himself and the great reluctance to serve on panchayats, that the present system is inefficient. He suggests the introduction of village and district Moonsifs like those of Madras, the optional reference of a cause to the Moonsif or panchayat, and the employment of criminal panchayats of enquiry - as a means of promoting union between the (3) people and the government, and an efficient modification of the ancient Hindoo judicature.

Captain Robertson, after expelling professional panchayats and Vakeels and revising suits discovered to be corrupt, persuaded respectable persons to become members, and introduced a plan of active supervision, which cannot but prove highly advantageous. Decisions are in Poona remarkable for acuteness, but there does not appear any efficient check against bribery.

Captain Pottinger states that panchayats have latterly been more just and speedy in their awards, from knowledge of the scrutiny their

* /Mamlutdars'

conduct is likely to undergo; he complains of the Kumavidars' vanality and the frequency of appeals. In the opinion of Mr. Giberm, a favourer of the Adawlut and Ameens, the present habitual Panchayatdars are in fact hired Vakeels, the Pergunah jurisdiction in the Deccan being without check or efficient responsibilitu, is liable to delay, corruption, and tyranny and the appeal, calling the punchayat to the head station, induces great vexation and expence.

In Sattara, panchayats appear to have been notwithstanding their prevalent defects, preferred by the suitors. Causes are referred thro' the Hoozoor to the Mamlutdar, and few complaints have been made either against the officer or panchayats under his direction.

Under Mr. Thackersay's active superintendence, the system has been, except in large towns and during the Jummabundy, successful. By giving the liberty of challenge, the partiality is rendered equal; Panchayatdars are not easily procured, but there have been few complaints of bribery, ~~but there have been few complaints of bribery~~ The appointment of Aumeens has been authorised on the Madras plan, which is thought to combine intelligence and dispatch and by appeal a check is established against corruption. The Moonsifs are, however, believed in some degree to induce litigation, as they certainly have a tendency to discourage panchayats. Mr. Thackersay recommends that suits respecting houses, late debts, and simple (4) contracts should be decided summarily, those relating to cast, marriage, inheritance or old debts, by arbitration or panchayats. The following is an abridgement of his plan of superintendence:

"Order for enquiry to be presented within a certain period. Appointment of panchayatdars by consent of parties. Attendance enforced by peons, fine and limitations of period. If deft. absent, decision ex-parte. If Plff. suit dismissed. Allowance to witnesses 6 pice per day, to be paid by party, after by loser. to panchayat (if no delay and if expense and income) paid by loser. Huzoor Shastery to give written legal opinion, if required. Suits as to property on the spot. Plff to be fined on frivolous complaint by the Hoozoor. Register of decisions.

Limitation of Potell's jurisdiction to 150 rupees, generally by razinamah or informal panchayat. Register of Fines, Crimes and Enquiry."

It is generally allowed that panchayats are preferred to native summary decisions, not to decree of an English Judge. They are from their knowledge and acuteness especially useful in disputes of Boundaries, accounts of cast; while their prevailing evils are, the difficulty of procuring attendance, delay, partiality and corruption. The following remedies have been suggested:-

Rotation of Punchayatdars by panel, or choice from list; to obviate hardship of attendance, corruption of particular members, and to obtain a sufficient number of qualified members.

Bond from Panchayatdars against delay and corruption.

Bond from parties, to pay subsistence of witnesses and panchayatdars by percentage of fine on loser.

By active European superintendence alone the evils of delay and partiality are to be avoidable and efficiently given to the Award without necessity of reversal.

In the Districts reports regularly transmitted would at once expedite the Awards, promote the probity of the panchayat, and prevent the renewal of the same suit.

VIII.29

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Camp Shewapoor
22nd December '22

