The Story of the High Court of Judicature at Bombay After Independence

(1947—1962)

By

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To
My Father
N. V. Gokhale

PREFACE

Some time in November 1961, Mr. H. K. Chainani, Chief Justice of the High Court of Bombay, requested me to write the history of the High Court after Independence in connection with the Centenary which was to be celebrated in April 1962. I acceded to the request coming as it did from a former esteemed and senior colleague and because of my respect and love for the institution with which I had been connected for over thirty-five years, for four-fifth of which I was a member of the Bar and for about one-fifth a member of the Bench.

My task was not at all easy. While every facility was given to me by the Chief Justice to write this story, I had to do the work at some pressure and practically without any assistance. I realised how retirement entails complete separation from the High Court Bar. The other difficulty I felt was that I was writing about the present, the living present, final judgment on which can only be properly and adequately written many more years hence. In this story I have attempted a connected and an objective narrative of some of the outstanding events that have happened since 1947 concerning the administration of justice in general and the High Court in particular. I have kept in mind the warning given by Horatius to a writer of contemporary history that he has to tread upon fires concealed by smouldering ashes. Such a writer has to avoid some temptations and pitfalls as well. "I suppose," wrote Lord Birkenhead, "it may be considered more tempting to be malicious about contemporaries and rivals than about characters who have passed into history and whom you never knew". In my view, a chronicler of contemporary events, if he is to be just as well as faithful, must be careful to steer his course between the Scylla of Adulation and the Charybdis of Abuse. I have not refrained, however, from praise or criticism where I thought it was due. The criticism has, however, been levelled against policies rather than against personalities. Often I have contented myself with a bare statement of facts which sometimes are more eloquent than any gloss that the narrator might put upon them. How far I have succeeded it is for the readers to judge.

It is necessary to explain the method I have followed. The period of fifteen years since Independence which I have endeavoured to cover has seen dynamic changes and the attainment of objectives for which the lawyers and the public had agitated for decades prior to Independence. In dealing with some of these important changes, I had to narrate the long course of events which preceded them. That was essential in order to present a connected and intelligible story. Besides that, I trust I have been able to narrate the inside story of some at least

of the events, which otherwise would have been almost a closed book to the lawyers and the public at large.

I must express my sincere thanks to Mr. H. K. Chainani, the Chief Justice, for his request to me to write this history and for the many facilities he placed at my disposal. He was also kind enough carefully to go through my writing and make suggestions. I must also offer my grateful thanks to Mr. M. C. Chagla, former Chief Justice, and now the High Commissioner for India to the United Kingdom, for the discussions I had with him in connection with this story and for going through the whole of the manuscript. Mr. R. A. Jahagirdar, Advocate, ex-Government Pleader and for some time Additional Judge of the High Court, was also good enough to go through the entire narrative. Obviously, however, none of them are responsible for any of the views expressed by me which are my own.

Mr. G. S. Gupte, Advocate, was good enough to secure for me the reports of the first four sessions of the Bombay State Lawyers Conference. Mr. Justice B. M. Kalagate, a former member of the Appellate Side Bar and now a Judge of the Mysore High Court, kindly secured for me the presidential speech and the resolutions passed at the fifth session of the Conference held at Dharwar, through Rao Bahadur B. L. Patil, Advocate. Rao Bahadur R. P. Sawant, Advocate, former Chief Justice of the Kolhapur High Court, and Mr. N. S. Shrikhande, Advocate, former Judge of the City Civil and Sessions Court, Greater Bombay, prepared for my use notes in connection with the High Court and the Privy Council in the former Kolhapur State. I must express my sincere gratitude to all these friends.

I must also record my thanks to Messrs. S. J. Rahimtoola, Prothonotary and Senior Master, Original Side, D. G. Gatne, the then Registrar, Appellate Side, N. M. Shanbhag, the then Acting Additional Registrar, Appellate Side as well as V. L. Rao, Secretary to the Chief Justice, for their ready assistance in preparing short notes which considerably facilitated my task of studying the numerous High Court files submitted to me from time to time on the subjects dealt with by me. My thanks are also due to my former stenographer, Mr. R. V. Kamat, who made speedy and accurate transcripts of my dictation, without which it would not have been possible to complete the narrative in a short time.

The writing of this story was completed about the time of the Centenary of the High Court in April 1962. The Chief Justice was not able to go through it till after the summer vacation of 1962. Shortly thereafter I myself became occupied with the investigation into the unfortunate accident to the Alitalia DC 8 aircraft in the beginning of July 1962. That might have postponed indefinitely the publication of this narrative. But Mr. N. B. Chandurkar, Senior Advocate, Supreme Court, generously undertook its publication in the first

instance in a serial form in his Maharashtra Law Journal as his popular Nagpur Law Journal came to be renamed since January 1963, and thereafter in the form of a book. I sincerely thank him for his kindness but for which I doubt whether this story would have been published so soon after the centenary year.

I am grateful to the Chief Justice and the Judges of the High Court for making available the necessary High Court files and allowing me to make such use of them as I deemed proper. I also acknowledge the kind permission given by the Government of India with regard to their publications, reports, Acts etc. referred to and relied upon in the course of this narrative. The letter from the Government of India was received just in time to enable me to refer to their permission here.

Apart from perusing and studying the many files of the High Court, I have consulted and relied upon the books and reports a list of which will be found appended to this book. I must acknowledge the valuable assistance I have derived from them. I am grateful to all those who readily gave me their kind permission in regard to the publications mentioned in the Acknowledgments. If through oversight, I have failed to obtain any necessary permission, I apologize to those who may be concerned.

I must also acknowledge the considerable assistance of my wife in the arduous task of the preparation and checking of the Index.

Bombay,
August 14, 1963.

B. N. GOKHALE

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CHAPTER I

RETROSPECT *

But so must order to disorder come
At their due time, and honour take its stance
Deep in dishonour's ground. Chaos is new
And has no past or future. Praise the few
Who built in chaos our bastion and our home.

— *Edwin Muir* †

The enactment of the Indian High Courts Act, 1861, by the British Parliament may well be regarded as an important landmark in the history of the British administration in India. The Act received the Royal assent on August 6, 1861. It empowered the Crown to establish High Courts of Judicature in the three Presidency towns of Calcutta, Madras and Bombay as also in other territories.

It would be convenient to refer briefly to the system of judicial administration which prevailed in Bengal under the East India Company, as the pattern of that system was largely though not wholly followed in Madras as also in Bombay. In the Charter granted by Charles II in 1683 as well as the Charters granted by James II in 1686 and by William III in 1698, the Company was directed to establish Courts of Judicature each consisting of a lawyer and two merchants at such places as was thought fit and proper. In 1726, the Board of Directors of the East India Company urged that a more regularly constituted judicial authority be established to curb the growing military refractoriness in their territory and to enable grant of Probate or Letters of Administration even where the executors or legal representatives of the deceased were not residents of the Company's settlements. Consequently under the Charter of September 24, 1726, the Mayor's Courts came to be established in the towns of Calcutta, Madras and Bombay. In 1753 these courts were re-established under a revised Letters Patent and a Court of Requests was also created for determination of petty suits of value not exceeding Rs. 20. In the mofussil, the East India Company got the right to administer civil justice under the grant of Diwani secured by Clive, but the Nizamat (or *Foujdari*), that is, the administration of criminal justice, remained with the Nawab of Bengal. The result of this was that Mahomedan law was administered by Mahomedan officers in criminal courts. This anomaly was ended in 1771 when the Company took over the entire administration of civil and criminal justice. In 1772, Hastings began the task of organizing the judicial system of Bengal. The mofussil Diwani Adalats or Civil Courts of first instance came to be located in the districts and were presided over by European Zila Judges with the assistance of Hindu and Mahomedan law officers, while for the trial of petty suits Courts of Sudder Amin and Munsiffs

* This Chapter is an adaptation of the Talk that the Author gave on the All India Radio which was broadcast on August 6, 1961, the day of the Centenary of the Indian High Courts Act, 1861. The author is indebted to the All India Radio for their kind permission to reproduce it with a few additions and changes.

† Collected Poems (1921–1958) of Edwin Muir published by Faber and Faber Ltd., London.

were created. A Provincial Civil Court of Appeal composed of four European Judges supervised the decisions of these courts and at the apex came the Sudder Diwani Adalat or Chief Civil Court of Appeal composed of the Governor and his Council assisted by Indian officers. On the criminal side there were the mofussil Nizamat Adalats supervised by the Courts of Circuit presided over by the judges of the Provincial Civil Appellate Courts, and the Sudder Nizamat Adalat was constituted the Chief Court of Criminal Appeal.

The functioning of the Mayor's Courts appears to have been condemned by a Parliamentary Committee. But according to Sir Charles Fawcett, a former Judge of the Bombay High Court, the working of the Mayor's Courts resulted in distinct progress in the administration of justice according to the principles and practice of the English Courts of Law and they formed a useful link in the chain that led to the establishment of the improved courts of justice of the 19th century *. Under the Regulating Act of 1773, the King in Council created the Supreme Court at Calcutta consisting of a Chief Justice and puisne Judges. This court superseded the Mayor's Court, but the Court of Requests which dealt with petty cases continued to work. The Supreme Court was given full power and authority to exercise jurisdiction throughout Bengal, Bihar and Orissa, to which was added the Province of Benares in 1797, but the decisions of this court were subject to a right of appeal to the Privy Council in certain cases.

In Madras and Bombay, the judicial system developed on similar lines. But it seems that Bombay was the first place in India where British justice came to be administered by a special Court of Judicature. The island of Bombay had been under Portuguese rule for over a century and a quarter and it actually came to be handed over to the British on February 8, 1665. At that time it was an insignificant fishing village and law cases were tried in Thana or in the superior court situated at Bassein. The Charter of 1668 transferring Bombay to the East India Company restricted the Company's power of enacting law and required it to be consonant to reason and not repugnant or contrary to the English laws. In accordance with this provision in 1669 detailed instructions were issued by the Company for establishing a Court of Judicature at Bombay, but it was not till 1672 that steps were taken to comply with this direction. On August 8, 1672, the Court of Judicature was inaugurated by the then Governor of Bombay with great pomp after a ceremonial procession from the Fort through the Bazar to what was known then as Guildhall, a big room in the Customs House where this court was held. Its constitution provided for a trial by jury under the presiding Judge and during the tenure of office of Judges Nicolls and Gary (1675-1683) it introduced the English ideal of the judiciary being independent of the executive. In Madras, the Bombay system was followed, but in Calcutta the judiciary does not appear to have attained at that time the same degree of independence. In Bombay as well as in Madras, the Mayor's Courts were established as in Bengal, and they came to be superseded first by what were known as the Recorder's Courts. Thereafter the Supreme Court was established in Madras in 1801 and in Bombay in 1823 on the lines of the Supreme Court in Calcutta. The Supreme Court of Judicature at Bombay consisted of the Chief Justice and two puisne Judges.

* The First Century of British Justice in India, p. 217 by Sir Charles Fawcett.

It is necessary to observe that the establishment of the Supreme Court in the three Presidency towns did not remove the many anomalies of the judicial system as it prevailed in these towns and in the mofussil. The courts that functioned in the towns of Calcutta, Madras and Bombay applied mostly the English civil and criminal law and their proceedings were also governed by the English law of procedure. Exception was, however, made regarding Hindus or Mahomedans so that in suits against parties where the defendant was a Hindu or a Mahomedan whether brought by Europeans or Indians of whatever religion, the law of the defendant was applied. The courts in the mofussil, however, did not follow English law and procedure and were either governed by Hindu or Mahomedan law or by the regulations framed by Government. But where none of these were applicable, the mofussil courts were directed to proceed according to principles of justice, equity and good conscience. Barring the provisions of Hindu and Mahomedan law, these mofussil courts had to do without any legal provision in several fields, such as, contract and evidence, and administration of the estates of the deceased. The process of filling up this lacuna commenced with the establishment of the Indian Law Commission, and the Imperial Legislature in 1834. But no effective progress was or could be made during the continuance of the rule of the East India Company. As early as 1852-53 evidence was tendered before the Parliamentary Committee, which sat on East India affairs, indicative of a definite opinion that it was desirable in the interests of better administration of justice in India that the Supreme and Sudder Courts should be consolidated into one in each of the three Presidencies. The object was to unite the legal training of English lawyers with the intimate knowledge of Indian customs, habits and laws possessed by judges in the country. The assumption of direct responsibility for the governance of India by the British Crown in 1858 facilitated this process of amalgamation and consolidation, and within three years after the proclamation of Queen Victoria the first and most important step to introduce a uniform system of law and procedure was taken. The Civil Procedure Code was enacted in 1859 while the Penal Code came into force in 1860 and the Criminal Procedure Code in 1861, all of them having been long in preparation. All courts came to be governed by the procedures laid down in these Codes except the Supreme Courts and courts established by Royal Charter. Cowell has thus described the effect of the enactment of these Codes:—

> "When these Codes had been passed, a very long stride had been made in the direction of one uniform system for the administration of justice in India. The next step was to abolish the Supreme Courts in the three Presidencies and the anomalous procedures observed in them, and constitute in each Presidency town a High Court of Judicature which should be supreme over all the Courts both in the Presidency towns and also in the Mofussil"*.

The bill for the establishment of the High Courts in the three Presidency towns was introduced in the House of Commons in 1861 by Sir Charles Wood who laid emphasis on two features of the bill, viz., that there would be only one Court of Appeal instead of two and that would improve the administration of justice throughout India; and the Judges of the High Court would be able to go on circuit to try criminal cases, whereas under the system then prevailing if a crime was committed by a European in the mofussil he had to be tried in the

*The History and Constitution of the Courts and Legislative Authorities in India by Herbert Cowell (Tagore Law Lectures) p. 160.

Presidency town which in many cases amounted to an absolute denial of justice. Under the Indian High Courts Act, 1861, when it became law, it was provided that on the establishment of the High Courts in Calcutta, Madras and Bombay, the Supreme and Sudder Courts were to be abolished. But provision was made for the appointment of Judges of the Supreme Court and permanent judges of the Sudder Courts as Judges of the High Court without further appointment. The High Court was to consist of a Chief Justice and as many Judges not exceeding 15 as the Crown may think fit to appoint, and they were to hold office during its pleasure. As regards the qualifications of the Judges, the Act provided that one-third of the number of Judges, including the Chief Justice, were to be Barristers of England or Ireland or members of the Faculty of Advocates in Scotland of not less than five years standing, and not less than one-third were to be members of the Covenanted Civil Service, and the remaining places were open to persons who had held judicial office or were Pleaders of the High Court of not less than 10 years' standing. The autonomy of the High Court was sought to be provided by the power given to it to frame its own rules for the exercise of jurisdiction by single Judges or Division Courts subject to any law or regulations by the Governor-General-in-Council and to the Chief Justice to determine what Judges shall sit alone or in the Division Courts. Each of the High Courts was also given the power of superintendence over all subordinate courts subject to its appellate jurisdiction and the power to call for returns, direct transfer of suits or appeals and frame rules of practice for the guidance of such courts.

In accordance with the provisions of the Indian High Courts Act, Charters were issued in 1862 to constitute the three High Courts of Calcutta, Madras and Bombay, and in 1866 the Allahabad High Court was created by a similar Charter. Original Letters Patent constituting the High Court of Judicature at Bombay was issued on June 26, 1862 and mentioned Sir Mathew Richard Sausse as the first Chief Justice and Sir Joseph Arnould, William Edward Frere Esquire, Henry Hebbert Esquire, Alexander Kinloch Forbes Esquire and Richard Couch Esquire, as puisne Judges. The High Court started working on August 14, 1862. Under the Letters Patent, the Chief Justice was empowered to appoint as many ministerial officers as may be found necessary for the administration of justice subject to any rules or restrictions as may be prescribed by the Governor-in-Council and to fix the salaries of these officers, subject again to the approval of the Governor-in-Council. The High Court's power to admit Advocates, Vakils and Attorneys on its roll and to make rules for their qualifications was provided for. The High Court was vested with Ordinary Original Jurisdiction in respect of suits of every description except Small Cause, and an appeal was provided from the decision of a Judge on the Original Side to a Bench under the Appellate Jurisdiction. The High Court was also invested with jurisdiction in Insolvency and it also got the Admirality, Ecclesiastical, Testamentary and Intestate jurisdictions which the Supreme Court possessed, as also its powers regarding the persons and estates of infants, idiots and lunatics. The High Court also became a Court of Appeal from all the subordinate civil courts. In criminal matters, the High Court was invested with Original as well as Extraordinary Criminal Jurisdiction and became a Court of Appeal, Reference and Revision. Charters constituting the Calcutta and Madras High Courts were on similar lines. But under the rules framed by the Calcutta and Bombay High Courts, Vakils could not practise on the Original Side, while in Madras the Vakils could plead as well as act both on the Original as well as Appellate Sides.

The first Indian to be appointed to the High Court Bench in Bombay was Mr. Justice Janardhan Wassoodewji who was from judicial service. But his was an acting appointment and the first permanent appointment of an Indian to the High Court Bench in Bombay was of Mr. Justice Nanabhai Haridas, who was then the Government Pleader, in 1883, 21 years after the establishment of the High Court in Bombay. He was succeeded by Mr. Justice K. T. Telang who was appointed in 1889 from the Original Side Bar. Mr. Justice M. G. Ranade was the first Indian from the judicial service to be appointed a permanent judge in 1893, and Mr. Justice Badruddin Tyabji, who was appointed a Judge in 1895, was the first Indian Judge to act temporarily as the Chief Justice of the Bombay High Court. No Indian Judge became a permanent Chief Justice of the Bombay High Court till the attainment of Independence and that honour went to Mr. M. C. Chagla.

The Vakil Bar on the Appellate Side organised an Association on January 24, 1864 and that is now known as the Advocates Association of Western India, while, so far as available record goes, the first meeting of the Bombay Bar Association on the Original Side appears to have been held on January 22, 1866, the members present being all Europeans, under the presidency of Mr. Taylor, the then Advocate-General Mr. L. H. Bayley being also present. The Incorporated Law Society of the Attorneys was founded on January 15, 1895. The Bombay High Court Law Library was established by a Government Resolution of November 14, 1867 and it has developed into a very well equipped law library which is taken advantage of by all branches of the profession. Dr. M. R. Jayakar's munificence has enabled the addition of another library known as the Kirtikar Law Library, which is managed under a scheme of trust by the Advocates Association of Western India.

On the midnight of August 14, 1947, in a dignified ceremony in the Central Court of the Bombay High Court, Sir Leonard Stone, the last of the British Chief Justices of the Bombay High Court, unfurled the National Flag of India in the presence of judges and a large assembly of lawyers and visitors amidst strains of *Vande Mataram* sung melodiously by an attorney, the late Mr. V. R. Divekar, on the floor of a court which had witnessed patriots being sentenced to long terms of imprisonment in trials for sedition.

The Bombay and other High Courts during their functioning for the last 100 years have established great traditions of independence and integrity, of deciding cases without fear or favour and have often acted as the bulwark of the civil liberties of the subject. The Indian Bar has played a glorious part in the building up and maintenance of these high standards. It has produced men of the highest intellect and calibre, some of whom have taken no small part in the struggle for freedom and the writing and enactment of the Constitution which established the Indian Republic in 1950.

The Bombay High Court has completed its existence of a hundred years on August 14, 1962, though its centenary was celebrated on April 14, 1962. The story of the High Court till 1947 is undoubtedly fascinating, but the short period of fifteen years after Independence which is still fresh in the mind of the present generation of lawyers is crowded with such important changes and happenings that the story of even this period will bear repetition in the year of this great event.

CHAPTER II

AFTER INDEPENDENCE

"Our country, whether bounded by the St. John's and the Sabine or however otherwise bounded or described, and be the measurements more or less, — still our country, to be cherished in all our hearts, to be defended by all our hands." — Robert C. Winthrop.

The unforgettable drama that was enacted in the Central Court of the Bombay High Court as the midnight hour struck on August 14, 1947, must have left a pleasant but indelible impression on the minds of the judges and the lawyers who were fortunate enough to witness and participate in it. Sir Leonard Stone, the last of the British Chief Justices of the Bombay High Court, did some good things and some which gave rise to adverse criticism. But the thing for which he deserves to be most remembered is the dignified manner in which he played his part in taking down the Union Jack, the symbol of the mighty British power in India, and unfurling the Tri-colour Flag of India, the symbol of Indian aspirations regarding freedom, in the special function held in the High Court. While Independence was being ushered in throughout the length and breadth of India, the judges and lawyers of the High Court celebrated the event in their own way, inspired with the determination to maintain the great traditions of the High Court of Bombay and the supremacy of law without which no democracy can function properly.

It was generally expected and known that Sir Leonard Stone would not thereafter preside over the Court and that Mr. M. C. Chagla, the senior most among the practitioner judges, would be appointed as acting Chief Justice. That expectation was fulfilled when he presided over the First Court the day after Independence Day. He had been elevated to the Bench on the retirement of Mr. Justice B. J. Wadia, later Sir Bomanji Wadia, in 1941 and belonged to the generation of lawyer-judges who believed in taking full and active part in public life, like Mr. Kashinath Trimbak Telang, Sir Narayan Chandavarkar, and Mr. Justice Ranade who, though he never practised as a lawyer and had accepted subordinate judicial service, was never afraid of inspiring, associating with and helping social and national causes and was promoted to a High Court judgeship despite these activities. Even as a puisne judge, Mr. Chagla had made his mark soon after his appointment by his quick grasp, clarity of perception, good despatch, but a passion for justice, and sound knowledge of law and pleasant manners. He had sat both on the Original as well as the Appellate Sides and his appointment as the acting Chief Justice was well received by every one concerned with the administration of justice in the Province of Bombay and by the public at large. He was confirmed as Chief Justice in February 1948 and thus had the honour of becoming the first permanent Indian Chief Justice to preside over the Bombay High Court. In the congratulatory reference made to him by the Bar, hope was expressed that in the new shape of things in free India, the good things and the good traditions of the old would be preserved and that as the head of the Bombay High Court he would not only ensure the continuance of the high traditions which had made the Bombay High Court renowned all over the country but that he would also help the profession to carry on its ideals into the future. In reply, this was what he stated :

"You are right that in a free and independent India the High Court must play a very big part. It is even more important under a popular and democratic Government that this

Court should be the bastion and the citadel of the subjects' rights and liberties. Whatever else may happen in the country, the subject should know that if he came to the High Court his grievances would be redressed. We are scrapping many things which we have inherited from the British, but there is one thing we should not scrap and that is the administration of justice. Not only we should not scrap it, we should strengthen it and fortify it, because a new world is rising before us, ideals are changing, the old landmarks are going, but the system of administration of justice must remain the one permanent and lasting thing in our country" *.

It is an irony of life that good fortune is generally succeeded by misfortune. Joy never remains unalloyed but must often be tinged with sorrow. In the very infancy of its independence, the whole country was rocked from one corner to another by the death of the very Architect of its Freedom. Mahatma Gandhi died at the hands of an assassin. The Apostle of Non-violence fell a victim to violence. The country was plunged in mourning. The High Court for the first time in its history paid glowing tributes to the memory of one who, though a lawyer, had not practised before it but dedicated his whole life to the service of the Nation.

Soon after the attainment of Independence, the country had to pass through a wave of fanaticism as a consequence of the partition of the country. Gandhiji had deeply felt the anguish of it all. He endeavoured his best to stop the frenzy of communalism which had reared its ugly head and claimed thousands of victims. But his death was a signal for fresh disturbances of another kind in this part of the country and consequent loss of life as well as destruction of property which Government did their best to check. Unfortunately, Government themselves took measures under 'the ignorant ferocity of panic', to use the words of Lord Rosebury characterising the repressive measures which the Government of William Pitt (the younger) took in the last decade of eighteenth century after an unsuccessful attempt on British Royalty. In the Province of Bombay hundreds of persons came to be detained under the Bombay Public Security Measures Act (IV of 1947) on mere suspicion and many among them were lawyers. One of the initial victims of these measures was a well-known, senior and respected lawyer on the Appellate Side, Mr. K. N. Dharap who, but for his ill-health and premature death, would have in all probability adorned the High Court Bench. He was released on a petition for *habeas corpus*. Over eleven hundred applications were similarly preferred under section 491 of the Criminal Procedure Code, many of the petitioners being leading pleaders from the mofussil Bars. It must be said to the credit of the High Court that the manner in which these applications were disposed of enhanced the reputation of the highest judiciary in the Province as the guardian of the liberty of the subject. Hundreds of detained persons were ordered to be released because the detention orders were found to be illegal.

The legal position regarding the issue of writs of *habeas corpus* had been clarified only a few months before by a Full Bench of the High Court. It had been held by that Full Bench that the High Courts in India had no longer the jurisdiction to issue the common law writ of *habeas corpus* and to exercise the powers which the Courts in England exercised. That power was controlled and circumscribed by section 491 of the Criminal Procedure Code †. This position changed after the Constitution, under which the High Courts came to possess power to issue writs of *habeas corpus* under Article 226 also.

* (1948) 50 Bom. L. R., Journal Section, p. 25 at p. 28.

† *Emperor v. Malhari Chikate* (1948) 50 Bom. L. R. 188 (F. B.).

dealing with applications for writs of *habeas corpus* which came to be filed as a result of the situation arising after Gandhiji's death, the High Court generally took a very broad view and decided to scrutinize the orders made and the grounds given for detention with utmost care and anxiety and to make every legitimate inference in favour of the subject, especially as it had become manifest to the Court in numerous instances that some of the District Magistrates had proved to be careless, arbitrary and mechanical and in some instances had acted improperly and without exercising due care in making use of the power of detention conferred on them under the provisions of the Bombay Public Security Measures Act*. Thus, soon after Independence, the High Court proved itself to be thoroughly independent in guarding the freedom and liberty of the subject in an atmosphere surcharged with suspicion, emotion and panic.

During the second world-war, with the resignation of popular ministries, Government was carried on in the Province of Bombay and in other provinces through the administrations set up under section 93 of the Government of India Act, 1935. With the termination of the war, these administrations ended and popular ministries again took charge of the provincial governments before Independence. With the advent of such a ministry in Bombay the way was made clear for consideration of judicial reform and legal problems which had been agitating the public mind and lawyers for years. The establishment of the City Civil and Sessions Court, the unification of the Bar in the High Court, the reform of legal education and the separation of the judiciary from the executive were some of the questions which the Bombay High Court had to consider just prior to and after Independence. They would be dealt with, along with other questions, in the course of this narrative.

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* See the observations of Mr. Justice Sen *In re Pandurang Govind Phatak* (1948) 50 Bom. L. R. 446 at page 448.

CHAPTER III

ESTABLISHMENT OF THE CITY CIVIL AND SESSIONS COURT IN BOMBAY.

"The Attorney loses the pleasure of making his long bill of costs but gets instead the honour of the right of audience in this Court. The Barrister loses his easy consent and motion briefs, but will have instead an additional appointment open to him while his services will be requisitioned in all important cases as is now done in the appeals and Small Cause Court. For the third limb of the Bar—the Vakil—a new field is opened out; therefore, on the whole the interests of the Bar do not suffer much, if at all. Even if it were otherwise, as an humble member of that Bar, I venture to say that our sense of duty is too high to allow our vested interests to stand in the way of any reform which is calculated to advance public interests."—The Hon'ble Mr. Vithalbhai J. Patel. (*)

No other problem raised more controversy in the annals of the High Court than the problem of creating a new court to relieve the arrears of work on the Original Side and cheapening the cost of litigation there. The question was raised and considered continuously for nearly sixty years before it came to be finally solved in 1948, not without considerable opposition from the Bombay Bar Association on the Original Side and the Incorporated Law Society, and from the High Court itself. The battle was fought almost to the last ditch. The details of the events given in this chapter are not only interesting from the point of view of the public interest aroused in the question, but the impetus that it gave to the reform of rules and procedure on the Original Side of the High Court from time to time. Even to-day, as the Report of the Law Commission and some of the recommendations contained therein show, the embers of the controversy are not fully extinguished.

Within a few years of the establishment of the High Courts in India in the three presidency towns of Calcutta, Bombay and Madras, complaints were made by the public about the prohibitive cost of litigation in these towns where the litigants had to resort to the Original Side. The earlier courts which dealt with petty suits, like the Court of Requests, were replaced in about 1850 by the Court of Small Cause. In 1882 the law governing these courts was consolidated by the Presidency Small Cause Courts Act (XV of 1882). In Bombay as well as in Madras, at one time, the enlargement of the jurisdiction of the Small Cause Court was viewed with favour to make justice available to the poorer sections of the people. The Madras High Court favoured this step, but a section of the public there thought that it might impair the efficiency of the Small Cause Court. Early in Madras two steps were taken to solve the problem. By an amendment of its rules, the High Court of Madras threw open its Original Side to Vakils. The litigants were thus able to engage Vakils for their work on the Original Side without approaching a counsel through the agency of the attorneys. The second step was to establish a City Civil Court with jurisdiction over suits and proceedings of a civil nature of the value not exceeding Rs. 2,500, excepting suits pertaining to the testamentary, intestate or matrimonial jurisdictions and relief of insolvent debtors, and suits cognizable by the Small Cause Court at Madras. This pecuniary limit was subsequently raised to Rs. 5,000, and by 1950–51 it was further raised to Rs. 10,000. In 1955 the pecuniary jurisdiction of the City Civil Court in Madras was raised to Rs. 50,000 so that the original jurisdiction of the Madras High Court was confined to matters exceeding Rs. 50,000 in value.

(*) Speech in the Legislative Council of the Governor of Bombay on March 13, 1916 recommending the creation of a City Civil Court.

Madras thus took the earliest step to unify the High Court Bar, and establish the machinery of a cheap court decades before Independence. It is sometimes useful to remember this fact when we, in Bombay, pride ourselves, and not always unjustly or improperly, in having given a lead in some matters to other centres in India.

The history of the agitation for the establishment of the City Civil Court in Bombay is, however, a long one. It may be conveniently divided into three periods : (1) From 1882 to 1910, (2) from 1910 to 1925, and (3) from 1928 to 1948.

As early as January 1886, there was agitation in the Bombay press on the hardships suffered by litigants who had to resort to the Original Side of the High Court for relief in civil matters. Newspapers like the *Bombay Gazette, Dnyanodaya* and *Jame Jamshed* animadverted against the ruinous expenses which the parties had to incur even in simple cases on the Original Side. The situation was described as "a blot on the fair name of English justice in India". Two cases were cited in support of this charge. The first was the case of a wife and child who were forcibly detained by relatives from the husband. The other related to a girl and a boy who were stolen from the custody of their lawful guardian. Neither the husband nor the guardian, we are told, could recover their own without resort to the High Court with the prospect of incurring several thousands of rupees in costs. It is difficult of course to ascertain the truth of these allegations. The criticism, however, mainly appears to have been levelled against the prevalent practice requiring engagement of two counsel in Long Causes.

On April 15, 1886 the Bombay Chamber of Commerce, which was a purely European commercial association, submitted a memorial to the Government of Bombay. It complained against certain rules on the Original Side, especially the one relating to the requirement of engagement of two counsel in Long Causes, without regard to the stake involved in the suit, and the frequent adjournments which were applied for and granted.

In consequence of this memorial, the Bombay Government wrote to the High Court *inter alia* as follows on May 17, 1886 :—

> "The Letters Patent of the High Court empower Your Lordships to determine by your rules and directions whether Advocates, Vakils and Attorneys shall be allowed to plead as well as act for the suitors. You have determined that Vakils and Attorneys shall not be allowed to plead on the Original Side of the Court. It is not for us to attempt to dictate to your Lordships the manner in which you should exercise a discretion vested in you by law. But it seems open to us to suggest that if a monopoly is created and maintained, the authority which creates it is justified in insisting that the monopoly shall not be abused to the prejudice of the public."

This led to the appointment of a committee of the Original Side Bar. Its report was approved by the Bar Association on July 31, 1886. The Bar protested against 'the offensive form in which the letter of Government is couched' and refuted the imputation that Bar rules had been made without regard to the interests of the suitors and operated oppressively on them or that they had the result of excluding from business junior members of the Bar, and that 'constant postponements of suits are obtained by the leading members of the Bar to suit their own convenience'. The Bar, however, showed its willingness to consider

the modification of the rule requiring the employment of two counsel in Long Causes to meet the views of the Chief Justice and Judges.

Sir Raymond West, then a Judge of the High Court, championed the cause of the Bar in his minute on the Bar Committee's Report deprecating any step "that would tend to make the Bar a body of needy and greedy adventurers struggling for life in sordid competition", but suggested certain reforms in the rules. Ultimately it appears to have been agreed that the engagement of two counsel should be obligatory only in suits above the value of Rs. 5,000.

At this time Sir Charles Sargent was the Chief Justice and the High Court was considerably perturbed by the growing arrears on the Original Side. There were only seven judges in the High Court and it was felt that the situation could only be remedied by the early appointmen of an eighth judge. It seems that Mr. Justice Farran, later Sir Charles Farran, was appointed to act temporarily as an eighth judge, but the Government were not in favour of a permanent increase of one more judge. Government had also appointed a Finance Committee and that committee had directed its attention to the examination of expenses incurred on the Bombay High Court. It appears to have been the view of the committee that the expenses were disproportionate to the work done by the High Court as compared to other tribunals. The committee, therefore, put forward the suggestion, as a measure of economy, of transfer of less important class of civil cases and suits and proceedings in insolvency to the jurisdiction of some less costly tribunal. It appears that the committee was even exploring the possibility of abolition or alternatively diminution of the original jurisdiction of the High Court.

The judges of the Bombay High Court at the time were agreed on the question that the dual system was admirably adopted for a proper investigation of the matters involved in the litigation on the Original Side. They were also of the opinion that the system was unnecessarily expensive in suits of small value. The Chief Justice and some of his colleagues were of the view that a considerable portion of the Original Side work could be conveniently transferred to a less expensive tribunal. And it is interesting to note that in this connection the view of Mr. Justice Nanabhai Haridas was that such work could be satisfactorily disposed of by a judge of the standing of a First Class Subordinate Judge (now known as Civil Judge, Senior Division) or a senior pleader on a salary of Rs. 1,200. He stated in his minute that the experiment of the new court may be tried for a period of one year or longer, if necessary, and it would succeed admirably provided the judge was well selected. This court was to work without the double agency of barristers and solicitors, the suitors having the choice of lawyers from barristers, solicitors and pleaders as in the mofussil or Small Cause and Police Courts. He also wanted simultaneously extension of jurisdiction of the Small Cause Court to Rs. 2,500. This minute was supported by relevant statistics. Mr. Charles Farran, who had continued as an acting Judge, and the remaining Judges did not agree with this view. They were of the opinion that suitable changes in the rules of the Original Side and a scale of taxation as would lessen the burden of cost on the poorer class of suitors would be sufficient to meet the situation. The minute then made by Sir Raymond West, while recognising that the High Court procedure was costly and dilatory and paying a compliment to the competence of Bombay pleaders, wanted exercise of caution in making

changes. Sir Raymond maintained that the administration of justice conducted in the High Court lent dignity to the popular conception of justice and set "a standard of grave loftiness of bearing, patience and thoroughness of work, the influence of which is felt throughout the community and in every ramification of the judicial system". This part of the minute possibly represents the most dignified protest ever made against the attempt to impair the jurisdiction of the High Court on its Original Side and deserves to be quoted:

> "If the Government of India contemplates any serious reduction of the High Court I think that on constitutional grounds it ought not to attempt to achieve this purpose by acts of its own but ought to go to the Imperial Legislature. The High Courts derive their authority directly from Parliament and from the sovereign; and they are charged with functions in relation to the executive, as to other subjects of Her Majesty which ought to be sustained in every possible way unless those authorities should think fit to annul or vary them. By a cavilling process of objection to this and that portion in succession of the Court's jurisdiction and by repeated piecemeal transfers of its functions it might in time be reduced to a little more than a show and then a new reformer would demand its abolition."

It may be mentioned that Sir Raymond West was for many years the Vice-Chancellor of the Bombay University, and the third recipient of the Honorary Degree of the LL. D. of the Bombay University, the only one amongst European judges to receive this honour.

But the Government of Bombay favoured the creation of a court similar to that of a Subordinate Judge in the mofussil with jurisdiction over all cases up to Rs. 5,000. They wanted that audience should be given to pleaders in such a court and court-fees were to be charged as in the mofussil. A note was prepared by the Finance Committee after personal discussion with the Judges of the High Court in which was recommended the establishment of a Civil Court for the City which would afford to the litigant public the advantage of a cheaper tribunal.

The question also came to be agitated in the local Legislature. On August 14, 1894, Mr. Chimanlal Setalvad, later Sir Chimanlal Setalvad, then practising as a pleader on the Appellate Side and a popular representative in the Bombay Legislative Council of those days, raised the question of the high costs of the Original Side through an interpellation in the Council. He asked as to whether the assurance as to the reforms which was given to the Chamber of Commerce was given effect to. And the reply of Government was that the High Court had done the needful regarding the revision of charges which were allowed on taxation according to the amount or importance of the suits.

Mr. Chimanlal Setalvad speaking later during the debate on the financial statement of the year 1894-95 referred to the notoriously heavy costs of litigation on the Original Side as being one of the chief reasons which had induced Government to refrain from levying *ad valorem* fees on the suits instituted in the High Court. He suggested two methods to reduce the costs of this litigation. The first method was to take away the monopoly of audience enjoyed by barristers and advocates instructed by attorneys on the Original Side and to allow pleaders as well as attorneys to have audience on the Original Side. The other method which, according to him, was more logical and beneficial to the public revenue, was to transfer all uncontested suits as well as majority of contested cases of a simple nature and of comparatively small value to "a new less costly, but by no means less efficient, court created for the purpose, where audience would be given to barristers, attorneys and pleaders." He also

mentioned that the then Chief Justice Sir Charles Sargent in his evidence before the Public Service Commission had expressed himself somewhat in favour of such a change. These suggestions of his were not liked by the Original Side Bar and were ridiculed by Sir Pherozeshah Mehta and the then Advocate-General. These views of Sir Chimanlal Setalvad are of importance and interest because later on he became an opponent of the proposal to establish a City Civil Court, as a member of the Original Side Bar. In that connection he wrote an article entitled "Civil Justice : Proposed Bombay Changes" in the *Times of India* of January 30, 1947, dealing with the problem of costs on the Original Side when the question of the establishment of a City Civil Court and the retention or modification of the dual system was being considered by Government and was being discussed by the public and the Bar. He was one amongst the very few members of the Bar who had the courage to make public his views on important questions relating to law or politics. Though people were often critical of his views, he was always held in high esteem by the members of the Bar and his passing away left a void which has never been filled up.

During the Chief Justiceship of Sir Charles Farran and of Sir Lawrence Jenkins, various procedural reforms were carried out with regard to originating summonses and the delegation of *quasi*-judicial power to the Prothonotary. This was intended to simplify procedure and expedite litigation on the Original Side. The High Court was able to report by 1912 that it could cope up with the increasing institution of suits with four Judges sitting on the Original Side.

In 1910, the question of the establishment of a City Civil Court was once again raised by the appearance of an anonymous article in the issue of the Journal section of the Bombay Law Reporter of September 30, 1910 entitled "Wanted a City Civil Court in Bombay". (1). It referred to prohibitive costs as the great drawback of all litigation on the Original Side and observed: "At times one witnesses the unusual phenomenon of an estate wrenched by a successful party from the hands of an obstinate opponent never reaching his own hands, in fact hardly travelling beyond the cashier's counter of his attorney", this being specially true of small estates worth Rs. 4,000 to 5,000. The article suggested the establishment of 'a sort of a Civil Court from the Districts transferred to the Presidency Town' and cited the instance of Madras, and of Allahabad where the District Court was working as satisfactorily as the Original Side of the Bombay High Court. The matter was also raised on the floor of the Legislative Council by Mr. R. P. Karandikar of Satara in about 1912 through interpellations.

The Government once again referred the matter to the High Court expressly citing the article in the Bombay Law Reporter. Sir Basil Scott, the then Chief Justice, did not like the manner in which Government had asked the High Court to express its opinion on a proposal made in an anonymous article, the justification for which was based, according to him, upon some unsupported assertions contained in it. Justice Sir Narayan Chandavarkar and Mr. Justice G. S. Rao, as he then was, agreed with the Chief Justice's view. Mr. Justice Batchelor thought that the assertions to which objection was taken were indisputable and anyhow the article expressed what was fairly common opinion as to excessive costs of High Court litigation. Mr. Justice Heaton agreed that the way in which Government had made the reference was bad but he added that "by this time we are

(1) (1910) 12 Bom. L. R., Journal Section, p. 97.

pretty well used to brutal directions in letters from Government and sometimes we reply in like manner". At the same time he wrote that he had an uneasy suspicion that the High Court was being every day criticised as a court in which the poor litigant had very little chance and that was a reproach which ought not to be endured or at any rate the High Court should remove any reasonable justification for it. In its reply of September 28, 1912, the High Court stated that the article appeared on its face to be a mere 'pot-boiler' and that the Editor of the Bombay Law Reporter, a pleader, had explained that he had asked Mr. Javeri, also a pleader and then on the Bench of the Presidency Small Cause Court, to write an article on the subject of the City Civil Court and had sent to him a copy of the Madras Act VII of 1892 for that purpose. If the Government was wrong in referring the anonymous article to the High Court, the latter also need not have gone to the length of trying to ascertain the name of the writer from the Editor. The High Court, in its reply, affirmed its opposition to the establishment of the City Civil Court but informed Government that it was contemplating the extension of summary procedure in force in suits on negotiable instruments to some other classes of claims specified in section 128 (f) of the Civil Procedure Code. It was further stated that the High Court would be prepared to recommend that the Chief Judge of the Small Cause Court should be given authority to try all partnership disputes concerning property under Rs. 3,000 in value.

In 1914, the question came to be raised again in the local Legislature. Mr. Vithalbhai Patel, Bar-at-law, later the Speaker of the Central Legislative Assembly, gave notice of his intention to move a resolution recommending the creation of a City Civil Court (1). The resolution was actually moved and carried on March 13, 1916 in an amended form. Sir Mahadeo Chaubal, at one time a prominent pleader on the Appellate Side who had also acted as a Judge of the High Court, was then a Member of the Executive Council of the Governor and he was responsible for suggesting the amendment which was ultimately carried. In its amended form the resolution recommended the Governor-General in Council to consider what additional facilities should be provided for disposal of suits in the High Court which were not within the cognizance of the Small Cause Court of Bombay.

Government invited public opinion on this point. Various public bodies, commercial or otherwise, including the Bombay Municipal Corporation, the Bombay Presidency Association, the Indian Merchants Chamber and the Social

(1) Mr. Patel in his speech moving the resolution gave a cynic's illustration of the results of litigation: "A plaintiff and a defendant are pictured as struggling for the possession of a milch cow; one has hold of the tail and the other of the horns; both are tugging hard to take the cow while a judicial officer is milking the cow and the two lawyers standing by are impatient to extract what milk is left in the udder." The then Advocate-General characterised Mr. Patel's description as 'a very incorrect caricature' and said that the fault did not lie in the machinery provided but in the litigious habits of the country and also to a great extent in the unscrupulous methods of litigants and opposed Mr. Patel's motion. In the discussion that followed two European members took part, Mr. E.F. Nicholson opposed the motion and Mr. J. S. Wardlaw Milne supported it, pleading for "a common-sense Court to deal with suits in a more common-sense way". Rao Bahadur G. K. Sathe, a prominent pleader from Sholapur purported to quote the remark of a Judge: "I wonder the people do not pull down the High Court stone by stone as a protest against the monstrous cost of litigation."

Service League of which Sir Narayan Chandavarkar, an ex-judge himself, was then the president, expressed themselves in favour of relieving the High Court of its original jurisdiction upto Rs. 5,000. The Grain Merchants Association wanted to raise the limit to Rs. 10,000. Some trading associations favoured the alternative proposal of enlarging the jurisdiction of the Small Cause Court. The Bombay Chamber of Commerce desired the creation of a Special Commercial Court within the High Court itself. The Anjuman-i-Islam was of the view that procedural reforms would be sufficient. In the ranks of the legal profession itself, the Incorporated Law Society opposed the proposal, while the Pleaders Association of Western India supported it. The High Court having been consulted again, took the stand in its reply of December 20, 1917, that the proper City Court for the City of Bombay was the High Court on its Original Side. It was further claimed that despite what may be said by 'would-be reformers', the High Court had always been a tribunal of extraordinary popularity as was evident in the three-fold increase in the institution of suits between 1887 and 1914, *pari passu* with the increase in the wealth of the city as indicated by gross assessment returns for purposes of municipal taxation in Bombay. Though there was an obvious flaw in this argument, since the litigants had no other alternative but to go to the High Court, the Government decided in July 1918 not to proceed further in the matter.

The agitation was, however, kept up by Mr. Vithalbhai Patel in the Imperial Legislature of which he had become a member and in the local Legislature by Mr. Manmohandas Ramji. Government was favourable but the High Court was not. Ultimately Government drafted a bill to amend the Presidency Small Cause Courts Act of 1882 in its application to the Presidency of Bombay, as suggested by the High Court, but proposed to extend the pecuniary jurisdiction of the Small Cause Court to Rs. 5,000. The bill was forwarded to the Law Officers of the Government of Bombay and the associations of lawyers and some commercial bodies. Mr. J. B. Kanga, later Sir Jamshedji Kanga, who is fortunately still with us, was the then Advocate-General and he favoured the proposal. The reasons that he gave are interesting. He pointed out that the costs of two sides incurred in suits of Rs. 5,000 and under often amounted to more than the sums involved in the suits and that in partnership suits where the assets were Rs. 5,000 and under, as also administration suits where the estate was of similar value, little was left for the parties to the suit in the High Court and a large portion of the estate was spent in costs. This opinion substantially bore out the criticisms that had been usually levelled against costs of litigation on the Original Side. Mr. S. S. Patkar, later Sir Sitaram Patkar and a Judge of the High Court, was then the Government Pleader and he expressed himself to be in favour of the creation of a City Civil Court rather than an extension of the jurisdiction of the High Court but supported the bill if that was the only alternative. The Bar was again divided in the usual manner. The Indian Merchants Chamber gave its support, while the Millowners' Association gave qualified support. The Chamber of Commerce opposed the bill. The Civil Justice Committee which had also considered the question recorded a non-committal opinion. The opinion of High Court judges was this time more favourable and they intimated to Government that in case the Government had decided to have a City Civil Court, the bill should be drafted on the lines of the Madras Act and at the outset only one judge may be appointed in that court from the local Bar. The Small Cause

Court Bar wanted the new court to be located in the Small Cause Court building on the ground of convenience and saving of public expenditure. But in May 1925, Government again announced their decision not to proceed with the bill.

In 1928–29, Rao Bahadur Kale and some other members of the local Legislature again raised the question on the floor of the House expressing emphatically in favour of establishing a City Civil Court. Government were not averse to these suggestions in the interests of public revenue, and in June 1931 tried to ascertain public and lawyers' opinion.. There was agitation in the public press also. The Advocates Association of Western India wrote in May 1930 and again in September 1931 advocating the establishment of a City Civil Court pointing out that when cities like Ahmedabad, Surat, Broach and Poona, which had important civil work and the same was being done expeditiously and at small costs, there was no reason why the litigating public in Bombay should not have the same facilities. The High Court on being consulted expressed its opinion by its letter of September 25, 1931, against any proposal for an intermediate court between the High Court and the Small Cause Court. It emphasised that a similar proposal had not been proceeded with in Calcutta and that the experience of Madras showed that it would not cheapen litigation. The judges, it appears, were agreed that the general standard on the Original Side, both in the preparation and presentation of cases, was higher than on the Appellate Side, and said that if the public paid more for the dual system, they were certainly better served by it. Both the Central as well as the Provincial Governments were willing to appoint a committee to go into the question. The High Court, however, requested postponement until after it had introduced reforms by way of expediting the procedure and reduction of costs based on the recommendations of a sub-committee presided over by Mr. Justice Rangnekar. Government agreed to this suggestion.

In the meanwhile, the Bars on the Appellate Side and the Small Cause Court as well as in the Police Courts had organised themselves to hold a lawyers' conference in the city to ventilate their grievances and also consider the question of judicial reforms. The first session of the Bombay Advocates and Pleaders Conference was held in Bombay on December 19 and 20, 1931, under the presidentship of Dewan Bahadur T. Rangachariar who had been a member of the Indian Bar Committee. The second session of the conference was held in Poona on March 3, 1934, over which Dr. Kailasnath Katju presided. At both these conferences the proposal to establish a City Civil Court was strongly supported. Mr. S. B. Dadyburjor, then a leading lawyer in the Bombay Small Cause Court, in his speech at the Bombay session of the conference, gave two instances of the heavy costs which litigants had to incur on the Original Side. One was of Mr. K. F. Nariman, the leader of the Nationalist Municipal Party. Mr. Nariman wanted to move a resolution in the Bombay Municipal Corporation to prevent the giving of an address to the Governor of Bombay. He gave therefore notice of an urgent motion to move the High Court for an injunction against the Corporation and for a hearing of that motion on the next day. The matter could not be taken on the next day and the address came to be given. Mr. Nariman had to withdraw his suit in which practically nothing was done. Yet the taxed costs in that suit which was withdrawn came to Rs. 700 and Mr. Nariman was compelled to settle it at Rs. 500. The other instance which Mr. Dadyburjor gave was more glaring. A poor cultivator from southern Konkan came to

Bombay and purchased machinery for ginning cotton. The manufacturers were rich British merchants and the purchaser was given an assurance that the machinery which he was purchasing was fit for ginning cotton grown in South India. It was, however, only suitable for Gujarat cotton and the purchaser found that the machinery was utterly useless for the object for which he had purchased it. He had paid Rs. 3,500 for the machinery and came to Bombay to file a suit against the merchants. As he had no money, it was decided that he should file a suit in the Small Cause Court claiming Rs. 2,000 only and abandon the rest of his claim. The suit was filed in the Small Cause Court, but the other side promptly got it transferred to the High Court. The poor man thought that he would have to spend a lot of money and became apprehensive and got the suit settled by agreement to pay Rs. 200 or 300 as costs of the other side *.

The question of the establishment of the City Civil Court was again brought to the forefront in 1936 by the communication addressed to Government by Mr. K. F. Nariman, then the Mayor of Bombay who, as stated above, had already burnt his fingers in the suit filed by him. It is the wearer of the shoe and not the cobbler who knows where the shoe pinches. The Government's reply was that in view of pending discussion on constitutional changes they would not be in a position to undertake anything that was contentious. However, the High Court was consulted and gave a reply on July 29, 1937, that reforms suggested by Mr. Justice Rangnekar, later Sir Sajba Rangnekar, had been carried out and nothing further was needed. The Prothonotary and Senior Master had been given more powers to hear miscellaneous matters in chamber and rules relating to commercial causes and summary suits had been amended leading to speedy disposal and the whole table of fees allowed to attorneys had been revised and relief had been also given to the litigant public by fixing limitation on costs in summary suits, short causes, notices and chamber summons and finally costs of one counsel only were to be allowed on taxation upto a claim of Rs. 10,000. Small reforms, it used to be always said in our freedom movement, are the enemy of large reforms. This perhaps proved equally true in the matter of the establishment of the City Civil Court. Even the popular ministry, of which Mr. K. M. Munshi was the Home Minister, decided in August 1937 not to proceed with the matter.

Then the World War came and the popular ministry resigned. The Government was taken over by the Administration under section 93 of the Government of India Act, 1935. This Administration enacted the Greater Bombay Laws (Declaration of Limits) Act (XVII of 1945). The result of this measure was that the limit of the ordinary original jurisdiction of the High Court was extended and came to embrace the Municipal Boroughs of Bandra, Parle and Andheri, Kurla and the Municipal districts of Ghatkoper, Kerol and Juhu and also 28 villages of the Bombay Suburban District. This seriously affected litigants of these areas who till then could file their suits in the civil courts in the Thana District. The residents of Andheri preferred a petition, dated November 26, 1945, to the Government of Bombay urging that there would be practical denial of justice to owners of small lands and properties in Greater Bombay if they were required to file their suits on the Original Side of the

* Report of the first session of the Bombay Advocates and Pleaders Conference (1931), pp. 45–46.

High Court. As the petition expressed it, the poor litigants would have to submit "to the onslaughts of their richer brothers" and "they would be really between the devil and the deep sea". They pressed for the immediate establishment of a City Civil Court with a pecuniary jurisdiction of Rs. 10,000, the parties being allowed to be represented by their lawyers as on the Appellate Side. It was suggested that the City Civil Judge should be selected from amongst the Civil Judges of Senior Division and the court be located at Dadar near the railway junction, so that parties and their witnesses coming from Greater Bombay area by the B. B. and C. I. or the G. I. P. Railways would find it convenient to go to the court. The press extended its support to this move and the Bombay Legal Aid Society as well as the Bombay Municipal Corporation drew the attention of the authorities to the new threat and suggested that the remedy lay in establishing a City Civil Court.

The Judges' response to this petition, which was forwarded to them, was sympathetic. In their reply of January 24, 1946 to Government it was admitted that it would be hard upon the residents of the suburban area to be required to fight their petty suits in the High Court by engaging solicitors and counsel. Curiously enough, however, the High Court repeated the suggestion it had made in 1922 to extend the jurisdiction of the Small Cause Court to certain classes of suits which were then not cognizable by it and to extend the pecuniary jurisdiction of that court to Rs. 3,000. It will be remembered that the draft bill prepared by Government in 1923 had provided for extending the pecuniary jurisdiction of the Small Cause Court to Rs. 5,000, but the Judges of the High Court in 1946 wanted it to be fixed at the lower figure of Rs. 3,000. It was also suggested that two more judges should be appointed in the Small Cause Court, one of them holding his Court at Andheri on the B. B. and C. I. Railway line and the other at Kurla or some other suitable place on the G. I. P. Railway line. The then Government thought that the question should be decided by a popular ministry which soon took over the reins of Government in the Province. Mr. P. M. Lad, I. C. S., was thereafter appointed to go into the question and submit his report regarding the establishment of a City Civil Court at Bombay.

That report was submitted by him, it appears, some time in the beginning of 1947. Strangely enough, the printed copy of the report does not bear any date and in the memorandum on the proposals contained in the report, drafted on behalf of the High Court by the then Chief Justice Sir Leonard Stone, Mr. Lad's report is described as 'undated'. The report made an exhaustive review of the history of the question and recommended the establishment of a City Civil Court in the interests of the litigants as well as of public revenue, as *ad valorem* court-fees were proposed to be levied in the new court.

Curiously, the report also considered the question of establishing a separate Sessions Court for Bombay. This question admittedly had never been so far raised nor was there any formal demand for it from any section of the lawyers or the public. It appears, however, from Mr. Lad's report that while the question of the City Civil Court was under consideration from time to time, occasional hints used to be thrown out by administrative departments that the parallel question of the criminal jurisdiction of the High Court might also be taken up, but such hints were never followed up. It would appear that Government had

decided to consider this question on grounds of economy and administrative convenience. It is difficult to say how far the High Court was aware of this.

Criminal sessions trials in Bombay had always been held with the aid of a jury. The Sessions Court in the Bombay High Court had been associated in the public mind with traditions of pomp and dignity. Many historic trials had taken place in the Central Court of the High Court, including political trials for sedition. With the increase of crime in the city, there was a corresponding increase in the number of cases committed for trial in the Sessions Court. About 1945, it would appear that for some time almost two High Court Judges were kept busy throughout the year in sessions work. This undoubtedly led to the dislocation of civil work. It would also seem that the Incorporated Law Society had complained that the diversion of one of the Original Side Judges for Sessions work led to the neglect of contested civil work on the Original Side.

Prior to 1943, there was no right of appeal against a conviction or acquittal by a Judge and jury in a trial before the High Court, except on a certificate granted by the Advocate-General under clause 26 of the Letters Patent that there was an error in the decision on a point or points of law. This was changed by the Criminal Procedure Amendment Act XXVI of 1943, which added section 411-A to the Criminal Procedure Code and gave a right of appeal against a conviction as well as acquittal in a trial before the High Court Sessions. The provisions of this section were modelled on the English Criminal Appeal Act, 1907, but there was this difference that, whereas under the English Act there was no right of appeal against an acquittal, sub-section (2) of section 411-A conferred upon the Provincial Government the same right of appeal against an acquittal as sub-section (1) conferred on the accused to appeal against his conviction both on facts as well as law. These appeals were heard in the Bombay High Court by a Bench of three Judges. In 1946, there were 19 such appeals. There was some controversy regarding the effect of the new provision on jury trials. Criminal Appeal No. 7 of 1944 against the conviction and sentence of death passed by Mr. Justice Maklin agreeing with the majority verdict of the jury was heard by a Bench consisting of Chagla, Lokur and Weston JJ. With regard to the effect of the new legislation, Chagla J., as he then was, made this observation:

> "The jury in the Bombay High Court has been placed in a worse position than that of the jury in the mofussil. No sanctity is attached to their verdict; and speaking for myself, I feel that the trial by a jury in the High Court under the law as it exists to-day has been reduced to a mockery."

Chagla J.'s view appears to have been that under the provisions of section 411-A, once leave was granted by the trial Judge, the Appellate Court had not to consider whether the verdict of the jury was unreasonable or perverse or whether on the evidence before the court the verdict was justified, but that the Court of Appeal was to approach the case as it would approach a conviction by a magistrate when he gives an appealable sentence or in the case of a conviction by a judge in the mofussil in a trial with the aid of assessors. See the report of the decision reproduced in the case of *Government of Bombay v. Fernandez* (1945) 47 Bom. L. R. 363, at pp. 365, 366. In this latter case, however, the Bench consisting of Divatia, Lokur and Weston JJ. did not agree with Chagla J.'s view but held that the general considerations on which the High Court has to act

in a case under section 411-A of the Criminal Procedure Code were practically the same as those under section 307 of the Code. Where the High Court has power, under section 307 of the Code, to go into facts in trials by jury in the mofussil, it is the settled practice to give due weight to the verdict of the jury and to limit its interference to cases where the verdict appears to be manifestly wrong or unreasonable. The above practice should be followed with greater reason in the case of verdicts of juries in the High Court itself where the jurors are expected to be more intelligent and experienced in the ways of the world and have also the benefit of the summing up of the case by a Judge of the High Court. The Court observed that simply because extraordinary power has been given to the High Court for the first time in 1943 by section 411-A of the Code, it did not necessarily follow that the Legislature intended that it would be exercised in every case in disregard of the well recognised principles applying to all trials byj ury *.

This was the position of the Original Criminal Jurisdiction and of the appeals from the decisions of the Sessions Court on the Original Side, which Mr. Lad took into consideration when he submitted his report containing proposals to establish a City Civil Court and a separate Sessions Court for Greater Bombay. It must be assumed that Government had asked him to consider the question of establishing such a Sessions Court also, though there was no demand for the same. All the pros and cons of this question were considered in the report. That the people looked upon the High Court as a stronghold for the defence and inviolate preservation of the life and liberty of a subject against executive encroachment was one argument against the abolition of this jurisdiction. The answer that was given was that separation of the judiciary from the executive was in the offing and popular Governments were in power and the argument, therefore, lost much of its force. It was admitted that there was a certain grandeur about a criminal trial in the High Court which by the solemnity of its procedure and the high position of the presiding Judge inspired confidence in the administration of justice, which an inferior court would not enjoy to the same extent. As against that, it was urged that in the interests of uniformity and saving of judicial power of the High Court it was unnecessary to employ High Court Judges to do work which all over the Province was being done by Sessions Judges and Assistant Sessions Judges in the mofussil. Besides, a Sessions Court, as contemplated, would enable the accused to get the benefit of the provisions in the Criminal Procedure Code which made death sentences subject to confirmation by a Bench of the High Court. That provision was not applicable to death sentences passed in trials before the High Court Sessions. Lastly, it was emphasised that the creation of a separate City Sessions Court would benefit the accused as audience would be allowed therein to members of all the branches of the legal profession in Bombay.

Though the report of Mr. Lad contained proposals both regarding the Civil as well as the Sessions Courts for the city, Government appears to have taken a decision regarding the Sessions Court earlier and wrote to the High Court on March 10, 1947 informing the Chief Justice and Judges that Government had decided to establish a separate Court of Session for Greater Bombay. By that time, it would appear, the Judges had not even obtained a copy of Mr. Lad's

* *Government of Bombay v. Fernandez*—(1945) 47 Bom. L. R. 363 at pp. 365–366.

report, which came to be forwarded to the High Court by Government's letter of May 1, 1947. The High Court, however, replied to Government's earlier letter on March 28, 1947 observing that the decision of Government to establish a separate Court of Session for Greater Bombay and to abolish the Sessions at the High Court was taken without consulting the High Court on the question of policy involved in the decision. It was observed that the matter had reached the stage of drafting the bill to be presented to the Legislature, which was clearly a stage at which it would not be either right or in accordance with the practice followed by High Court Judges to take part, as the construction to be placed on the amendment to the law may well come up before the High Court for consideration and decision*. By their letter of April 22, 1947 Government expressed regret that the High Court's opinion was not formally taken before Government decided to create a separate Sessions Court for Greater Bombay. It was pleaded that the Hon'ble Minister for Home Department had discussed the matter informally with the Hon'ble the Chief Justice. However, the letter continued, the decision of Government was by no means irrevocable and Government would pay great attention to the views of the High Court and would be glad if the Chief Justice and Judges favoured it with their views on the proposal. This was like a judge beginning to deliver his judgment but expressing regret to the appellant's advocate for not calling upon him to reply after he had heard the respondent's advocate and decided to dismiss the appeal, which has happened on some, though rare, occasions undoubtedly through oversight.

As stated previously, the report of Mr. Lad was forwarded to the High Court on May 1, 1947 and was considered by the Judges after the vacation. It appears that during the vacation Sir Leonard Stone prepared an exhaustive memorandum which was considered at a meeting of the Judges and with certain changes sent to Government as the unanimous opinion of the Chief Justice and the Judges of the High Court. The High Court's view on the report was that it was preferable to establish a new court rather than attempt to extend the jurisdiction of the Small Cause Court which was not the appropriate tribunal for dealing with an entirely different type of litigation. It was suggested that Rs. 10,000 was the absolute limit to which the new court's jurisdiction should attain during 'the contemplatable future'. The limit of the jurisdiction should be raised to Rs. 5,000 in the first instance as in the Madras City Civil Court, which approximated also to the Equity Jurisdiction of £ 500 of the City of London Court and the English County Courts. It was also stated that the best plan would be for Government to take power in the bill to extend the pecuniary limit to Rs. 10,000 and that after consulting the High Court on each occasion the Government should raise the jurisdiction of the new court by stages commencing with Rs. 5,000, then Rs. 7,500 and ultimately Rs. 10,000, which

*It may be observed that the policy almost uniformly followed by the High Court when it is sought to be consulted by Government regarding any proposed legislative measure has been thus stated: "When the Bill in any way concerns Administration of Justice or procedure or practice to be followed by any of the Courts of this Province their Lordships have always considered it their duty to express their views on the Bill. Where, on the other hand, the Bill is unconnected with any of these matters, and concerns matters of legislative policy, which may be controversial, their Lordships refrain from expressing any opinion." High Court's letter to Government dated July 5, 1946 on the question of the Estate Duty Bill. This policy has been uniformly followed.

process, it was observed, had "the added advantage of making it possible to gauge the efficiency and popularity of the new court before it was heavily committed and would avoid to some extent plunging the new court into arrears of work on the first day of its sitting." This language appears much like the language of the former British Government offering political reforms to India by gradual stages. The memorandum further observed that the success of the proposed court solely depended upon the qualifications of the judges selected, their conditions of service and the salaries to be paid to them. But, in any event, in order to attract good men of experience at the Bar, it was suggested that the age-limit for retirement should be extended to 62, so that it would attract advocates up to the age of 50 and allow them to serve at least for 12 years.

The High Court expressed itself against the location of the new court in the High Court building, because in the Chief Justice's view, keeping it away from the High Court building would lead to a much better distribution of work in the legal profession. "In Bombay", Sir Leonard Stone said, "it is exceedingly difficult for the young advocates to get started—infinitely more difficult than it is in London. This is because in Bombay senior or 'fashionable' advocates tend to monopolise as much work of all type as they can, and because in the past Judges have been far too lenient in granting adjournments 'to suit the convenience of advocates' ". The junior Bar of those days had undoubtedly much to be thankful to the Chief Justice for the strictness that he brought to bear in the reform of rules and their enforcement, which undoubtedly led to a far greater distribution of work than ever before.

It may be mentioned that the Bombay Bar Association also submitted its opinion in July 1947 on Mr. Lad's report. The Association was of the view that no case was made out for the establishment of the City Civil Court in Bombay on the ground of any benefit to the litigant and it emphasised that legislation should not be hurried through, that public opinion should be elicited on the proposed measure and that jurisdiction of the City Civil Court, if established, should not exceed Rs. 5,000 and that the court should be located in the High Court building.

As regards the proposal to abolish the criminal jurisdiction of the High Court, the memorandum prepared by the Chief Justice expressed dissent from some of the arguments in Mr. Lad's report. "I am unable to agree", said Sir Leonard Stone, "that the solemnity and dignity of the High Court trial in cases of serious type which is a pattern and an example to the judges of the whole Province is a wastage of judicial power nor can I agree that Sessions crime in Bombay City is on the same plane as 'village crime' which form the great majority of the criminal cases tried by Sessions Judges in the mofussil." While expressing considerable doubt as to the wisdom of the course proposed, the High Court stated that there should be set up with concurrent jurisdiction to the High Court, a court which would try all cases which at present go to the High Court Session but that 'in a particular case of great complexity or in which communal, political or factional passions are aroused, the Court of Criminal Appeal would have the power of application being made to it to order a trial before a High Court Judge at the High Court, the type of cases contemplated being illustrated by the mention of the Bawla Murder Case,

the Gee-Purdy Robbery Case and the Kalbadevi Shooting Case. The Bombay Bar Association also opposed the establishment of a separate Sessions Court. It is not clear whether any of the other Bars were consulted either by the Government or the High Court. In all probability, they were not.

Two bills were sent by Government for consideration by the High Court regarding their proposals. The bill for the establishment of the City Civil Court contemplated an initial jurisdiction of Rs. 10,000 which Government could raise up to Rs. 25,000. The High Court, in its opinion, on the bill, again pressed for the limitation of the jurisdiction to Rs. 5,000 to enable the High Court to watch the experiment of the new court before it was extended to Rs. 10,000, as it would be taking too great a risk to invest the new court straightaway with so wide a power. The Provincial Government's power to extend the jurisdiction to Rs. 25,000 was also sought to be limited by the introduction of the requirement of prior consultation with the High Court. The Government stated that normally the High Court was bound to be consulted but did not agree to have such a provision in the bill itself.

As regards the bill for the amendment of the Criminal Procedure Code, it was initially sought therein to constitute the new Court of Sessions as a Court of Appeal from decisions of Presidency Magistrates. The High Court expressed its emphatic opposition to this proposal giving the following reasons :

"The Presidency Magistrates appointed by Government are selected from the Bombay Bar and are usually men of great experience. They have been empowered to try cases of a complicated character and it is extremely desirable that appeals from their decision should not go to the new Court, which is intended to be set up, but should continue to lie to the High Court. The High Court when hearing appeals from decisions of Presidency Magistrates lays down the law and the procedure and also important principles which apply to the whole Province and which serve as a guidance to the whole Magistracy in the Province."

The Government accepted this view of the High Court and decided not to invest the proposed court with appellate powers against decisions of Presidency Magistrates. In view of the increasing amount of criminal work on the Appellate Side at present, the proposal might perhaps have received a different consideration if it had been made now.

The City Civil Court and the Sessions Court for Greater Bombay came to be simultaneously established on August 16, 1948 and the full designation of the court is "The City Civil and Sessions Court, Greater Bombay" *.

The new court came to be located in the High Court Annexe which had been specially built for that purpose †. The initial jurisdiction of the court was

* The necessary legislation to give effect to Government's decision in these matters was enacted in the form of three Acts. The Code of Criminal Procedure (Bombay Amendment) Act (XXXII of 1948) was enacted on April 10, 1948, the Bombay City Civil Court Act (XL of 1948) on May 10, 1948, and the Bombay High Court Letters Patents (Amendment) Act (XLI of 1948) on May 4, 1948. It may be mentioned in connection with the last named Act that Government had originally proposed the amendment only of the Letters Patent of December 8, 1823 establishing the Sessions Court and the High Court had to point out that it was functioning not under that Letters Patent but under its own Letters Patent of December 28, 1865. The Act, therefore, ultimately amended both the Letters Patents.

† After this building was completed, the Industrial Court had occupied a portion of the building, but subsequently it had to shift and is now accommodated in the hutments on the Foreshore Road.

fixed at Rs. 10,000. The salary of the Principal Judge was fixed at Rs. 2,500 and that of other judges at Rs. 2,000. The age of retirement of the Principal Judge was fixed at 60, while that in the case of other judges was the usual age of retirement at 55. By Bombay Matrimonial (Transfer of Cases) Act (XXVI of 1950) power was given to the High Court to transfer to the City Civil Court any suit or proceeding which was cognizable by the High Court as the Court of Matrimonial Jurisdiction. Under the Hindu Marriage Act, 1955, the City Civil Court has jurisdiction to try matrimonial suits.

The controversy regarding the jurisdiction of the new court, however, did not end with its establishment. Under section 4 of the Bombay City Civil Court Act, 1948, the Provincial Government was empowered by notification in the Official Gazette to invest the City Civil Court with jurisdiction to receive, try and dispose of all suits and proceedings of a civil nature arising within Greater Bombay and of such value not exceeding Rs. 25,000 rupees as may be specified in the notification. In exercise of its powers the Government of Bombay issued a notification on January 20, 1950, enlarging the jurisdiction of the City Civil Court to embrace suits and other proceedings of a civil nature not exceeding Rs. 25,000 in value. This step was hailed by those who had always favoured the establishment of such a court, even though the High Court was opposed to it. It, however, caused consternation amongst its opponents. Well might have the critics exclaimed that the prophetic words recorded by Sir Charles Farran in his minute in 1886, had turned out to be true *.

The notification, however, came to be promptly challenged. One Narottamdas Jethabhai had a claim to recover Rs. 11,704 from the defendant Phillips, to assert which he filed a plaint and presented it to the Prothonotary of the High Court for being admitted. That officer, however, referred it under the then Rule 90 of the High Court Rules (O. S.), to the Judge in Chambers for disposal. In view of the importance of the question involved, a notice was ordered to issue to the Advocate-General of Bombay who appeared under protest, but ultimately asked leave to withdraw and that leave was granted. The matter was then argued before Mr. Justice Bhagwati by Sir Jamshedji Kanga on behalf of the plaintiff, and the learned Judge directed that the plaint should be accepted holding that section 4 of the Bombay City Civil Court Act of 1948 was *ultra vires* the Provincial Legislature and, therefore, inoperative and void and could not confer any effect on the notification issued by the Provincial Government, and the jurisdiction of the High Court to entertain suits exceeding Rs. 10,000 and not exceeding Rs. 25,000 in value remained unaffected. The plaint having been admitted, notices were directed to be issued to the defendant and the State of Bombay. The plaintiff took out summons for judgment, which was heard by the Chief Justice, Mr. Chagla and Mr. Justice Tendolkar. It was held by the Division Bench on the question of jurisdiction that section 4 of the Bombay City Civil

* In the minute made in 1886 by Mr. Justice Farran, then acting Judge, on the proposal of the Finance Committee to set up a new City Court, he had the courage to state: "The tendency of an executive Government, charged with the judicial administration of a country, is prone to discover merits in an income-producing Court which to ordinary eyes are not so readily perceptible" and in somewhat ironical language he had then prophesied that Government would be tempted to go on increasing the pecuniary jurisdiction of such a Court.

Court Act, 1948, was *ultra vires* the Provincial Legislature because it purported to delegate to the Provincial Government the power to invest the City Civil Court with jurisdiction exceeding 10,000 rupees already conferred upon it by section 3 of the Act. The Court was of the view that it was not open to a Legislature, supreme and sovereign as it may be within its own province, to delegate to any authority the power of legislation which had been entrusted to it under the Constitution. It was solely the privilege of the Legislature to make laws and in exercising that privilege it may entrust subordinates and agents with the power to carry out its policy and to give effect to the legislation, but the subordinates and agents must act within the policy laid down by the Legislature. The Legislature could not create a parallel or alternative law-making authority. Holding that view, the Bombay High Court decided that the notification issued by Government under section 4 of the Act investing the City Civil Court with jurisdiction to try claims exceeding 10,000 rupees in value was invalid and of no effect *.

The matter, however, did not rest there. The Government of Bombay filed an appeal to the Supreme Court against this decision. The appeal was heard by a Constitutional Bench of five judges. All the judges delivered separate but concurring judgments allowing the Bombay Government's appeal. They held that section 4 of the Bombay City Civil Court Act, 1948, was not *ultra vires* the Legislature of the State of Bombay and, therefore, the Notification issued by the Provincial Government under section 4 of the Act, investing the Bombay City Civil Court with jurisdiction to try claims not exceeding 25,000 rupees in value, was effective. The Supreme Court was of the view that the Legislature of the State of Bombay in empowering the Provincial Government to invest the City Civil Court with jurisdiction upto Rs. 25,000, by Notification under section 4, had not delegated its legislative authority to the Provincial Government. The provision under section 4, related only to the enforcement of the policy which the Legislature itself had laid down and it was an instance of a species of conditional legislation, which came directly within the principle enunciated by the Judicial Committee in *Queen v. Burah* §, where the taking effect of a particular provision of law is made to depend upon determination of certain facts and conditions by an outside authority. It was observed by Mr. Justice Mehr Chand Mahajan, as he then was, that section 4 of the City Civil Court Act, 1948, did not empower the Provincial Government to enact a law as regards the pecuniary jurisdiction of the new court and it could in no sense be held to be legislation conferring legislative power on the Provincial Government. He further observed that the true distinction is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. Objection may be taken to the ormer but not to the latter †.

The City Civil Court began to function with only the Principal Judge in the beginning on August 16, 1948, but three more judges were appointed from September 1, 1948. The strength was increased to six in 1951, after the increase

* *Narottamdas Jethabhai v. Phillips* (1950) 52 Bom. L. R. 571.

§ (1878) 3 App. Cas. 889.

† *State of Bombay v. Narottamdas* (1951) 53 Bom. L. R. 402.

of jurisdiction to Rs. 25,000 in 1950. Owing to the vast increase in the volume of its work, the strength was further increased to nine judges, and at present there are thirteen judges in the City Civil Court, eight of whom are permanent and the rest additional. In 1948, the number of suits instituted inclusive of suits transferred from the Original Side was 902. It rose to 2,400 in 1950 when the jurisdiction was extended and in the year 1961 the number of suits instituted went up to 4,839. The balance of undisposed suits at the end of 1948 was 736; at the end of 1950 it was 2,615; at the end of 1955 the balance was 5,049; and the balance at the end of the year 1961 is 8,179. An explanation of these arrears, in spite of the increase in the number of judges, must be found in the enormous increase in the work of the Sessions Court, which keeps many of the judges fully occupied. The judges have been recruited from both the members of the Original as well as the Appellate Side Bars as well as by promotion from amongst District Judges. The City Civil and the Sessions Court has attracted lawyers both from the Original as well as the Appellate Side Bars, the attorneys as also lawyers from the Small Cause and Police Courts.

It appears from the Report of the Law Commission that representatives of the Original Side Bar in Bombay pressed for restoration of the High Court's jurisdiction in matters exceeding Rs. 10,000 in value. The Law Commission on the evidence before it reached the conclusion that the increase in the jurisdiction of the City Civil Court from Rs. 10,000 to Rs. 25,000 has not resulted in either the cheapening of the litigation or quicker disposal of cases. They reached a similar conclusion with regard to the City Civil Court in Madras which has now pecuniary jurisdiction upto the value of Rs. 50,000. The Law Commission has, therefore, recommended that the jurisdiction of the City Civil Courts in Madras and Bombay should be reduced to Rs. 10,000. It must, therefore, be said that the controversy as to the pecuniary jurisdiction of the City Civil Court is not yet over. It is no doubt true that court-fees have now been introduced on the Original Side. It is, however, extremely doubtful whether either the Government of Maharashtra or the High Court of Bombay would be willing to retrace the steps which have been already taken and restore the Original Civil Jurisdiction of the High Court to suits above Rs. 10,000 as envisaged in the Law Commission's proposals.

CHAPTER IV

UNIFICATION OF THE BAR

"In the Original Side of the Calcutta and Bombay High Courts alone, where the cleavage between the Original and Appellate Jurisdictions continued to be marked due, as we have seen, to historical reasons, the functions of pleading and acting, which a legal practitioner normally combines in his own person, were bifurcated and assigned, following 'the usage and the peculiar constitution of the English Bar' to Advocates and Attorneys respectively."

—Mr. Patanjali Sastri, Chief Justice of India *.

Prior to the Indian High Courts Act of 1861, which, as we have already seen, received the Royal assent on August 6, 1861, and constituted perhaps the most important landmark in the history of British administration in this country and which led to the establishment of the three High Courts at Calcutta, Bombay and Madras in 1862, two kinds of courts administered justice in the territories under British rule. The Supreme Courts exercised jurisdiction in the Presidency Towns. The Sudder Courts exercised jurisdiction over the mofussil areas. The Charter Acts and the Letters Patent establishing the Supreme Courts conferred on them the power to enroll advocates who could be authorised to act as well as plead in these courts. Power was also given to the Supreme Courts to make rules for this purpose. Under the rules so made, Advocates were empowered only to appear and plead but not to act. On the other hand, the Attorneys who were enrolled were authorised to act and not to plead. In the Sudder Courts, which had Appellate Jurisdiction, and the courts subordinate to them, Pleaders who obtained a certificate were both allowed to act as well as to plead. The Supreme Courts and the Sudder Courts were abolished and, in the picturesque phraseology of Sir Charles Farran, the High Court sprang from the ashes of the two courts which preceded it †. According to Mr. Justice Patanjali Sastri, former Chief Justice of India, the differentiation which formerly marked the functions of the legal practitioners was continued in the High Courts under the notion, apparently, that the High Court in the exercise of its Ordinary Original Jurisdiction, was the successor of the Supreme Court and that, on the Appellate Side, it inherited the jurisdiction and powers of the Sudder Courts. The result was that on the Original Side, Advocates were allowed only to appear and plead instructed by Attorneys empowered to act on the Original Side, as in the Supreme Court previously. On the other hand, on the Appellate Side they were allowed both to act and to plead as in the Sudder Courts. Another class of practitioners known as Vakils were, however, neither allowed to act nor to plead on the Original Side but they were allowed both to act and to plead on the Appellate Side §.