My dear Strachey,

I wrote to you the other day but I have since received your letter of July 2nd. The omission of the Regulation you mention (1st of 1799) by our Committee is certainly an oversight, but probably proceeded from the Committee's never thinking we had the power to govern otherwise than by law. I do not think there is much fear of our Committees being betrayed into the technicalities of English law (more fear of Scotch and Civil Law, if any). I had heard something of Mr. Shirley's letter but indistinctly. I hope the matter has been fully explained in the reports of the Bombay Government. I cannot guess the ground of blame. Captain Thomson discovered the Beuiboo Alli to commit piracy from their port of (I forget the name) instead of merely attacking that port, he imprudently entered into a combination with the Imaum of Muscat whose rebel subjects they were) to attack their principal town inland. He was totally defeated and most of his detachment cut up, the Beauiboo Alli taking no prisoners. I was in Guzerat when the news arrived, but it seemd so obvious that we must recover the reputation of our Arms on which alone an exemption from piracy depends that Sir Charles Colville immediately resolved on preparing an expedition. In the meantime the news reached me from Arabia by Cutch and I sent instructions for an expedition before I had heard of Sir C. Colville's views. The expedition sailed, the Beuiboo Ali behaved with the utmost gallantry but were defeated, and at the Imaum request all the ~~Illanis~~ were brought to India. I directed them to be treated with every attention as prisoners of war and not long after consulted General Smith on the possibility of releasing them. At his recommendation I wrote to the Imaum who agreed to allow all but the Chiefs to return. I afterwards wrote in favour of the Chiefs who were also allowed to return, and have had very satisfactory accounts of their reception from themselves. It is true that while in India many died of the cholera and small pox, as many did also in Arabia. The latter disorder indeed ~~regard~~ so much there as to induce me to send a vaccinator thither in the idea that such a period was favourable for his reception. I am glad the business was not brought before Parliament because no good can follow and much harm may in a distant country where Asiatic affairs are viewed through the medium of much ignorance and some prejudice, and where Ministers will perhaps be

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India Office Records: Elphinstore Papers

glad to show their candor by giving up people with whom they have nothing to do. Mr. Morley, however, is gone home and will probably stir the business a-gain. Stay till I have made £60,000. Et tu Brute! This is a sentence of banishment for life and hitherto I have opposed your (20) opinion to that of the whole world as to the justice of it. You ask w hy I should wish to come away, because at Bombay the climate is debilitating in the extreme, spirits or feelings of animal comfort and satisfaction are unknown; the business is fatiguing and mechanical, the society formal and uninteresting; because I like leisure, reading, travelling, hunting, associating with my intimate friends and taking my case in my inn and because at Bombay I have instead black boxes, dull dispatches, rides on the beach and drives to Parell, dinner parties of 100 people, and no society but official visitors. Nevertheless like Bombay, and should be sorry to be removed to Madras but for the hope that the number of (21) boards might save me a great deal of detail, and Lauderdale above all that the additional salary would shorten my stay in India. I have however no chance of it, and no wish to contend it with Malcolm if I could, being sincerely connived of his superior claims and superior fitness. I go to Gokauk tomorrow or the day after. I have seen the falls, but there are ladies and others with me who have not.

(Signed) M.E.

Edward Strachey Esq
East India House, London.

VIII·30

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July 14, 1823

(Draft of a letter to ~~Mr.~~ Sudder Adawlut
in reply to their letter of)

1. With every respect for the opinion of the Chief Judge, the Governor in Council is compelled to differ from him in this instance and to reta in the sentiments he has expressed on former occasions.

2. If the Hindoos had any clear code of laws which was generally recognised throughout their country, all that would be requisite would be to translate it into English and into the languages spoken by the common people under this Presidency and to leave it to time to bring forward the few cases in which particular casts or countries had customs differing from the general law. But the Governor in Council understands the *Dhram Shaster to be a collection of antient treatises neither clear nor consistent in themselves and now buried under a heap of more modern commentaries. The whole of this body of law is perhaps beyond the knowledge of the most learned Pundits and every part of it is totally unknown to the people who live under it.

3. Its place is in many cases supplied to them by known customs; founded indeed on the Dhurm Shaster; but modified by the convenience of different Casts or communities and no longer deriving authority from any written text.

4. The uncertainty of all decisions obtained from such sources must be obvious especially when it is required for the guidance of a foreign Judge himself a stranger both to the written law and the usage which in some cases supplies its place. The usual resource, when the Shaster is to be consulted, is to refer to the Pundit of the Court on whose integrity the justice of the dec ison must in the first instance depend. Supposing however that he is honest, and even learned (which last quality ~~is not~~ rare), he has the choice of a variety of books to quote from and in many instances the same book has a variety of decisions on the same question. No two Pundits are therefore likely always to agree in their decisions and even the same man at different times may undesignedly give opposite opinion on similar cases.

5. When the question depends on Custom, the evil is at least as great. The law is then to be

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India Office Records: Elphinstone Papers: Mss Eur F88: Box 13 12 No. 2.

collected from the examination of private individuals. The looseness of tradition must lead to contradictory opinions and even when any rule is established it is likely to be too vague to be easily applied to the ease in point: Add to this the chance of corruption, faction, favour and other sources of partiality among the witnesses.

6. It must be acknowledged that if the above be a true picture, it is possible on either mode of trial for the parties, the Judge, or the Public, to foresee what decree will be pronounced or to say whether or not it is legal after it has been promulgated.