The Vakils in Madras, however, were fortunate in getting this disability removed very early. By a rule made by the Madras High Court, the Vakils were permitted to appear, plead and act on the Original Side, apart from their right to do so on the Appellate Side as well as on the Criminal Side of the High Court. The right of the Vakils to appear in appeals from the decisions of Insolvency Commissioner to the High Court had been also recognised. But their

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* *Aswini Kumar Ghosh v. Arabinda Bose* (1953) S C R 1, 9 =(1952) 15 S C J 568, 571.

† Minute of Sir Charles Farran in 1886 previously referred to at p. 24.

§ *Aswini Kumar Ghosh v. Arabinda Bose* (1953) S C R 1=(1952) 15 S C J 568, 570.

right to appear before the Insolvency Commissioner came to be recognised subsequently *. The Attorneys at Madras challenged this right of the Vakils which, in effect, was even more extensive than the right accorded to other sections of the Bar. The petition filed by them challenged the *vires* of the rules framed by the High Court within the powers conferred by the Letters Patent of 1865 relating to the admission and powers of Advocates, Vakils and Attorneys. Notice of this petition was served on 32 out of 34 Vakils enrolled in the Madras High Court at that time. Of the other two, one was dead and the other could not be found. The petitioners were represented by three European counsel, while two vakils, both of whom were Indians, appeared for the counter-petitioners. The Madras High Court did not accept the contentions of the petitioners and the judgment delivered by that Court praised the mode in which business of the Appellate Court was conducted by the Vakils and it was also stated that the Division Courts exercising original jurisdiction also to a considerable extent derived assistance and advantage from their skill. It was at the same time observed that some change was required in the prevalent system of admitting Vakils so that the requisite professional attainments proportioned to the large privileges enjoyed by them might be secured. It was further stated that the question whether attorneys should be admitted on equal terms to appear and plead and act in the High Court in Original Side suits for recovery of small debts and demands may have to be considered †.

The Legal Practitioners Act (XVIII of 1879) consolidated and amended the law relating to legal practitioners in India. It enabled the Advocates and Attorneys enrolled in any High Court to practise in all subordinate Courts and in any other High Court with permission of that High Court. No Vakil or Pleader, however, it was made clear, was entitled to practise in the High Court exercising original jurisdiction in the Presidency Towns. All Attorneys in any High Court became entitled to practise in all courts subordinate to such High Court and in any court in British India other than the High Court established by Royal Charter on the roll of which they were not entered. The right to practise thus conferred connoted the right to plead as well as to act in the courts mentioned §. It appears that even at that time Mr. Nanabhai Haridas, who later became a judge of the Bombay High Court, had raised his voice against the provisions of the Legal Practitioners Act which restricted Vakils to the Appellate Side of the High Courts in Presidency Towns †.

It appears that in Bombay also the Pleaders enrolled in the Bombay High Court and entitled to practise only on the Appellate Side had been pressing the Chief Justice and Judges to allow them to practise on the Original Side. In the debate on the Financial Statement of 1894-95, to which a reference has been already made in the previous chapter, Sir Chimanlal Setalvad, then a pleader practising on the Appellate Side, made a suggestion that the monopoly of

* Speech of Sir P. S. Sivaswamy Iyer, President of the Golden Jubilee Celebrations of the Advocates Association, Madras, on February 19, 1939. See also (1896) VI Madras Law Journal (Journal Section), p. 473.

† *In the matter of the Petition of the Attorneys* (1876-78) I L R 1 Mad. 24.

§ *Aswini Kumar Ghosh v. Arabinda Bose* (1953) S C R 1=(1952) 15 S C J 568, 571.

† See Joint Memorial addressed to the Chief Justice and Judges of the Bombay High Court by the Advocates' Association of Western India, the Bombay Advocates' Association and the Police Court Bar Association, dated February 10, 1938.

Barristers and Advocates entitled to appear on the Original Side instructed by Attorneys should be done away with and Pleaders as well as Attorneys should be given the right of audience on the Original Side. This would undoubtedly have led to a reduction of the costs of litigation against which the public was agitating. He, however, made it clear that in his view the other method, namely the establishment of a separate City Civil Court, would be preferable. Just prior to the retirement of Sir Charles Sargent in about 1895, the High Court had passed a rule enabling a Pleader of ten years' standing who was a Bachelor of Laws of the Bombay University to be enrolled as an Advocate entitled to practise on the Original Side, provided he ceased to practise for one year. It would appear that the immediate reason for making this rule was the impediment which came in the way of Mr. Rustomji Patel, who was then the second judge in the Small Cause Court, from being appointed as the Chief Judge. Mr. Patel was a Pleader and the Chief Judge had either to be a Barrister or an Advocate. On the passage of the rule, the High Court enrolled him as an Advocate, and appointed him as the Chief Judge *. Sir Lawrence Jenkins who, as is well-known, was favourably inclined towards the Appellate Side Bar and who had often spoken well about the leading members of that side, curiously enough amended the rule making it optional for the judges to enroll such advocates who applied for being allowed to practise on the Original Side. In 1897, the High Court Pleaders approached the Judges requesting the modification of the rule by deleting the condition as to cessation of practice for one year and to consider the desirability of extending the benefit of the rule to all High Court Pleaders whether Bachelors of Law or not. Both requests were then refused. But several years later in 1921, the condition as to cessation of practice was deleted.

Sir Chimanlal Setalvad was one of the earliest to take advantage of this rule and subsequently Mr. H. C. Coyajee as well as Sir Dinsha Mulla and Mr. Ratanlal Vakil, one of the editors of the Bombay Law Reporter, came to be similarly enrolled as Advocates on the Original Side. This rule, however, did not satisfy the Vakils as a class, because admission to the Original Side under the rule was hedged round with 'safeguards', a word which later on in political parlance came to have much odious connotation. For one thing, the Vakils applying for such admission had to cease practice for one year, though that condition came to be deleted later on. Obviously it would be impossible for some of the pleaders at least to fulfil such a condition. As was observed in a representation made by the Pleaders' Association of Western India in October 1920, the condition as to cessation of practice for one year would cause unnecessary hardships and loss and very few Vakils would be ready to undertake the sacrifice and risk involved therein. Many lawyers were also reluctant to apply, as the Chief Justice and Judges had the discretion to refuse such an application or impose conditions in granting it. In fact, Mr. S. G. Velinkar, a well-known and leading criminal lawyer, was refused such admission and had to go to England and qualify himself for the Bar §. After he returned from England he had a very large and lucrative practice on the Criminal Side of the High Court.

* Recollections and Reflections by Sir Chimanlal Setalwad, p. 19.

§ Report of the proceedings of the First Session of the Bombay Advocates' and Pleaders' Conference, 1931, p. 28.

On March 15, 1916, Mr. R. P. Paranjpye (later Sir Raghunathrao Paranjpye, a Minister of the Government of Bombay, and later a Member of the Council of the Secretary of State for India in England) induced the Bombay Legislative Council to carry his resolution urging that Pleaders should be allowed to appear and plead on the Original Side of the High Court, in civil or criminal matters and in Original Side appeals, which they were debarred from doing under the then Rule 40 of the Original Side. The only exception in that rule was that when a question of Hindu or Mahomedan Law or a question of usage arose in a case, the Court, if it thought fit, might allow a Pleader to plead in that case. The Original Side Bar Association opposed the implementation of this resolution by its memorial of April 18, 1916 and the High Court did not accept the resolution either.

In April 1917, the Pleaders' Association of Western India suggested that as most of the High Court Vakils were graduates in law there was no reason why they should not be allowed to appear, act and plead on the Original Side leaving those who wished to have the luxury of the double agency to pay for it. In October 1920, another representation was made by the Pleaders' Association of Western India requesting that the rule on the Original Side for admission of Vakils should be modified to allow a vakil of not less than five years' standing to be enrolled on the original side and also to delete the condition as to cessation of one year's practice. This proposal was opposed by the Bar Association on the Original Side. In February 1921, the Small Cause Court Vakils' Association also pressed the High Court to allow all Vakils to practise on the Original Side without any restriction. The case of a *Tandel* (sailor) was cited in support. He got a decree for Rs. 300 in respect of his provident fund against the Bombay Port Trust, which appealed to the Full Court. The Judges of that Court differed and the case was referred to the High Court, where his pleader who had appeared in the Small Cause Court could not appear, and the poor man was required to pay the costs of about Rs. 1,000. Ultimately in March 1921, as a result of these representations, the High Court amended the rule and deleted the condition as to cessation of practice for one year.

In 1923, a private bill was moved in the Central Legislative Assembly to amend the law as to legal practitioners and to create an Indian Bar. Government while agreeing to circulate the bill for opinion, announced that a committee was about to be appointed to go into the whole question. The bill appears not to have been further proceeded with.

The Indian Bar Committee was accordingly appointed in November 1923 by the Government of India to examine and report on proposals for constituting an Indian Bar on an all India or provincial basis with particular reference to the constitution of Bar Councils, and the extent to which it would be desirable to remove the then existing distinctions between Barristers and Vakils. The committee was presided over by Sir E. M. Chamier, Ex-Chief Justice of the Patna High Court and then the Legal Adviser and Solicitor to the Secretary of State. Mr. Justice Mulla, then Additional Judge of the Bombay High Court (later Sir Dinshah Mulla) and Mr. S. S. Patkar, then Government Pleader (later Sir Sitaram Patkar, Judge of the Bombay High Court) were amongst the members of the committee. The committee submitted its report in February 1924. It recommended the establishment of a single grade of practitioners to be called

Advocates and the cessation of the separate grade of Vakils or Pleaders, but stated that where special conditions were maintained for admission to plead on the Original Side of the High Court the only distinction shall be within that grade which shall consist of Advocates entitled to appear on the Original Side and Advocates not so entitled. The committee also proposed that Vakils of not less than ten years' standing should be admitted at once to practise on the Original Side. The committee further recommended the establishment of Bar Councils.

The Government of India drafted a bill in accordance with the recommendation of the Indian Bar Committee for the establishment of the Bar Councils. That bill was circulated for opinion. It evoked considerable difference of opinion amongst the Judges of the Bombay High Court some of whom felt that it sought to deprive the High Court of its power under the Charter regarding admission of Advocates. Some felt apprehension as to whether the dual system would continue if it was made to depend on the rules framed by the Bar Council. Some regarded the measure as a right beginning for the establishment of an autonomous Bar. A draft as prepared by a committee consisting of Justices Sir Lallubhai Shah, Sir Charles Fawcett and Mr. Kemp was forwarded to Government with some changes as the opinion of the High Court.

The Indian Bar Councils Act (XXXVIII of 1926) was enacted and received the assent of the Governor-General on September 9, 1926. To some extent, it brought about the unification and autonomy of the Bar. Vakils and Pleaders entitled to practise in the High Court all merged in one class of Advocates and thus had the right to practise in the High Court in which they were enrolled and in any other court in British India subject to certain exceptions. The Act provided for the constitution of Bar Councils for each High Court. Under section 9 of the Act, the Bar Council was empowered with the previous sanction of the High Court to make rules to regulate the admission of persons to be Advocates of the High Court. Rules could also be made regarding the qualifications to be possessed by persons applying for admission as advocates. Under the proviso to section 9 (1), such rules were not to limit or in any way affect the powers of the High Court to refuse admission to any person at its discretion. Under sub-section (3) of section 9, it was provided that the rules could not disqualify a woman for admission to be an advocate by reason only of her sex. By virtue of sub-section (4) of section 9, the powers of the High Courts of Calcutta and Bombay were expressly preserved to prescribe the qualifications to be possessed by persons applying to practise in the said High Courts in the exercise of their original jurisdiction or the powers of those High Courts to grant or refuse, as they thought fit, any such application or to prescribe the conditions under which such persons would be entitled to practise or plead. Under section 14 (1) (a), an Advocate's right to be entitled as of right to practise in the High Court of which he was an Advocate was made subject to the provisions of sub-section (4) of section 9. By virtue of the Original Side Rules, Advocates entitled to plead on the Original Side were differentiated in Bombay from the other Advocates by being described as Advocates (Original Side). As a result of the reforms carried out in the system of legal education in Bombay in pursuance of some of the recommendations of the Legal Education Committee, of which Sir John Beaumont, the then Chief Justice was the Chairman, the Bar Council began to hold examinations which every holder of a law degree had to pass before he could be enrolled as an advocate.

In January 1926, Mr. C. M. Gandhi, later Dewan Bahadur C. M. Gandhi, a well-known pleader of Surat, was enrolled as an advocate on the Original Side. While admitting him as an advocate, Chief Justice Sir Norman Macleod declared in open court that the admission of a pleader practising in the mofussil to the roll of Advocates without his passing the Advocates' Examination was an honour which would be bestowed only upon merit and the claims of any applicant to that honour will in future be very closely scrutinized.

After the establishment of the Bar Council, in which representatives of all the branches of the profession worked together, the question of the unification of the High Court Bar came to be raised from time to time. In February 1938 the Advocates' Association of Western India, the Bombay Advocates' Association and the Police Courts' Bar Association forwarded a combined memorial to the Chief Justice and Judges of the High Court regarding the manner in which rule 8 of the High Court Original Side Rules relating to the admission of advocates on that side was being applied in applications that were then preferred by advocates seeking enrolment on the Original Side. Rule 8 allowed the Chief Justice and Judges in special cases and on such conditions as they wished to impose, to dispense with the Original Side Advocates' Examination in the case of advocates of not less than ten years' standing. Till 1924 only 10 advocates were admitted under this rule and the Indian Bar Committee had observed that the benefit conferred by the rule was largely illusory. It further remarked that the committee disapproved in principle of a rule which enabled the High Court to make invidious distinctions between practitioners †. In 1931, the Bombay Bar Council had represented to the High Court that all Advocates, A. S., of more than 10 years' standing should be allowed to practise on the Original Side. The High Court expressed the opinion that no change in rule 7 (corresponding then to the later rule 8) was necessary and observed that very few advocates had taken advantage of the rule and applied for permission to practise on the Original Side. The memorial submitted by the three associations stated that the reluctance of advocates to apply under the rule was to be explained by the rigidity with which the rule had been administered in the past. It was further pointed out that the Government of India Act, 1935, had done away with all distinctions between a pleader on the one hand and a barrister on the other which existed formerly regarding admissions to the High Court bench, including that of the Chief Justice, and that even as regards the provisions relating to the appointment of Judges and the Chief Justice of India to the Federal Court no distinction had been drawn between a pleader and a barrister. It was also stated that in December 1937 the Chief Justice of India had given an assurance that there would be one category of advocates practising before the Federal Court, no matter by what door they had originally entered the profession. The rules of the Federal Court carried out this assurance. The memorial, therefore, requested the High Court to consider all applications under rule 8 in the light of the considerations put forward in the memorial.

In January 1945, Mr. K. R. Bengeri, an advocate practising on the Appellate Side, asked the Bar Council whether there was any legal prohibition for an advocate on the Appellate Side wearing bands while appearing in court. It seems that a similar inquiry had been made in 1932 by another lawyer on which the Bombay Bar Council had passed a resolution that in its opinion there was no

† Indian Bar Committee's Report, paragraph 36, page 21.

prohibition against any advocate putting on bands while appearing in courts. Mr. Bengeri was informed accordingly. On January 26, 1945, the Advocates' Association of Western India requested the Judges to amend the relevant rule of the Appellate Side regarding the dress prescribed for an advocate with a view to enabling them to wear bands as well. This question was considered by the Judges in March 1945. They thought that this was a minor question and therefore decided to tackle the larger problem of unification. A committee of Judges suggested that the rule on the Original Side should be modified to enable an advocate of not less than five years' standing to be enrolled on the Original Side without passing the Advocates' (O. S.) Examination. It will be remembered that such a proposal made by the Pleaders' Association in 1920 was turned down by the Judges then. It appears that the idea of the Judges in 1945 was that the benefit should go only to advocates on the Appellate Side and not to those practising in the mofussil courts, the Bombay Small Cause Court or the Bombay Presidency Magistrates' Courts. It was decided to consult Original Side opinion on this point. Nothing however happened thereafter. It was good that this idea did not materialise as it might have led to further bitterness between the Bars.

In his article on 'Civil Justice : Proposed Bombay Changes', published in the *Times of India*, dated January 30, 1947, which has been already referred to, Sir Chimanlal Setalvad, while not approving the proposal to create a City Civil Court, had admitted that there was substance in the contention that while persons called to the Bar in England were admitted as advocates on the Original Side there was no reason why those who had passed the LL. B. or High Court Pleaders' Examination should be required to pass a further test of the Advocate (O. S.) Examination or to practise for 10 years before they were admitted, at the discretion of the Judges, on the Original Side. He observed that it could be urged with some force that both sides of the High Court should be open to persons qualified for the Bar in England as well as those who passed the LL. B. or the High Court Pleaders' Examination.

Then the Bar Council at its meeting held on July 16, 1945, passed by a majority of 8 to 2, a resolution moved by Mr. G. P. Murdeshwar, an advocate on the Appellate Side and at one time the president of the Advocates' Association of Western India, to the following effect :

> "In the opinion of the Bar Council, the time has arrived for achieving the ideal indicated by the Bar Committee in 1924 that there should be a single grade of advocates entitled to appear in all Courts."

Nothing, however, appears to have been done on this resolution for nearly two years beyond consulting the Bar Associations. The Advocates' Association of Western India was naturally in favour of it, but the Bombay Bar Association wanted further time to consider it, though the matter had been hanging fire for over two years. In August 1949 the Advocates' Association of Western India passed a resolution that the members of the association would wear bands while appearing in courts. This considerably upset some of the Judges as it appeared to them to be something like a threat or defiance, though it was known that some of the senior advocates on the Appellate Side had thrown their weight against any precipitate action. Ultimately the Association decided to postpone giving effect to the resolution to wear bands an assurance having been conveyed that the question of unification was being taken up within a couple of months. This

threatened Battle of the Bands created some stir at that time in the usually placid atmosphere of the High Court.

The Bombay Bar Association opposed the proposed unification at its meeting held on August 18, 1949 expressing its view that the proposal that every advocate shall have the right to practise on the Original Side provided he was instructed by a solicitor and that no advocate shall be required to be instructed on the Appellate Side would lead to a levelling down of standards. It was emphasised that the old tale of the inferior coin driving out the superior will be repeated. Vain glory could not have gone further. In the words of the poet:

"What you don't grasp is wholly lost to you;
What you don't reckon, think you, can't be true;
What you don't weigh, it has no weight alas !
What you don't coin, you 're sure it will not pass !"

Despite this reactionary gesture on the part of the Bombay Bar Association, the Judges were bent on proceeding with the reform.

The Chief Justice Mr. Chagla had made a minute in favour of the proposal in January 1948 pointing out that the dual system would continue but that it did not require for its continuance the existence of a separate Bar. He emphasised that the unification would create one strong Bar, and would tend to remove friction and bitterness that existed between the Original Side and Appellate Side Bars. His view was that it would strengthen and not weaken the Original Side. He also expressed the view that the High Court might consider the creation of a Senior Bar on the lines of King's Council in England.

The question came to be considered at a chamber meeting of Judges held on September 19, 1949. The Judges decided, though not without a dissenting voice, that there should be one united Bar consisting of advocates enrolled in the High Court under the Bar Councils Act, and that such advocates should be entitled to practise on both the sides of the High Court. It may be mentioned that this was the general view amongst the Judges when they considered Mr. Lad's Report proposing the establishment of the City Civil Court, and that view came to be confirmed in 1949. A committee consisting of Mr. Justice N. H. C. Coyajee and Mr. Justice Gajendragadkar, who later became a Judge of the Supreme Court, was appointed to go into the amendments that would be necessary in the rules to give effect to the intended unification. The amendments suggested by the committee were adopted with certain modifications at another chamber meeting of Judges held on October 13, 1949. The amended rules came into force from November 7, 1949, from which date the two bars have been completely unified.

Under the amended rules, all advocates became entitled to appear on either side of the High Court. Advocates cannot act for a party in any matter on the Original Side, except for the insolvent in Insolvency Court, or for a prisoner in the Criminal Court or for a party in an income-tax matter. Advocates cannot appear and plead on the Original Side unless instructed by Attorneys except in matters indicated above. The letters 'O. S.' after the word 'Advocate' were deleted from the rules and a common dress was prescribed for all advocates. The Advocates, (O. S.) Examination, which had existed from almost the beginning of the High Court, came to be discontinued from March 1951. In 1960, the right of an advocate to appear without being instructed by an attorney, came to be further extended. An advocate can now appear and plead on the Original Side without

being instructed by an attorney in applications under Article 226 of the Constitution, in matters relating to income-tax, wealth-tax, gift-tax, expenditure-tax, estate-duty or sales-tax. He can also so appear and plead in references under the Land Acquisition Act, cases under the Chartered Accountants Act, insolvency matters and cases under the criminal jurisdiction, if any.

The establishment of the Supreme Court raised another problem regarding the rights of advocates enrolled by the Supreme Court and entitled to practise therein *vis-a-vis* the Original Side of any High Court. One Mr. Aswini Kumar Ghosh, who was an advocate of the Supreme Court, was also on the roll of Advocates of the Calcutta High Court. But he was not entitled under the rules of the Calcutta High Court to appear on the Original Side of that court, without being instructed by an attorney. On July 18, 1951, he filed a warrant of authority executed in his favour by the defendant in a suit pending on the Original Side of the Calcutta High Court. The Registry on the Original Side returned the warrant with an endorsement that it must be filed by an attorney and not by an advocate under the High Court Rules and Orders on the Original Side. Mr. Ghosh claimed that by virtue of his being an advocate of the Supreme Court he had the right to act as well as appear without being instructed by an attorney on the Original Side under the provisions of the Supreme Court Advocates (Practice in High Courts) Act, 1951, which provided that such advocates were entitled as of right to practise in any High Court in India. He, therefore, moved the High Court under Article 226 of the Constitution for the issue of appropriate writs, orders or directions to the Registry of the Calcutta High Court for enforcement of the rights denied to him. A Special Bench of the Calcutta High Court consisting of Travor Harries C. J., Chakravartti and Banerjee JJ. dismissed the petition holding that the advocate did not become entitled to act on the Original Side of the High Court on his being enrolled as an Advocate of the Supreme Court.

Mr. Ghosh thereafter filed a petition to the Supreme Court under Article 32 of the Constitution. As the issues raised by the petitioner were of far-reaching importance to the Bars in Calcutta and Bombay, the Supreme Court directed notice of the proceedings to be served on the Incorporated Law Society, Secretary of the Bar Association and Secretary of the Advocates' Association of the Calcutta High Court. All of them appeared. The Secretary, Advocates' Association, Madras High Court, also appeared as an intervener. The Attorney-General appeared in person also as an intervener. The Supreme Court had, therefore, the advantage of a full argument on this question from all points of view. The matter was heard by five judges and the majority of the Court consisting of Patanjali Sastri C. J., Vivian Bose and Ghulam Hasan JJ. held that an Advocate of the Supreme Court became entitled as of right to appear and plead as well as to act in all the High Courts including the High Court in which he is enrolled, without any differentiation being made for this purpose between the various jurisdictions exercised by those courts. It was also held that the word 'practice' as applied to advocates in India includes both the functions of acting and pleading and there was nothing in section 2 of the Supreme Court Advocates (Practice in High Courts) Act, 1951, to warrant the cutting down of the statutory right to pleading only on the Original Side of the Calcutta High Court. The rule of the Calcutta and Bombay High Courts, Original Side, which denied an advocate the right to exercise an essential part of his unctions by

insisting on a dual agency on the Original Side was much more than a rule of practice and that the power of making such a rule unless expressly reserved by the Supreme Court Advocates (Practice in High Courts) Act (as it was reserved under section 9 (4) and section 14 (3) of the Bar Councils Act) would be repugnant to the right conferred by section 2 of the former Act. Mr. Justice Mukherjea and Mr. Justice S. R. Das did not agree with this view *.

The All-India Bar Committee which had been appointed in December 1951 was presided over by Mr. Justice S. R. Das later Chief Justice of India who, along with Mr. Justice Mukherjea, had held the minority view in the above-mentioned decision. This committee by a majority reported in March 1953 in favour of the retention of the dual system in the Bombay and Calcutta High Courts. Two members of this committee, Dr. Baxi Tek Chand, a retired judge of the Lahore High Court, and Mr. V. Rajaram Ayer, Advocate-General of Hyderabad, expressed their dissent from this view. The committee recommended that if their view on the dual system was accepted, it would be necessary for the Government of India to undertake legislation to except the Original Sides of the Calcutta and Bombay High Courts from the operation of the Supreme Court Advocates (Practice in High Courts) Act, 1951, so far as acting on the Original Side was concerned. In effect the committee recommended that the right upheld by the majority view of the Supreme Court should be taken away by statute. Under section 34 (2) (iii) of the Advocates Act, 1961, which has now come into operation, the High Courts at Calcutta and Bombay have been accordingly given power to make rules determining the persons who shall be entitled respectively to plead and to act in these High Courts in the exercise of their original jurisdiction.

QUESTION OF RESERVATION OF SEATS IN THE BAR COUNCIL.

The unification of the Bar raised the further question as to whether reservation of certain seats for Advocates (O. S.) and Barristers in the Bar Council was justified, even if it was not invalid, now that the High Court Bar was united. The provisions of the Indian Bar Councils Act had been made applicable to the Bombay High Court in 1928. Under sub-section (3) of section 4 of that Act, the High Court had the power to direct as to what proportion of the elected members of the Bar Council shall be persons who, for such minimum period as the High Court may determine, have been entitled to practise in the High Court in the exercise of its original jurisdiction, and such number as was fixed by the High Court out of the said proportion were to be Barristers of England or Ireland or members of the Faculty of Advocates in Scotland. On September 25, 1928, the Bombay High Court passed the following resolution by virtue of its power under section 4 (3) :

> "It is hereby resolved that out of 10 elected members of the Bar Council to be constituted for the High Court of Judicature at Bombay, 1/2 should be persons who have for the minimum period of 10 years been entitled to practise in the High Court in the exercise of its Original Jurisdiction and 4 of the said 1/2 shall be Barristers of England or Ireland or members of the Faculty of Advocates in Scotland."

The result of this was that 5 of the elected seats on the Bar Council came to be reserved for persons entitled to practise on the Original Side for a minimum period of 10 years. Out of these 5, 4 were to be barristers. It appears that this

* *Aswini Kumar Ghosh v. Arabinda Bose* (1953) S C R 1=(1952) S C J 568=A I R 1952 S C 369.

reservation of a preponderant percentage of reserved seats for barristers was disliked, and the Bar Council and the Bombay Bar Association suggested that there should be no reservation for barristers at all, but that if the reservation was thought necessary because of the provisions of the Bar Councils Act or considered otherwise expedient, then the number of seats reserved for barristers should be the minimum. This led the High Court to amend the resolution of 1928 on April 3, 1944 and the representation of barristers came to be reduced to 3 out of the 5 reserved seats.

With the removal of the distinction between Advocates (O. S.) and the rest of the advocates in 1949, the Bar Council passed a resolution requesting the High Court for a suitable amendment of the resolution regarding fixation of the proportion of Barristers and Advocates (O. S.) out of the elected seats on the Bar Council. On this point, the Bar Association on the Original Side as well as the Advocates' Association of Western India were consulted. The Bar Association suggested in its letter of February 2, 1952 that the practitioners on the Original Side were entitled to a proper and due representation on the Bar Council not as a privileged minority but as an important component of the profession. The Association desired that if this ratio of representation for Advocates (O. S.) could not be secured by election, then it must be done by nomination by the High Court. The Advocates' Association of Western India, on the other hand, suggested that all provisions for reservation of seats for Barristers and Advocates (O. S.) should go. It would appear that the apprehension felt by the Original Side Bar regarding their representation on the Bar Council was the result of the convention that was established between the bar on the Appellate Side and the Small Cause and Police Court bars. When the Bar Council came to be established in 1929, all these bars had resented the reservation of seats for Advocates (O. S.) and Barristers, as required by the Bar Councils Act. Most of the members of these bars could not get any of the 5 reserved seats on the Bar Council. But they could as well unite to keep out the privileged class of Original Side Advocates from getting any out of the other 5 unreserved elected seats on the Bar Council. The unity that was achieved between all Advocates as distinguished from Advocates (O. S.) and which was in evidence since the organisation of the First Bombay Advocates' and Pleaders' Conference in 1931, led to the establishment of this convention. Now that the distinction between Advocates (O. S.) and Advocates (A. S.) was removed, the former class of advocates felt that advocates from the Appellate Side, the Small Cause Court and Police Court Bars being in an overwhelming majority might even encroach on the reserved seats which had been kept for those entitled to practise on the Original Side alone.

On March 10, 1952, Chief Justice Mr. Chagla expressed his view in a minute that the demand for the abolition of the reservation could not be conceded. That was because notwithstanding the unification of the Bar, reservation for the Advocates (O. S.) had to be made as it was prescribed by statute. He also observed that unification was of recent origin and all members of the Bar had not practised in the High Court as of right for 10 years on the Original Side, but he thought that a valid case had been made for a lowering of the proportion previously fixed. He, therefore, recommended that the reservation of seats, instead of being fixed at 5, may be reduced to 4, out of whom 2 might be barristers. This view of the Chief Justice was accepted by the High Court and a resolution was passed accordingly on March 31, 1952, whereby it was decided

that 4 out of 10 elected members of the Bar Council should be persons who have been for the minimum period of 10 years entitled to practise on the Original Side of the High Court, and 2 out of the said 4 should be barristers. It has to be mentioned that the Advocate-General had been from the beginning an *ex officio* member of the Bar Council and apart from the 10 elected members, 4 members used to be nominated by the High Court. Out of this by convention the Government Pleader used to be one*.

On April 18, 1958, the Bar Council passed a resolution that the High Court be requested to reserve only one seat for barristers, instead of two, as fixed in 1952, and that necessary steps be taken to move the Government of India to amend the Bar Councils Act. Mr. Manilal G. Desai, an advocate, also wrote a letter about the same time drawing the attention of the High Court to the anomaly of reservation now that the unification of the Bar had been attained. The High Court decided to review the whole question at the end of 1959. That was because by the end of 1959, advocates who were only entitled to practise on the Appellate Side at the time of the unification of the Bar in November 1949 would become eligible to contest even the reserved seats after a period of 10 years, because by the end of 1959 they would also have fulfilled the minimum requirement as to practice for 10 years on the Original Side. The Bar Council and Mr. Desai were informed accordingly.

Mr. Manilal G. Desai, however, decided to test the question judicially as elections were contemplated to be held by the end of 1958. He filed a petition challenging the legality and vires of sub-section (3) of section 4 of the Indian Bar Councils Act and of the resolutions and rules made thereunder or in conformity therewith. He asked further for a writ, order or direction against the Bar Council restraining it from holding any elections which had been settled to be held on December 12, 1958, as these elections would be on the basis of reservation of seats. The High Court, however, rejected this petition and held that sub-section (3) of section 4 of the Indian Bar Councils Act, 1926, and the resolution passed by the Bombay High Court on April 10, 1952 §, in pursuance of the provisions of that section could not be challenged on the ground that Article 14 of the Constitution of India was violated. The view of the High Court was that the provision under section 4 (3) of the Bar Councils Act was not open to challenge on the ground that it conferred an arbitrary or naked discretion on the High Court. The discretion was conferred on the highest judicial authority which could be trusted to exercise it judicially. The Bar Council was an institution which was the creature of the Bar Councils Act. It conferred a right on advocates among other things to elect representatives on the Bar Council. This was neither a fundamental nor a common law right. The Act empowerd the

* It might be mentioned that the Advocates' Association of Western India had recommended to the High Court by its letter dated January 7, 1932 that the Bar Councils Act may be amended to make the Government Pleader an *ex officio* member of the Bar Council like the Advocate-General. The Association also suggested that pending such an amendment, the High Court might nominate the Government Pleader as a member of the Bar Council. The High Court informed the Association that they had already suggested the amendment to Government and that the proposal about nomination would be duly considered. Thereafter the Government Pleader has been for many years nominated by the High Court.

§ This seems to be a mistake in the report and the date should have been March 31, 1952.

High Court to provide for special reservation of seats in the Bar Council for the benefit of Advocates entitled as of right to practise on the Original Side as also the barristers, provided they had a certain minimum standing at the Bar. The right of being a member of the Bar Council was not a fundamental or common law right but a franchise which was merely the creature of a statute. Such a right could be asserted only to the extent and subject to the conditions specified in the statute creating it. Since the Legislature brought into existence an institution like the Bar Council and made provisions concerning its constitution and composition, the provisions of the law which brought it into existence could not be challenged on the ground that the various interests concerned are unequally represented thereon. It appears from the judgment of Mr. Justice Mudholkar, who later became a Judge of the Supreme Court, in this case that the Advocate-General, who appeared for the Union of India as well as for the Bar Council, had pointed out to the court that as a result of the abolition of the distinction between the Appellate Side and the Original Side on November 7, 1949, every advocate was, from that date, entitled to practise on the Original Side with the result that advocates who were, on November 7, 1949, practising as advocates on the Appellate Side would also be entitled to the benefit of the special reservation after November 7, 1959. The question, therefore, whether there was any point in continuing the special representation would arise for consideration only thereafter *.

This matter of reservation, however, ultimately came to be discussed at a chamber meeting of Judges on September 14, 1959 and it was decided that it was no longer necessary to continue the reservation. A resolution was accordingly issued on October 10, 1959 cancelling the resolution of 1952 and all subsequent resolutions regarding reservation of seats on the Bar Council out of the elected members under section 4 (3) of the Bar Councils Act.

THE DUAL SYSTEM.

There can be no doubt that for years the existence of the dual system in Calcutta and Bombay always evoked criticism from that section of the Bar, members of which could not practise on the Original Side. Such advocates could only do so by applying for being so enrolled at the discretion of Judges or by appearing for the Advocates (O. S.) Examination. The system used to be also subjected to severe criticism at one time by the public for its prohibitive cost. Even amongst Judges there was no unanimity on the question of the necessity of such a system. But there was general agreement that it ensured better preparation and presentation of cases though at enhanced cost. The question of the establishment of the City Civil Court often came to be mixed up with the continuance of the dual system on the ground of the prevalence of high costs on the Original Side. The Bombay High Court, as we have seen, from time to time brought about procedural reforms to cut down costs and this process was always accelerated on many occasions when the demand for the establishment of the City Civil Court became more vocal, evoking sympathetic consideration from the Government. The Indian Bar Committee of 1923-24 had reported in favour of the retention of the system in Calcutta as well as in Bombay, though not unanimously. The memorandum of Mr. Justice Coutts-Trotter which was also signed by Mr. S. R. Das, then the Advocate-General of Calcutta, and by Mr. M. M. Chatterjee, President of the Incorporated Law Society, Calcutta, and

* See *Manilal v. Union of India* (1959) 61 Bom. L R 976.

the minute of Rao Bahadur, later Dewan Bahadur, T. Rangachariar appended to this report contained all the points in favour and against the dual system respectively.

At the first session of the Bombay Advocates' and Pleaders' Conference which met under the presidentship of Diwan Bahadur T. Rangachariar in 1931, a resolution was passed unanimously for the abolition of the dual system. That resolution was repeated at the second session of the conference held at Poona in 1934 when Dr. Kailasnath Katju presided. In his report on the proposals to establish a City Civil Court and a Sessions Court for Greater Bombay, Mr. Lad had also considered the effect that the establishment of the City Civil Court would have on the Bar on the Original Side. He noted the criticisms made against the system as well as the points in its favour. As already stated previously, Sir Leonard Stone, then Chief Justice, had prepared a memorandum on these proposals, which memorandum was accepted by the other judges with certain changes. It recommended the abolition of the distinction between Advocates (O. S.) and Advocates (A. S.), giving all advocates the right to practise in all the courts in the Province. But it stated that when an advocate sought audience on the Original Side of the High Court he would have to be instructed by an attorney. This decision was confirmed and implemented in November 1949. The All-India Bar Committee appointed in December 1951 which was presided over by Mr. S. R. Das, then Judge of the Supreme Court and subsequently the Chief Justice of India, also elicited opinion on this question. The Bombay High Court in its memorandum to this committee observed that the dual system had been in existence on the Original Side for nearly 100 years and had played a great part in the efficient administration of justice, as it led to the better preparation and presentation of cases and also in the training of a competent Bar. The criticism about its costliness had lost much of its force with the establishment of the City Civil Court, which possessed in 1960 jurisdiction up to Rs. 25,000. But the High Court, however, had then expressed the view that it would be perhaps desirable to make the system optional rather than compelling every litigant to come to the High Court on its Original Side through the agency of the solicitors and counsel. While the High Court promised to consider whether it would be possible further to cheapen litigation on the Original Side, under the existing system, it pressed for the High Court being given the power to determine when the system should be changed from the compulsory one into an optional one. As has been noted previously, except two members, the majority view of the All-India Bar Committee of 1953 was in favour of the retention of the dual system in the High Courts at Calcutta and Bombay. That is also the view of the Law Commission which, as we have seen before, has recommended the restoration of the jurisdiction of the Bombay High Court between Rs. 10,000 to 25,000, which has been given to the City Civil Court. Under the Advocates Act (XXV of 1961), which has now come into force, the High Courts at Bombay and Calcutta have been empowered to frame rules to determine persons who shall be entitled respectively to plead and to act in the High Court in its original jurisdiction. It is not likely that the High Court would exercise this power to put back the hands of the clock by placing any additional restrictions on advocates entitled to practise on the Original Side. Whether it would act up to its view placed before the All-India Bar Committee to make the system optional, it is difficult to say.

Despite the unification brought about in the Bar of the High Court, it can hardly be said that there is complete 'emotional integration' in the Bombay Bar, if one were permitted to use political phraseology now in vogue. To some extent, this is natural because the members of the Bar in Bombay are engaged and appear in the High Court on Appellate and Original Sides and in other civil and criminal courts. Most of the senior members confine their practice to the respective courts to which they are ordinarily attached. Most of the courts in Bombay have their own Bar Associations and that also is natural because the Bar in each court has its own problems which can only be dealt with and solved through these associations. In the High Court itself, on the Appellate Side, there is the Advocates' Association of Western India, which was founded on January 24, 1864, and will be completing its centenary in 1964. On the Original Side, the Bombay Bar Association was founded a little later, while the attorneys have their Incorporated Law Society founded on January 15, 1895. If, however, it is permissible to make a suggestion, it is worthwhile considering whether the High Court Bar should not have a sort of a non-official central committee composed of representatives of these three associations, which can also invite the representatives of the Small Cause Court Bar, the Police Courts Bar and the City Civil Court Bar Associations on suitable occasions, so that all questions of common interest can be tackled in a united manner. Such a non-official central committee will serve some useful purpose, though it is true the Bar Council itself is likely to contain representatives from all the respective Bars. The present relations of cordiality and co-operation which have been established between the Bars on the Appellate and Original Sides since 1949 can be perhaps further strengthened by some such method.

ABOLITION OF DISTINCTION BETWEEN ADVOCATES AND PLEADERS.

It would appear that the larger question of doing away with the distinction between Pleaders and Advocates had been also considered by the High Court in January 1949. The main difficulty in the matter was the financial one, since Pleaders paid Rs. 50 only for their sanad and the Advocates had to pay Rs. 750 for enrolment. The then Law Minister of the Bombay State Mr. Dinkerrao Desai, it seems, was willing to reduce the enrolment fee to Rs. 200 treating all lawyers on an equal footing. The Bar Council and the Advocates' Association of Western India were in favour of the proposal to abolish the distinction between Pleaders and Advocates and the majority of the District Bars also seemed to favour it. It would seem that the High Court was willing to enroll all the existing pleaders without payment of any additional amount, the fee of Rs. 200 to apply to future applicants only. In March 1949, a letter was sent to Government pointing out that the present distinction between the two classes of lawyers was an anachronism and the expression 'Pleaders' was antiquated. It was, therefore, proposed that there should be only one class of lawyers for the whole State to be known as Advocates, whether they practised in the High Court or in the districts, and a uniform fee of Rs. 200 should be charged for enrolment. The Government of Bombay took some time to consider the financial implications of the proposal. Despite repeated reminders, no reply was received from Government for two years. In his address inaugurating the first session of the Bombay State Lawyers' Conference held at Bombay in April 1951, Chief Justice Mr. Chagla referred to this question and urged the conference to press Government emphatically for this

reform. A resolution was accordingly passed demanding the abolition of the distinction between Pleaders and Advocates. Whether it was the result of this resolution or otherwise, the Government replied to the High Court in June 1951 that they accepted the principle of a unified Bar and that necessary legislation would soon be undertaken. In January 1952, Government even informed the High Court that a draft bill was being prepared to amend the Bombay Pleaders Act of 1920 and the Indian Stamp Act, 1899. But there was a fly in the ointment possibly because the All-India Bar Committee under the chairmanship of Mr. Justice S. R. Das was expected to submit its report shortly. The Government of Bombay informed the High Court that the question of a unified Bar for the whole of India would be considered by that committee and it would be desirable to await its report. This report was submitted in March 1953 and the Government of Bombay informed the High Court thereafter that the Central Government was likely to undertake legislation for the unification of the Bar on an All-India basis and it would, therefore, be not desirable for the Bombay Government to promote any legislation on the lines proposed by the High Court in March 1949. The proverbial slip between the cup and the lip this time resulted in a further delay of years. With the passage of the Advocates Act (XXV of 1961) by Parliament on May 19, 1961, the ideal of unification of the Bar seems to be now achieved for the whole of India.

CHAPTER V

THE HIGH COURT AND MERGER OF STATES.

"Fortune turns on her wheel, the fate of Kings."

— Seneca.

With the attainment of Independence, it was thought at one time that the problem of the Native States might prove thorny and difficult of solution. The country, however, was soon to see a miracle happen. Except Junagadh and the State of Hyderabad where police action had to be ultimately resorted to, almost all the Indian States agreed to surrender their sovereignty and merge with the rest of India. The credit for this glorious achievement principally goes to Sardar Vallabhbhai Patel in charge then of the Home Ministry of the Government of India, who handled the situation with promptness, tact and firmness. Some of the rulers of the States also, it must be said to their credit, co-operated inspired with patriotic feelings. It does not fall within the limits of this history to discuss in detail how this objective was achieved. It is proposed to mention and deal in this chapter with some of the orders promulgated in this connection for the administration of the areas which merged in the Province of Bombay and some of the problems which the High Court had to face and tackle with by reason of this merger.

During the period of about 14 months between March 1948 to May 1949, 56 small and big States merged with the Province of Bombay. On March 8, 1948, 16 States in the Deccan and one Jahagir accepted merger. The State of Janjira merged on May 6, 1948. 35 Gujarat States including some small areas, Thanas and Jahagirs, were brought in on June 10, 1948. The Danta State integrated on December 2, 1948, though the administration appears to have been taken over by the Government of Bombay on November 6, 1948. In 1949, 3 more States were brought in. The State of Kolhapur integrated on March 1, 1949, while Baroda and Kutchigadh came in on May 1, 1949. The merger of these States with Bombay was made possible by virtue of section 290 of the Government of India Act, 1935, as adapted by the India (Provisional Constitution) Order, 1947, under which the Governor-General could by order increase the area or alter the boundaries of any Province and make such provisions as he may deem necessary or proper for any supplemental, incidental and consequential matters. The Bombay (Enlargement of Area and Alteration of Boundaries) Order, 1947, was promulgated on January 19, 1948, it being thought expedient that certain areas outside the Dominion of India should be included therein and made part of the Province of Bombay. As required under section 290 of the Government of India Act, 1935, the views of the Provincial Government both with respect to the proposal to make the order as well as in respect of its provisions were ascertained. The order came into force on January 19, 1948. It empowered the Governor of Bombay to provide for the proper administration of these added areas. The Government of Bombay in exercise of the power conferred by section 4 of the Extra-Provincial Jurisdiction Act (XLII of 1947) passed the Administration of Indian States Order, 1948, which came into force on June 10, 1948. It provided for the executive authority, the application and continuance of laws and the jurisdiction of the High Court and for some other matters for the Indian States in the Deccan and Gujarat which had merged. Under paragraph 5 of this Order, the Bombay High Court was invested with Original, Appellate and other juris-

diction and also superintendence and administrative control over all subordinate courts in each of these Indian States. Similar administration orders came to be passed in exercise of the powers conferred by section 4 of the Extra-Provincial Jurisdiction Act (XLII of 1947) for Janjira, Kolhapur and Baroda States and came into force on May 6, 1948, March 1, 1949 and May 1, 1949 respectively.

The Indian States (Application of Laws) Order, 1948, was promulgated on July 28, 1948, providing for the application and commencement of Central and Bombay Acts, which were made applicable to the Indian States in Gujarat and Deccan as also the State of Janjira. It also provided for repeal of enactments in force in these States. Similar provision was made for Kolhapur and Baroda States by promulgation of the Kolhapur State (Application of Laws) Order, 1949, and the Baroda State (Application of Laws) Order, 1949, which came into force on March 1, 1949, and July 30, 1949 respectively.

Special Officers were appointed by Government to make inquiries and to submit reports as regards the condition of judicial administration in the merged States, the availability of facilities for establishment of new courts and to make suggestions for introduction of judicial administration on the lines of the existing administration in the Province of Bombay. Mr. T. K. Tukol, now a Judge of the Mysore High Court, was the Special Officer who submitted reports regarding Gujarat and Deccan States, and Mr. M. S. Patil was appointed Special Officer for Baroda.

DECCAN STATES.

There were in all 17 States, including one Jahagir in this group. In 1946, the rulers of some of these States had decided to form a United Deccan State with a High Court, a Judicial Commission and a Constituent Assembly. The Raja of Aundh was elected the first Rajpramukh and the Raja of Bhor the Uparajpramukh in October 1947. But the public opinion in these States was in favour of merger. The decision of the rulers of the States in Orissa to merge with India strengthened this opinion in favour of merger. The Rajmandal or Council of Rulers passed a resolution in December 1947 to accept merger if the people of the State were of that opinion. The Constituent Assembly of the United Deccan State expressed itself in favour of merger on January 26, 1948. After Gandhiji's death, serious disturbances broke out in some of these States which the administrations therein were unable to cope with, and that hastened and facilitated to some extent the acceptance by the rulers of the merger agreements.

Amongst these States, Sangli had a well-developed system of judicial administration and a fairly good Bar with a well-equipped library. It had its own High Court till it came to be abolished by the promulgation of the Administration of the Indian States Order, which applied to the Deccan States. A few other States in this group had also High Courts, but in one of them there was no permanent High Court Judge at any time, and in others also such courts were hardly effective. Judicial officers, it appears, were often entrusted with non-judicial duties. In one State, the Special Officer could not even get correct information about the exact number of courts working there. The Jahagir had a Diwan who had the qualification of having passed only the matriculation examination and yet had the powers of a Subordinate Judge of the Second Class,

corresponding to the Civil Judge, Junior Division. According to the report of the Special Officer, generally speaking, in the Deccan States there was an attempt to follow the procedure and method adopted in the system of administration of justice in neighbouring districts of the Province of Bombay. Except for the lack of efficiency of certain members of the staff, the Special Officer was of the view that there was nothing serious to differentiate between the courts in these areas and the courts in India. The judgments were generally written in English, but pleaders were permitted to argue in Marathi *.

GUJARAT STATES.

The Maharajah of Rajpipla on behalf of most of the rulers of the Gujarat States, on the eve of merger, made a statement declaring the desire of the rulers to make all sacrifices in the wider interests of India as a whole. He emphasized that the rulers had "cheerfully responded to the call of duty and decided to take the first step in forming the Province of Maha-Gujarat by integrating our States with the Province of Bombay" †. His words have proved prophetic.

According to Mr. Tukol, the Special Officer, the merger of the States in Gujarat raised judicial administrative problems more vexed than those raised by the merger of Deccan States. For instance, though the States of Rajpipla and Bhadarwa had merged respectively in Broach and Kaira districts and though Chief Administrators were appointed for these States, they were not attached at first to the districts of Broach and Panch Mahals for purposes of administration of justice. This resulted in considerable accumulation of arrears in these two States and when reference was made by Government to the Bombay High Court, it had to be pointed out that it was primarily the duty of Government to take the necessary steps in this matter in consultation with the High Court. Some of the States in Gujarat headed by Palanpur were converted into a separate district of Banaskantha, the headquarters of which came to be located at Palanpur. Another block of States headed by the Idar State was amalgamated into the district of Mahikantha § with the headquarters located at Himatnagar. There were other States also in Gujarat which merged in the Province. Some of these were non-judicial Talukas, Estates and Thanas and were dealt with under the Bombay (Enlargement of Areas and Alteration of Boundaries) Order, 1947, issued under section 290 of the Government of India Act. Others like Cambay and Balasinor were full jurisdictional States and they integrated with the Dominion of India and were dealt with by the Government of Bombay under powers conferred on them in pursuance of the Extra-Provincial Jurisdiction Act, 1947. Many of these were tiny States and little attention was paid by their rulers to regulate properly the procedure and practice of the civil and criminal Courts. The courts in these States had been set up sometimes indiscriminately for the

* Even in the Province of Bombay there was a time when pleaders conducted their cases in their own vernaculars, both in the original and the appellate courts, and in the High Court also vakils addressed the Court in their own vernaculars. See the report of the First Session of the Bombay Advocates' and Pleaders' Conference, 1931, p. 1, Speech of Diwan Bahadur G. S. Rao, Chairman of the Reception Committee.

† The Story of the Integration of the Indian States by V. P. Menon, p. 207.

§ The district of Mahikantha came to be subsequently renamed as the district of Sabarkantha because of the Sabar river which flows through certain parts of the district.

convenience of the public as means of travel and communication were difficult. In some of the larger States, there were good buildings, but in most there were no good libraries with the result that it seriously affected the efficiency of judges and magistrates. The clerical staff in most States was ignorant of English and had not passed any examination even in their mother-tongue. The judicial administration in States which were amalgamated in Banaskantha district had many defects. There was no systematic maintenance of records or any method in admission of documents. The menial staff was not at all sufficient for the courts, though in other departments there used to be a surfeit of peons and watchmen who were without work. The buildings were often dilapidated, and in one State members of the Bar were being accommodated in an elephant's stable. Courts used to rely upon old editions of law books. It is, however, necessary to mention that in Idar State there was a complete separation of the judiciary from the executive and the buildings at Himatnagar were modern and properly equipped.

JANJIRA STATE.

This State had a Muslim ruler known as the Nawab of Janjira. The administration of law and order of this State was already vested in the Government of Bombay. The ruler stood out for some time, but ultimately accepted the merger.

Mr. Tukol as well as Mr. G. H. Guggali, District Judge, Thana, had made inquiries regarding the administration of this State. The geographical situation of villages removed from one another by rivers and creeks constituted the principal difficulty regarding the creation of courts in this State. This State was a small one consisting of about 246 villages out of which nearly 1/8th were deserted villages. The court building at Murud, the capital, was fairly good as also the library.

KOLHAPUR STATE.

Because of its political importance, the Government of India did not want to take any hasty steps in securing the merger of this State. But serious disturbances broke out in the State after Gandhiji's death as in some of the Deccan States, and the Ruler, whose adoption had been recognized only in March 1947, and who was the former Maharaja of Dewas Senior, readily agreed to the appointment of an administrator nominated by the Government of India. In February 1949, the Maharaja consented to sign the agreement merging the Kolhapur State with Bombay. It seems that Sardar Patel was greatly relieved by the smooth manner in which the merger of this important State in the Deccan took place*.

Mr. C. S. Deodhar, District Judge, at Kolhapur was asked to make his report regarding the judicial administration in Kolhapur. There were 9 feudatory Jahagirs in the State of Kolhapur and they had merged with the parent State in December 1948. Before 1931, the Maharaja exercised the highest judicial powers in the State. The District Judge was called the Sarnyayadhish and it seems that before he joined the Bombay judiciary, Mr. Mahadeo Govind Ranade was the Sarnyayadhish at Kolhapur for some time. Instances of non-qualified persons functioning as sub-judges were, however,

* The Story of the Integration of the Indian States by V. P. Menon, p. 210.

not unknown, as also of executive interference with the judiciary. The traditions of the District Court were said to be generally good, though not without exception. According to the report of the District Judge Mr. Deodhar, in some of the taluka courts in Kolhapur the delay in the hearing of suits was incredible and the litigants had come to regard the delay as a normal feature of litigation.

A High Court had been established in Kolhapur in 1931 and started working in June of that year. It had original as well as appellate sides and three Judges, including the Chief Justice. A Supreme Court was established simultaneously with the High Court. Mr. Justice Madgavkar, a former Judge of the Bombay High Court, presided over the Supreme Court of Kolhapur for several years. Its appellate powers were like those of the Judicial Committee of the Privy Council, the provisions of sections 109 and 110 of the Civil Procedure Code being made applicable. However, appeals could be preferred to the Supreme Court even in regard to matters of the value of Rs. 5,000 or upwards. A sentence of death passed by the High Court was subject to confirmation by the Maharaja of Kolhapur. The Chief Justice had full powers of superintendence over all subordinate courts. Conferences of judicial officers, magistrates and pleaders, were sometimes held under the presidentship of the Chief Justice.

As regards the pre-merger laws in this State, it appears that many of the Acts in India were made applicable to the State. The Kolhapur State passed some progressive laws regarding marriage, divorce and prevention of cruelty to women and the succession rights of the illegitimate progeny of Hindus from Hindu *Jogtins* in 1919-20. The Digest of Hindu Law and two volumes of Vat Hukums constituted a peculiar feature of Kolhapur laws and they came in for considerable comment in the Bombay High Court after merger, as many of the appeals from the Kolhapur territory raised questions concerning them. The Digest of Hindu Law was a translation pure and simple of an edition of Mulla's Hindu Law of 1919. It was said to be an attempt to codify Hindu Law, but like the laws of Persians and Medes it remained unchangeable and unaffected by subsequent changes incorporated in the later editions of Mulla's Hindu Law based on subsequent decisions. Some of the Vat Hukums governed Inam lands given to various persons by the Maharaja of Kolhapur for rendering service to him. There were, however, Vat Hukums on other topics also not only issued by the Maharaja but other officers as well. Sir Govindrao Madgavkar, presiding over the Supreme Court, had on one occasion to refer to the 'wilderness of these Vat Hukums prevalent in the State'. He expressed his view that it was for the courts to distinguish between these Vat Hukums which had the force of law and others which were merely directions by the executive Government to subordinate officers for their guidance *. The difficulties that cropped up in the construction of these Vat Hukums and the Digest of Hindu Law, which governed some of the litigation in Kolhapur State, came to be noticed by a Full Bench of the Bombay High Court after merger †.

In about 1945, a Joint High Court was created for Kolhapur and some of the Deccan States. The Supreme Court was thereafter abolished. This Joint High Court continued till June 1947 when the High Court of Kolhapur was again

* *Gundo Tatyaji v. Nagesh Gopal* (1944) Kol. L R (Part I), p. 79, 83-85.

† *Ramappa Vanappa v. Laxman* (1950) 52 Bom. L R 839 (F. B.)=A I R 1951 Bom. 258.

re-established by an order of the Maharajah. The High Court became the final judicial authority in the State, only death sentences being subject to confirmation by the Maharajah. This High Court in its new form had no Original Side. Mr. Justice N. S. Lokur, after his retirement from the Bombay High Court, was for some years the Chief Justice of the Joint High Court and, after its abolition, of the Kolhapur High Court. It appears that when he took charge of the Chief Justiceship he received no confidential files about judicial officers. This led to some difficulty when the question of absorption of judicial officers from Kolhapur was taken up. According to the Chief Administrator's Report also, it seems that there was no regular maintenance of annual confidential reports of judicial officers in Kolhapur State. The Kolhapur Constitution Act, 1947, came to be repealed with effect from March 1, 1949.

BARODA STATE.

The Baroda State was one of the most enlightened of the Native States in India. This was due to the sagacity and progressive outlook of Sir Sayaji Rao Gaekwad who with the help of some of his eminent Dewans modernized the administration and introduced many social reforms which made the State compare very favourably with even British India in the matter of reform of Hindu Law. He was succeeded by his grandson Sir Pratap Singh, whose second marriage with Sita Devi in 1943 created something like a sensation since he took the extraordinary step of amending the Baroda law against bigamy with retrospective effect so as to make it inapplicable to his own marriage. He was also responsible for making the amazing offer to the Government of India in September 1947 that Baroda would shoulder the responsibility for maintaining law and order and peace and tranquillity in the whole of Kathiawar and Gujarat on condition *inter alia* that the Ruler of Baroda should be declared the King of Gujarat and Kathiawar having sovereign powers, an offer which Sardar Patel naturally rejected. Ultimately, however, he was persuaded to have the merger of his State with Bombay and announced his decision on January 31, 1949 *.

The Baroda State had a fairly developed and efficient judicial system which was working satisfactorily. The High Court of the State, Varishta Nyayadhishi, was established in 1871 and functioned as the highest court of justice in civil and criminal matters. The High Court was entrusted with power of supervision over all subordinate civil and criminal courts. The Chief Justice and two puisne Judges constituted the High Court and two more Judges were appointed temporarily on May 1, 1949, to clear up the arrears before the end of July 1949. The High Court was located in a magnificent building, Nyayamandir or Temple of Justice.

There was, besides the High Court, the Huzur Nyayasabha, corresponding to the Judicial Committee of the Privy Council. The procedure in this Nyayasabha was for its members to record their opinion in writing as to how a particular appeal should be decided. These opinions were then submitted to the Huzur or the Baroda Government for sanction. After necessary sanction, the opinions were adopted as judgments of the Huzur and delivered by the Administrative Member. It appears that the Chief Justice of the High Court was entitled to sit on the Privy Council in any appeal if he was not concerned with it as a party to the High Court decision. The Huzur Nyayasabha was abolished by the Baroda

* The Story of the Integration of the Indian States by V. P. Menon, pp. 417-418.

Government about May 1, 1949 while the High Court came to be abolished on August 1, 1949.

PROBLEMS DUE TO MERGER.

The main problems which the Government of Bombay had to consider in consultation with the High Court were the formation of judicial districts, appointment of judicial officers for the merged areas, appointment of the requisite staff in the new courts, buildings for courts and for residential accommodation of judicial officers, and in some areas the question of Sanadi Pleaders had also to be tackled owing to the introduction of the Indian Bar Councils Act and the Bombay Pleaders Act in these areas. These questions were settled by discussion at a conference between the Chief Justice and the Chief Minister. In recommending the establishment of new courts and amalgamation of existing courts, consideration was naturally given to public convenience, availability of buildings and other amenities and facilities, existence of convenient means of travel and communication and equitable distribution of work without causing dislocation in any of the existing courts. In some of the former courts in the Deccan States as well as Gujarat States, work was very light. It was expected, however, and that expectation was largely realised, that work would increase considerably with the coming into force of the Bombay Agricultural Debtors Relief Act, 1947, in these States. Thousands of applications for adjustment of debts were filed under this Act in the new areas, as they were filed in the old Province of Bombay. The defective drafting of this Act had already earned for it the nick-name of the 'BAD' Act *.

As a result of absorption of parts of the merged areas in contiguous talukas and districts and the creation of new courts, eight new judicial districts came to be added. Broach and Panch Mahals district was split up into two, *viz.*, Broach district and Panch Mahals district. Thana district also came to be split up into two, *viz.*, Thana and Kolaba districts. Six more districts were also created, *viz.*, Sabarkantha (formerly known as Mahikantha), Banaskantha, Sangli, Kolhapur, Baroda and Mehsana. At first Sangli came to be known as South Satara, the old Satara district being called North Satara. The craze for changing names led to their being once again named as Sangli and Satara districts respectively. Godhra became the headquarters of the Panch Mahals district. For a considerable period, the District Judge of this place had to wage a fight to get possession of a suitable building for the location of the District Court. He wanted a bungalow, which was occupied by the Mamlatdar and the Personal Assistant to the Collector, for location of the District Court. His suggestion was accepted by the High Court, but the attitude of the Collector was in line with the usual step-motherly attitude adopted by Government officers regarding accommodation of judicial officers as compared with the facilities enjoyed by the revenue and executive officers. In this particular case, after a good deal of correspondence

* The High Court in its revisional jurisdiction under section 115 of the Civil Procedure Code always used to be very strict at the time of admission. There are some reported cases which show that in such applications the opponent's Advocate used to be called upon at once at the final hearing stage to show cause why the order challenged should not be set aside. However, admissions of Civil Revision Applications has tended to be more liberal in recent years and revisions under the Bombay Agricultural Debtors Relief Act were in early days freely admitted owing to its defective and often ambiguous wording.

with Government and support from the High Court, the District Judge could obtain possession of the bungalow he wanted for the district court.

As regards absorption of judicial officers from the merged States, rules of absorption had been made. The Public Service Commission referred the cases of these officers to the High Court for approval. At the interviews of these officers by the Public Service Commission, a High Court Judge was deputed for advising the Commission. Only those officers who were found suitable were absorbed in the judiciary. Only a few could be absorbed as Assistant Judges and the rest as Civil Judges, Junior Division, and Judicial Magistrates. However, regarding all such officers so absorbed, an assurance was given to Government that the High Court would watch the work of all promising judicial officers from the merged areas and do its best to recognise and encourage merit by considering such cases for suitable promotion from time to time. As a result of merger, 116 judicial officers came to be absorbed, 4 as Assistant Judges, 1 Civil Judge, Senior Division, 63 Civil Judges, Junior Division, and 48 Judicial Magistrates.

In some of the States like Baroda and Kolhapur, as already stated, the highest judicial tribunal was constituted on the lines of the Judicial Committee of the Privy Council. Appeals from the decisions of the State High Courts were preferred to such a tribunal. In some States, cases used to be decided by the Rulers themselves either on the advice of the same judge who decided it or judges specially appointed for the purpose, and in some on the advice of the Diwan, according to the provisions of the constitution of that State. In Baroda alone, there were many such appeals in the Huzur Nyayasabha at the date of integration and a few more were expected to be subsequently filed. There were a few such matters from other States as well. The Government, therefore, proposed to promulgate an order to be known as the Judicial Committee (Integrated States) Order, under section 4 of the Extra-Provincial Jurisdiction Act, 1947. They proposed that three judges should sit on such a Committee. The High Court did not want to spare more than two judges for this work. It was pointed out to Government that "there is a tremendous pressure of work in the High Court and it is with great strain that the Judges are coping with the existing work in the High Court." Government accepted the High Court's view and accordingly the Judicial Committee (Integrated States) Order was issued on July 12, 1949, and came into force immediately. The Chief Justice thereafter constituted from time to time a Judicial Committee of two Judges to dispose of such matters. The Judicial Committee so constituted framed its own rules for carrying out the purposes of the Order. Such Judicial Committees had to be constituted from time to time till almost the end of 1958.

With the disappearance of the Native States came to an end the many funny incidents and anecdotes of the working of their courts with which members of the Bar used to be regaled by advocates who had the opportunity of appearing and arguing in these courts. The fees received by such advocates sometimes used to be fabulous.

At the first session of the Bombay Advocates' and Pleaders' Conference held in Bombay in 1931, Mr. G. R. Abhyankar, a well-known pleader at Sangli and a political worker keenly interested in the reform of Native States, stressed how it was necessary to bring the courts in these States under the appellate powers of a Supreme Court for India. He recounted his experience as to how political

officers used to hear and dispose of criminal appeals involving even serious offences. In one murder appeal, while the matter was being argued before a Political Officer, the latter got up suddenly to have a ride on his horse and put his foot in the stirrup, when the pleader for the accused pleaded with him to look into some of the provisions of the Indian Penal Code before he decided the matter and said that the Code was 'a very interesting book and perhaps may deserve your Honour's consideration.' The Officer cryptically replied, 'I shall consider', and went away galloping and the appeal was finished there and then*.

The late Mr. K. H. Kelkar, an able and witty lawyer on the Appellate Side, used to tell his own experience in a heavy civil appeal argued by him on behalf of the respondent before the court presided over by the Ruler and the Dewan of a State. The late Dewan Bahadur G. S. Rao appeared for the appellant and addressed for several hours a learned argument in fluent and polished English diction, for which he was known, citing numerous rulings in support of his able arguments. When it came to be Mr. Kelkar's turn to reply for the respondent, he, having throughout felt that the arguments on behalf of the appellant had gone over the head of the court, pleaded for his being allowed to address the court in Marathi, because he could not compete with the fluency of his learned friend in English. The permission was duly granted. After finishing his arguments he also requested to be allowed to submit a summary of his arguments in Marathi and that prayer was also granted. Dewan Bahadur Rao then replied on behalf of the appellant in English and both he as well as Mr. Kelkar returned to Bombay, but not before the latter had learnt from the Clerk of the Court of the talk that the Ruler had with his Dewan in their evening walk to the effect that while the pleader for the appellant was very learned and had good command of English, the pleader for the respondent was very clever in elucidating his points before the court in a clear manner. Needless to say, the appeal came to be dismissed, the judgment, which was in Marathi, following closely the reasoning and wording of the arguments submitted to the court by the respondent's pleader.

The merger of these princely pockets and States has undoubtedly been justified by the results. Though some of the rulers had shown a progressive outlook and taken steps to introduce an element of democracy in their administrations, on the whole they constituted islands of reaction which were an anachronism amidst the progressive forces working in the rest of the country. By this process of much-needed integration, the subjects of those States, whatever disadvantages they may have been initially subjected to, have been able to participate in the all-round progress that the country achieved, including the benefit of a uniform and enlightened administration of justice which had proved itself, on the whole, as a bulwark against executive encroachment.

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* Report of the Proceedings of the Bombay Advocates' and Pleaders' Conference held in Bombay in December, 1931, p. 41.

CHAPTER VI

THE HIGH COURT UNDER THE CONSTITUTION

"Let every American, every lover of liberty, every well-wisher to his posterity, swear by the blood of the Revolution never to violate in the least particular the laws of the country, and never to tolerate their violation by others. As the patriots of seventy-six did to the support of the Declaration of Independence so to the support of the Constitution and the laws let every American pledge his life, his property, and his sacred honour; and let every man remember that to violate the law is to trample on the blood of his father and to tear the charter of his own and his children's liberty. Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap. Let it be taught in schools, in seminaries and in colleges. Let it be written in primers, spelling books and in almanacs. Let it be preached from the pulpit, proclaimed in legislative halls and enforced in courts of justice. And, in short, let it become the political religion of the nation."

—Abraham Lincoln.

The Constituent Assembly of India, after deliberations lasting over three years, adopted, enacted and gave to the people of India a well-drafted Constitution on November 26, 1949. The preamble of this Constitution has been often repeated for the noble principles it enshrines. In this history of the Bombay High Court after Independence, it deserves to be repeated again. The people of India solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens: Justice, social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all Fraternity assuring the dignity of the individual and the unity of the Nation. The Constitution, as is well-known, came into operation from January 26, 1950. It carved out an important place in its structure for the judiciary over which was placed at the head the Supreme Court of India. Throughout the proceedings of the Constituent Assembly, there was no dissenting voice as to the necessity of securing a strong and independent judiciary for implementing the important role which was being assigned to it. During the discussion and debates regarding the constitution of the Supreme Court and of the High Court, there was unanimity as to the necessity of placing the judiciary above party politics, securing the appointment of Judges of the High Court and of the Supreme Court on the basis of merit, so that the country would have a thoroughly independent judiciary *.

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* Soon after the commencement of the Constituent Assembly sittings, on December 1, 1946, a little incident occurred which illustrates the respect which the High Court Judges have evoked among the people of this country for the independent role that they played during the British regime. The temporary chairman Dr. Sachchidananda Sinha, the senior most among the members of the Assembly, paid, along with others, a glowing tribute to Dr. Rajendra Prasad when he was elected the permanent chairman of the Constituent Assembly. He recalled how in the year 1902 Dr. Rajendra Prasad passed his matriculation examination standing first in the Calcutta University of those days extending from Assam to Punjab and North-East Frontier, and how he wrote in his *Hindustan Review* that Rajendra Prasad would one day not only be the President of the Indian National Congress but, like Sir Narayan Chandavarkar presiding over the Lahore Session of the Congress, receive a communication from the Viceroy of India offering him a High Court Judgeship. Dr. Sinha added that Dr. Rajendra Prasad lived to be the President of the Indian National Congress more than once, though he did not become a High Court Judge, and said that he had been anxious that he should become a High Court Judge

The Supreme Court of India came to be inaugurated two days after the first Republic Day and the function was attended by members of the Bar from other parts of India as well as by some of the Chief Justices of the High Courts. Sir Harilal Kania who, though he was not made the permanent Chief Justice of the Bombay High Court after Sir John Beaumont, had the honour of becoming the first Chief Justice of India. Mr. M. C. Setalvad, who had been the Advocate-General in Bombay till he tendered his resignation in 1942 and who had, it appears, declined the honour of becoming the first permanent Chief Justice of the Bombay High Court*, became the first Attorney-General of India. These were honours and distinctions for which the Bombay High Court and the Bar had reason to feel justifiable pride. Both Sir Harilal Kania and Mr. M. C. Setalvad, in their speeches, made a reference to the severance of the ties with the Privy Council as a result of the Abolition of the Privy Council Jurisdiction Act, 1949, which was passed in October 1949, and the enactment of the Indian Constitution. "Our ties with the Judicial Committee of the Privy Council", said Mr. Motilal Setalvad, "have now snapped. But the law laid down in their judgments will doubtless continue to mould and influence the decisions of this Court. This is inevitable because the roots of our statute law and legal forms lie deeply enmeshed in the jurisprudence of England and the decisions of the English Courts."§ Sir Harilal Kania, in his speech on the occasion, also referred to the great part played by the Judicial Committee of the Privy Council and observed that though its decisions, some of which were monuments of learning, would no longer be binding on the Supreme Court, they were bound to be treated with the greatest respect, having become a part of the law of the country and would be treasured so long as our present system of law endured. He then referred to the necessity of having High Courts with a strong personnel if the Supreme Court was to have full assistance in its important work. "We hope", he observed, "that political considerations will not influence appointments to High Courts. It is necessary that for the High Courts merit alone should be the basis for selection, if the High Courts have to remain strong, independent and enjoy the confidence of the people."†

No history of a High Court would be complete unless the position of the Supreme Court as well as of the High Court under the Constitution is briefly described. The Supreme Court now occupies a position of pre-eminence in the Indian judiciary. The provisions pertaining to the Supreme Court are to be found in Articles 124 to 147 of the Constitution. It is an Appellate Court against the decisions of all the High Courts. It has the power of review over decisions of all tribunals functioning anyhwere in India. It has got original jurisdiction in respect of appropriate proceedings for the enforcement of rights conferred by Part III of the Constitution and the citizen's right to approach the Supreme Court for vindication of his fundamental rights is itself guaranteed under Article 32. For the enforcement of fundamental rights, the Supreme Court has power to issue directions, orders or writs including writs in the nature of *habeas corpus*,

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because he would have handled properly the British bureaucracy and the executive with his independent judgment and trenchant criticism.

—Constituent Assembly Debates, Vol. I, p. 48.

* Recollections and Reflections by Sir Chimanlal Setalvad, p. 59.

§ (1950) 52 Bom. L R, Journal Section, p. 18.

† (1950) 52 Bom. L R, Journal Section, pp. 20, 21.

mandamus, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate for the said purpose. The right guaranteed by Article 32 shall not be suspended except as otherwise provided for by the Constitution. Under Article 141, the law declared by the Supreme Court is to be binding on all the courts within the territory of India. It has been held by the Supreme Court that there is nothing in the Constitution which prevents the Supreme Court from departing from its previous decision subsequently if the Court is convinced of its error and its harmful effect on the general interests of the public. Article 141 which lays down that the law declared by the Supreme Court shall be binding on all courts within the territories of India must, in this context, refer to courts other than the Supreme Court*. Under Article 143, the President of the Indian Union is empowered to obtain the opinion of the Supreme Court on any question of law or fact which has arisen or is likely to arise and which is of such public importance that it is expedient to obtain such opinion. When a reference is so made, the Supreme Court shall, after such hearing as it thinks fit, report to the President its opinion on that question. Such an opinion was asked for by the President in the controversy that arose in Kerala on the Education Bill which was passed by the Legislative Assembly of the State of Kerala on September 2, 1957†. Under Article 144, all authorities, civil and judicial, shall act in aid of the Supreme Court. There can be little doubt that the position of the Supreme Court with such extensive jurisdiction over such a vast country like India is almost unique in the world.

The functions and powers of the High Court are dealt with by Articles 214 to 232 of the Constitution. Article 226 deals with the power of the High Court to issue writs, like the Supreme Court, throughout the territories, in relation to which it exercises jurisdiction not only for enforcement of the fundamental rights but for any other purpose. This power, therefore, is wider in this respect than that of the Supreme Court. By virtue of Article 226 (2) powers conferred on the High Court are not to be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32. It would be open to Parliament to confer on the Supreme Court power to issue writs, orders or directions for other purposes also and to enlarge its extensive jurisdiction still further. The High Court can act independently in its own sphere, but it is bound by the law laid down by the Supreme Court in view of Article 141. Even an *obiter* of the Supreme Court deserves the highest respect and it is incumbent upon the High Court to accept it as correctly laying down the law §. That was also the position regarding *obiter dicta* of the Privy Council †. The High Court must also act in aid of the Supreme Court by virtue of Article 144.

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* *The Bengal Immunity Company v. The State of Bihar and others* (1955) 2 S C R 603 =(1955) S C J 672. This decision disapproved of the majority decision in *The State of Bombay v. The United Motors (India) Ltd.* (1953) 55 Bom. L R 536 (S. C.)=(1953) S C J 1069. This earlier Supreme Court decision had itself reversed the decision of the Bombay High Court in *United Motors (India) Ltd. v. State of Bombay* (1953) 55 Bom. L R 246. The Supreme Court decision has given a go-by to the principle of *stare decisis* and thus it has aligned itself with the Supreme Court of U. S. A. The practice of the High Court of Australia and the Privy Council is different.

† *In re The Kerala Education Bill, 1957*, (1959) S C R 995=(1959) S C J 321.

§ *Narayanlal Bansilal v. M. P. Mistry* (1959) 61 Bom. L R 220. See also *Mohandas v. Sattanathan* (1954) 56 Bom. L R 1156.

† *Shriniwas v. Balwant* (1913) 15 Bom. L R 533, 546.

Under Article 227, the High Court has power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. The subordinate judiciary is under the control of the High Court. The High Court has power under Article 228 to transfer a case pending in a subordinate court if it is satisfied that it involves a substantial question of law as to the interpretation of the Constitution, the determination of which is necessary for the disposal of the case. After such withdrawal it can either dispose of the case itself or determine the said question of law and return the case to the court from which it was withdrawn for disposal in conformity with its own judgment.

In no manner is the High Court subject to the 'superintendence' of the Supreme Court. The Chief Justices of India since the establishment of the Supreme Court, have often paid visits to the several High Courts in the country. It is now well settled that such visits are not intended to be 'inspection tours' but friendly visits which enable the Chief Justices of India to make personal contacts with the Judges and members of the Bars of the various High Courts. Mr. Patanjali Sastri visited the High Court in April 1952, Mr. Mehr Chand Mahajan in August 1954, Mr. Sudhi Ranjan Das in September 1956, all during their tenure of office as Chief Justices of India. The present Chief Justice of India, Mr. B. P. Sinha, has similarly paid so far three visits, the first time in March 1960 and again in November 1961 and on the third occasion he came to inaugurate the Centenary of the Bombay High Court on April 14, 1962. These visits have been of the friendliest character and have always been accompanied by a round of pleasant functions.

The High Courts' contact with the Supreme Court is also kept up by the Conferences of Chief Justices of all the High Courts at New Delhi which are convened by the Chief Justice of the Supreme Court. These have become almost annual fixtures. Important questions like the policy underlying appointment of High Court Judges, hours of working of the High Court, disposal of arrears, etc., are discussed at these conferences. They have been of use to the High Courts from the point of view of developing uniformity and establishing contacts between Chief Justices of all the High Courts themselves. The venue of such conferences had been till now New Delhi, but it has been suggested that they might be usefully held on occasions at the capital of some of the States. At the time of the Centenary in April 1962, the Chief Justices' Conference came to be held in Bombay. Such conferences have undoubtedly created another force of judicial as well as national integration of considerable value.

POWERS OF THE HIGH COURT UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION *.

Even prior to the Constitution, the High Court had jurisdiction to issue writs of *certiorari* and prohibition. That jurisdiction was restricted to the Original Civil Jurisdiction of the Bombay High Court †. There was jurisdiction also to issue writs in the nature of *mandamus*, which fell under section 45 of the

* The cases referred to in this section are not intended to be exhaustive. They indicate the principles on which the Bombay High Court has generally proceeded in dealing with applications under Articles 226 and 227.

† *Ryots of Garabandho v. Zamindar of Parlakamedi* (1945) 47 Bom. L R 525 (P. C.) where the history of legislation and case-law on the subject is exhaustively dealt with.

Specific Relief Act, in which case the jurisdiction was territorially restricted in a similar manner *. Under section 491 of the Criminal Procedure Code, the High Court had the power to issue writs in the nature of *habeas corpus* throughout the territory of the Province of Bombay.

Under the Constitution the High Court became the custodian of the fundamental rights of the citizens. Its territorial jurisdiction in the matter of issuing writs became coextensive with the whole State of Bombay. Its jurisdiction is not confined to writs which it could issue in the past, but it is now empowered to issue 'directions, orders or writs' for enforcement of any of the fundamental rights and also for any other purpose. The power is to issue not only writs in the nature of the various categories of writs, *viz.*, *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, but these writs themselves. Whereas the power of the Supreme Court is confined under Article 32 to issue directions, orders or writs including writs of various categories mentioned above for the purpose of enforcement of fundamental rights, the High Court's jurisdiction is much wider since it can issue directions, orders or writs for other purposes as well, like those for which the High Court used to issue writs prior to the enactment of the Constitution.† It will be seen, therefore, that the powers and jurisdictions which the High Court had previously possessed have been preserved under Article 225, while Article 226 confers on the High Courts new and very wide powers in the matter of issuing writs which they never possessed before §.