7. There are but two courses by which a remedy can be applied to these intolerable evils. The first is to make a new code founded entirely on general principles applicable to all ages and nations, the second is to endeavour to compile a complete and consistent code from the mass of written law and the fragments of tradition; determining, on general principles of jurisprudence, those points where the Hindoo books and tradition present only conflicting authorities; and perhaps, supplying, on similar principles, any glaring deficiencies that may remain when the matter for compilation has been exhausted.

8. The first of these courses, if otherwise expedient, is rendered entirely impracticable here by the attachment of the natives to their own institutions and by the degree to which their laws are inter-woven with their religion and manners. The second plan is therefore the only one which it is in our power to pursue. The first step towards the accomplishment of its object appears to be to ascertain in each district whether there is any book of acknowledged authority either for the whole or any branch of the law. The next is to ascertain what exceptions there are to the written authorities and what customs and traditions exist independent of them.

9. The best modes of conducting these enquiries are 1st to examine the Shastrees, Heads of Casts, and other persons likely to be acquainted either with the law, the customs of Casts or the public opinion regarding the authority attached to each and 2nd to extract from the records of the Courts of Justice the information already obtained on these subjects in the course of judicial investigations.

10. The manner in which the first mode of enquiry is to be pursued will be explained in a subsequent part of this dispatch. If it could be everywhere carried into complete effect the 2nd mode might be of less importance but, considering the obstructions to which any undertaking must be exposed which requires considerable exertion from a numerous body of natives, the Governor in Council thinks it is still very desirable to collect such opinions as have been elicited by patient enquiry in particular cases where the proofs on each side were brought forth by the stimulus of individual interest.

11. The Governor in Council has therefore determined to appoint Mr. Borradaile as formerly proposed and is of opinion that he should be instructed to collect with as little delay as is consistent with accuracy the Behustas given by Pundits in cases referred to them by the Court and the answers given by witnesses examined regarding the customs of Casts. Mr. Borradaile will receive his detailed instructions from the Sudder Adaulut which will point out to him in what cases he is to report the Behusta or evidence at length, in what cases he is to abstract it and in what cases to punish only the result of numerous Behustas and examinations. The Sudder Adaulut will also be pleased to point out to him the topics to which he should first turn his attention; which will perhaps depend on those adopted by the Judge of Surat under the instructions which will be communicated in a subsequent part of of this despatch. It appears to the Governor in Council to be very important to ascertain at some period the real state of the law relating to the tenures by which different classes of lands are held of the Government and the rights of the Ryots in relation both to Government and to their immediate superiors in the village; but he does not wish to point out the time for this branch of the investigation and conceives the order of enquiry should be fixed by the Sudder Adaulut in such a manner as may best promote their means of judging of the proceedings and of correcting any deficiencies that may occur.

12. Mr. Borradaile will be directed to repair without delay to Surat whence he may proceed to any Zillah selected by the Sudder Adaulut. The Governor in Council has no doubt that Mr. Borradailes zeal will induce him to use every exertion to bring the important duty entrusted to him to a close and he relies on the Sudder Adaulut for adopting every means of expediting the execution of a task which has

been so long in contemplated. Mr. Borradaile ought to report as he from time to time concludes each stage of his investigation at each Zillah to enable the Sudder Adaulut and government to judge of his progress and the probable result of the plan.

13. Since the appointment now about to be filled by Mr. Borradaile was proposed by the Sudder Adaulut, a similar species of research has been commenced on in Bengal and as it may be useful to the Sudder Adaulut to know the plan (illegible) adopted there, a copy of the correspondence relating to it is enclosed.

14. I am now directed to revert to the mode of ascertaining the existing law by a reference to the inhabitants themselves which was alluded to in the 9th paragraph of this letter. On this subject, The Governor in Council directs me to transmit a copy of a correspondence which has taken place between Government and the Regulation Committee and to communicate the following observations on the despatch of the Committee.

15. The Governor in Council entirely concurs in the opinion of the Committee that the first attempt at the introduction of this enquiry should be made in the district of Surat. The known (illegible) abilities of Mr. Anderson, no less than the attention to the improvement of the judicial system for which he has ever been distinguished, point him out as eminently qualified to mark out the course of an enquiry of so much delicacy and importance. The Governor in Council requests that the whole of the present correspondence be communicated to him and that he be requested to commence immediately on the proposed plan making any alterations or modifications which his own judgment and experience may suggest.

16. Referring to the 2nd clause of class 4th and the 4th of class 5th of the questions proposed by the Committee the Governor in Council entertains doubts whether it may not be preferable in the first instance merely to ask what are the Rules (illegible) and in the event of a reference to the Shasters to call in the Pundit as proposed.