As these powers under Article 226 are now embodied in the Constitution, they have been placed beyond the challenge of the Legislature. It is only by way of an amendment of the Constitution as provided in Article 368 that these powers can in any way be touched. To the extent, therefore, that any legislation seeks to take away the powers of the High Court to issue any writ, direction or order contemplated by Article 226, that legislation would be *ultra vires* of that Article †.

Curiously enough, the Constitution seems to have made another distinction between the method by which the powers of the Supreme Court and the High Court can be enlarged, reduced, modified or abolished by an amendment of the Constitution. Article 32 falls in Part III of the Constitution dealing with Fundamental Rights. The enforcement of these rights is itself a guaranteed right under Article 32. The amendment of Part III of the Constitution would be governed by the first paragraph of Article 368 so that any of the Articles dealing with Fundamental Rights including Article 32, can only be initiated by the introduction of a bill for the purpose in either House of Parliament. When the bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, it has to be presented to the President for his assent. Upon such assent being given to the bill the amendment becomes effective. There is

* *Kanaiyalal v. Secretary of State* (1925) 27 Bom. L R 368.

† *Emperor v. Jeshingbhai Ishwarlal* (1950) 52 Bom. L R 544 (F. B.) at pp. 547-548. Though Mr. Justice J. C. Shah differed from the majority view of Chagla C. J. and Bavdekar J. on the merits of the impugned externment order in that case, there was no difference of opinion regarding the legal position under Article 226.

§ *Rashid and Son v. Income-tax Investigation Commission* (1954) S C R 738=(1954) S C J 264.

† *Abdul Majid v. Nayak* (1951) 53 Bom. L R 621.

a proviso to Article 368 and under clause (b) of that proviso, for amending Chapter IV of Part V, which deals with the Union Judiciary, and Chapter V of Part VI, which deals with High Courts in the States, a further safeguard is provided, *viz.*, that any amendment relating to these shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the bill making provision for such amendment is presented to the President for assent. As Articles 226 and 227 of the Constitution form part of Chapter V of Part VI, any amendment of the powers of the High Court under these two Articles will come under the additional safeguard of requiring ratification by the Legislatures of not less than one-half of the States. No such safeguard seems to have been provided for amendment of the powers of the Supreme Court under Article 32. *

A party seeking relief under Article 226 for enforcement of his fundamental rights or for any other purpose must satisfy certain conditions before he would be entitled to have his petition entertained. He must be prompt in approaching the High Court. Only the diligent and not the indolent can get relief. If delay has occurred, it has got to be condoned by advancing proper reasons. The only delay that the Court will excuse in presenting a petition under Article 226 is the delay which is caused by the petitioner pursuing a legal remedy open to him. If he has pursued an extra-legal or extra-judicial remedy, the Court will not help him. † If a party wants to challenge the jurisdiction of a tribunal to pass an order against which he is aggrieved, the objection as to jurisdiction must be raised before the tribunal itself whose order is sought to be challenged. ‡ Even before the Constitution it was settled law that if the party seeking the relief of a writ was guilty of suppression or non-statement of material facts, his petition was liable to be dismissed. If the lacuna or defect in the petition was, however, not the result of any deliberate intention to mislead or deceive the Court but was the result of inadvertence or want of appreciation of the true legal position, the Court might allow the application to be amended. || This principle has been followed after the Constitution also.

The jurisdiction of the High Court under Article 226 is an exceptional and discretionary jurisdiction and has got to be sparingly used. If a citizen can obtain equally adequate, equally efficacious and equally prompt remedy in the ordinary courts of law, the High Court would ordinarily not exercise its discretion in his favour. But there may exist special circumstances when a writ, order or direction under Article 226 may be issued, even though an alternative adequate remedy may exist.¶ It has been held that this rule about an alternative remedy is not an inflexible rule but the High Court must exercise its powers with due circumspection and due regard to the powers of other

* In this connection, the observations of Patanjali Sastri J. in *Romesh Thappar v. The State of Madras* (1950) S C R 594=(1950) S C J 418, at p. 420, may be noted. The learned Judge stated that Article 32 did not merely confer power on the Supreme Court, as Article 226 does on the High Court, to issue certain writs for the enforcement of the right conferred by Part III or for any other purpose, as part of its general jurisdiction. In that case, it would have been more appropriately placed among Articles 131 to 139 which define that jurisdiction.

† *Gandhinagar Motor Transport Society v. State of Bombay* (1953) 55 Bom. L R 922.

‡ Ibid.

|| *Manibhai Patel v. Arbuthnot* (1947) 49 Bom. L R 454.

¶ *Walchandnagar Industries v. Bombay State* (1953) 55 Bom. L R 77.

tribunals.* This principle has been held not to apply where the party comes to the court with the allegation that his fundamental rights have been contravened.†

When the authority issuing the order is the Central Government located in New Delhi, the mere fact that the order came to be served on the petitioner in Bombay, who challenged its validity in the Bombay High Court, would not confer jurisdiction upon the High Court.° But when the effective and subsisting order is that of an authority which is located in Bombay, a petition challenging such an order is maintainable in the Bombay High Court even though that order had been sought to be revised by the revisional authority in New Delhi. The reason is that when a revisional court dismisses a revision petition, the dismissal does not confirm the order of the court below but it merely refuses to interfere with the order.¶ But the power of the High Court to strike down the provisions of a law enacted by Parliament, if it finds that the impugned provision as enacted violates a fundamental right claimed by the petitioner, is not in any way limited by the fact that the impugned law was enacted by Parliament and not by the State Legislature.† In a recent case where an Ordinance promulgated by the President known as the Essential Services Maintenance Ordinance, 1960, on the eve of the General Strike that was contemplated by some of the Central Departments of India, was challenged *inter alia* on the ground that the fundamental right of the petitioners to form Associations or Unions was violated, it was held by the Bombay High Court that as action was being taken under the Ordinance by an authority located within the territory over which the High Court exercised jurisdiction, it was open to the court to examine its constitutionality. On the merits, however, it was held that the right to go on strike was not included in the rights conferred on citizens under Article 19 (1) (c) and (g) of the Constitution and that the Ordinance prohibiting strikes did not contravene the provisions of the said Article.‖

WRIT OF HABEAS CORPUS

Before the Constitution, the High Court had power to issue a writ in the nature of *habeas corpus* under section 491 of the Criminal Procedure Code. That power has been confirmed as well as widened by virtue of Article 226.** It has

* *Phoolchand v. Nagpur University* (1957) 59 Bom. L R 300=1957 N L J 67. *Shantilal v. M. G. Abrol* (1960) 62 Bom. L R 1030.

† *United Motors (India) Ltd. v. State of Bombay* (1953) 55 Bom. L R 246. In this case the Bombay High Court had held that the Bombay Sales Tax Act, 1932 was *ultra vires* the State Legislature. On that point the Supreme Court reversed the decision of the High Court in *The State of Bombay v. United Motors (India) Ltd.* (1953) 55 Bom. L R 536=(1953) S C J 373.

° *P. N. Films Ltd. v. Union of India* (1955) 57 Bom. L R 753.

¶ *Sipahi Malani v. Fidahussein* (1956) 58 Bom. L R 344.

† *Manilal v. Union of India* (1959) 61 Bom. L R 976.

‖ *S. Vasudevan v. S. D. Mittal* (1961) 63 Bom. L R 774.

** Immediately after the Quit India movement, in August 1942 one political case known as *Keshav Talpade's case*, aroused considerable interest. Talpade was a petition-writer in the Bombay High Court. He was detained under the Defence of India Rules, the validity of which came to be challenged in a petition filed by him. A Full Bench of the Bombay High Court consisting of Sir John Beaumont, Chief Justice, Mr. Justice Chagla and Mr. Justice Weston, dismissed the petition. The Federal Court differed from the view taken by the Bombay High Court and held that rule 26 of the Defence of India Rules was *ultra vires* the Central Legislature. Then followed

been already mentioned that over eleven hundred applications for writs of *habeas corpus* came to be filed after Gandhiji's death. But these were under section 491 of the Criminal Procedure Code. Over fifty writ petitions for *habeas corpus* also came to be filed as a result of the agitation and disturbances in connection with the Samyukta Maharashtra movement in 1956. In the case of *In re Pralhad Krishna Kurne*, a writ petition for *habeas corpus* under Article 226 of the Constitution was decided by a Full Bench of the Bombay High Court as it involved a point of some importance. In that case the point raised was as to whether successive applications for such a writ could be filed before different Benches of the High Court. The petitioner Kurne had made an application under section 491 of the Criminal Procedure Code before a Division Bench and that came to be dismissed. A further application was then made by the petitioner on the strength of a decision of another Division Bench subsequently. It was contended on his behalf that it was his right to make an application for *habeas corpus* under Article 226 of the Constitution of India to successive Judges of the High Court. That application was heard by a Full Bench and it was held that under Article 226 it was the High Court that was dealing with an application and not a Judge or Judges individually and that the petitioner had no right to present successive applications to different Judges of the High Court. The Full Bench, therefore, dismissed the petition but recommended to Government not to take its stand on any technical ground but to review the case of the petitioner in the light of a subsequent judgment delivered by another Division Bench. ¶

MANDAMUS, CERTIORARI AND OTHER WRITS

Prior to the Constitution, writs of *mandamus* used to be issued by the High Court under the provisions of section 45 of the Specific Relief Act. A petition for *mandamus* does not constitute a court into a Court of Appeal from the decision of the public officer against whom the writ is intended to be directed. † The Court issues a writ of *mandamus* in order to compel an authority to act according to the mandate of the Legislature. The authority cannot step outside the ambit of the law within which its power has to be exercised. The powers have further to be exercised strictly according to the conditions and limitations laid down by the Legislature. The function of *mandamus* is to operate within the law, to enforce the law, whatever the nature or character of the law might be. But when a party comes to the court under Article 226 and requires the assistance of the Court to carry out the provisions of the law, it is on the

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a veritable tussle between the High Court and the Federal Court as to the form of the Federal Court's order. The case came back on two occasions to the Bombay High Court before the same Full Bench. The Chief Justice and Mr. Justice Chagla in effect did not act upon the decision of the Federal Court on a technical ground. Mr. Justice Weston differed and expressed the view that as a result of the Federal Court's decision the detenue would have to be released. Here, if ever, was a case of technicalities delaying and defeating justice. The detenue ultimately came to be released by the Government of Bombay. See Recent Judgments in India, Vol. I, with a Foreword by Dr. Kailasnath Katju, published by the Hindustan Times, pp. 22, 23 and 30 and *Emperor v. Keshav Talpade* (1944) 46 Bom. L R 22 and the note on pages 49 and 50.

¶ *In re Prahlad Krishna Kurne* (1951) 53 Bom. L R 61.

† *Shankar v. Returning Officer, Kolaba* (1952) 54 Bom. L R 137.

assumption that those provisions are valid provisions and effect must be given to them.*

As regards writs of *certiorari*, the High Court has the power to correct and rectify the record of the proceedings of an inferior court or tribunal. The basis of a writ of *certiorari* is that the order challenged must be a judicial or quasi-judicial order and the authority passing it is one discharging judicial functions. An administrative order cannot be corrected by a writ of *certiorari*. † There must be an error of law in the order apparent on the face of the record. It must be a speaking order showing clear ignorance or disregard of any provisions of law to be amenable to correction by the issue of such a writ. The error of law cannot be considered to be apparent on the face of the record if it has to be pointed out to the superior court after a long and elaborate argument. ‡

ELECTIONS AND THE HIGH COURT

Article 324 of the Constitution has provided for an independent machinery for superintendence, direction and control of elections which is vested in the Election Commission. The Chief Election Commissioner, who is the Chairman of this Commission, is not liable to be removed from his office except in like manner and on like grounds as a Judge of the Supreme Court. Under Article 329 (a), the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court. Article 329 (b) provides that no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for or under any law made by the appropriate Legislature. The Bombay High Court has held that the expression "election" does not connote merely the ultimate decision or the ultimate result but it comprises every stage from the time the notification is issued till the result is declared, and even perhaps, if there is an election petition, till the decision of the Election Tribunal. Therefore, nomination of candidates, scrutinising of nominations and decisions as to whether a nomination paper is valid or not, are all part and parcel of an election. Consequently the decision of a Returning Officer rejecting a nomination paper cannot be challenged by way of a writ petition under Article 226. ¶ But once an election is challenged before the Election Tribunal by presentation of an election petition, that Election Tribunal functioning within the territorial jurisdiction of a High Court would fall within the sweep of the power under Article 226. The Election Tribunals are also subject to the superintendence of the High Courts under Article 227 of the Constitution and that superintendence is both judicial and administrative. || The decision of an election tribunal is also subject to an appeal to the High Court under section 116-A of the Representation of the People Act XLIII of 1951.

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* *Kaikhusroo Phirozeshah v. State of Bombay* (1955) 57 Bom. L R 24.

† *Emperor v. Jesingbhai Ishwarlal* (1950) 52 Bom. L R 544 (F B).

‡ *Mushran v. Patil* (1951) 53 Bom. L R. 1009.

¶ *Shankar v. Returning Officer, Kolaba* (1952) 54 Bom. L R 137.
See also *Ponnuswamy v. Returning Officer, Namakhal* (1952) S C J 100.

|| *Hari Vishnu Kamath v. Syed Ahmad Ishaque* (1955) 1 S C R 1105=(1955) S C J 267.

GENERAL

The validity of several Acts beneficent or otherwise has been challenged before the Bombay High Court in Bombay, Nagpur and Rajkot unde Article 226 of the Constitution, as for instance the Bombay District Police Act, the Preventive Detention Act, the Bombay Industrial Relations Act, the Industrial Disputes Appellate Tribunal Act, the Bombay Land Requisition Act, the Bombay Beggars Act, the Administration of Evacuee Property Ordinance, 1949 and Act of 1950, the Bombay Personal Inams Abolition Act, the Bombay Tenancy and Agricultural Lands Act, the Bombay Prohibition Act, Motor Vehicles Act, Sea Customs Act, the States Reorganisation Act of 1956, Money-Lenders Act, Indian Bar Councils Act and numerous others. Rules and notifications issued by Government under Acts have been also challenged. These challenges have in most cases failed. In rare cases, a few sections or rules have been declared void. At the same time, the powers of the High Court have been effectively used to correct arbitrary, illegal and unjust orders. But these powers were initially described in so glowing terms that perhaps they lured many unwary litigants to file numerous applications which afterwards came to grief, just like the birds which pecked in vain at the grapes so well painted by the Grecian artist Zeuxis and described by Shakespere :

> *"E'en as poor birds, deceived with painted grapes*
> *Do surfeit by the eye, and pine the maw"*

This may be true of some applications. But there have been applications also made in all kinds of circumstances and for all manner of relief which have not been entertained by the High Court. Thus, in one case, a complaint was lodged by a person against the Assistant Commissioners of Sales-tax under section 500 read with section 109 of the Indian Penal Code. It was contended by the officers that the proceedings could not be initiated in the absence of sanction under section 197 of the Criminal Procedure Code, as they were Government servants. That contention was accepted by the Magistrate and the officers were discharged. In revision filed before the Additional Sessions Judge, the order was set aside and the case was remanded to the District Magistrate with a direction that he by himself or by any of the Magistrates subordinate to him should make further inquiry in the complaint. The officers applied in revision to the High Court against that order and the order was confirmed by the High Court of Bombay at Nagpur. It appears that the Government of Bombay by a resolution sanctioned the defence expenses of the respondent-officers. The complainant, therefore, filed petitions under Articles 226 and 227 of the Constitution before the Nagpur Bench praying for a writ of *certiorari* quashing the Government Resolution. It was held by the Nagpur Bench that a tax-payer had no right to challenge expend ture of public moneys by Government. If Government purported to spend money for a purpose which it characterizes as a public purpose though it is challenged as being not a public purpose, the proper place to criticize the action of the Government would be the Legislature or the appropriation committee, and the Courts are not the forum in which Government's action could be sought to be criticised or restrained. * This decision, however, ought not to lull public bodies and corporations into a false sense of security, because it has been held by the Bombay High Court in several cases that a suit would lie at the instance

* *Laxman v. Asstt. Commissioner, Sales-Tax* (1960) 62 Bom. L R 880.

of individual tax-payers for an injunction restraining a Municipality from misapplying its funds. In an old case, the Municipality of Sholapur was desirous of expending a sum out of the municipal funds on the purchase of musical instruments for a band, which the Municipality had resolved to establish. It was the contention of the tax-payers that this was not one of the purposes for which the Municipality was authorised by law to spend municipal funds. The trial court had decreed the tax-payers' suit. The District Court held that the tax-payers were not entitled to sue without proof of special damage. It was held by the Bombay High Court in second appeal that the suit was competent at the instance of individual tax-payers for an injunction restraining a municipality from misapplying its funds. The matter was, however, sent down for decision of the point whether the expenditure which the Sholapur Municipality proposed to make was legal. * Similarly a resolution of the City of Nagpur Corporation permitting expenditure for sending delegates to the Health Conference of representatives of commonwealth countries which was to meet in England was held by the Nagpur Bench to be beyond the powers of the Corporation and, therefore, *ultra vires*. †

Curious pleas have been also taken to challenge the *vires* of certain Acts under the Constitution. One Narasu, who was convicted under the Bombay Prevention of Hindu Bigamous Marriages Act for entering into a second marriage, challenged before the High Court the *vires* of that Act. His conviction had been set aside by the Sessions Judge and there was an appeal by Government against that acquittal. The second wife had also been convicted for the main offence as also the first wife and some other persons for abetment. There was a reference made by the Sessions Judge regarding some of these accused. It was contended before the High Court that the Act was bad because it contravened the fundamental rights guaranteed by Articles 14, 15 and 25 of the Constitution. It was held that personal law was not included in the expression "laws in force" used in Article 13 (1) of the Constitution of India, and that what the State wanted to protect was religious faith and belief; and if religious practices ran counter to public order, morality, health or a policy of social welfare and reform upon which the State had embarked, then the religious practices must give way before the good of the people of the State as a whole. ‡

In another case, a non-citizen was charged with adultery under section 497 of the Indian Penal Code and was being prosecuted for that offence. He applied to the High Court under Article 228 challenging the legality of section 497 on the ground of discrimination. His contention was that under section 497 of the Indian Penal Code, a man was liable to be punished for the offence of adultery while the woman went scotfree, as the wife was not punishable as an abettor. The contention that this law was discriminatory as between man and woman was negatived, in view of the peculiar position assigned to women in Indian society at one time which necessitated their protection.¶

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* *Vaman v. Municipality of Sholapur* (1897) I L R 22 Bom. 646.

† *John Servaga v. Nagpur Corporation* (1959) 61 Bom. L R 1299.

‡ *State v. Narasu Appa Mali* (1951) 53 Bom. L R 779.

¶ *State v. Yusuf Abdul Aziz* (1951) 53 Bom. L R 736. This decision was confirmed by the Supreme Court in *Yusuf Abdul Aziz v. The State of Bombay* (1954) 56 Bom. L R 1179 (S C).

ARTICLE 227

There is considerable difference between the jurisdiction that the High Court exercises under Article 226 and the one under Article 227. In acting under Article 226 of the Constitution, the High Court does not act as a Court of Appeal and does not substitute its own order on the merits of the case for the order of the inferior court or tribunal which it quashes. If the order is quashed, the inferior court or tribunal is left at large to pass any proper order in the light of the decision of the High Court. If, on the other hand, the High Court refuses to interfere and dismisses the petition, then the order of the inferior court or tribunal stands and assumes the necessary finality. Under Article 227 the High Court exercises a supervisory jurisdiction and it has the power not only to quash the orders made by inferior courts or tribunals but also to pass substantive orders in place of the orders it has quashed or set aside. * Superintendence of the High Court under Article 227 is not confined to administrative superintendence but also includes judicial superintendence. Article 227 only deals with the power of the High Court and not with the rights of a litigant who may approach the High Court. He has no right to do so, nor has he a right to a remedy because the High Court may refuse that remedy under Article 227. An application under Article 227, therefore, is not a specific legal remedy open to him which would preclude his getting relief under Article 226. † The power of the High Court to quash the order passed by a tribunal in the proceeding brought before the High Court is not affected by reason of the subsequent extinction of that tribunal. :: A mere erroneous decision which cannot be corrected by the High Court in revision under section 115 of the Civil Procedure Code also cannot be corrected under Article 227 of the Constitution of India. An error which has to be established by a long process of reasoning on points where there may conceivably be two opinions cannot be said to be an error apparent on the face of the record. **

As a result of the powers conferred on the High Court under Articles 226 and 227 of the Constitution, hearing of constitutional matters has now become one of the most important and exacting part of judicial work occupying the time of at least one Division Bench. These applications were filed initially without much discrimination and though increase in court-fees led to some kind of check, it has not brought about, to any appreciable extent, reduction in the volume of this kind of work, though the principles governing the powers of the High Court are now well settled. Bad drafting of some legislative measures, even though beneficient, has been largely responsible for this. One notorious instance is the Bombay Tenancy and Agricultural Lands Act. The tenancy legislation was first enacted in the State in 1939 and was amended on several occasions. But despite mild protests from the Bench, the confusion in some of its provisions has become worse confounded with each successive amendment. In England, it is the parliamentary draftsman who has come in for criticism against defective drafting of statutes and Mr. Megarry has quoted in his very interesting book 'Miscellany at Law', a verse in which the draftsman is depicted as singing to

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* *M. D. Thakur v. Labour Appellate Tribunal* (1955) 57 Bom. L R 1148.

† *Sarin v. Patil* (1951) 53 Bom. L R 674. See also *Lakhama Pesha v. Venkatrao* (1954) 56 Bom. L R 824.

:: *Narayan Deju v. Labour Appellate Tribunal* (1957) 59 Bom. L R 261.

** *Satyanarayan v. Mallikarjun* (1960) 62 Bom. L R 146 (S C).

oppression to all the classes of the community throughout the country". It was urged that the Secretary of State should appoint committees in each Province to submit reports to himself on this subject.

In 1893, the question was raised on the floor of the then Legislative Council by S r Pherozeshah Mehta, who moved a resolution demanding that magisterial work should be handed over to the subordinate civil judiciary. At the Bombay Provincial Conference held at Ahmedabad in the same year, a memorandum was prepared by Sir Pherozeshah Mehta and a committee came to be appointed to work out a scheme of separation in various districts of the Province of Bombay. On July 1, 1899, a memorial was presented to the Secretary of State signed by eminent British public men and retired officers in support of the Indian demand. Amongst the signatories were Lord Hobhouse, and Sir Richard Garth and Sir Charles Sargent, retired Chief Justices of Calcutta and Bombay High Courts respectively, and other retired Judges of the High Courts in India including Sir William Wedderburn and others. A bitter controversy raged as a result of this memorial. But in 1908 the Government of Lord Curzon gave a decision not to countenance such separation. In the period which followed, however, there was a marked change in the attitude of Government. As the cry for separation was most vocal in Bengal, Government decided to start the experiment there in accordance with the decision announced by Sir Harvey Adamson, the then Home Member of the Government of India, but owing to disorders which took place in that Province the implementation of that policy was postponed.

In 1913, Mr. Surendranath Banerjee, later Sir Surendranath Banerjee who was one of the most important figures in the public life of those days and who had been the President of the Indian National Congress, moved a resolution on the subject, in the then Central Legislative Council, urging that separation of judicial and executive functions should be carried out in accordance with the demand of public opinion without any delay. The Public Service Commission which had been appointed about that time considered this question as a side-issue. It seemed to favour this reform. A public meeting of the citizens of Bombay was also held in this year under the auspices ofthe Bombay Presidency Association and it asked for a speedy formulation of a scheme of separation. But the first World-War broke out and it led to the shelving of this question as it postponed the consideration of all political questions.

After the termination of the war, which witnessed the quickening of the political life in the country, the question of separation was once again raised in the Bombay Legislative Council in September 1921 by Mr. Kanji Dwarkadas through a question. In the next month Rao Bahadur G. K. Chitale from Ahmednagar moved a resolution urging separation by entrusting criminal cases to subordinate judges. That resolution secured equal number of votes, but was declared lost by the casting vote of the President, Sir Narayan Chandavarkar, who explained his action on the ground that Sir Maurice Hayward, then Home Minister of the Bombay Government, had given an assurance that Government would go into the whole question at an early date. Nothing daunted, Rao Bahadur Chitale moved a similar resolution on March 17, 1922 and had the satisfaction of carrying it through the Council. Similar resolutions also came to be passed in other Provinces and in the Council of State as well as in the Legislative Assembly at the centre. Two sessions of the Bombay Advocates' and Pleaders' Conferences of 1931 and 1934 also passed resolutions on this subject.

The Government, however, was against this reform and the political situation in the country was not likely to induce them to change their attitude.

In 1935, the Government of India expressed their opposition to the separation of the judiciary from the executive stating that it had become an "exploded theory" in view of the trend of legislative practice in England. In 1937 the Congress came into power and formed popular ministries in several Provinces. The public expectation in the matter of implementation of this reform was naturally great. Mr. C. Rajagopalachari, the then Chief Minister of Madras, however, dashed these hopes to the ground when he stated in reply to a question in the Madras Legislative Assembly that "Now that the Congress is in office we will see that executive officers do not go wrong and we shall control them". The comments of Sir Chimanlal Setalvad in his autobiography on these remarks are interesting: "When C. R. says 'we shall control them', he lays bare the very evil that people want to eradicate. They do not want the judiciary to be 'controlled' in any manner by the executive."¶ Sir John Beaumont, after his retirement from the Chief Justiceship of the Bombay High Court, also criticised the failure on the part of the Congress Ministers to tackle the problem of the magistracy as a cynical sacrifice of principle to expediency. †

In 1942, in a transfer application before the High Court, Chief Justice Sir John Beaumont made judicial comments on the question of separation. A person who was alleged to have cut grass from government land was charged before the court of a third class magistrate at Dohad on the basis of a report by the Mamlatdar. The Magistrate, who was also the Treasury Aval Karkun as a revenue officer, was subordinate to the Mamlatdar. The accused made an application for transfer, and the District Magistrate rejected it on the ground that it would be unfair to the trying Magistrate to assume, without some definite evidencee of bias, that he would allow his judgment in a criminal case to be influenced by a superior officer. The accused applied to the High Court, which allowed the application and directed the transfer of the case. "One cannot ignore the fact", the Chief Justice observed, "that the trial Magistrate is also a revenue officer, and is subordinate in that capacity to the Mamlatdar who made the report, and if the trial Magistrate should be called upon to express an opinion as to the competence or honesty of the Mamlatdar's report, it seems to me impossible to shut one's eyes to the fact that he is going to be very reluctant to make any hostile criticism on an officer on whose favour he is dependent as a revenue officer. The learned Government Pleader says that to transfer a case in such circumstances is to introduce a dangerous principle. But I think the dangerous principle is the non-separation of the executive and judicial functions; and so far as I am concerned, as long as these functions are not separate, I shall never hesitate to transfer a case from a Magistrate who may be called upon in the course of the trial to differ from the views expressed by his revenue superior." ‡

¶ Recollections and Reflections (page 166) by Sir Chimanlal Setalvad who has given some glaring instances of executive interference in judicial functions in his book.

† The Indian Judicial System : Some Suggested Reforms : A paper read by the Rt. Hon. Sir John Beaumont, Kt., P. C., before a meeting of the East India Association in London, in May 1944, which is reproduced in (1946) 48 Bom. L R, Journal Section, p. 12.

‡ *Adambhai v. Imperator*, Criminal Application No. 73 of 1942 for transfer decided by Beaumont C. J. and Wassoodew J. on June 19, 1942 (Unreported).

It may be mentioned that about 1945 the Government required the services of revenue officers, who were doing criminal work as City Magistrates, for executive work in connection with the prosecution of the second World-War. In 1945-46 therefore the High Court was requested to loan the services of select civil judges for appointment as stipendiary magistrates. Thus the demand made in previous years that civil judges should be invested with criminal jurisdiction came to be satisfied partially because of the exigencies of the war. It seems that thereafter owing to the abolition of the system of Honorary Magistrates in the mofussil and to replace permanently revenue officers who were formerly doing criminal work but whose services were required in connection with executive functions, Government decided to recruit candidates directly from the Bar for appointment as stipendiary magistrates. This was in December 1946. The Congress Government which was then in power also desired that these direct recruits from the Bar should remain under the control and the supervision of the High Court and the question of their postings and grant of leave should also be decided by the High Court. In pursuance of this policy, 52 resident magistrates recruited from the Bar were placed under the administrative control of the High Court. This was a significant departure from the previous policy of the Government.

The Madras Government at about this time appointed a committee presided over by Shri K. Raja Ayer, Advocate-General of Madras, to report on this question. That committee submitted its report on November 7, 1946. By a resolution dated February 1, 1947, the Government of Bombay appointed a similar committee with Mr. Justice N. S. Lokur as the chairman to report on the question of separation of the judiciary from the executive. In the terms of reference to the committee, it was directed to consider the report of the Madras Committee also. The Lokur Committee began its work soon after its appointment. It tried to elicit opinion from representative sections of the public. At that time, however, the public mind was preoccupied with more important and wider constitutional questions that were under discussion by the Constituent Assembly. Despite this handicap, the Lokur Committee had before it a large and varied but representative body of opinion which, according to its report, favoured the removal of all control of executive over the judiciary. It appears that the Madras Committee which had submitted its report was concerned only with the question of separation in the mofussil. In Bombay also it was in the districts that the question had assumed importance and had agitated the public mind.

The Lokur Committee submitted its report on October 11, 1947. The report constitutes perhaps the severest condemnation of the system which prevailed till then. The revenue officers in Bombay consisting of the Assistant Deputy Collector and the Mamlatdar and his subordinate, the Aval Karkun, were all invested with magisterial powers. The magistrates used to be classified as Magistrates of the First Class, Magistrates of the Second Class and Magistrates of the Third Class. Over their head was the District Magistrate who was the Collector on the executive side. On the evidence before it, the committee came to the conclusion that the personality of the District Magistrate manifested itself to influence subordinate magistrates in a number of ways. He used to issue from time to time circulars to magistrates which afforded useful guidance in their work, but occasionally impinged on matters properly belonging to the field of judicial discretion. He rarely issued direct instructions, but the remarks offered

by him contained hints which he knew would not be ignored by the subordinate magistracy because they looked to him for promotion and future prospects. It was the committee's view that subordinate magistrates were generally sensitive to remarks made by the District Magistrate on their calenders and that they were apt to follow them even in preference to High Court decisions. The Collector as the head of the executive in the district and as a District Magistrate was in a position to dominate the will and influence the decisions of magistrates in an indirect way. If a subordinate magistrate, not confirmed in his post, did not follow the lines indicated by the head of the executive administration in the district, he was constantly under the fear that he may be reverted to the clerica grade and may have to pass his life as a clerk.

It appears from the Lokur Committee's report that even after the assumption of office by popular ministries in 1947, voices were raised against separation. The idea of separating the judiciary from the executive was ridiculed as 'an exploded theory' and 'school-room cant'. It was urged by the opponents of separation that the higher judiciary was always busy and could not adequately supervise the magistrates. That tended to introduce weakness in the administration when Government had to tackle underground subversive forces. It was suggested that, under a system of separation, the Courts would fail to deal adequately with anti-social criminals like 'black-marketeers'. It was also said that the need for inflicting severe sentences in such cases was not adequately appreciated by the judiciary. The Lokur Committee also noticed one argument mentioned in the report of the Madras Committee that the scheme of separation whereby the entire magistracy is kept under the control of the High Court would create an '*imperium in imperio*'. The Lokur Committee rejected these contentions and declared itself in favour of total separation. In doing so, it relied on the evidence before it consisting of the views of eminent non-officials and of retired High Court Judges and District Judges. It would be interesting to indicate briefly the relevant views of three such witnesses. Mr. K. B. Wassoodew, ex-Judge of the Bombay High tCourt, expressed the view that the dominant desire of the magistracy was to please the executive on whom the prospects of their promotion entirely depended. The evidence of Mr. V. B. Raju, I. C. S., District Judge, Surat, later Judge, Bombay High Court and now of the Gujarat High Court, was an eye-opener. He stated : "The Magistrates are not at present independent of the police in their outlook. Some First Class Magistrates have expressed to me that sometimes they dared not displease a Police Sub-Inspector, and Second Class and Third Class Magistrates can ill-afford to displease a Police Jamadar." The view of the present Chief Justice Mr. H. K. Chainani, then District Judge, Ahmedabad, is thus quoted by the Committee: "Cases have occurred and probably are occurring today, in which District Magistrates take Magistrates to task for passing certain orders which were not quite to the liking of the police or the executive. Instructions are also sometimes issued to Magistrates as regards the nature and duration of sentences they should pass in certain cases or class of cases. To avoid publicity or adverse criticism, instructions are marked Confidential." On this evidence the committee was of the view that despite Independence there still remained deeply planted in the hearts of those who remembered the earlier days a strong desire to see the complete emancipation of every court and judge from all vestige of influence or interference by the State that might fetter the judge's

freedom to exercise the powers extended to him according to his own good conscience and standards of uprightness.

Though the question of independence of the High Court was not strictly within the terms of reference of the committee, it considered that question also in view of the current discussion of the question in the public, by lawyers and also in the Constituent Assembly. In that connection, the evidence of Sir Leonard Stone C. J., was referred to. It appears that Sir Leonard Stone raised the question of the appointment of High Court Judges and stated before the committee that if the control of the subordinate judiciary was to be given to the High Court under a scheme of separation, the High Court itself must maintain its independence. If it could not remain outside the influence of the executive, then the proposed separation would be a failure.

The recommendation made by the Lokur Committee by its report of October 11, 1948 may be conveniently indicated here. It recommended complete separation of the judiciary from the executive. The Collector was, in future, to continue as District Magistrate and head of the police but was not to try cases and hear criminal appeals. The magistrates having criminal jurisdiction were to be styled as Judicial Magistrates. They would be subordinate not to the District Magistrate but to the Sessions Judge and the High Court. The Deputy Collector would continue to be Sub-Divisional Magistrate and the Mamlatdar and the Aval Karkun would continue to possess magisterial powers. But these powers of the revenue officers would be for the only purpose of maintaining peace and order. The proceedings under preventive measures under the Criminal Procedure Code would be initiated by these officers. But when these proceedings reached the stage of trial, they were to be transferred to the appropriate Judicial Magistrate. Judicial magistrates were to be recruited as civil judges and not merely as magistrates. They were to be subordinate to the Sessions Judge and the High Court. Select officers of the Revenue Department already doing magisterial work were to be retained, but they also were to be subordinate to the Sessions Judge and the High Court. Third class magistrates were to be abolished. Persons newly recruited as civil judges were to act, in the first instance, as Second Class Magistrates for one year, thereafter they were to be invested with first class powers. The Lokur Committee recommended the establishment of one cadre of Civil Judges and Magistrates, but the officers, it was suggested, could for some years work as magistrates and for some years as civil judges by turn, but not simultaneously, except when required by exigencies of local conditions such as insufficiency of work. The committee recommended that the village police patils should not be empowered to try even petty criminal cases. The view of the committee was that powers to try such cases may, by way of experiment, be conferred on select village panchayats. Power to transfer cases should be conferred upon the court to which appeals from the court from which transfer was sought ordinarily lie. Juvenile Courts were to be made subordinate to the Sessions Judge. Certain incidental recommendations were also made, as the scheme was likely to add to the burden of the work of the District and Sessions Judges. It was proposed to relieve them of the work of management of minors' estates of which the Nazir or the Deputy Nazir is appointed as the official guardian. It was suggested that the Collector should be appointed a guardian under the Guardians and Wards Act. The committee, however, was not unanimous on this point.

It was also suggested that a Police Prosecutor should be attached to every magisterial court to be recruited from practising lawyers but they were not to be allowed private practice. The committee also recommended that Government should undertake the necessary legislation to implement these recommendations and that the changes should not be introduced by stages but at once without any avoidable delay.

Government announced their decision on August 16, 1948, accepting the principle of separation. The proposal of the committee to withdraw the power of hearing petty cases from the police patils was immediately acted upon and a notification was issued accordingly on November 13, 1948. The High Court was requested to give its opinion on the report, which was considered at a Chamber Meeting of the Judges in October 1948 which accepted most of the recommendations. The High Court was of the view that the reform was long overdue and, now that the reigns of the Government had passed to the popular ministry, there was no justification for the continuance of the objectionable combination of the judiciary and the executive. The distinction drawn by the Lokur Committee between 'Judicial' and 'Executive' Magistrates was accepted. The Lokur Committee's recommendation that there should be one cadre of Civil Judges and Magistrates and that they should be recruited from practising lawyers was also approved. The High Court was, however, of the view that there should be a civil judge to do the civil work and a magistrate to do the criminal work for each taluka, but when civil work was not sufficient, the civil judge may also do criminal work as a magistrate. It did not approve of the proposal to transfer the management of minors' estates to the Collector from the District Judge inasmuch as it could not appreciably lessen the latter's work. According to the High Court's view the proposal should be considered later on. Regarding the appointment of Police Prosecutors, while the recommendation of the committee was accepted, it was suggested that the Sub-Government Pleader of the civil Judge's Court should also be the Police Prosecutor for the Taluka Magistrate's Court. This would end the inconvenience caused to Magistrate's Court by the Police Prosecutor being required to attend two or three courts at once and the consequent delay in the disposal of criminal cases. The High Court agreed that the village police patils may not be empowered to try petty criminal cases, but it did not agree with the recommendation of the committee that these powers should be vested in the Village Panchayat Courts. On the other hand, the High Court recommended that if the public was to be associated with the administration of justice as far as possible, the system of appointing Honorary Magistrates in the mofussil, which had been discontinued, should be revived. Appointments should, however, be made on merit on recommendation of the Sessions Judge in the District and of the High Court in Greater Bombay.

There was some difference of opinion between the High Court and the Government on the question whether the High Court should have the final voice in the selection of the personnel of the subordinate judiciary. The High Court claimed this right in the interest of separation, though there was no dispute that Government was the final authority in the matter of appointment of officers to the subordinate judicial service. On the other hand, the Government's contention was that the High Court's proposal to have the final voice in the selection of the personnel of the joint cadre as well as the temporary cadre to the High Court could not be accepted, though Government would consult the High Court

and give due weight to its views in the matter. There was some correspondence on this point but in view of the mandatory provisions of section 255 of the Government of India Act, 1935, the Government's view was accepted, so that cases of all resident magistrates were referred to the Public Service Commission after obtaining the views of the High Court. These magistrates were brought on the joint cadre in four batches after considering their suitability for being appointed as civil judges.

Two Acts were passed to bring into operation the scheme of separation. The Bombay Separation of Judicial and Executive Functions Act, 1951 (Bombay Act XXIII of 1951) to provide for separation of performance of the judicial and executive functions in the State of Bombay received the assent of the President on July 5, 1951. That Act had to be further amended, and the Bombay Criminal Procedure Amendment Act, 1953 (Bombay Act XXXIV of 1953), to amend the Code of Criminal Procedure, 1898, in its application to the State of Bombay, and also the Bombay Separation of Judicial and Executive Functions Act, 1951, for certain purposes, received the approval of the President on June 3, 1953. This latter Act was brought into force on July 1, 1953. It may be mentioned that the delay in implementing separation came to be criticised by the public and was the subject of a resolution at the First Session of the Bombay State Lawyers' Conference held in Bombay in 1951 and also at the Second Session of the Conference held at Nasik in June 1952. It appears, however, that the delay was occasioned to some extent by reason of the fact that financial provision had to be made for the scheme of separation in the Budget of 1952–53 and because of the time taken to select suitable officers. By a notification, dated June 27, 1953, the Bombay Separation of Judicial and Executive Functions Act, 1951, was also brought into force on July 1, 1953, on which date the separation of the judiciary from the executive came to be celebrated. For transferring all Judicial Magistrates to the administrative control of the High Court under Articles 234 and 235 of the Constitution, the Government issued a notification under Article 237 on July 7, 1953.

It may be mentioned that after the first reorganisation which resulted in the creation of the bilingual State of Bombay, the areas of Vidarbha, Marathwada, Saurashtra and Kutch merged in the State of Bombay. Separation between the judicial and the executive functions in Vidarbha area came to be introduced from September 1, 1959. In the other three areas there was no such problem; yet *de jure* separation in conformity with the position in the original Bombay State was introduced in these areas also with effect from the same date.

HONORARY PRESIDENCY MAGISTRATES.

The system of Benches of Honorary Magistrates which used to try petty criminal cases was in vogue in some places in the mofussil. Serious complaints were received by Government from the public regarding the working of these courts. That is why that system came to be abolished with effect from January 1, 1938. In the mofussil, therefore, there are now no Honorary Magistrates.

In Greater Bombay, the system of Benches of Honorary Presidency Magistrates continued to exist till the end of 1946, but the system, as it was working, was very defective. Some of the appointments used to be made on political considerations. Many of these magistrates were found not to take sufficient

interest in their work. Considerable discrepancy in the quantum of fine levied by different Benches in the sentences imposed also came to be noticed. The attendance of some of these Honorary Presidency Magistrates was irregular. For these reasons, Government decided to abolish these Benches and they were abolished with effect from January 1, 1947. To cope with the work which used to be disposed of by them four additional stipendiary Presidency Magistrates were appointed. The Government order, however, did not affect the continuance of lady Honorary Presidency Magistrates, who were attached to the Juvenile Courts.

In subsequent years there was an enormous increase in the arrears of criminal cases in the Courts of Presidency Magistrates despite the increase in their number. The High Court urged the revival of the system of Honorary Presidency Magistrates but insisted on appointments being made on merit. Government did not agree at first to the revival on the ground that there would be no specific advantage in reviving a system as the drawbacks which led to its abolition could not be avoided. In 1956, Government reconsidered their decision and agreed to revive the system and requested the High Court to send its detailed proposals in that behalf. This decision was impelled by two reasons. First, there was acute congestion of work in the criminal courts necessitating the setting up of an agency to dispose of petty cases. Secondly it appears that there was also a growing desire to associate the members of the public with the administration of justice. There was, however, criticism in the press about this decision and the Chief Minister Mr. Y. B. Chavan made it clear that the High Court had approved the Government proposals and that in the selection of persons for Honorary Presidency Magistrates' posts, the High Court would be consulted and appointments made only when recommended by the High Court. Such procedure, he claimed, would prevent the possibility of any influence being exercised by the executive on the Honorary Presidency Magistrates. †

At present, petty cases including what are known as Hawkers' cases have been transferred to such courts. The High Court's view in the matter of extension of jurisdiction is to proceed very cautiously in the matter. The total strength of Honorary Magistrates is now 120, out of whom 25 are ladies. Lady Presidency magistrates have been so far posted in the Juvenile Courts as the presence of such magistrates is necessary both in the morning and evening session of the Juvenile Court, though it is now proposed to place before them other cases as well. Several Benches of Honorary Magistrates have been working to dispose of petty criminal cases since August 1958.

VILLAGE PANCHAYATS.

Under Article 40 of the Directive Principles of State Policy under the Constitution, the State is expected to take steps to organise village panchayats and to endow them with powers and authority as may be necessary to enable them to function as units of Self-Government. In the State of Bombay village panchayats have been functioning since the last four decades now. Under the Village Panchayats Act, 1920, the panchayats were invested with some administrative powers in rural areas. Their penal power, however, was confined to

† This assurance was given by the Chief Minister at a dinner held in his honour by the Society of Honorary Presidency Magistrates in April 1957. See Times of India, dated April 6, 1957.

levying of penalty up to Rs. 10 for breach of any bye-law. The Bombay Village Panchayats Act of 1933 conferred judicial power on Panchayat Benches which could try petty civil and criminal cases. The legal practitioners, however, could not appear before these Benches. The High Court was not consulted at the time of both these Acts. In 1938 when the Congress assumed the reins of Government, the High Court came to be consulted regarding the amendment of the Village Panchayats Act for extension of the civil and criminal powers of the panchayats. As already stated, the Lokur Committee was in favour of extending the power of the Panchayat Benches. The High Court pressed for the revival of the system of Honorary Magistrates in the mofussil. This suggestion was, however, not accepted by Government. Later on Government empowered Village Nyaya Panchayats to take cognizance of offences under section 85 (1) of the Bombay Prohibition Act regarding the offence of being drunk and incapable of taking care of oneself and being of disorderly behaviour. In 1955 a bill to amend the Village Panchayats Act was sent to the High Court for opinion. It provided for an appeal to the District and Sessions Judge against the decision of a Panchayat Bench. The High Court was of the view that instead of appellate powers the District and Sessions Judge should have powers of revision only to interfere in case the decision was illegal or improper. It was further suggested that the District and Sessions Court should have power to transfer cases. The High Court also expressed its view that instead of automatically empowering the Panchayat Benches with extended judicial powers, the Government should obtain from the Legislature power to extend civil and criminal jurisdiction of the Panchayat Benches after considering the case of each of them on merit. It was finally suggested that if the Government wanted to confer additional powers or to withdraw such powers from any panchayat, it should be done in consultation with the High Court. This bill, however, was not proceeded with owing to reorganisation. In 1958 another bill was sent for opinion. That bill incorporated almost all the suggestions made by the High Court except the last one about consulting the High Court before conferring or withdrawing powers on the Panchayat Benches. Under the bill, not only was power of revision conferred on the Sessions Judge but also power to quash proceedings and transfer criminal cases. The amended Village Panchayats Act became law in 1958. The High Court was also consulted regarding the draft rules framed under the Act. The most important suggestion of the High Court was that there should be some minimum educational qualification or at least an ability to sign for membership of the Nyaya Panchayat. Though some other suggestions made by the High Court have been accepted, the question of minimum educational qualification has been left for consideration in the future.

OUSTER OF CIVIL COURT'S JURISDICTION.

It often happens that what is given by one hand is taken away by the other. With the accomplishment of the separation of judicial and executive functions, the entire subordinate judiciary including the Civil and the Judicial Magistrates, came under the administrative control of the High Court. The revenue officers ceased to do criminal judicial work. But another important field was opened up for their activity by the power given to them to decide questions of status and other questions relating to agricultural tenants under the provisions of the Bombay Tenancy and Agricultural Lands Act. Thus a large slice of civil jurisdiction was taken away from the civil courts. The more objectionable part of

this transfer was that the lawyers' right to appear in these courts came to depend upon the discretion of the presiding officers of the tenancy courts. The lawyers in their conferences as well as in the press protested against this exclusion but without much effect. This step was not taken, it may be granted, in the spirit of the declaration of the Shakesperian character Dick, the Butcher, in Henry VI: "First thing we do, let's kill all the lawyers". Distrust about lawyers has been in evidence from time to time in all countries. One known instance of their eradication for some time took place in the seventeenth century Georgia, which had attempted to rid herself of what might have been regarded as the pest of lawyers. That State passed a single ordinance for the prohibition of rum and lawyers. According to Justice Cardozo, "She (Georgia) let up afterwards upon the less flagrant of these evils but she was inexorable about the lawyers." ¶ The Government of Bombay fortunately made no such discrimination.

In his speech inaugurating the First Session of the Bombay State Lawyers' Conference, 1951, the Chief Justice Mr. Chagla criticised severely the unfortunate trend in legislation in the State to exclude lawyers from appearing before certain tribunals and the "equally dangerous and the equally obnoxious" tendency to oust the jurisdiction of civil courts in certain matters. "While the exclusion of lawyers" he said, "undermined the efficiency of the judicial machinery, the ousting of the jurisdiction of civil courts destroys the judicial machinery altogether to the extent of the ouster. Where rights and liabilities of subjects are to be determined, they should always be determined judicially, they should be determined by tribunals that possess the necessary judicial equipment and training." ‡

The tenancy courts which deal with these questions under the Bombay Tenancy Act do, however, come under the power of superintendence of the High Court under Article 227 of the Constitution. That has led to a tremendous increase in Special Civil Applications which is the name given for applications under the Constitution. As parties are not often represented in such matters in the lower tenancy courts or at least the Court of the Mamlatdar, the High Court naturally scrutinizes the decisions of these tribunals with greater care in the interests of justice. The necessity to refer certain questions for decision to the Mamlatdar under section 85-A of the Tenancy Act has also led to a bottleneck and consequent delay in disposal of suits in the lower civil courts. The tenancy courts take time to return their findings to the civil court and, even after these findings are received, there is further considerable delay as adjournments have to be given because these findings are subject to appeal and revision to the different categories of tribunals under the Tenancy Act.

¶ Justice Cardozo's address at the dedication of the new home of the New York County Lawyers' Association on May 26, 1930.

‡ Report of the Bombay State Lawyers' Conference, April 21, 1952. See pages 9–10.

CHAPTER VIII

LAWYERS' CONFERENCES AND THE PROBLEM OF LEGAL AID.

"We must not forget that we are a body of men whose essential function is to serve the nation. As the nation turns to trained medical men or scientists to look after its health and scientific growth, so does a nation need lawyers to help in the administration of justice and in the building up and working of its laws. The lawyers like any other body of servants of the nation must understand the people's needs, try to serve them as best as they can in their own sphere and help to solve the people's problems in the manner lawyers can help to solve them. I feel that in order to be a useful instrument of service to the people the lawyers must continue to command the trust, the respect and the confidence of the mass of the citizens. The profession must so conduct itself that the ordinary man may regard it as an useful auxiliary for the vindication of his property and other rights and not as an excrescence imposed upon him by the regulations of Courts. It is only when these conditions are fulfilled that the lawyer can discharge his due functions in society. I think that it is up to us to study our changed and rapidly changing environment and adapt ourselves to it so that we fulfill our true function in the body politic."

Mr. M. C. Setalvad, Attorney-General of India. †

The lawyers' conferences which were held in our State have reflected the endeavours made by the lawyers to organise themselves for the solution of their problems, redress of their grievances and the improvement of their standards. The movement represented a centralising force of which full advantage could have and should have been taken by all those interested in the progress of the administration of justice. The movement received sympathy and support of the judges but unfortunately languished for want of sustained enthusiasm amongst the lawyers themselves. A narrative such as this cannot be complete without a resume of these conferences which voiced the views of the lawyers of the State on vital problems affecting the law courts.

Before India attained Independence, two conferences were held in the then Presidency of Bombay. They were known as the Bombay Advocates' and Pleaders' Conferences. The first session of the Conference was held in Bombay on December 19 and 20, 1931. It was organised by the three Bars of Bombay, namely, the Advocates' Association of Western India, the Small Cause Court Bar Association and the Police Courts Bar Association. Members of these Bars had common interests in those days in the matter of the establishment of the City Civil Court and the abolition of the dual system on the Original Side. On these points there was a conflict of interests between these Bars on the one hand and the Original Side Bar and the Attorneys. It was, therefore decided by the Reception Committee of this conference not to invite the Original Side Bar and the Incorporated Law Society to join the conference. Mr. B. G. Kher, Solicitor, later the Premier in the Bombay Government as the Chief Minister then used to be known, protested against this exclusion and there was some justification in his protest since he was at one time a member of the Vakils' Association on the Appellete Side till it later on amended its rules. However the Reception Committee did not accept his view. A few senior Advocates on the Appellate Side were also against holding such a conference because it was felt that no such conferences were held in the past and that resolutions of a political character were likely to be passed at such gatherings.

† Presidential Address at the second session of the Bombay State Lawyers' Conference held on 31st May and 1st June 1952 at Nasik.

The first conference was presided over by Dewan Bahadur T. Rangachariar, C. I. E., M. L. A., a distinguished lawyer of Madras, who had been a member of the Indian Bar Committee, a member of the Bray Committee concerned with the question of reform in the N. W. F. Province, and of the Army Retrenchment Committee. He was then the vice-president of the Madras Bar Council. Unfortunately, after he arrived in Bombay he fell ill on the day the conference opened and the proceedings had to be conducted by Dewan Bahadur Harilal Desai, a leading lawyer from Gujarat, who read the address of the president. The address dealt with all the important problems that were placed for consideration before the conference. The president stressed the usefulness of lawyers' conferences not only in advancing legal opinion on problems of the Bar and the judiciary but in evolving practical methods not only to create solidarity in the profession but to maintain its honour and dignity. Among the interesting suggestions that were made by Dewan Bahadur T. Rangachariar may be mentioned the establishment of a provident gratuity fund and of a co-operative credit society for the *benefit* of the less fortunate and straggling members of the legal profession in days of need and distress and also in case of premature deaths, establishment of arbitration and conciliation boards, and training of lawyers' clerks.

On the opening day of the conference, Sir John Beaumont, the then Chief Justice, and Justices Patkar and Rangnekar were among the distinguished visitors. The conference passed many resolutions on subjects like the constitution of the Indian High Court, recruitment to the judiciary, the establishment of a Supreme Court, abolition of the dual system and the establishment of a City Civil Court. It expressed its opinion that all judicial and magisterial officers should be recruited exclusively from amongst practising members of the Bar and appointments to all judicial offices should be made having regard to the efficiency, experience and ability of the candidates concerned, and further recommended that the power to make appointments should vest exclusively in the High Court. The most lively interest was created in a resolution relating to disciplinary jurisdiction which gave expression to the lawyers' views that the provisions in the Bar Councils Act and the Bombay Pleaders Act were vague and wide and that they should be limited to apply to cases of misconduct of a strictly professional kind or offences involving moral turpitude only. The question had been brought to the forefront in view of the fact that lawyers who had taken part in the political movement were being hauled up under the diciplinary jurisdiction. An amendment was, therefore, moved to the resolution before the conference. It sought the addition of a sentence, viz., "Participation in any political movement or conviction therefor should not be deemed to be misconduct entailing any disqualification." There was a sharp difference of opinion on this amendment, but the mover of the resolution Mr. C. N. Kanuga, a distinguished criminal lawyer of the Police Court Bar, accepted the amendment. Ultimately, the resolution as amended was carried by the conference by an overwhelming majority. In order to carry out the work of the conference, a central committee was appointed to represent the city and the mofussil bars which had participated in the conference.

The second session of the conference was held nearly three years thereafter at Poona on March 3, 1934. It was presided over by Dr. Kailasnath Katju, then a distinguished member of the Allahabad Bar, who after attainment of

Independence occupied distinguished posts of a Governor, Home Minister in the Union Government, and who was till recently the Chief Minister of Madhya Pradesh. In his presidential address he dealt with relevant legal problems with the consummate skill and lucidity for which he has been always known. Regarding the existence of the dual system in Bombay and Calcutta, he dealt with the argument that it was essential in the interests of the commercial community which had a stake in the proper investigation of commercial causes, and said :

> "There are outside Bombay and Calcutta many other places, which have in recent years developed commercially. Karachi is one. Cawnpore is another. It is called commercial capital of the United Provices. In Cawnpore there is a large commercial community both European and Indian. Delhi is fast growing in importance from a commercial and industrial point of view. So are many other places throughout India. If the commercial people of Karachi, Cawnpore, Delhi, Lahore and Amritsar are quite satisfied with the legal facilities open to them and with the assistance which is rendered to them by vakils and advocates, I do not know any reason why the dual system should be insisted upon in the name of the commercial community of Bombay and Calcutta."

In the matter of professional standards, he emphasised that the senior members of the profession have the most onerous duties cast on them. "They have to set", he said, "an example of high professional morality in their own personal conduct. The senior members are the salt of the profession and if the salt itself loses its savour, wherewith shall it be salted ?" As regards the growing number of law reports, official and non-official, and the tendency to report cases turning purely upon facts or merely restating the law, he said that they were calculated to increase the labour of the practitioners and to confuse the judge and he, therefore, appealed to the profession to signify clearly their approval or disapproval of such journals. It may be stated that so far as the Bombay High Court is concerned, it is now the settled convention that the official and non-official law reports can only publish at their option such judgments as the Judge signifies may be referred to them.

The Poona session of the conference also passed resolutions similar to those that were passed at the Bombay conference. A central committee was also appointed at this conference.

Mr. Ramdutt W. Desai, at one time Chief Justice of the Baroda High Court and a respected senior advocate on the Appellate Side, who was one of the secretaries of the central committee, had drawn up, soon after the first session of the conference in consultation with other colleagues, a constitution for a Bar Association for the whole of the presidency which was to be known as the Bombay Presidency Bar Association. It was intended to be a central body for all the bar associations scattered throughout the presidency. The scheme, however, unfortunately never went through.

After the second session of the lawyers' conference, there was a lull for many years and no conferences were held. In 1940, an attempt was made to revive the conference, but owing to the turn for the worse taken by the second World-War and the political situation in the country, it was decided to abandon the idea.

After the unification of the Bar in 1950, the Advocates' Association of Western India of which the Author was the president then, took the initiative in convening a lawyers' conference of the State, which since then came to be known as the Bombay State Lawyers' Conference. The first session of this conference

was held in Bombay in 1951. It was inaugurated by Mr. M. C. Chagla, the then Chief Justice, and was presided over by Dr. M. R. Jayakar, a combination of two men who had done so much for the Bar in Bombay.

In his inaugural address, the Chief Justice dwelt on the important question of removing the distinction between pleaders and advocates which still prevented a complete unification of the Bar. As has been described previously, he had pressed, but unsuccessfully, upon the Government the necessity of effecting this reform by making all legal practitioners advocates of the High Court. Mr. Chagla referred to the need of an All-India Bar and an All-India Bar Council. "I also look forward", said the Chief Justice, "to the day when in all matters concerning discipline the Bar Councils alone will decide questions of misconduct and the High Courts will act on the recommendations of the Bar Councils. I believe in independence and autonomy. No organisation can be strong and powerful unless it is independent and autonomous. This is equally true of the Bar as a profession". He expressed concern at the distrust and hostility that was being shown of late towards lawyers and the legal profession and uttered the warning that to try to lower the dignity or status of lawyers will be a national disservice. Referring to the necessity of the Bar keeping its independence of outlook, he said. "The justifiable glory of a member of the Bar is and should be that he is not to bend his knees to anyone, that he can think his own thoughts and dream his own dreams, that he is answerable to no human being and that the only loyalty he owes is to the faith within him. It is only the cultivation of this spirit that can make the legal profession great, and it is only this sturdy independence that can make it possible for the profession to give to the judiciary just, upright and impartial Judges". He might as well have added that it should be the duty and the glory of the Bench to give full scope and opportunity to the members of the Bar to cultivate this much-needed spirit of sturdy independence. It is the promising junior at the Bar who requires sympathy and encouragement and to the extent that it is forthcoming from the senior members of the profession and from the Bench that makes for the ultimate strength and independence of the Bar and the continuity of its high standards and traditions.

Dr. Jayakar's presidential address was a dignified plea for national restraint now that India had attained Independence. In particular, he expressed himself against constant changes in the Constitution. "A fundamental right", declared Dr. Jayakar, "is as integral a part of the State's Constitution as any other. Wise people do not change their constitution because it does not suit them for the time being. A Constitution, as constitutional lawyers have very often said, is an organism. It has life and sentience, if it is real or appropriate. It must have time to take roots and gather sustenance among other things from the willing obedience of the citizens. It is only monkeys who pluck out a plant hurriedly to see whether roots have grown overnight. Wise men in charge of State affairs do not emulate this habit. A Constitution grows in strength the longer it is respected and obeyed. So its strength lies in being permitted to grow old without disturbances". After reminding the lawyers that since the enactment of the Constitution they had the additional duty of being 'friendly watch-dogs' of the Constitution, Dr. Jayakar paid a tribute to the judiciary which had shown the required courage and independence in upholding popular rights guaranteed by the Constitution. His frank views on the abolition of the Judicial Committee of the Privy Council which, according to him, constituted a step "taken with undue

haste and perhaps under the influence of an undue sense of national elation and pride" did not evoke much agreement from the audience. It is true that the jurisdiction of the Privy Council came to be abolished by legislation in 1949, before the Constitution came into force, and the establishment of the Supreme Court completed the severance of that link. But India having decided to declare herself to be a Sovereign Democratic Republic, the continuance of the Privy Council, which constitutionally always announced its decisions in the form of advice tendered to the British Sovereign, would have been an anachronism whether looked at legally or politically. Dr. Jayakar expressed the fervent hope that the Supreme Court in India would in course of time acquire the dignity and knowledge and the reputation of the Judicial Committee. His outspoken view that the frequent differing judgments of the Supreme Court Judges, which constituted in early days a feature of many important constitutional decisions, and not only puzzled the lay public but even those who are familiar with judicial differences, was highly appreciated by the profession, coming as it did from a distinguished constitutional lawyer who had occupied a seat on the Federal Court as well as the Judicial Committee of the Privy Council. As was said by poet Cowper:

> "And diff'ring judgments serve but to declare.
> That truth lies somewhere, if we knew but where."

A case of this kind was the one reported in *In re Article 143, Constitution of India*‡ where there were differing judgments of the Judges of the Supreme Court constituting the bench expressing views which taxed the ingenuity of Counsel and Judges of the Bombay High Court for a considerable time when it was cited and considered in one case.†

Dr. Jayakar stressed the necessity of setting up a statutory Law Commission in view of the increased legislative activity in this country. He pleaded for the establishment of a permanent body which would make an examination of laws as they are enacted and of their working, as also of the decisions of the various High Courts, and afford help such as it could in avoiding conflict of legislation and judicial decisions. He expressed the hope that the lawyers would call for the appointment of such a statutory Law Commission acting on lines similar to the Law Commission in England. The Bombay conference did pass such a resolution calling for the appointment of a Law Commission not only by Parliament but also by the Legislatures of each State to study and scrutinize the various enactments, regulations and law reports with a view to bringing the said enactments and regulations in harmony with the Constitution, judicial decisions and the modern trend of legislation. This resolution was repeated at the fourth session of the Bombay State Lawyers' Conference in October 1954, over which Mr. M. P. Amin, the then Advocate-General of Bombay, presided. The appointment of the Law Commission came to be announced in Parliament on August 5, 1955 by the then Law Minister Mr. C. C. Biswas. Amongst its eleven permanent members were Mr. M. C. Setalvad, Attorney-General of India (Chairman), Mr. M. C. Chagla, Chief Justice of the Bombay High Court, and Mr. G. N. Joshi, Advocate, Bombay. Mr. Chagla had inaugurated the first session of the Bombay State

‡ A I R 1951 S C 332.

† See observations of Chagla C. J. in *Chimanlal Dipchand v. Bombay State* (1954) 56 Bom. L R 321, 331.

Lawyers' Conference, and Mr. M. C. Setalvad presided at the second session held at Nasik. But in the introductory chapter of the Law Commission's Report, while dealing with the history which led to its appointment, prominent mention is made of the resolution passed on July 6, 1954 by a political body like the All-India Congress Committee. But there is no mention of similar demands made by representative conferences of lawyers in Bombay and elsewhere. Why blame politicians alone for their attitude of neglect of lawyers and their views ?

Amongst other resolutions passed at the Bombay session of the conference may be mentioned resolutions about the creation of an All-India Bar, of a Bar Association for the whole State of Bombay, establishment of a unified Bar for the State, trial by jury, law reporting, civil liberties and the right of citizens to be represented by lawyers in *quasi*-judicial or administrative tribunals. The conference expressed itself in favour of a uniform Civil Code applicable to all the citizens in the Union of India. It may be mentioned that such a Civil Code is envisaged by Article 44 of Part IV of the Constitution, which enumerates the Directive Principles of State Policy, but nobody seems to remember it now.

One positive result of the conference was the appointment of a standing committee representing all the bars in the State. It was intended to carry the work of the conference throughout the year. Mr. C. K. Daphtary, then Advocate-General, was elected the chairman of the standing committee and promised to do his best to help implement the resolutions passed at the conference. Within a few months, however, he was appointed the Solicitor-General of India and had regretfully to return this unmarked brief of the conference. The standing committee was not able to meet often as it should have if the object with which it was appointed was to be achieved. The second feature of the conference which may be mentioned was that once again after 1934 prominent lawyers from all over the State met together on one platform to discuss and solve professional and public questions of common interest. *

In order to keep the continuity of such conferences, the organisers took care that an invitation was received from some other centre for holding the next session of the conference. Such invitation was received from Nasik and was cordially accepted.

The second session of the lawyers' conference was held accordingly on May 31 and June 1, 1952 at Nasik. Mr. M. C. Setalvad, Attorney-General, presided over that session. His presidential address was singularly refreshing from the point of view of the many useful suggestions he made for consideration by members of the Bar. He suggested setting up of an All-India organisation for the Bar on the lines of the Legal Council of Australia and the American Bar Association in the United States. He answered one possible criticism in respect of this suggestion that such a non-official body would be superfluous with the formation of an All-India Bar Council. He stressed that Bar Councils of the States and an All-India Bar Council can perform only some statutory functions as laying down of proper standards of legal education, enrolment of members

* Mr. H. V. Pataskar of Chalisgaon, later Minister in the Union Ministry of Law and now the Governor of Madhya Pradesh, vied with Mr. S. S. Malimath of Dharwar later a District Judge in the Bombay State and subsequently a Judge of the Mysore High Court, in thanking the reception committee for convening the conference. They are now ranged on opposite sides in the boundary dispute between Maharashtra and Mysore.

of the Bar and the exercise of diciplinary jurisdiction. These statutory bodies, he emphasised, could never be in a position to deal with those numerous questions which concern either the profession itself or the profession in the discharge of its duties and functions to the public and the country generally. Secondly, lawyers are most fitted on account of their training and tradition to keep a watchful eye on the working of the Constitution. They would be in a position to detect trends destroying its spirit or negativing its provisions. Lawyers can help building up of healthy and useful conventions without which no Constitution can grow and function properly and adequately. Lawyers also can keep a vigilant eye on the action of the executive if it tries to interfere with the independence of the judiciary or its role under the Constitution. Mr. Setalvad said that these tasks would be more effectively performed if lawyers had an efficient and India-wide organisation. Now that the All-India Bar Council is an accomplished fact with the enactment of the Advocates Act of 1961, lawyers of this State may well remind Mr. Setalvad of his ideas and request him to take a lead in establishing an effective non-official organisation of the Bar on an All-India basis which would affiliate the Bar Associations in all the States.

Referring to the question of arrears, Mr. Setalvad stressed that to some extent it was a problem of having competent judges and an efficient Bar. He pleaded for simplification of procedure and curtailment of the right of revision. The Law Commission, over which he has presided, has made useful suggestions in these matters and some of them are being administratively as well as judicially implemented by the Bombay High Court.

In the concluding portion of his address, Mr. Setalvad posed a question to the lawyers which he has raised on many subsequent occasions also : "One feels", he said, "that there is a fall in the standards all round. Is the lawyer of to-day as painstaking in the preparation of his cases, as upright in his dealings with his clients, as frank and as courteous to the Court and as conscientious in the discharge of his duties as a citizen and tax-payer, as his counterpart of a generation ago ? There are many who would answer in an emphatic negative. Here again is a matter for us all to ponder over and remedy."

This conference also passed many important resolutions. Apart from repeating resolutions about the All-India Bar, unification and removal of distinctions within the Bar etc., it expressed its opinion that all matters under the Bombay Tenancy Act should be made determinable by civil courts as the Tenancy Act had introduced many departures from the established law of property, and disputes between landlords and tenants involved intricate questions of law, and civil judges were better equipped to determine such questions than revenue officers. A further resolution wanted the right of the litigants to be represented by legal practitioners, in matters arising under the Bombay Tenancy Act and other enactments, to be recognised. A connected resolution urged upon Government to appoint a committee of experts in agricultural economy and problems of village community to examine the operation and effect of the Tenancy Act. The conference also called upon senior members of the Bar to associate with themselves junior lawyers in special suits, sessions cases, heavy appeals and other important matters on adequate remuneration. It also requested Government to extend legal aid to needy litigants and appealed to the members of the

Bar to co-operate in the matter. Another important resolution expressed disapproval of appointments of Public Prosecutors and District Government Pleaders on political considerations and urged that in the interests of maintaining the tone of the administration of justice, selection to such posts and similar offices should be made on merit alone and on recommendations of highest judicial officers. A resolution was also passed urging Government to appoint a committee to inquire into the provisions of the Bombay Prohibition Act, the Bombay Money Lenders Act and the Hindu Bigamous Marriages Act and to report on their effect on agricultural economy and the social life of the village community. This resolution was of a controversial character and after some discussion was passed by a large majority but not unanimously like other resolutions. The question of hardships suffered by litigants, lawyers and others connected with civil courts on account of want of suitable court buildings in some places was also raised by a resolution, but ultimately the matter came to be referred to the standing committee which was appointed by this conference also as was done at the first session. Sholapur's invitation to hold the next session of the conference there was accepted.

The third session of the conference was held in Sholapur on November 1 and 2, 1953. It was presided over by Mr. R. A. Jahagirdar, a former Additional Judge of the Bombay High Court. Mr. Jahagirdar's presidential address, like the previous presidential addresses, made suggestions to enhance the utility of lawyers' conferences and to make them agencies for not only professional but public weal. Lawyers, he pointed out, were members of the body politic and they owed an obligation to the society in which they lived. Therefore they should not be satisfied by limiting their deliberations to professional topics but should also discuss questions affecting the public as well. He mentioned that as Vice-Chancellor of the Karnatak University while he was inaugurating the Karnatak and Maharashtra Medical Conference at Dharwar, he had advised the doctors who attended that conference to celebrate the conference week as a Public Health Week and to speak in the local language to people on nutrition, sanitation, hygiene, public health and other matters in non-technical terms. He tendered the same advice to lawyers who, when they attended the lawyers' conferences, must establish contact with the general public by addressing meetings to enlighten the public about their rights and obligations under the Constitution and other Acts. It may be stated that the organisers of these conferences had from the beginning the ideal in mind to restore the lawyers to the position they previously occupied in the public life of the country. Mr. Jahagirdar was, therefore, right in emphasising this important aspect of a lawyer's life. Mr. Jahagirdar condemned in strong terms the attempt on the part of the Government of the State to exclude lawyers from certain fields. "The Bombay State Government", said Mr. Jahagirdar, "for reasons best known to themselves, are trying to undermine the very forces that are responsible for maintaining the rule of the law. They seem to look upon the lawyer as a parasite and an intermeddler and the court as a nuisance. They seem to have developed a belief in their monopoly of wisdom and have constituted themselves as sole judges for deciding how the interests of the litigating public would be best served..... .....Nowadays life has become so complicated that the assistance of experts would be required in almost every walk of life. The lawyers being experts in law and adept in marshalling the facts of their case,

would render valuable assistance to the courts or tribunals without taking much of the public time, which would not be the case if the party is asked to conduct and argue his case by himself. I cannot understand the mentality which is behind this measure which excludes lawyers from appearing before certain tribunals." Mr. Jahagirdar had resigned his Government Pleadership after the Quit-India movement in August 1942 owing to his strong sympathies with the Congress. This trenchant criticism coming as it did from him was much appreciated by the lawyers assembled at the conference. Mr. Jahagirdar also pleaded for continuing the experiment started by the High Court in recruiting District Judges direct from senior members of the Bar and wanted that experiment to be extended further by selection of Civil Judges, Junior Division, from fairly senior persons from the Bar on proper emoluments, and Civil Judges, Senior Division, also directly from the Bar on the understanding that they would have to retire either as Judges of the Junior Division or Senior Division, to which posts they were selected. Mr. Jahagirdar's address also contained a detailed examination of the bill for judicial reform which Dr. Kailasnath Katju, Union Law Minister, had at that time introduced in Parliament to simplify judicial procedure and to make it less dilatory, less cumbersome and less expensive.

The Sholapur conference also passed resolutions on questions of interest to the Bar in general and local bars in particular besides repeating some of the earlier resolutions. It expressed regret at the inaction on the part of Government to provide suitable court buildings at Sholapur, Karmala, Amalner, Thana, Belgaum and other places. It may be mentioned that Sholapur has now a fine building for its District and other courts. The conference expressed itself against the transfer of management of estates of minors from the District Court to the Collector as inconvenient and not in the best interests of the minors. It may be recalled that this was the recommendation made by the Lokur Committee in October 1947, though it was not a unanimous recommendation. The High Court had not approved of that recommendation as it could not appreciably lessen the work of district judges. The experience of the local bars supported the High Court's view which does not appear to have been accepted by Government. The conference also recommended the removal of the surcharge on court-fees and refund of half the court-fees when a matter was compromised before the actual hearing or when it was summarily dismissed in appeal. Government partially accepted these recommendations subsequently at the suggestion of the High Court. This conference also appointed a standing committee and accepted the invitation of the Surat Bar to have the next year's session at Surat.

The fourth session of the Bombay State Lawyers' Conference was held at Surat on October 23 and 24, 1954. It was inaugurated by Mr. Justice Shah, who later became a Judge of the Supreme Court, and presided over by Mr. M. P. Amin, then Advocate-General of the State of Bombay. The Surat Bar literally showered the accustomed hospitality of Surat on the delegates attending the conference. The arrangements for the residence and comforts of delegates at Nasik and Sholapur had also been satisfactory. Mr. Justice Shah spoke mainly on the problem of delays and heavy costs of litigation. As regards delay he expressed the view that the procedure in the law courts was not alone responsible for dilatoriness. What was required, according to him, was a change in outlook on the problem of delay. If the outlook could be cultivated in which the judge and the lawyers regard themselves as wheels in the administration of justice,

each in his appointed place, the problem would not be as formidable as it appeared. Mr. Justice Shah also examined the anomalies of the Court-fees Act and expressed the hope that the conference would take steps to ventilate the grievances of the litigants in this behalf. Referring to lawyers' fees, he said, that while a lawyer must get his remuneration, an average litigant who has a just claim must also be able to secure the benefit of lawyer's services within his means and if he is unable to do so, the machinery must be regarded as worse than useless. He then referred to the report of the committee presided over by Mr. Justice Bhagwati in 1949 on Legal Aid, which had "remained in the archives of the Secretariat in cold storage". He appealed to the lawyers to solve this problem of legal aid to the poor by canalising the enthusiasm and spirit of service of the individual lawyer and by evolving a scheme of free legal aid, advice and assistance to be formed in each town served by a court under the administration of the lawyers' conference.

Mr. M. P. Amin, in his presidential address, first referred to the contribution of Surat city to law. He stated that Surat gave to the High Court Nanabhai Haridas, the first Indian to adorn the Bench of the Bombay High Court * and Sir Harilal Kania, who became first Chief Justice of India. He also referred to Surat District as having given to the Bombay Bar one of its most illustrious advocates and a political leader like Mr. Bhulabhai J. Desai. He wanted the All-India Bar Council when established and the State Bar Councils to be clothed with higher and wider powers particularly regarding legal education, enrolment of advocates and diciplinary jurisdiction. In the field of legal education he urged that there should be a minimum amount of what is called liberal education before the student went in for the law course. He did not want the language of the High Courts to be regional as it would create serious difficulties in the administration of justice and the future progress of the profession. If Hindi were to be the language of all the High Courts in India and of legislative enactments, there would be greater solidarity between the several States and among members of the various bars. He urged the adoption of proper methods to regulate admission to the profession which would secure a healthy competition and prevent undue overcrowding. He expressed his regret that the standard of professional ethics showed a tendency to deteriorate and hoped that serious efforts would be made by the Bar Council and all the members of the profession in maintaining a high standard of professional ethics and establishing proper conventions. Mr. Amin said that lawyers should consider it their duty to conduct proceedings in court in a dignified manner and that there should be no attempt to distort evidence or browbeat witnesses. He wanted recruitment and control of all judicial officers in the subordinate courts in the State to be with the High Court and not with the executive or the Public Service Commission. He expressed himself against drastic restrictions on rights of appeal and revision inasmuch as the present-day litigation involved more intricate and a much larger number of points of law than litigation in the past. He also wanted law reporting to be under the control of the Bar Council. He concluded with a fervent plea to lawyers willingly to sacrifice their time and engagements and play their proper role in the general progress of the country.

* As a matter of fact, the first Indian Judge of the Bombay High Court was Mr. Janardhan Wassoodewji but his was an acting appointment. Mr. Nanabhai Haridas was the first Indian permanent Judge of the High Court from the Bar.

The conference repeated some of the resolutions passed at previous sessions. The most important resolution passed at the Surat conference was relating to the constitution of the Bombay State Lawyers' Conference which defined its objectives. Some important matters were referred to the standing committee for action which expressed its opinion on the Code of Criminal Procedure Amendment Bill of 1953 brought up before Parliament. An invitation from Dharwar for holding the next session was also accepted.

The fifth and the last session in this series of conferences was held at Dharwar on December 24 and 25, 1955. It was presided over by Mr. Purshottom Trikumdas. The organisers of the conference at Dharwar were good enough to invite the Author to inaugurate it but he could not do so on account of previous engagements. But the conference was good enough to record its appreciation for the services rendered by the Author as a member of the Bar to the cause of the conference since its inception.

Mr. Purshottom Trikamdas dealt in his presidential address with a number of questions of immediate interest to the Bar. Referring to the impending reorganisation of the State, he expressed the hope that the contemplated changes would not result in narrow linguistic sectarianism. He hoped that lawyers would look on the problem objectively and, whatever the changes, they would stand together like a solid phalanx and uphold the rule of law. He pointed out that prior to 1921 India had very few High Courts, which after 1951 increased to 17. Would it not be better, he said, both from the point of personnel as well as that of administration of justice if there were High Courts and other tribunals with jurisdiction which would extend to groups of States which would reduce the number of High Courts to 5 or 6 in the whole of India, though there could be Benches sitting at more than one place ? He uttered a word of protest against the Prime Minister Mr. Jawaharlal Nehru's statement that the lawyers were static, and wanted to remind him that it would be a sad day for any democracy if the interpretation of any law changed from moment to moment. He stated, however, that he would agree with the Prime Minister if the latter was referring to the meagre contribution that had been made by the legal profession on the question of simplification of law and legal procedure; and he told the conference that while learned treatises and commentaries had been written by distinguished lawyers, there was little creative or critical contribution from Indian lawyers so far. He welcomed the appointment of the Law Commission and stressed the need of early revision and simplification of the welter of laws that cluttered the Statute. He also pointed out that there was need of a permanent commission to co-ordinate the laws of the various States and to advise the State Governments with a view to bringing about uniformity of laws wherever possible. He suggested revision of the State List of the Seventh Schedule and transfer of some of the items from the Concurrent List to the Union List and he gave instances in this connection of criminal law, criminal procedure, marriage and divorce, preventive detention, transfer of property, contracts, evidence, civil procedure, contempt of court, etc. He expressed the view that a judge in a criminal court must play a more positive role while a witness was being cross-examined, and did not appreciate that the judge should be assigned the role of a referee watching a bout between skilful fencers. Nor did he appreciate the judiciary frowning on what was wrongly described as cross-examination by a judge. He expressed his agreement with Dr. Katju's view that the levy of

ad valorem court-fees was unjust, if not immoral; for it was no less than trafficking in justice. He criticised the inadequate salaries paid to judicial officers and as one holding socialist views he pointed out that socialism or even socialistic pattern did not mean "general pauperization, as it is wrongly imagined by people who know little about it, but a general upgrading of our wretched existence in this country". He also criticised the action of the State Government in not implementing the scheme of legal aid recommended by the committee presided over by Mr. Justice Bhagwati. He expressed himself as not being enamoured of the system of jury as it worked at present because "corruption has laid its dirty finger on juries as well". But he said that he would be in favour of the system provided no verdict of the jury was a verdict unless it was unanimous. The conference passed a number of resolutions including one on court-fees, and one recommending that High Courts and other tribunals as well as the Public Service Commission should be established common to a group of States, which would result not only in the saving of administrative costs but also efficient administration of justice. The resolution recommended that in such a case the High Court and the other tribunals may hold sittings at convenient places within a group of States. Such a resolution was passed for the first time at such conferences owing to the impending reorganisation of States. It was consistent with the provisions of Article 231 of the Constitution. But recent years have seen new High Courts springing up along with new States.