17. With regard to the 8th class, the Governor in Council conceives that the questions contained in it should be proposed not only to the Shasteree of the Court and to as many other learned men as may be convenient but likewise to the Heads of

Jummayuts and to all persons likely to be acquainted with public opinion. The object the Governor in Council observes is not to ascertain the doctrines contained in a particular law book but the degree of estimation in which it is held by the community. The opinions of the learned and unlearned may however be stated separately.( )

18. It will perhaps strike the Sudder Adaulut that no attention is paid in their instructions to the Mahommedan law but the number of Mussalmuns under this Presidency is comparatively small; and as their Code is little liable to local variation, the same rules that are found to be in force in Bengal will probably answer for all India.

19. The enquiries above explained having been completed, it is the intention of the Governor in Council that the whole shall be framed into a concise digest by the Sudder Adaulut or by a Committee hereafter to be appointed for the purpose. The body will be formed by such laws as are generally observed and Appendixes will be added for local or partial rules.

20. A complete body of the laws now in force( ) will thus be presented; and, should the understanding go no further, it will be attended in the judgment of the Governor in Council with incalculable advantages; but the Governor in Council is of opinion that after this digest shall circulated have for a certain time as a book of information through not of authority, it may ultimately be improved by the decision of all doubtful questions, the removal of all glaring blemishes and the filling up of all great deficiencies, until it forms a complete code of laws sanctioned by Government and accessible in their vernacular languages to all classes of its subjects.( )

*As the accomplishment of this plan will require long perseverance and cannot be effected under one Government, the attention of the Court of Directors should be drawn to it that, if they approve the principle, they may enjoin the completion of the work.

The Governments of Bengal and Madras should be requested to send us any collections of decisions they may possess or any information they may have collected calculated to throw light on the traditionary and written laws in force among the Hindoos.

No 40 July 14, 1823
* The Sudder Adaulut on the formation of a Hindoo Code.

(VIII:31)

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July

Bombay 21, 1823

My dear Strachey,

I wrote to you lately and have since received two letters from you of ~~of~~ November 1st (44) and January 2nd. In the first of these you object to a code founded on Hindoo Law. My answer is, what would you have instead? Would you go on with Hindoo Law without a code at the mercy of your Shasterees and witnesses (for in many cases you are obliged to examine evidence to ascertain the law)? or would you sit down and make a code entirely out of your own head and introduce it by an order of Government? You ~~will~~ certainly will not take the first of these plans and as to the second I think even if the people were perfectly willing to receive your plan, it would bear to be argued whether a new code would answer as well as one founded on the established law. A vast number of things are in themselves almost indifferent so as they are fixed and it is much better to let what is gnerally known stay than to throw everything (45) into confusion for a slight improvement. But as the people are not willing, the question is still more against you. Have you the right to impose on a nation a code extremely repugnant to the wishes of the whole body of the people? If you have the right, have you the power? Mr. Mill (who by the by has written a great deal of good sense on this subject, and who in fact is the person with whom the plan of framing a real code for India originated) Mr. Mill would reply that it is a mistake to suppose the people so repugnant to the introduction of a rational code you have only (he would say) to get the Pundits to assure them it is all in the Shasters and everybody will be satisfied. Supposing the people really were so completely in the hands of the Pundits, it must be remembered that there (46) (are) some 100,000 Pundits in India. You cannot bribe them all and the unbribed ones will soon expose your trick. Controversial writings on subjects of law are common even now. But the truth is every Hindoo knows enough of the law to detect your most important innovations. The first would be the abolition of cast. Could any set of Pundits persuade the people that that was authorised by the Shasters? In the article of marriage Reason forbids marriage till the parties are arrived at the years of discretion or at least of puberty

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India Office Records: Eliphinstoe Papers

but every Bramin child knows that his law most earnestly enjoins the marriage of girls at an early stage of childhood and almost forbids its being put off till they reach the age of ten. Examples are infinite where a change could could not be made unperceived and where if perceived it would excite universal disgust, if not resistance. Now I do not see why we should propagate the true law with the sword, any more than the true religion; especially as we are still very uncertain which is the true law. I have lived to see the Roman law and the English law go out of fashion and I should like to be sure that the new one was likely to keep its ground at home before I run any great risk to introduce it here. (47)

You say you hardly know what I mean by "Hindoo Laws practically and generally recognised". I will give you an example both of much laws and of my proposed mode of dealing with them. The law of succession as laid down in Colebrookes translation is recognised everywhere and the difficulties and contradictions involved in it are equally general. I would admit the law but instead of quoting 50 texts, I would put it in one clear sentecne. To go into particulars all authorities agree that sones are entitled to equal shares of their fathers property: all likewise agree that, if the sons do not divide their inheritance, they continue coparceners, and all the gains of each individual go to the common stock; but they disagree about what is a proof of division: the rational few say that if a son leaves the paternal estate with only enough of the common stock to maintain him till he finds employment and afterwards in the course of years amasses a fortune, it shall be considered as his own; The majority say that if he takes a pair of shoes from the common stock along with him, the whole of his property belongs to the fraternity. In such a case, I would condense the texts in favour of equality of inheritance into one line and those regarding coparceny into another; but in the disputed point, I would exercise my own judgement and declare that a man who drew no more than his own share from the common stock should not be obliged to account for his profits, unless he entered into a formal agreement to that effect with his brothers. With respect to your idea of our Revenue Regulations. The drafts sent in by the Committee completely tie up the Collectors hands so much so that I am afraid it will be found impracticable to adopt them to their full extent. The great object is to prevent arbitrary increase of assessment and how to do this in new countries where the resources of it are not known is the difficulty. Even in very old ones it is still difficult because (48) (49) (50)

surveys get obsolete and assessments founded on them if adhered to become exceedingly unequal. You have very little to boast of in Bengal on this head. You fixed the assessment on the Zemindar and made all the world ring with your liberality and wisdom; but you declared that the Zemindar's assessment on the Ryot was to be regulated by Customs and you left it to the Courts of justice to ascertain what the customs was; leaving millions of Ryots liable to ejectment and ruin with the remedy of obtaining damages provided they could prove in Court that the Zemindar had demanded more than was authorised by custom all this inspite of your letters of January 2nd. But I have written enough about (51) codes etc., God knows. I enclose my last minute on the subject to the criminal code. The practice of Hindoos Princes themselves authorises our making one entirely to our own taste.

Yours ever

(Signed) M.E.

Strachey Esq.

VIII.32

These regulations should now be sent as usual for the opinion of the Sudder Adawlut and the Judges.

They should also be sent to the Commissioner in the Decken with a request that after carefully revising them and removing all parts that he thinks would obviously be injurious in the Deckan, he will circulate them to the Collectors with instructions to conform to them in all cases where they do not seem likely to cooperate injuriously and to record the reasons for deporting from them in all cases where such a course may be necessary. These recorded objections with a report at the end of six months from the Collectors and the Commissioner on the operation of the Code will enable us to judge whether it should then be permanently adopted as the Criminal Law of the Deckan. The Commissioner should report at once the points which he thinks injurious. The Collectors also should as soon as possible state the objections which occur to them (2) on the first perusal of the Regulations. Their subseqent objections should be sent to the Government through the Commissioner or as they occur and this should be done even although they should be recorded in criminal trials sent to Government. The copies of these Regulations for the Deckan Collectors should be made by tried writers in Bombay. This will contribute to despatch and also to correctness which in the case of Regulations is obviously of high importance. Care should be taken to get them soon out of hand. The copies should be sent ony by one as they are ready.

It should be mentioned to the Commissioner that some points of the proposed Regulations are obviously inapplicable to the Deckan. The I Chapter, Criminal Justice down to Section 23 for instance, these he will of course point out to the Collectors.

It will rest with the Commissioner what portion of the powers of Magistrate or Criminal Judge

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India Office Records: MSS: Eur F.88 Box 13.B, 12 No.s
Minute of Governor in Council, Bombay, Jany 26, 1824
Minute on the Criminal Code.

is to be entrusted to (8) the Assistants and what parts of the authority of the Sudder Adawlut he should reserve to himself. Capital cases and cases of imprisonment for life will be forwarded to Government as heretofore.

The following are all that seem to require to be noticed at presently by the Governor in Council in the Despatch to the Commissioner.

Reg. Police — It appears objectionable to empower Patails to put in the stocks Sec XX or to empower a ~~X~~ District Officer to sentence to public disgrace.

People of a certain rank should be protected from all interference which they think disgraceful such as search of their houses and unless there be strong grounds to ∠c suspect them of criminal connivance. They should likewise be exempted from oaths on this and in some cases even from attendance. All the rules now in force on these subjects in the Deckan should be kept up.

Sec. 51, Clause 1st — The Commissioner should be apprised that the Governor in Council entertains great doubts respecting the justice and expediency (4) of this clause.

Sec. 49, Cl. 3 — Section 49, clause 3rd restore a copy of the Section on Regulation (Civil) on the competency of witnesses.