Unfortunately no further invitation appears to have been secured at the Dharwar conference for holding the next session of the conference. The result was that a curtain fell on these conferences which was not raised for more than six years. After the celebration of the High Court Centenary on April 14. 15 and 16, 1962, the first session of the Maharashtra State Lawyers' Conference came to be held at Ahmednagar on April 21, 1962. It was inaugurated by the Chief Justice of India Mr. B. P. Sinha and presided over by Mr. M. C. Chagla, the former Chief Justice of the Bombay High Court and now the High Commissioner of India to the United Kingdom. The Bar at Ahmednagar deserves to be congratulated on giving a lead in this matter to the lawyers of the State. †

These conferences had their uses in affording a meeting place for lawyers in the entire State for discussing legal problems of interest to the profession as well as to the public. Despite the permanent constitution of the conference which was adopted at Surat, these conferences have not been held regularly even biennially or triennially. Since the session at Dharwar the Bombay High Court has seen many changes as a result of the two reorganisations. Some territories have gone out and some new areas have come in to form the State of Maharashtra. The ideal of an effective unofficial State Bar Association, which was envisaged at the very birth of these conferences in 1931 remains even to-day a distant dream.

THE PROBLEM OF LEGAL AID.

The question of affording legal aid to the poor has always agitated lawyers and has also been considered by Government. The Bombay Legal Aid Society has been carrying on unostentatious and valuable work in the field since about

† As this narration is not intended to cover events after the celebration of the High Court Centenary, details about the resolutions passed at this Conference are not given here,nor does it appear that an official report of the Conference is available as yet.

November 1924. The late Mr. N. M. Joshi, a veteran labour leader of Bombay, was its first president. Mr. Framroz A. Vakil was the president of the Society for 20 years and took keen interest till his death in 1959. Mr. N. H. Pandya has been its honorary secretary and has made legal aid his life's mission for over thirty years. In April 1949, the Society organised the Bombay Provincial Legal Aid Conference over which Mr. Justice J. C. Shah presided. Mr. B. G. Kher, then Premier of Bombay, who inaugurated the conference as well as Mr. Justice Shah referred with approval to the recommendations of the Rushcliff Committee in England on the subject of legal aid and the steps that were taken to implement its recommendations resulting in the enactment of the English Legal Aid and Advice Act, 1949. Mr. Kher also stressed the moral obligation on the legal profession to render legal assistance to all those members of the community who cannot afford to pay for such assistance provided no undue burden was thereby cast upon any single individual lawyer. It may be mentioned that the Bombay Legal Aid Society has carried on its work during all these years with the help of private donors like Sir Neville N. Wadia and donations from charity boxes in the courts of the Bombay Presidency Magistrates. For many years the Government of Bombay used to give a grant of Rs. 300 per year to the Society. With effect from April 1, 1952 the grant came to be increased to Rs. 1,200 at which figure it has remained till the present.

It may be mentioned that the Government of Bombay had appointed a committee on March 23, 1949, under the chairmanship of Mr. Justice N. H. Bhagwati to inquire into and submit its recommendations on legal aid at Government cost to poor persons, to persons of limited means and persons belonging to backward classes in civil and criminal proceedings. It submitted its report on October 31 of the same year. The report emphasised the obligation of the State to provide at its cost legal aid and assistance to poor persons in civil and criminal cases. It recommended a scheme for rendering legal aid on a statutory basis. The District Judge under this scheme was to appoint Taluka and District Legal Aid Committees in consultation with the president of the Bar Associations of the Taluka and the District respectively. In Greater Bombay, it recommended the establishment of committees each for the Original and Appellate Sides, the City Civil Court and three separate committees for the Presidency Magistrates' Courts situated in three zones. At the apex there was to be a Provincial Legal Aid Committee with its office in Greater Bombay to supervise, direct and control the work of the various Legal Aid Committees and be in charge of and administer the legal aid fund and make reports and recommendations to Government. On the certificate of this committee was to depend the remission of court-fees and process-fees in civil cases. Membership of these committees was to be honorary. A social worker or a public spirited citizen was to be associated with the work of these committees through co-option, care being taken to see that the selected person would be such as not to come in the way of the harmonious working of the committees. The assignment of lawyers for civil and criminal cases was to be made by these committees from the panel of lawyers, normally of at least 5 years' standing at the Bar, who were to be paid reasonable fees but every lawyer was expected to appear free at least in six cases per year. A legal aid fund was to be built up of contributions from the Provincial Government and local bodies; donations from associations of merchants and trade unions, public charitable trusts and organisations, costs recovered from the unsuccessful opponents

contributions from partially assisted persons and fees received from applicants for legal advice were also to form part of the fund. The priorities for introducing the scheme of legal aid as and when funds permitted were also listed. The High Court expressed itself generally in favour of the recommendations of the committee including that regarding the appointment of a special committee to consider the various suggestions. For years the principal recommendations of this repor have remained without being fully and effectively implemented. The Bombayt Legal Aid Society held a Legal Aid Week in Bombay in 1955 to attract public attention to this matter and also drafted a scheme for bringing out legislation on the lines indicated in Mr. Justice Bhagwati's report.

The existing povisions for legal assistance in civil and criminal matters can be briefly summarized at this stage. Under the Civil Manual, provision is made for giving legal aid to paupers. A lawyer assigned by the court in a pauper matter is not at liberty to refuse the case unless he satisfies the court that he has good reasons for so refusing. He is not entitled to take or seek to obtain any fees from the pauper. The court has the power to award costs against a defaulting party or out of property recovered in the suit and to direct payment to the lawyer appointed on behalf of the pauper. In criminal matters also provision is made to give legal assistance at Government cost in the City Sessions Court as well as in the mofussil to persons accused of offences punishable with death. In sessions cases in the mofussil not involving a murder charge, legal assistance is made available at the cost of Government to persons whose annual income does not exceed Rs. 1,800, but this rule does not apply to sessions cases in Greater Bombay.

Apart from these general provisions, the Government have put in force five schemes for granting legal assistance to persons of various backward classes. Under the first and second schemes, legal assistance is given to the Scheduled Tribes in civil proceedings and in criminal proceedings in non-cognisable cases. Under the third scheme, provision is made for affording legal assistance to *Vimukta Jatis* (ex-criminal tribes) in civil cases and in criminal proceedings in non-cognisable cases. Under the fourth scheme, provision is made to give free legal assistance to Harijans who have to institute civil proceedings claiming damages for harassment caused to them owing to observance of untouchability such as denial of drinking water, denial of temple entry, etc. Under the fifth scheme, free legal assistance is given to members of the Schedules Castes whose annual income does not exceed Rs. 1,800, in civil proceedings as well as criminal proceedings in non-cognisable matters.

The Law Commission has also recommended that the State must accept the obligation to make available legal aid to the poor and persons of limited means and to make necessary funds available for this purpose as this is a service which a welfare State owes to its citizens. According to the Commission, the legal profession must also accept the responsibility for the administration and working of schemes of legal aid. But it recognised that the real difficulty in implementing the scheme of legal aid on a proper basis is the financial one. In the Author's view, Government are charging very high court-fees in every kind of litigation and if they can be persuaded to divert at least a definite percentage of such court-fees to be earmarked for this purpose, the solution of the problem will be facilitated. In May 1961 presiding over a lecture of Mr. Asoka Sen, the Union Law Minister, at the Government Law College, Bombay, the Author

ventured to make the suggestion that 10 per-cent of court-fees earned by Government in civil cases should be set apart for this purpose and the Union Government might also make its own contribution to such a fund which should be administered under the direct control of the High Court.

VOLUNTARY LAGAL ASSISTANCE BY SENIOR LAWYERS IN CRIMINAL CASES.

In the High Court, in confirmation cases as well as criminal appeals and revisions, when the accused is unrepresented an advocate is appointed to defend him at Government cost. But the High Court with the help of senior members of the Bar has gone further and evolved a scheme of voluntary legal assistance in criminal cases involving serious offences. It is interesting to see how this scheme originated. In August 1954, Dr. Kailasnath Katju, as Union Home Minister, wrote a letter to Chief Justice Mr. Chagla pointing out the desirability of the High Court taking steps to secure competent legal assistance to the accused in cases involving death sentences when the accused are unable to make their own arrangements owing to poverty. Along with this letter a note on this question was also annexed. Dr. Katju mentioned his own experience as Minister of Justice in the United Provinces (now known as Uttar Pradesh) where he had to deal with mercy petitions in large numbers, and it appears that he felt occasionally that in 'Pauper Appeals' important points had not been brought to the notice of the judges. He expressed his view that it was the duty of the members of the legal profession to assist to the best of their ability poor people in peril of their lives in some of these cases. According to him, in most of such cases, junior lawyers were engaged but they suffered from the handicap of lack of experience. He, therefore, suggested that efforts be made to persuade senior and experienced counsel to assist junior counsel, so that the senior counsel may have a conference with the junior in charge of the case and suggest a line of defence as also the manner in which the case should be placed before the court. It was further suggested that the senior advocate may appear and argue the case actually when it came up for hearing before the court, if he found himself free and in a position to do so.

As the idea contained in this letter was approved by all the judges, in consultation with the Advocate-General and the Government Pleader and after ascertaining informally the views of senior members of the Bar, a list of senior counsel came to be prepared to appear free of charge in Confirmation cases, i. e. cases where the accused has been sentenced to death and his sentence has been submitted to the High Court for confirmation as required under section 374 of the Criminal Procedure Code. The senior counsel was expected to assist the junior counsel by advice and discussion and, if possible, to argue the case himself if he found himself free on the date of the hearing. This was done before the reorganisation of States in 1956.

When Dr. Katju was informed about this, he expressed his satisfaction at what was proposed to be done and he also wrote that the fees paid to junior counsel in criminal pauper matters were very low. In a further letter he made a positive suggestion that in such matters the junior should be fairly compensated for his labour, including perusal of the papers, preparation of the case and appearance in court. Mr. Chagla took up the matter with Mr. Morarji Desai, then Chief Minister of the State of Bombay, suggesting that in Confirmation cases the junior counsel must get at least Rs. 100, for the first five hours and a refresher at the rate of Rs. 10 per hour if the case lasted longer than five hours. Previously the fee for such matters was only Rs. 50. The Government of

Bombay having studied the proposal from the point of view of its financial implication accepted the proposal of the High Court and issued the necessary notification enhancing the fees to Rs. 100 for the first five hours and a refresher at the rate of Rs. 10 per hour thereafter as suggested by the High Court. After the establishment of the bilingual State of Bombay, the scheme was also extended to the Benches of the Bombay High Court at Nagpur and Rajkot by about the middle of July 1958.

Under the scheme so framed, in all Confirmation cases in the High Court, a junior advocate is appointed at Government cost. At the same time, a senior advocate is appointed, from the panel prepared, to guide and help the junior. Normally the senior advocate himself argues the case on behalf of the condemned man. Regarding his own cases in other courts, the senior counsel is accommodated and the court generally keeps back his cases till he is free from the Confirmation case. The senior counsel is appointed only after ascertaining from him whether he would be in a position to appear in the case when the matter comes before the Court.

Confirmation cases in the Bombay High Court are given the highest priority in the interests of the accused himself as he is under a sentence of death. Whatever might be the views of the Bar regarding the manner of disposal of other cases, none, as far as the Author is aware, has ever. complained about the manner in which Confirmation cases are heard and disposed of by the judges. Almost the whole of the relevant record in such cases is allowed to be read and every relevant point is permited to be urged. It has been found by experience that in cases of complexity and bulky record, the appearance of a senior counsel has greatly facilitated the task of judges, which is always onerous and of great responsibility in such cases. The junior members of the Bar who are also selected from a prepared list now get better remuneration, apart from the invaluable experience they acquire by appearing in important matters of this type along with an experienced senior. If the senior is unable to attend in some case, a junior gets the opportunity to conduct the case himself on the lines indicated and discussed with the senior before the matter is heard by the court.

A similar scheme has been evolved in connection with jail appeals in which the accused are sentenced to 7 years' imprisonment or more. The credit for this goes to Mr. Chainani, the present Chief Justice, who made a minute about this in July 1958 when he was a Puisne Judge. Under this scheme, in jail matters when the accused is sentenced to 7 years' imprisonment or more and is unable to make any provision to engage an advocate, an advocate is appointed to argue the matter *amicus curiae* at the stage of admission. The advocate is selected from the panel specially prepared for this purpose. At the stage of preliminary hearing, he does not get paid but has to do the work free. But if the matter is admitted and the accused still does not make his own arrangements by engaging a counsel of his choice, the advocate who previously argued the matter for admission *amicus curiae* is appointed under this convention to appear at the stage of final hearing also and he then gets paid according to the government resolution applicable to jail appeals. As regards the record and proceedings of the case, at one time they were not sent for at the admission stage. The advocate concerned had to make out a case for calling the record and generally the court is not reluctant to send for it in case it is found necessary.

A slight change in this matter came to be introduced when Mr. Chainani became the Chief Justice. Now the record and proceedings are sent for even at the admission stage in all cases where a sentence of imprisonment for life is imposed on an accused in a jail appeal. In other cases, as previously, an advocate has to make out a case for the record being sent for and obtain the necessary direction of the court.

This system has worked on the whole very satisfactorily. In some matters the judges have found that junior advocates in charge of these cases had studied the record very carefully and have discovered arguable points which it would have been difficult to notice in jail appeals on the basis of judgments only without such assistance. Judges, who preside over the regular Criminal Bench, as also those who do constitutional matters, rarely find their week-ends free. With increasing criminal work for admission, the task of the regular Criminal Bench has become in recent years singularly strenuous. The scheme of advocates appearing at the admission stage *amicus curiae* has not only lightened the labour of the judges but has proved an additional safeguard for the accused as well. It might be mentioned that the list of advocates appearing *amicus curiae* is intended to be revised from time to time to enable the inclusion of young advocates who are not in the list but who show promise in arguing their cases before the court. A fall in the standard of study and preparation is also liable to lead to the deletion of names from the list.

As regards the mofussil also, in November 1958 directions were issued to see whether steps could be taken to engage a senior pleader in an honorary capacity to assist the pleader who is engaged at government cost to defend an accused person in sessions cases, where the charge involved a sentence of death. A letter was accordingly written to all the District Judges pointing out that in cases involving sentence of death it would be desirable that senior and experienced pleaders might be requested to give necessary guidance and assistance to the junior pleaders engaged at government cost in such cases. It had been found by experience that the juniors were not able to do full justice to the case. It was, therefore, suggested to the District Judges that they should consult the senior lawyers in their courts and prepare panels of senior advocates willing to offer their help to junior lawyers. The response to this was encouraging in many districts. In some districts, there was a misunderstanding as to the precise nature of the scheme and the senior members of the Bar were unwilling to spare their time or assist the juniors, being under the impression that they would have merely to sit by the junior's side in court while he conducted the defence. The position had, therefore, to be further clarified. It was suggested that junior lawyers, having between 3 to 10 years' practice, should be engaged to defend the accused in murder cases. The senior lawyers, who were willing to join the scheme, were to offer their advice and guidance to the juniors as to the lines on which the accused was to be defended. It was emphasised that whenever possible the senior lawyer should himself cross-examine important witnesses and also argue the case on behalf of the accused, but it was made clear that it was not necessary for the senior to be present throughout the trial. All the District Judges were informed that as far as possible some adjustment should be made so as to suit the convenience of seniors willing to appear in such cases. With this clarification, opposition to the scheme which had manifested itself in some districts has now been largely overcome. The latest reports from most

of the District Courts show that the working of the scheme has been generally satisfactory and successful wherever the accused had to be defended, he having not made or being unable to make arrangements for his own defence.

It will thus be seen that in the High Court as well as in the mofussil the members of the Bar have given effect to their desire expressed in conferences or otherwise to associate themselves with a scheme of legal aid in response to requests from the High Court. Senior members of the Bar have voluntarily come forward to render legal assistance in criminal cases involving sentences of death, and in the High Court even junior advocates appear *amicus curiae* at the time of admission in jail appeals involving sentences of imprisonment for 7 years or more. It remains with the Government now to make possible the implementation of an effective and satisfactory scheme of legal aid in civil cases also, not merely confined to some backward classes only but to all classes who are in genuine need of such aid.

CHAPTER IX

THE TWO REORGANISATIONS OF THE BOMBAY STATE

"The first essential objective of any scheme of reorganisation must be the unity and security of India. Any movement which may tend to impair the unity of the country must ultimately affect the welfare of all sections of the Indian people. Any measure of reorganisation which is likely to create tension and disharmony must weaken the sense of unity among the people of India, and should not, therefore, be countenanced."

—Report of the States Reorganisation Commission, 1955. †

The States of the Indian Union never represented pre-existing sovereign units like the cantons of the Swiss Federation or the colonies in America before their union. In India, the Provinces were the creatures of historical forces. Even Mr. Montagu and Lord Chelmsford in their report on Indian Constitutional Reforms expressed themselves as being impressed with the artificial and often inconvenient character of the then existing administrative units. But they described provincial patriotism as sensitively jealous of its territorial integrity and had uttered the warning that division of territory not made in response to a popular demand was apt to provoke wide and deep-seated dissatisfaction. ‡ The merger of Indian States after Independence was achieved by accession through negotiation as mentioned in a previous chapter. Their sovereignty was surrendered by them to the Central Government before the Constitution came into force. Under Articles 2 and 3 of the Constitution it is Parliament that is vested with the power of admitting or establishing new States, increasing or decreasing the area of a State or altering its boundaries or its name. One limitation on this power contained in the Proviso to Article 3 is that no Bill for this purpose can be introduced in either House of Parliament except on the recommendation of the President. Secondly, where the proposed changes affect the area, boundaries or name of any of the States, the Bill must be referred to the Legislature or Legislatures of the States concerned to express their views. Under Article 4 (2) no such law is, however, to be deemed to be an amendment of the Constitution so that it is not necessary to invoke the provisions governing constitutional amendments contained in Article 368. Such bills have, therefore, not to go through the procedure laid down for amendment of the Constitution in Article 368. ¶

In December 1953, the Prime Minister, Pandit Jawaharlal Nehru, announced in Parliament the appointment of a Commission to examine objectively and dispassionately the question of reorganisation of States so that the welfare of the people of each State as well as of the nation as a whole might be promoted. The States Reorganisation Commission came to be set up accordingly on December 29, 1953, consisting of Mr. Saiyed Fazl Ali, an ex-Judge of the Supreme Court and then the Governor of Orissa, as the Chairman, Pandit Hridaynath Kunzru, President of the Servants of India Society and a member of the Rajya Sabha, and Sardar K. M. Panikkar, then Ambassador of India in Egypt, as members. It submitted its report on September 30, 1955. With regard to Bombay, it made the following recommendations: The four Kannada-speaking

† Report, para 107, page 30.

‡ Report on Indian Constitutional Reforms (1918) pp. 158-159.

¶ See *Padmakar Balkrishna v. State of Bombay* (1957) 59 Bom. L. R. 355.

districts of Bombay, namely, Dharwar, Bijapur, North Kanara and Belgaum (except Chandgad Taluka), were to go to the new State of Karnatak, recommended by the Commission, which ultimately came to be known as the State of Mysore. The Bombay State was to be reconstituted to include the then existing Bombay State excluding the Abu Road Taluka of the Banaskantha District and the four districts of Karnatak referred to above. Three additional areas were to be merged with the State of Bombay: (1) The Marathi-speaking districts of Hyderabad, namely, Osmanabad, Bhir, Aurangabad, Parbhani and Nanded; (2) Saurashtra; and (3) Kutch. The Commission also recommended the creation of a new State of Vidarbha consisting of the eight Marathi-speaking districts of Madhya Pradesh, namely, Buldana, Akola, Amravati, Yeotmal, Wardha, Nagpur, Bhandara and Chanda. The rest of the area of Vidarbha was to go to form, along with other areas, the new State of Madhya Pradesh. This story is not concerned with the other recommendations of the States Reorganisation Commission.

The publication of these proposals led to a fierce agitation on the part of the people of the Marathi-speaking areas not only because they were not separated from the Gujarati-speaking areas but also because as the Marathi areas in Vidarbha were kept out to form a new State, it was thought that in the case of Maharashtra alone the principle of reorganisation, applied to the other areas, was not followed. The alternative proposal to form Bombay City into a Union territory evoked equally bitter opposition. The High Court as such was not concerned with the merits of the controversy except in so far as it affected the administration of justice. But as happens usually in such cases the effect on the administration of justice was not a factor taken into consideration at all. A number of *habeas corpus* petitions also came to be filed as a result of the arrest and detention of persons in connection with the Samyukta Maharashtra movement and the High Court dealt with those petitions in accordance with the principles which have been now well settled in connection with such petitions.

The bill that came to be introduced in Parliament had proposed, however, the formation of three separate units, namely, (1) the Union territory of Bombay, (2) State of Maharashtra including Marathwada and Vidarbha, and (3) State of Gujarat including Saurashtra and Kutch. As a result of further negotiations, Parliament ultimately gave its sanction to the creation of the bilingual State of Bombay composed of the areas of the Bombay State including Saurashtra and Kutch as visualized by the States Reorganisation Commission as also the areas of Vidarbha which the Commission had recommended should form a new State of Vidarbha. The Parliament passed the States Reorganisation Act (XXXVII of 1956) on August 31, 1956.

This Act which was brought into force on November 1, 1956 came to be challenged by way of a petition in the Bombay High Court which rejected the petition. The matter went to the Supreme Court. One of the contentions raised in challenging the validity of the States Reorganisation Act was that the ultimate proposal of a composite State of Bombay was a substantial modification of the original proposal of three separate units contained in the bill and the State Legislature had no opportunity of expressing its views in favour of one composite unit. This contention was negatived and it was held that the second condition in the Proviso to Article 3 of the Constitution had no such drastic

effect as to require a fresh reference every time an amendment of the proposal contained in the bill was moved and accepted in accordance with the rules of procedure of Parliament, and that the formation of a composite State of Bombay was not so completely divorced from the original proposal in the bill as to make it in reality a new bill so as to necessitate a fresh reference to the State Legislature. *

Part V of the States Reorganisation Act, 1956, contained provisions *inter alia* relating to the High Courts of the States affected by the reorganisation. The High Courts exercising jurisdiction in relation to the then existing States of Bombay and Madhya Pradesh prior to November 1, 1956 became the High Courts for the new States of Bombay and Madhya Pradesh. The Act contained detailed provisions regarding jurisdiction of the High Courts in the new States, power to enrol advocates, practice and procedure, custody of seals, powers of judges, and procedure as to appeals to the Supreme Court. The High Court at Nagpur, which became the High Court of Madhya Pradesh, ceased to have jurisdiction regarding the districts of Vidarbha transferred to the new Bombay State. Similarly all proceedings pending in the High Court of Saurashtra or in the Court of the Judicial Commissioner for Kutch were transferred to the Bombay High Court. The High Court at Bombay ceased to have jurisdiction in respect of the four Kannada-speaking districts which went to the new State of Mysore. Provision was made for the transfer of proceedings pending in the Bombay High Court to the new High Court of Mysore on certification by the Chief Justice of the High Court at Bombay that such proceedings were fit to be heard and decided by the High Court of Mysore regard being had to the place of accrual of the cause of action and other circumstances. Exception was, however, made regarding appeals, applications for leave to appeal to the Supreme Court, applications for review and other proceedings which sought relief in respect of any order passed by the High Court at Bombay before reorganisation. The jurisdiction of the Bombay High Court came to be extended to the five districts of Marathwada which merged in Bombay. Proceedings which were pending in the High Court at Nagpur or the High Court at Hyderabad, which had to be certified by the Chief Justices of those Courts as fit to be heard by the Bombay High Court having regard to the place of accrual of the cause of action and other circumstances came to be transferred to the Bombay High Court. The result was that the work in the judicial districts of Vidarbha and Marathwada which had merged in Bombay came to be transferred to the High Court at Bombay. A similar provision was made regarding transfer of work relating to the four Karnatak districts in the Bombay High Court to the new Mysore High Court. There were other incidental provisions in the States Reorganisation Act which it is not necessary to mention.

As a result of this reorganisation, four Judges of the Nagpur High Court came to be transferred to the Bombay High Court, namely, Mr. Justice K. T. Mangalmurti, Mr. Justice J. R. Mudholkar, Mr. Justice Y. S. Tambe and Mr. Justice S. P. Kotval. Mr. Justice M. C. Shah, Chief Justice of Saurashtra High Court, as well as Mr. Justice S. M. Palnitkar, Chief Justice of the former Hyderabad High Court, became Puisne Judges of the Bombay High Court. The seniority of these Judges came to be fixed *vis-a-vis* the Puisne Judges of the

* *Babulal Parate v. State of Bombay* (1960) S. C. J. 167.

Bombay High Court according to their confirmation as Puisne Judges in the case of Nagpur Judges, and the date of their confirmation as Chief Justices in the case of the Saurashtra and Hyderabad Judges.

It was decided to have separate Benches of the Bombay High Court at Nagpur and Rajkot for the convenience of litigants and members of the Bar at those places. One or two Judges from Bombay have since then gone to Nagpur to deal with, along with the Nagpur Judges, the judicial work of the Nagpur Bench. Generally one Judge from Nagpur has also come to Bombay for the same purpose. Similarly one or two Judges from Bombay also went to Rajkot till the second reorganisation led to the establishment of a separate State for Gujarat. This inter-change of judges has contributed much to the attainment of team spirit and cohesion amongst the judges and uniformity of practice and procedure. Suitable residential accommodation was provided for the judges going to Nagpur and Rajkot as also to the judges coming from Nagpur to Bombay. These judges have to stay between 6 to 10 weeks at these places, and most of them who went to Nagpur or have come to Bombay from Nagpur have found the allowances given to them inadequate and have been generally out of pocket. But the system has been continued and cheerfully worked by the judges in the interest of uniformity in the administration of justice. The system of taking lunch in a common room by all the judges which prevails in Bombay was also introduced at Nagpur.

The High Court building at Nagpur is a magnificent structure and the courts there are air-conditioned. Though the books in the library of the Nagpur High Court had to be distributed between the Madhya Pradesh High Court and the Nagpur Bench of the Bombay High Court and many valuable latest editions of law books went to Jabalpur where the High Court of Madhya Pradesh was set up, the library at Nagpur is well equipped with books on constitutional as well as on other legal subjects. Members of the Bar at Nagpur have access to this library and can read the books and law reports in the library itself. In Bombay, judges have a library of their own to which members of the Bar have no access. This Judges' Library at Bombay had to be replenished at considerable expense with American Law Reports and other publications on constitutional law after the Constitution. The Bar in Bombay, as stated previously, has two libraries, one the High Court Law Library and the second one the Kirtikar Law Library, donated by Dr. M. R. Jayakar, which is controlled and managed by the Advocates' Association of Western India.

The Nagpur High Court had an efficient Bar and such of the members of the Bar who did not migrate to Jabalpur, the seat of the new Madhya Pradesh High Court, were suddenly faced, as a result of the reorganisation, with a much attenuated quantity of work. None of the members of the Nagpur Bar came to Bombay to practise here. That was also the case with Rajkot with possibly an exception or two. Advocates from Marathwada, however, had perforce to come to Bombay as a very large number of appeals, revisions etc. came to be transferred to Bombay as a result of the merger of five districts of Marathwada in the Bombay State. But members of these respective Bars, it must be said to their credit, have co-operated with the judges in bringing about uniformity of standards and of practice and procedure. At Nagpur there was for a considerable time the apprehension that the Bench there would be abolished at one time or the

other. But the Chief Justice, Mr. Chagla, when he went there for the first time in 1957 in connection with some Full Bench matters, gave an unequivocal assurance to members of the Bar there that he would be no party to such abolition as long as the Bar at Nagpur itself wanted to have a Bench for the disposal of cases instituted there. After the second reorganisation, a provision has been incorporated under section 41 of the Bombay Reorganisation Act (II of 1960) to have a permanent Bench at Nagpur of not less than three judges. This was perhaps due to the continued agitation on the part of a section of the people in Vidarbha for having a separate State of their own. So far the Chief Justice has always gone to Nagpur to preside over Full Benches there as also to dispose of other work. Under the rules which came to be framed, income-tax matters could not be heard either at Nagpur or at Rajkot. That rule came to be changed in view of the provisions of section 41 of the second Reorganisation Act referred to above.

As a result of the transfer of the four Kannada-speaking districts to the State of Mysore, in all 1086 proceedings had to be transferred, consisting of 1038 civil matters and 48 criminal matters, to the Mysore High Court. Against that, as a result of the merger of Vidarbha, Marathwada, Saurashtra and Kutch, the file of the Bombay High Court increased by 6945 civil matters and 777 criminal matters, in all a total of 7722. From Vidarbha area there was a total of 3523 matters received, out of which 3214 were civil matters and 309 criminal. This file was retained at Nagpur. From Saurashtra came 836 matters, 755 civil and 81 criminal. From Kutch, only 76 matters were received, 64 civil and 12 criminal. The matters from Saurashtra and Kutch were kept for disposal at Rajkot. From Marathwada area, in all 3287 matters were received, 2912 civil and 375 criminal including 4 Confirmation cases. The whole of this file came to Bombay and was disposed of here.

The most serious problem which faced the High Court after the first reorganisation was the establishment of uniformity in the judicial set up in the State by bringing the judicial administration in the new regions in conformity with that prevailing in the old State of Bombay. The absorption of judicial officers from the four regions of Vidarbha, Marathwada, Saurashtra and Kutch was another difficult problem. There was considerable difference between the set up in each of these regions. In order to achieve uniformity it was decided to appoint a special officer to make recommendations in this behalf after visiting and making inquiries in each of these regions. Mr. V. A. Naik, now Mr. Justice Naik, who was then the District and Sessions Judge, Poona, was appointed the Special Officer for this purpose. He submitted his reports with regard to all these areas, the constitution of civil and criminal courts there and the strength of judges and staff required for managing these courts.

In the Vidarbha area which merged in Bombay, there were only four judicial districts as against eight revenue districts. The Nagpur judicial district comprised Nagpur and Bhandara revenue districts. Wardha included Wardha and Chanda revenue districts. Amravati judicial district consisted of Amravati and Yeotmal revenue districts, and Akola included Akola and Buldana revenue districts. In the old Bombay State each revenue district was also a judicial district with a separate District Court with the only exception of the District Courts of Banaskantha and Sabarkantha, which came into Bombay as a result of

the merger of some of the princely states in Gujarat. The special officer recommended the splitting up of the four judicial districts in Vidarbha into eight judicial districts corresponding to the revenue districts in Vidarbha. This recommendation was accepted and implemented soon. This step was justified not only in view of the statistics regarding civil and criminal work which made such splitting up necessary in the interest of efficiency of judicial administration, but it was also convenient from the point of view of the litigant public. In the case of Chanda district, the volume of litigation was small but that was because of the difficulties of communication, and the litigation there was expected to grow as Chanda is a rapidly developing district which has an extensive forest area growing superior quality of teak, a paper mill and a number of coal mines. There was some controversy regarding the location of the district headquarters of the new Buldana district. The Bar at Khamgaon, which is an industrial town linked to the main railway line, put forward its claim to be selected for the location of the District and Sessions Court. But Buldana was selected as being the headquarters of the revenue district also and having a more temperate climate than at Khamgaon. An Assistant Judge's Court is now located at Khamgaon. The available buildings in the new districts were found suitable except at Yeotmal. It may be mentioned that the condition of the District Court building at Nagpur also has caused much concern to the High Court. The building is inconvenient to the District and subordinate judges and to the members of the Bar and proposals for a new building are now under consideration.

The problem of separation of the judiciary from the executive existed in Vidarbha alone and not in other areas. The Government of the old Madhya Pradesh had already taken a decision to bring about separation without any loss of time. As it involved solution of some administrative problems, provision of buildings and finances, a memorandum had been issued on June 20, 1950 to all District Magistrates. In consultation with the Nagpur High Court, some Civil Judges were given criminal work and one Magistrate civil work. Some Tahsildars were also appointed to try civil suits of small value. But in fact no civil suits were actually pending before them except in one case at the time of the reorganisation. After the merger of Vidarbha into Bombay, separation of the judicial and executive functions having already been accomplished in the original State of Bombay, a similar decision was taken with regard to Vidarbha and it came into operation on September 1, 1959.

As regards the five districts of Marathwada, there were some good features about the working of the courts of justice there which impressed the special officer. They were the clockwise regularity and punctual working of the courts and the attendance of the pleaders, and the fact that the members of the Bar used to be in their prescribed court-dress.* In the Osmanabad district, the headquarters had been located at Osmanabad since 1951. Even before merger it had been suggested that the headquarters of the district should be shifted to Latur and just before merger the Government of Hyderabad had issued an order to that effect on representations from some of the talukas. This created a stir

* The High Court has now prescribed a court-dress for all the districts in the new Civil and Criminal Manuals, but the members of the Bar in some districts do not appear to have taken kindly to it. With the unification of the Bar on an All-India basis, which has been achieved now, the question may perhaps be tackled more satisfactorily through the All-India Bar Council.

at Osmanabad. There was a lot of agitation for maintaining the *status quo*, and, as it happens in such matters, evoked considerable controversy. It was the opinion of the special officer that Latur would be better as headquarters of the district considering the geographical situation, the availability of means of communication, other facilities available at Latur and the general desire of the people in the district. But that view was not accepted and though for some time there was even a threat of a hartal, the headquarters continued at Osmanabad and an Assistant Judge's Court is located at Latur for the convenience of the litigants there. After all, making changes in the district headquarters, after it continues at one place for a number of years, is not always easy and desirable. It can never be said, however, that this is a final decision. In Marathwada area there was no problem of separation of judicial and executive functions as there had already been a *de facto* separation, but the *de jure* separation was brought into force from September 1, 1959 in this area also.

The special officer also made detailed reports about Saurashtra and Kutch, but as these areas have now gone to Gujarat, it is not necessary to refer to his recommendations. In both these areas there was no problem of separation of judicial and executive functions, though *de jure* separation on the lines obtaining in the old Bombay State was introduced in these areas also with effect from September 1, 1959.

In order to appreciate the problem regarding uniformity of judicial set up in the entire bilingual State of Bombay, it would be necessary to indicate the nature of the judicial set up in the original Bombay State. There were three types of civil courts in the former State of Bombay: the District Court, the Court of the Civil Judge, Senior Division, and the Court of the Civil Judge, Junior Division. The District Judge presides over the District Court and has unlimited pecuniary jurisdiction, but in practice he does not exercise it owing to the existence of the Court of the Civil Judge, Senior Division, in all districts with unlimited pecuniary jurisdiction which enables it to entertain all civil suits. The District Judge is also invested with other jurisdictions, such as matrimonial, testamentary, jurisdiction under the Company Law etc., and has appellate powers against the decisions of the Court of Civil Judge, Junior Division, which court has now pecuniary jurisdiction up to Rs. 10,000.. The Civil Judge, Senior Division, is also invested with power to try testamentary cases and cases under the Land Acquisition Act when transferred by the District Judge, and can entertain and try cases under the Hindu Marriage Act. He is also invested with Small Cause Court powers varying from Rs. 800 to Rs. 1,500. The Civil Judge, Junior Division, is also invested with Small Cause Court powers varying between Rs. 100 to Rs. 500. Besides his regular civil jurisdiction is up to Rs. 10,000. His court is also empowered to try uncontested cases under the Indian Succession Act. On the criminal side, after separation was effected between the judiciary and the executive in the Bombay State, there is the Court of Session in each district and the Courts of the Judicial Magistrates. There are, since the separation of judicial and executive functions, no Second Class and Third Class Magistrates, but Judicial Magistrates of the First Class only. Judicial Magistrates are subordinate to the Sessions Judge and under the administrative control of the High Court. The Executive Magistrates are subordinate to the District Magistrates and are not amenable to the administrative control of the High Court. In order to introduce this type of judicial set up in all the new four

regions, the Bombay Civil Courts Act was extended to them, with the result that a uniform civil judicial set up came to be introduced with effect from April 1, 1959. As regards the criminal set up, the Separation of Judicial and Executive Functions Act came to be extended to Vidarbha on September 1, 1959. Fifty-two Judicial Magistrates were initially sanctioned for dealing with criminal work in Vidarbha. They were drawn at first from the Revenue Magistrates but now they have been gradually replaced by Judicial Magistrates, though some of the Revenue Magistrates who were found competent and willing were also proposed to be absorbed as Judicial Magistrates.

The other problem which had to be tackled was of absorption of judicial officers from these areas. In Bombay, Assistant Judges are selected from the subordinate judicial officers or directly recruited from the Bar. The age limit is 45, but in the case of the former judicial officers of the Native States that age limit does not operate. In the case of selection from Civil Judges, Junior or Senior Divisions, consideration is given to the confidential reports made by the District Judges from time to time regarding their work. On the basis of this record these officers came to be interviewed. Latterly, in the entire State, in the case of the service recruits, their recent judgments are also read by a committee of High Court Judges, and that is an additional factor taken into account when selections are made for posts of Assistant Judges. In the case of direct recruits from the Bar, consideration is given to the recommendation and report of the District Judge and those found suitable are called for interview. As a result of these interviews, in both cases, selections are ultimately made. In Vidarbha, the question of what were known as Additional District Judges raised some problem. They were appointed in most districts not on the basis of selection but by seniority, and in some cases there was accelerated promotion on account of war service or some such factor. There were similar difficulties regarding absorption of officers in other areas. Ultimately it was decided to absorb them on an *ad hoc* basis of a five-year formula, which was applied to Additional District Judges in the Vidarbha region, the District and Sessions Judges in the Saurashtra region and the District Judges from Marathwada region. The result was that Additional District Judges from Vidarbha who had worked as such for five years were absorbed as Assistant Judges, and District and Sessions Judges in Saurashtra and Maharashtra who had worked as such for five years or more were absorbed as District Judges. The question, however, has not as yet been finally decided by Government. From the Marathwada area, there were five Sub-Judges *cum* District Magistrates who in the matter of their pay-scale were far higher than the Civil Judges, Junior or Senior Division, but the powers that they exercised were different. All of them were absorbed as Civil Judges, Junior Division, though they continued to draw their original higher scale of pay, and some of them have been promoted as Civil Judges, Senior Division.