Penal Chap IV — The particular attention of Commissioner should be drawn to this Chapter (on crimes against the state), the application of which to a new conquest should not be hastily made even if the rules contained in it were themselves unexceptionable (Section XIII). It should also be observed to him that the Governor in Council conceives the distinction between natives and Europeans authorities to be objectionable and would with the definition to be less ~~indivi~~ invidiously worded.

It will strike the Commissioner that no sufficient provision is made for the punishment of "banditt" (bands) unless their assembling should be followed by some other criminal act.

A copy of the letter to the Commissioner should be sent to the Committee. This opportunity should be taken of expressing to the Committee the wish (5) of Government, that in

reporting on the observations received from the Judges and Collectors on the Regulations formerly circulated, the Committee would furnish Government with a summary of the remarks on each Regulation in such a form as may enable Government to see on one view the objections stated with the authority by which each is supported and the opinion of the Committee as formed on considering all that has been urged on each subject except when the objections and arguments are too long to admit of it a tabular form will be most convenient.

VIII .33

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The Governor-in-Council will not at present advert to particular passages in the different Regulations with the exception of one which has a general effect (p.) on the character of the whole code.

This is the Preamble of the Penal Regulations which as it now stands has an appearance of a sudden abrogation of the existing law of the country and introduction of an entirely new code but which would be rendered unobjectionable in this respect if after stating that the Hindoo and Mahomedan law were in some cases inconsistent with humanity and justice, as has been done in page 1st, it went on to observe that those codes left so great a discretion to the judge that before we got possession of the country the punishment attached to all offences were become altogether arbitrary.

India Office Records: Elphinstone Papers: MSS European F88/13/B/2/99: Elphinstone's last minute of criminal regulations and draft for the Com. dated 10.4.1821.

VIII·3A

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My Dear Sir,

I received the enclosed letter yesterday from the Commander-in-Chief, but a s you will perhaps prefer reading the accompanying paper at your leisure I take the liberty of ~~reading~~ sending it to you rather than doing myself the pleasure of waiting upon you. But if there is any point on which you may require explanation I shall be most happy to give it personally.

May I be permitted to advert to the question by what law the native troops ought to be tried in criminal cases as I feel considerable anxiety on the subject. For if it be decided in favour of the native law I must acknowledge my (p.) inability at present to conduct according to it the proceedings of a native General Court Martial, or to give an opinion on such as may be held at the subordinate stations. Nor do I know where to look for information on the subject. My deputies are, I fancy, in the same predicament, and yet the correctness and regularity of the proceedings of a native General Court Martial depend entirely on the Judge Advocate. The difficulty arises from the modifications and alterations introduced by the Government Regulations into the very principles of both Hindu and Muhammedan Law. For the rules of evidence and the punishments awardable have been completely altered, and its have been declared to be capital or liable to a severe penalty which the Hindus and Muhammadans ~~furnished~~ punished either very differently, or did not consider deserving of punishment. I need only instance the admission of presumptive evidence (p.) which is ~~respected~~ rejected by both the Hindu and Muhammaden law, and the punishments unknown to their laws now awarded in cases of murder and larceny, the only crimes that are likely to come before a native Court Martia-l.

With respect, therefore, to the manner in which the 11th article 9th section of these articles of war ought to conclude -

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India Office Records: Elphinstone Papers: MSS European F88/Box 10/A/1: Letter from Vans Kennedy to Monstuart Elphinstone: No 1. Native Court Martial

whether "but in all such cases the punishment awarded are one to be in conformity to the Law of England" - or - "are to be in conformity to the Hindu and Muhammadan law as modified and altered by the Regulations of Government" - it would seem that the difference is merely in name and not ~~impa~~ in fact; for the punishment awarded would be the same in either case - But to the latter wording there appears to be this objection that the first proposition contained in it is actually contradicted by the latter; because in criminal cases the Hindu and Muhammadan law no longer (p.) exists in British Courts of Justice. Might it not, therefore, be considered as a step gained in getting rid of the mere form that still prevails in these courts by at once introducing the English law in criminal cases into the military courts? On this point the Commander-in-Chief's remark with respect to the natives is I believe, most just, and their prejudices, even if they could form any opinion on the preferable system of criminal law, are consequently out of the question. But were the native law adopted the native officers might obtain some acquaintance with its general principles, and being ignorant of the alterations made in them by Government, it is more than probable that this defective knowledge might lead the members of the native courts martial into many irregularities, which the Judge Advocate would not be able to prevent.

I trust that my interest in the subject will be sufficient ~~ap~~.) apology for my taking the liberty of troubling you with these imperfect remarks, and remain/ My Dear Sir,/most obediently and sincerely

Yours
Vans Kennedy

Bombay
5th June, 1824

VIII.35

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St. Helena
10th August, 1825

My Dear Sir,

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My taste and habits continue to be interested with whatever relates to India. The European nations who have acquired dominions in that country, have endeavoured in a certain degree to estblish their own laws and institutions; but no effort has been able to destroy the ancient usages and laws. These attempts however have introduced a strange mixture of European and Asiatic customs. The institution of Punchayat always appeared to be one (p.) of the most interesting of Indian usages and a natural way of administering justice. It had its birth in the earliest ages of society. The people themselves seemed very much attached to it, and the introduction of a strange code was considered by the higher orders at least as a severe punishment. Their dislike was strongest whereever they had not been ~~unused~~ inured to a foreign yoke. It was often impossible to unravel the intricacies of a civil cause without the assistance of a native court. This was a strong motive, for wishing to preserve ~~the~~ pure and entire the simple system of Punchayat; but I fear that we shall not succeed in reconciling it with our modes of proceeding. Their spirit is destroyed by the superintendence of strangers, or rather by the manner in which Europeans will always exercise that superintendance. Might not the attendance of the members of Punchayat be ensured by a compulsive process in the same manner as we compel the appearance of juries? This would make the duty obligatory as well as legal. It would not be a greater hardship than the attendance of ~~j~~urymen in Great Britain. It would be ~~envious~~ if not useful to enquire what has been the practice of other European nations who have acquired dominion in India. They have confided I imagine more in the judicial accuteness of the natives than we have done. Even at

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* Informs of death of Adams. Thanks for letters of 7th and 16th November, 1824.

India Office Records: Elphinstone Papers: MSS European F/88/7/D/4/16: Letter from Alexander Walker to Monstuart Elphinstone: Extract

Barcoolin I believe, the Pandarang sat on the Bench with the British Magistrate.

I am aware that this subject has long engaged your anxious attention and I ought therefore to entreat you to have the goodness to excuse these trite observations; but I will own that I thought the force of custom alone would have been sufficient to have maintained the power of Punchayets.

(signed) Alexander Walker

VIII.36

132

From Mr. Erskine:

The Brahmins have always been hostile to native literature, and corrupted it with their Sanscrit. But if no very old monuments can be procured, it would be satisfactory to procure the oldest. Even these might shew what extent of change had taken place in the spoken language....

I had a few days ago a letter from Macleod enclosing an account of the Adjanta Caves which completely settles their character. He had only a few hours of one day to devote to them so that his account is less perfect than be could have wished.

From Mr. Erskine:

Mr. Steele is delighted and full of gratitude for what he calls your splendid offer. He will do what he can to pass by the earliest time you mention, and will consult his Moonshee etc. as to the practicability.

India Office Records: Elphinstone Papers: MSS European F88/Box 8/A/11/No.61: From William Erskine dated Poona 27.1.1822 (Extract)
Box 8/E/13/No.43: Letter from Mr. Erskine: (Extract).

VIII.37

I have more than once proposed measures with the object of ascertaining the law actually in force among the natives in the different districts under this Presidency, that there might be some guide for our Courts in their decisions, and some check on the Shastrees, and (2) on the witnesses who are examined to ascertain the usages of castes. It appears to me that a great advance would be made towards the attainment of this object, if the heads of all the considerable castes in each district could be prevailed on to answer a few questions that might be put to them through the Judge of the Zillah. The Regulation Committee might be (3) requested to prepare such a collection of questions as appeared to them most likely to draw out the information required, and likewise to give their opinion as to the most expedient mode of procuring answers. The Judge might be directed to put the questions to the persons now considered as the heads of each caste, or the cast might be allowed to name a certain number (4) persons who should be competent to answer. The whole should be put on the footing of a wish on the part of the Judge to obviate the constant disputes and altercations that arise regarding the customs of different castes. The ulterior object of sonnor or later combining the whole into one code, should be kept out of view, as likely to alarm a people (5) so adverse to any interference with their customs; and likewise, because its accomplishment is in reality so remote and uncertain. If answer can be procured to these questions, even if no further progress be made, the Judge in each Zillah will be saved a great deal of trouble and uncertainty by having the opinion of each caste, obtained at a time when it (6) was not influenced by any existing controversy, to refer to in all cases of dispute.

The Committee must be requested to prepare their questions with as little delay as possible, as a long time must elapse before the answers can be received.

They should likewise be requested to direct their attention to ascertaining the points in which the authority of law (7) books is admitted as regulating the local custom, and also, the books

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India Office Records: MSS Eur F.88, Box 13B 12 No.2: Customs of Casts and ultimate of a Code: 22, 1823

which are of most authority in each Zillah.

When all this information is procured, the Committee will probably be able to class the rules accordingly as they are binding on all Hindoos, or binding on all of a certain caste wherever found, or on those merely who belong to that part (8) of a particular caste which inhabits a particular country. If this were done, we should have made a great stride towards the formation of an intellegible code of laws for our native subjects.

I beg to see the proceedings in 1821 (I think) on my proposal for forming a collection of the decisions of the Courts on cases (9) depending on customs of castes, and on local usages.

VIII.38

The view taken by the Commissioner in the first paragraph of his letter appears to be that the present question has been decided by a Panchayat and that as there has been no appeal, it follows as a matter of course that the award should be enforced. I cannot, however, assent to this assumption. The Panchayat was assembled to try a cause between 157 Bramins of Poona and 6 Bramins of Ahmednagar. It may be presumed though it is not stated that the members were not challenged by either party and on such a supposition the award ought certainly to be binding on the parties. But the present Panchayat has gone far beyond the question it was appointed to investigate and has decided on the most important rights of the whole cast of the Sonars who were neither Plaintiffs nor Defendants in the suit and who had never in any shape agreed to submit to the arbitration of the Panchayat. Even if the consent of particular Sonars had been obtained to the arbitration, the Panchayat could not have been undertaken without infringing the first of the rulees lately promulgated regarding Panchayats by which it is declared that "causes relating to the internal regulations of particular casts shall be exclusively settled by Panchayats composed of members of the cast concerned."

For these ~~xxxxxx~~ reasons, I cannot consider any judicial decision to have been passed onthe claims of the Sonars and I am of opinion that no steps directly affecting them should be adopted in consequence of the award now (2) forwarded.

With regard to the 6 Bramins, the Bramin cast is doubtless competent to decide and as they appear to be nearly unanimous, they should be allowed to enforce their decision by the means unusually employed to maintain cast discipline which it is believed never requires the assistance of the Government.

In considering the policy to be observed by Government in cases like the present where a cast goes beyond what is considered by the Bramins to be its place in the Hindoo scale, the first maxim that occurs to us is to allow perfect freedom of action. If the Sonars depart from the rules laid down in the Shasters, they are guilty of heresy but heresy especially against the Hindoo

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India Office Records: MSS Eur F.88:Box 13C/13: June 25, 1824: Disputes between Bramins and Sonars.

religion is not an offence which we ought to punish if we take a narrower view of the subject and consider merely what is politic in our particular situation in India. The conclusion is the same for it is obviously our wisest part to maintain a strict neutrality among all sects and religions and to show a firm resolution never to interfere in any of them unless the public peace shall be disturbed. The only question therefore that requires investigation at present is whether the (3) toleration of the alleged irregularities of the Sonars is likely directly or indirectly to excite such a degree of popular discontent and to disturb the public tranquilty.

On this head, the Commissioner might be requested to consult the intelligent natives of the Deckan guarding (as he naturally would do) against the partial statements of the Bramins. An enquiry might also be made as to the practice of Gujerat and of Bengal, Madras and the Nizam's country on this particular subjects. First whether such a pretension was admitted on the part of the Sonars. 2nd whether if not admitted it was even put down by the Government. If the first of these questions should be generally answered in the negative or the 2nd in the affirmative, the recent introduction of our Government and the influence of the Bramins in the Paishwas' country would justify our deporting in such peculiar circumstances from the general rule of universal toleration; but if the answers should be of an opposite nature, we might venture with the general reason and practice of India on our side, to return to our usual indifference and leave the Hindoo customs to be supported as long as they are to be supported by their deep root in the opinions of the people.

VIII.39 137

My Dear Sir,

I have prepared the accompanying preface in explanation of the objects of the enquiry into Hindoo Law etc. and am desirous that you should approve the form in which it has been drawn up before it is sent to the press. I have thought it better (p.) to condense in the introduction all the particulars noticed which were before inserted in different parts of the work.

Very sincerely yours
Arthur Steele

Secretary's Office
3rd August

India Office Records: MSS European F88/
Box 10/B/4/No. 13: Letter from Arthur Steele to Elphinstone dated perhaps 30th August, 1825 (or 1826):
No. 32 is from Mr. Greenhill stating that "Parties wish to abide by the result of a reference to Benaras."
Box 10/A/1/No. 35 is a letter dated 20.10.1823 fron Anderson to Warden (13 pages) on practices of castes; and
No. 47 is on the introducing new code of regulations (2 pages).