As there was considerable difference in the rules of the civil and criminal practice and procedure obtaining in the original Bombay State and the new regions, the task of revising both the Civil and Criminal Manuals was difficult as well as arduous. The Chief Justice Mr. Chainani entrusted it to committees presided over by Mr. Justice Mudholkar. Rules which were in force in each of the four new regions and, specially in Vidarbha which had very detailed civil rules of practice and procedure, as also the rules prevailing in the original State

of Bombay in about 26 districts were taken into careful consideration. Suggestions for improvement made by some select District Judges from varions areas were also considered. The committee along with the Chief Justice completed this job thoroughly and with expedition so far as it was possible to do and it was accomplished just before the bifurcation of the bilingual State into the States of Maharashtra and Gujarat. The revised Civil and Criminal Manuals thus produced on the whole contain the best features of the rules prevailing in the several regions which formed the bilingual State of Bombay. These revised rules are intended to simplify existing procedure, ensure speedy disposal of civil and criminal work, reduce costs and lessen the hardship and inconvenience to parties and their witnesses.

It may be mentioned also that a Criminal Manual has been for the first time prepared for the use of the Presidency Magistrates in Greater Bombay. A suggestion about this had been made as early as January 1951. Government's approval had been received for the compilation of such a manual in 1954. The then Chief Presidency Magistrate Mr. K. J. Khambata had even informed the High Court that the drafting of such a manual for Presidency Magistrates' Courts was taken in hand. It appears, however, that nothing tangible was done till July 1960. On July 28, 1960, a conference was held between all the Presidency Magistrates and the Chief Justice and the Administrative Judges of the High Court and it was suggested to the then Chief Presidency Magistrate Mr. G. K. Rege that it would be desirable that Presidency Magistrates should go through the revised Criminal Manual and make suggestions as to the form in which the Criminal Manual should be adapted for the Presidency Magistrates' Courts. Accordingly some proposals were forwarded to the High Court and the Manual was finalised in consultation with a committee of three Presidency Magistrates and the Registrar, and has been approved by the Chief Justice with certain modifications.

The question of revising and bringing up to date the Appellate Side Rules was also taken in hand in 1960 with a view to simplifying the present procedure, to ensure that every matter got ready within the minimum time possible after it was filed in the High Court and to reduce costs to the parties. Mr. Justice Mudholkar also presided over this committee and after considering the existing rules as well as the rules framed by other High Courts and in particular by the former High Court at Nagpur, the committee submitted its report and the revised Appellate Side Rules came into operation before bifurcation.

THE SECOND REORGANISATION.

In August 1959, the rumblings of another reorganisation began to be heard and that became an accomplished fact by the end of April 1960. The Bombay Reorganisation Act (II of 1960) received the assent of the President on April 25, 1960 and that led to the severance of Gujarat from the rest of Maharashtra including Greater Bombay. The new State of Gujarat was formed comprising of the Districts of Banaskantha, Mehsana, Sabarkantha, Ahmedabad, Kaira, Panch Mahals, Baroda, Broach, Surat, Dangs, Amreli, Surendranagar, Rajkot, Jamnagar, Junagad, Bhavnagar and Kutch, that is to say, the original Gujarat Districts, except such area as had gone to Rajasthan, and Saurashtra and Kutch which merged in Bombay in 1956. Some of the villages in Umbergaon Taluka of Thana District and in Nawapur, Nandurkar, Akkalkuva and Taloda Talukas of West Khandesh were also included in the new State of Gujarat.

Chapter IV of the Bombay Reorganisation Act dealt with the constitution of the High Courts. The High Court of Gujarat was newly created and the High Court at Bombay became the High Court for the State of Maharashtra, which was referred to in the Reorganisation Act as the High Court at Bombay. Ahmedabad was selected as the seat of the Gujarat High Court, though it would appear that claims on behalf of Baroda were also put forward as there were better and more suitable buildings at Baroda than at Ahmedabad. Mr. Justice S. T. Desai had the honour to become the first Chief Justice of the Gujarat High Court and he ceased to be a judge of the Bombay High Court. Four other judges, namely, Mr. Justice K. T. Desai, Mr. Justice J. M. Shelat, Mr. Justice N. M. Miabhoy and Mr. Justice V. B. Raju, became puisne judges of the new High Court and ceased to be judges of the Bombay High Court. It was provided that they were to rank in the new High Court according to the priority of their respective appointments as judges of the High Court at Bombay.

The Reorganisation Act of 1960 contained provisions as to the jurisdiction of the Gujarat High Court, its power to enrol advocates, practice and procedure, custody of its seal, powers of judges, procedure as to appeals to the Supreme Court, similar to the first Reorganisation Act of 1956. The Bombay High Court ceased to have jurisdiction in respect of the territories transferred to the State of Gujarat. Such of the proceedings pending in the Bombay High Court were transferred to the High Court of Gujarat as were certified by the Chief Justice of the Bombay High Court as being fit to be heard and decided by the new High Court having regard to the place of accrual of the cause of action and other circumstances. But the High Court at Bombay was to have jurisdiction regarding appeals, applications for leave to appeal to the Supreme Court, applications for review and other proceedings as sought relief in respect of any order passed by the High Court at Bombay before bifurcation. In relation to transferred proceedings, an advocate entitled to practise or an attorney entitled to act or authorised to appear or to act in such proceedings, got the right to appear or to act as the case may be in the Gujarat High Court. In all 3933 matters were transferred from the file of the Bombay High Court to the Gujarat High Court, 3588 civil and 345 criminal. As already mentioned, section 41 of the Reorganisation Act of 1960 also created a permanent Bench of not less than three judges at Nagpur. Several advocates, senior as well as junior, who were for years practising on the Appellate Side of the Bombay High Court had to leave Bombay on account of this bifurcation and go to Gujarat to practise in a new atmosphere though all the judges who began to preside over the new High Court had been the judges of the Bombay High Court.

As regards division of assets, including library books, it was made on the basis of a rough ratio of two to one as between Maharashtra and Gujarat. Regarding judicial posts and personnel, that ratio could not be strictly followed as the posts in the judiciary are localised posts and their division had to be made having regard to the number of posts in the different cadres in the districts which were to constitute the new State of Gujarat and those remaining within the new State of Maharashtra. Though this separation from colleagues caused a sense of regret among the judges, the entire work of separation was effected in an atmosphere of utmost goodwill and cordiality.

It may be mentioned that, in one Criminal Appeal No. 351 of 1960, a Full Bench of the High Court of Gujarat consisting of five judges has, in October 1961, considered the question of the binding nature of the judicial precedents of the Bombay High Court prior to May 1, 1960, i. e., the day on which the State of Gujarat came into being. The Full Bench has held on October 31, 1961 by a majority (Mr. Justice Miabhoy dissenting) that the decisions of the Bombay High Court prior to the appointed day, i. e., May 1, 1960, do not constitute "any law in force before the appointed day" within the meaning of section 87 of the Bombay Reorganisation Act, 1960, but that the decisions of the Bombay High Court given before the said date have as much binding force and effect as if they were the decisions of the Gujarat High Court itself. A decision of a single judge, of a Division Bench and of a Full Bench of the Bombay High Court prior to the aforesaid date will, therefore, have the same binding force and effect as a decision of a single judge, of a Division Bench and of a Full Bench respectively of the Gujarat High Court.

As a result of the merger of Native States, as already mentioned, in all 116 judicial officers came to be absorbed, 4 as Assistant Judges, one as Civil Judge, Senior Division, 63 as Civil Judges, Junior Division, and 48 as Judicial Magistrates. The transfer of the B. A. D. R. work to the judiciary, as also the merger of States, led to an increase in the strength of the judiciary in the mofussil and the complete separation of the judiciary from the executive, which was effected on July 1, 1953, in the old State of Bombay, also led to the appointment of new Judicial Magistrates. As a result of the first reorganisation and the transfer of four Kannada-speaking districts, 75 judicial officers were transferred to Mysore consisting of 4 District Judges, 5 Assistant Judges, 6 Civil Judges, Senior Division, 32 Civil Judges, Junior Division, and 28 Judicial Magistrates, while one Civil Judge, Junior Division, went to the State of Rajasthan because of the transfer of the Mount Abu Road taluka from the Banaskantha district to Rajasthan. As a result of the merger of Vidarbha region, 61 judicial officers were absorbed, 4 District Judges, 24 Additional District Judges and 33 Civil Judges. The Marathwada region gave 56 judicial officers, 6 District Judges including an Additional District Judge, 5 Sub-Judges *cum* District Magistrates, 44 Munsiff-Magistrates and one Railway Magistrate. 70 judicial officers came from Saurashtra region, 5 District Judges, 4 Assistant Judges, 5 Civil Judges, Senior Division and 56 Civil Judges, Junior Division. Only 17 judicial officers came in as a result of the merger of the Kutch area, consisting of 1 District Judge, 1 Additional Sessions Judge and 15 Sub-Judges.

The following table will show the fluctuation in the sanctioned strength of the different categories of judicial officers in the State of Bombay and now of Maharashtra, since 1947, excluding Greater Bombay :—

Cadres of judicial officers.	Prior to Independence.	After Merger of Indian States.	Bilingual State of Bombay.	State of Maharashtra.
District Judges	17	23	41 (including one Joint Judge)	25
Assistant Judges	11	29	46	33
Small Cause Court Judges.	2	3 (Includes one at Baroda subsequently abolished).	6	3
Civil Judges (Senior Division)	23	42	64	38
Civil Judges (Junior Division)	110	262	525	345 Civil Judges *cum* Magistrates.
Judicial Magistrates.	52	159	(Out of the above 525, 179 were posts of Judicial Magistrates.)	

Under the bilingual State of Bombay there were as many as 40 districts and the High Court enjoyed the honour and dignity of having its writ run in the largest State of India. That glory was of a very short duration. Even the present High Court, however, as would be observed from the table given above, has more districts and more judicial officers under its control than it had prior to Independence when Bombay was a multilingual State.

After the creation of the State of Maharashtra, the question arose as to whether the High Court should call itself the Maharashtra High Court or the High Court at Bombay. Throughout its history, the name of the High Court has been the High Court of Judicature at Bombay, and that had been the title in every appeal or application preferred to the High Court and in other official records. The High Court at Bombay has been the proud possessor of great traditions. The judges, therefore, unanimously decided to continue the previous name officially, as there was justification for it under the Bombay Reorganisation Act of 1960 as well as the Letters Patent. Though in the press the High Court is often referred to as the Maharashtra High Court, the official name of the High Court continues to be the High Court of Judicature at Bombay. It may be, as Shakespear has said, "What's in a name ? That which we call a rose, by any other name shall smell as sweet." But those who believed in continuity of traditions possibly thought otherwise :

> *"Who hath not own'd with a rapture-smitten frame,*
> *The power of grace, the magic of a name."*

It may be mentioned that in his inaugural address at the Centenary Celebrations of the High Court in April 1962, the Chief Justice of India, Mr. B. P. Sinha, expressed his view against any move to change the name of the Bombay High Court in view of the great name it has acquired as the repository of justice and expressed the hope that it would continue to add lustre to its time-honoured name.

CHAPTER X

JUDICIAL CONFERENCES AND THE PROBLEM OF ARREARS.

"No branch of the administration is conducted in broader daylight than the administration of justice. Our conclusions, particular or general, are always open to public criticism. But our work is best performed in the cold light of reason and of truth with the minimum of heat; and it suffers if the dust or noise of politics is allowed in or near the portals."

— Sir Govind Dinanath Madgavkar. †

The District Judges constitute the most vital link between the High Court and the subordinate judiciary. They are the head of the administration of justice in every district. They send returns of their work as well as the work of the subordinate courts in the district to the High Court. They forward annual confidential reports about each Civil Judge and Magistrate in the district belonging to different categories, their judicial qualities, administrative capacity, their relations with the members of the Bar and about their character. The District Judges are expected to look into some of the judgments of the subordinate officers and guide them from time to time. If a District Judge finds that a subordinate judge or magistrate is overburdened with work, he recommends to the High Court measures to relieve congestion in any particular court. The confidential records so sent constitute the most important material which is taken into consideration when the question of promotion or selection to higher posts arises, though as already stated in the previous chapter, nowadays the High Court also calls for some of the latest judgments of the subordinate officers to satisfy itself as to the correctness or otherwise of the District Judge's reports and to judge the judicial ability of the officer concerned. Periodic inspection of the subordinate courts is also made by the District Judges. As regards complaints against pleaders, an inquiry is held against them by the District Judge; and even regarding complaints against advocates practising in the mofussil, they are first considered by the High Court and if a *prima facie* case is disclosed, either a tribunal of the Bar Council is set up by the Chief Justice or with the concurrence of the Bar Council the inquiry may be conducted by the District Judge for the convenience of the parties and witnesses in these cases. Ultimately, of course, the report of the District Judge comes before the High Court under the disciplinary jurisdiction. This procedure will now change because of the complete unification and autonomy of the Bar and the creation of an All-India Bar Council under the provisions of the Advocates Act of 1961 passed by Parliament.

Conferences of judicial officers are also convened by District Judges periodically to discuss problems of procedure and practice and senior members of the Bar also take part therein. Some of these conferences are inaugurated by Judges of the High Court which creates a further link between the High Court and the mofussil judiciary. This is a special feature developed by the Bombay High Court and has been found very useful, especially if such conferences take place after a District Judges' Conference is held at Bombay. The conferences at district level in that case would act like what are known as echo conferences, so that the District Judges are able to explain to their subordinate judicial officers and

† Speech in reply to farewell reference by the members of the Bar on March 19, 1931 in the Central Room of the Bombay High Court. (1931) 33 Bom. L. R., Journal Section, p. 17, at p. 23.

the members of the Bar the decisions taken at the District Judges' Conference in Bombay. In Bombay, the postings and transfers are done by the High Court every year and even in the middle of a year if found necessary for administrative reasons. In making such transfers and postings, the convenience of the members of the judiciary on the ground of educational needs of their children or close relations staying with them or medical facilities etc., are generally taken into consideration.

In this complicated task of administration, the High Court has the service of the Registrar on the Appellate Side, who is drawn now from the ranks of District Judges. Formerly, the Registrar used to be drawn only from the ranks of District Judges belonging to the Indian Civil Service. Later on, members of the Provincial Service became eligible and came to be appointed as Registrars. Except Dewan Bahadur M. G. Rao, who was a member of the Appellate Side Bar and had occupied the post of the Deputy Registrar and who was appointed permanently to the post of the Registrar, no member of the Appellate Side Bar has been appointed to this post in a permanent capacity.

There have been two instances in the past when lawyers who had no connection with the mofussil temporarily filled the post of the Registrar. Mr. R. D. Sethna was a lawyer practising on the Original Side when he filled the post of the Registrar for some time, while Mr. N. D. Gharda who was also the Registrar for some time was not even a practising member of the Bar, much less had he any experience of the working of the courts in the mofussil.† As early as 1932, the Reorganisation Committee appointed by the Government of Bombay had observed that it was not necessary to select the Registrar from the judiciary and had proposed to place the Registrar's post on the same basis as the Master and Registrar in Equity on the Original Side though on grounds of retrenchment the Committee had proposed the scaling down of the pay of the post to that of the Small Cause Judges and the Presidency Magistrates.¶

While many posts in the offices on the Original Side of the Bombay High Court are open to the members of the Bar, down from the post of the Prothonotary and Taxing Master and have been competently filled by them, the only posts that have been filled on the Appellate Side from the Bar are the posts of one Assistant Registrar, who acts also as Taxing Master, the Deputy Registrar and the newly created but not yet permanent post of an Additional Registrar. The post of a special officer newly created on the Appellate Side as well as a similar post in the office of the Nagpur Bench of the High Court at Bombay is also filled from the ranks of judicial officers. The Advocates' Association of Western India had in times past urged the appointment of a member of the Bar to fill the post of the Registrar and it was on account of this demand that Dewan Bahadur M. G. Rao came to be appointed as a permanent Registrar during the time of the Chief Justiceship of Sir Leonard Stone. The main argument against the appointment of a member of the Bar to fill the post of the Registrar was that an officer of the status of a District Judge who is familiar with administrative work and conditions in the districts would be the fittest person to be appointed the Registrar as he would be in a position to deal effectively and efficiently

† See the memorial submitted to the Chief Justice and Judges by the Advocates' Association of Western India in December 1935.

¶ Report of the Reorganisation Committee (1932), Chapter XIX, paragraph 311, p. 177.

with all problems that arise regarding postings and transfers, relief to be given to particular courts and other numerous matters of day to day administration which arise in the mofussil. While there was at one time a good deal of force in this argument, with the creation of an Additional Registrar's post which should be made a permanent post, the Registrar's post can now be filled by a member of the Bar or by promotion of an officer recruited from the Bar holding the Additional Registrar's post, and in that case the Additional Registrar can as well be drawn from the ranks of junior District Judges. The Registrar is generally not the senior most District Judge, and his selection has in the past led to some grievance on the part of District Judges of about the same standing, as it is felt that the Registrar's post brings its occupant in close contact with the Judges of the High Court and that has its advantages. The question, in the Author's opinion, may have, therefore, to be considered in the near future, if the feeling amongst members of the Bar is the same as in old days that the Registrar's post should be filled from the Bar.

In view of the important role of District Judges in the judicial administrative machinery, it had been felt for long that the High Court should hold periodically a conference of District Judges to discuss important administrative problems and questions of practice and procedure and other matters relating to residential accommodation of judges and the members of the staff in the mofussil, library facilities etc., as vitally affect the smooth running of the machinery of administration of justice. But no such conference was actually held till 1946. About 20 years prior to this, there was an informal conference, it appears, of some District Judges held at Poona over which Mr. Wild, the then District Judge, Poona, presided, but that does not seem to have been initiated by the High Court. It appears to have been held during the Indian Civil Service Week, which used to be an annual celebration at one time, enabling Indian Civil Service officers to meet together once a year. Only a few questions appear to have been discussed informally at that conference.

The first District Judge's Conference was held officially by the High Court at Bombay during the time of the Chief Justice, Sir Leonard Stone. It was held on March 29 and 30, 1946 in the Chief Justice's Court. The Administrative Judge, who was present at and participated in the conference was Mr. Justice Lokur and he appears to have addressed the conference at its second sitting. The Chief Justice, in his speech, pointed out that the conference was the first of its kind and hinted that it heralded possibly further periodic conferences of District Judges in the future. The first reason he assigned for calling the conference was the fact that he had completed his tour of 17 districts, but he himself described it as a secondary reason. The primary reason for calling the conference may be described in Sir Leonard Stone's words: "I would give you as our first reason that we are living in times pregnant with great possibilities and with great changes, and that it is right that judges should get together to discuss amongst themselves matters which they have the best opportunity of knowing about. I think that the High Court should be in a position to express its views to whatever Government this country is going to have, if it is asked to advise with regard to the administration of justice and any changes or improvements which can be made." The Chief Justice then referred to some of the questions of judicial administration in the mofussil and the problem of overcrowding in the mofussil Bars which he had noticed during his tour. He expressed himself

as enormously impressed by the standard of advocacy at the district and taluka centres and said that there was a good deal of potential talent but there were too many members of the Bar trying to get a living wage for which there was not enough work to go round. As regards the staff of the subordinate courts, he said that the clerks were inadequately paid with no sufficient prospects in future. Bailiffs and peons, according to him, were grossly underpaid, which resulted in an amount of corruption especially among the bailiffs. "Not only", he said, "you have to pay to get your process served, but people pay in order that processes be not served". This cannot in any sense be regarded as an exaggerated picture drawn by Sir Leonard Stone. The Chief Justice also spoke on the necessity of judges being independent of executive interference. Those were days when separation of the judicial and executive functions had not been accomplished. With separation, there is every reason to hope, that interference on the part of the executive officers is a thing of the past.

There were five District Judges belonging to the Indian Civil Service who attended the conference, including the present Chief Justice Mr. H. K. Chainani, then District Judge, Surat, and Mr. D. V. Vyas, District Judge, Ahmedabad. During the discussion on the subject of adjustment of seniority for promotion among the three wings of the District Judges with reference to their practice at the Bar and service, these judges gave their opinion that recruitment from the Indian Civil Service to the judicial service should be stopped as soon as possible and that all Indian Civil Service officers then in the judicial branch of the service should be given the option of reverting to the executive. After independence this option was conceded and was exercised by some of these judges.

There was no further conference of District Judges till 1951. The second conference was held on March 23, 1951, in the Judges' Library of the Bombay High Court. It was presided over by Chief Justice Mr. M. C. Chagla. Mr. Justice G. S. Rajadhyaksha and Mr. Justice P. B. Gajendragadkar attended and participated in the conference as the first and second Administrative Judges respectively. Like the first conference, this conference also came to be held after Mr. Chagla had paid visits to some of the districts in the State. It may be mentioned that these visits of the Chief Justice to the District Courts and some other courts are intended to obtain first-hand knowledge of local conditions and problems and to tender guidance to judicial officers, wherever necessary, while inspecting the courts.

In his speech the Chief Justice first referred to the problems created by the merger of some of the Native States in the State of Bombay, like Baroda, Kolhapur, the Gujarat and the Deccan States. He congratulated the District Judges concerned in discharging successfully the great responsibility thrown on them of bringing the standard of justice in these areas to the same level as it prevailed in Bombay and in introducing the Bombay ideals of impartiality, efficiency and punctuality in these areas. He referred to the impending separation of the judicial and executive function which would throw greater responsibility on District Judges. The increase that had been brought about in the pecuniary jurisdiction of Civil Judges, from Rs. 5,000 to Rs. 10,000, had naturally led to an increase in civil appeals before the District Judges and the Assistant Judges. Within these limits, Mr. Chagla pointed out, the courts would be doing the same work which

was so far being done by the High Court in First Appeals of the value within these limits. He stressed that the Assistant Judges had to realise that their judgments, when they are doing civil appellate work, should be of a character which would strike the High Court as having been written from a sense of responsibility as the first fact finding court. Mr. Chagla then referred to the returns of disposal of civil appeals from different districts, which revealed an unsatisfactory state of affairs, because there were a large number of civil appeals pending disposal in those districts. He asked the District Judges to bear in mind how important it was that the arrears should be cleared and should not be allowed to grow any further. The Chief Justice finally praised the District Judges' work in successfully maintaining proper judicial standards in their districts.

Numerous problems about administration of justice were discussed at this conference. One problem related to vacations enjoyed by the Sessions Judges and Additional Sessions Judges, and the decision that was accepted was that the general rule should be that all criminal work received before the vacation should be first disposed of and the work received during the vacation may be dealt with after the opening of the courts. This rule of practice has been now invariably followed in the mofussil as well as in the Sessions Court in Greater Bombay. One subject discussed at this conference was about the dress of pleaders in the mofussil. The general sense of the conference was that a black coat should be prescribed for all pleaders appearing in court. It was however thought that before passing any order to that effect, it would be desirable that District Judges should elicit opinion of the District and Taluka Bars in their respective districts as to whether such a proposal would be acceptable.

The third District Judges' Conference was held after four years on April 16, 1955, in the Judges Library. Mr. Chagla as the Chief Justice presided over the conference and Mr. Justice Y. K. Dixit and Mr. Justice H. K. Chainani attended and participated in it as the first and second Administrative Judges respectively. Mr. Chagla in his speech asked the District Judges to bear in mind that India was essentially a country of villagers and poor people and unless they felt that justice was properly administered it could not be said that the courts had succeeded in their task. He referred to the most outstanding event that had taken place after the last conference of 1951, namely, the separation of the judiciary from the executive. This reform made District Judges judicial heads of the districts in the real sense of the term. He asked them to maintain a very strict supervision over the subordinate criminal courts which had been brought under the administrative control of the High Court after the separation. "Civil courts", said Mr. Chagla, "have been going on following standards and traditions which are very old, but as far as criminal courts are concerned they come under our supervision for the first time, and therefore I would like to impress upon the Sessions Judges the very great importance of keeping a close scrutiny over the work done by the magistrates." The question of arrears of civil appeals also came in for consideration. The target that the Chief Justice wanted to be aimed at was that no civil appeal should remain pending for more than one year. He impressed on the District Judges the necessity of doing their administrative work as far as possible outside court hours. Such a system created a good effect on the public as well as the litigants who do not like to come to court and find that the judge has not turned up for half an hour or an hour. Formality and

dignity, he said, are qualities which should be present in the administration of justice and the impression created on the public mind in this respect is undoubtedly of great importance. That is why it was essential that a judge should not at his own sweet will alter the time of the working of the court by entrenching upon it the work of disposal of administrative files. It may be mentioned that that is the practice that has been invariably followed by the Chief Justice and all the Administrative Judges in Bombay.

The Chief Justice also touched upon another important point, namely, about the manner and the contents of confidential reports submitted by the District Judges about the judges and magistrates subordinate to them. Often they were found to be worded in a language of hyperbole instead of containing an honest, accurate and outspoken appraisal of a subordinate judicial officer's work. This naturally made the task of selecting Assistant Judges very difficult. He also made it clear that so far as criminal courts including the sessions court were concerned, they could not enjoy the vacations, but that the system of holidays could be revised by the District Judge in consultation with the members of the Bar to suit both the litigating public and the practising lawyers. This conference also considered the question relating to practice and procedure about recording of a confession. Even after separation, confessions were being recorded by Executive Magistrates who are not under the administrative control of the Sessions Judge. The opinion expressed by the conference was that Judicial Magistrates alone should record confessions. The present rule in the revised Criminal Manual of 1960 allows a confession to be recorded by a Judicial Magistrate or a District Magistrate or a Sub-Divisional Magistrate or any other Magistrate specially empowered by the State Government. The conference was also of the opinion that no judge or magistrate should attend any function, however important, arranged in connection with the visit of the Governor or any other dignitary if it was held during court-hours. That is in accordance with what the High Court Judges themselves have been doing in Bombay. Just prior to the bifurcation of the State of Bombay, there was a Government House farewell function but Judges could not attend it as it was held during working hours of the High Court.

After the third conference held in 1955, there was a lull again for five years. This is somewhat surprising because as a result of the first reorganisation in 1956 the bilingual State comprised no less than 40 districts and there were certainly urgent and important administrative problems which could have been discussed. But no judicial conference came to be held after the first reorganisation during the tenure of office of Mr. M. C. Chagla.

The fourth District Judges' Conference was convened on February 5 and 6, 1960, a few weeks before bifurcation. That was held in the Kirtikar Law Library in the High Court building. The present Chief Justice Mr. H. K. Chainani presided and the Author and Mr. Justice D. V. Patel attended and participated in the conference as the first and second Administrative Judges respectively. Mr. Justice K. T. Desai, Mr. Justice V. M. Tarkunde and Mr. Justice V. A. Naik also attended this conference as other Judges concerned with the administration. This was the largest District Judges' Conference ever to be held in the State of Bombay. It had a very heavy agenda before it. Its importance lay in the fact that the State was breaking up into two States within a couple of months and it was felt that

the decisions taken at this conference would be of great help in administrative matters to the new High Court of Gujarat. Besides, like the previous conferences, this conference was also held after Mr. Chainani had visited many of the districts and some other judicial centres where he could make a personal study of conditions prevailing in the mofussil courts. The Chief Justice told the District Judges assembled that he found the conditions in the offices of some of the courts 'shocking', though he had given sufficient advance notice of his intended visit. He also pointed out that while judicial work was of primary concern, the administrative work was no less important. It was necessary that they should periodically visit the offices of their courts to enable them to come into contact with members of the staff, which would make it possible for them to exercise a close supervision over the work of their staff. It may be mentioned that Mr. Chainani not only tendered this advice to the District Judges but followed it up regarding the High Court offices as well. This is an innovation which is perhaps of considerable value in tightening up the administration. Mr. Chainani found from his visit to the lower courts that many matters were often unready but which with a little attention could be made ready. He, therefore, asked the District Judges to scrutinize the returns from the subordinate courts carefully to secure disposal of old cases and prevent accumulation of fresh arrears. He also advised them to meet their subordinate judges periodically and give them advice and instructions wherever necessary. He told the conference that the objective that the District Judges should set for 1960 should be that no civil matter should remain pending which was more than one year old, and no criminal case, whether in the District Court or in the Court of a Magistrate, should remain pending for more than six months.

The conference discussed steps to dispose of old cases and criminal matters within certain time-limits and evolved a workable rule for adequate disposal of cases every month in the Courts of the District and Sessions Judges as well as in the subordinate courts. It was, however, recognised that no hard and fast rule could be laid down as to what could be regarded as adequate disposals since the nature of litigation differed from place to place. An important step was also taken by preparation of a standard list of text-books, civil and criminal, which were to be provided for different judges and magistrates. The Concise Oxford English Dictionary is one of them. The key-note of this conference was devising of methods for clearance of old cases and quicker disposal of current cases.

The last of the series of these conferences before the Centenary was held on April 21 and 22, 1961 also in the Kirtikar Law Library. This conference came nearly one year after bifurcation with the High Court's jurisdiction reduced to 25 districts. The Chief Justice Mr. Chainani presided over the conference, and the Author and Mr. Justice Tarkunde attended and participated in it in the capacity of first and second Administrative Judges respectively. In this conference also the Chief Justice defined the objective about the pendency of cases by stating that no criminal case should remain pending for more than six months, a regular civil suit should be disposed of within 12 months and a special suit within two years. He, however, made it clear that while the High Court was anxious that old criminal and civil matters were disposed of as soon as possible, there was equal anxiety that the quality of work should not suffer and what the High Court wanted was not disposal for the sake of disposal but that there should be both quality and quantity and that "every case must receive the time, care and

attention which it properly and legitimately requires". He impressed upon the District Judges the necessity of familiarizing Assistant Judges with administrative work. That was necessary in view of the fact that there have been in recent times very rapid promotions. He suggested that Assistant Judges might be placed in charge of certain branches or departments of the District Court office. The key-note of this conference also was consideration of steps to be taken to achieve the targets fixed for disposing civil appeals, special suits and regular suits. The normal period of disposal of special darkhasts, regular darkhasts, small cause darkhasts, as well as steps to see that the time-limit fixed for disposal was adhered to were discussed and decisions taken on these matters. Normal disposals by several grades of judicial officers also came to be discussed and decisions taken.

It has now been decided that normally sessions cases should be disposed of within three months from the date of their receipt in the Sessions Court as also criminal appeals and criminal revision applications. Other criminal cases are to be disposed of within six months, regular civil appeals within one year, miscellaneous appeals and applications within six months, and special civil suits as also land acquisition references within two years. The time-limit for regular civil suits has been fixed at one year and for small cause suits six months. In order to ensure that cases are disposed of within these time-limits, monthly returns are scrutinized in the High Court office. Thereafter they are submitted to one of the Administrative Judges and the Chief Justice. Wherever necessary, suitable instructions are issued in order to secure expeditious disposal of old matters. It may be mentioned that the Law Commission considered the question of arrears and made certain recommendations, and the decisions now taken are intended to give effect to some of these recommendations. If results are to be the test as to the validity of these measures, then it must be said from the actual disposals that the decisions taken in the fourth and fifth District Judges' Conferences have on the whole proved effective.

PROBLEM OF ARREARS AND DISPOSALS.

This is not at all a new problem. From times past it has existed in the mofussil and in the subordinate courts in Greater Bombay and in the High Court itself. It engaged the attention of the High Court in 1886 when the question of the appointment of an eighth permanent judge came up for consideration. It was discussed at the time when the High Court wanted a ninth permanent judge. The question has cropped up from time to time whenever the question of increasing the strength of the High Court judges has been raised. There has been a tremendous in creasein civil and criminal work in the High Court due to merger of States, reorganisations, new social legislation, writ and other special applications under the Constitution, increase of crime and other reasons. Increase in the strength of the judiciary has not solved the problem since this increase is not commensurate with the increase in work. Extra-judicial enquiries occupied the time of some of the High Court judges even before Independence. It is much more so after Independence. Remedies have been devised to cope with the problem and to take steps to implement them. There has been criticism about these measures in the mofussil as also in Bombay. It is no use criticizing the High Court alone for taking these steps. At the same time, the fact cannot be ignored that there is criticism at the Bar both in the High Court and in the mofussil about what is often called the spirit of disposal.

That criticism has to be appreciated, understood and considered. The subordinate judiciary has hardly any say in the matter and it can only act as an instrument of the policy decisions taken by the High Court.

The problem of arrears in the High Court was studied by the High Court Arrears Committee of 1949 presided over by Mr. Justice S. R. Das, and recommendations have been also made about it by the Law Commission, some of which have been sought to be implemented.

It is useful to collect together the recorded reaction of the Bench and the Bar on the point of disposal so far as the High Court is concerned. The members of the Bar who have practised before and after Independence in the High Court have not been particularly happy at one time or the other with the manner of disposal of appeals and cases on the ground of growing arrears. Protests from the Bar could only be by their nature indirect and courteous. As early as 1946, Mr. C. K. Daphtari, the then Advocate-General, in welcoming a newly appointed Judge, exhorted him thus: "If I may utter a word of respectful entreaty, be your shibboleths thoroughness and the satisfaction of the public rather than despatch and disposal." ° Mr. M. C. Chagla as the Chief Justice in his address to the second District Judges' Conference in 1951 impressed on the District Judges that "giving a fair and patient hearing, doing justice, understanding and appreciating the point before you, being courteous and kind to the Bar are much greater and important qualities than mere disposal" * though he also stressed the importance of clearing up old arrears. It is a principle which applies to all courts and it has been by far and large observed rather than broken. Mr. Justice J. C. Shah, later a Judge of the Supreme Court, in his inaugural address at the Bombay State Lawyers' Conference at Surat in 1954 dealt with the problem of delays which were partly responsible for increasing costs to the litigants. He answered the criticism that was levelled against expedition which had been called 'a craze for disposal' and asserted that "often that is a cry of vested interests. I would even welcome the opprobrium of craze for disposal if uniform expedition for purposes of doing justice with swiftness and certainty is adopted for hearing and decision of cases." † Mr. M. P. Amin, in his presidential address at the Surat conference within half an hour of Mr. Justice J. C. Shah's speech, emphasised that justice delayed was justice denied, but that "any undue desire for quick disposal and disposal of cases is likely to put a premium on senior lawyers in addition to chances of injustice and dissatisfaction in the mind of the litigant."¶ As late as 1958, Mr. H. M. Seervai, the present Advocate-General, in bidding farewell to a retiring judge referred to "the current fashion to substitute hustle and hurry in place of justice" and stated that the retiring judge adhered to "the older view which looks upon both these things as very unruly servants, very much like hasty servants, who run away before half the message is heard, with the result that several messages have to be sent, and repeated interpretations have to be put upon judgments which need never have been delivered in their original form." ** The categorical statement of the present Chief Justice that what was wanted was not disposal for the sake of disposal but quality and quantity of

° Vol. 24 of the Bom. Law Journal (1946), p. 243.

* Report of the Second District Judges' Conference (1951), p. 4.

† Report of the Fourth Session of the Bombay State Lawyers' Conference held at Surat in 1954.

¶ *Ibid*—Presidential Address of Mr. M. P. Amin.

** (1958) 60 Bom. L R (Journal Section), page 50. .

disposal, each case receiving the time, care and attention which it properly and legitimately required, has been already quoted in connection with the fifth District Judges' Conference held in 1961.

It is possible to reconcile all these statements. But the Author would leave it to the readers to do so and to arrive at their own conclusions. But this much can be said without fear of contradiction that a fetish of disposal and expedition is not calculated to develop good advocacy and a strong Bar. It does not exterminate bad and irksome advocacy either. Bystanders may derive some entertainment at the expense of counsel if the Judge loses his temper, and at the expense of the Judge if there is a retort not very courteous by counsel. There is a duty cast alike on the Bar and the Bench in this matter. It is the duty of the Bar to see that unnecessary time is not wasted by absence from court when the case is called out, by sudden applications for adjournments which are likely to inconvenience the court and advocates whose cases are down below and by putting a reasonable restraint on prolixity. So far as judges are concerned, they have to be punctual, patient and courteous. If they can control arguments, well and good. If they cannot control counsel, let them "with patient inattention, hear him prate".

There is unfortunately no correct appreciation in the public mind regarding the nature and amount of work that the High Court Judges do. The more surprising part of it is that even persons in high offices on the executive side do not realise this when they talk of the leisure and vacations enjoyed by Judges and members of the Bar. For a busy practitioner there are hardly any free Sundays because he has to hold conferences in respect of cases likely to be heard on Mondays and the following days. It seems to be sometimes imagined that the judges' work in Court is not continuous but can be interrupted. That perhaps explains how phone calls at the High Court intended for judges are sometimes received even during working hours, as well as invitations to functions during these hours in honour of dignitaries like the President, Vice-President and the Prime Minister not merely from private institutions but by semi-Government or Government bodies. Ministers, who are in Bombay, can and do attend such functions, but Judges cannot and do not attend them even if the invitation comes from the Raj Bhavan. Some high officers including Ministers, who are non-lawyers, have expressed surprise at being told about the amount of work that High Court Judges have to do outside court-hours.

Every High Court Judge has to read papers at home for admission and final hearing matters with every prospect of some of them being adjourned because of illness of counsel or the matter becoming unready by the death of a party which is often announced when the matter is about to be handed up. Normally judgments are immediately dictated after the completion of the arguments in open court, but they have to be corrected as soon as they are transcribed, and this has to be done naturally outside court-hours. Judgments reserved on important points of law and in matters of complicated and bulky record or when the bench is about to break up have to be dictated outside court-hours with the aid of the record and corrected in the same manner. The Chief Justice and Administrative Judges also find their hands full every day and at week-ends with administrative work including scrutiny of the returns submitted by lower courts. In fact it is the careful scrutiny of these returns and the suggestions made by the High Court as a result of it which has enabled the judiciary to dispose of old cases. Along

with the increase in civil and criminal work, the administrative work has also tremendously increased with about 400 civil and criminal courts working in the State. In some of the High Courts there are rules as regards casual leave which is taken by the judges. But the High Court Judges in Bombay by a convention do not take casual leave except when they are prevented from attending by serious illness or urgent personal difficulties. So far the High Court of Bombay has enjoyed a well-merited reputation for its excellent record in keeping down arrears.

Up to 1956 the High Court used to enjoy in the year twelve weeks of vacation, 8 in summer, 2 weeks in October and 2 weeks in Christmas, apart from Sundays and public holidays. The working days of the High Court used to be about 190 days in a year. In 1957 the October vacation was reduced by one week. In 1958 a desire was expressed by Government and the matter was discussed at the Chief Justices' Conference that the vacations should be further cut down when it was agreed by the Chief Justices that the working days would be raised to 200. To achieve this target the summer vacation was cut down by two weeks so as to make it six weeks. Even then five Saturdays were selected as working days to make up the total of 200 days. Thereafter the Union Government insisted that the working days should be increased to 210. This was agreed to by the Bombay High Court though not without some reluctance because it meant more working Saturdays and less time for reading, during the week-end, of admission and final hearing matters. It was not liked by the members of the Bar either. All the High Courts did not act up to this recommendation. In 1961 the Bombay High Court had 15 working Saturdays, and in 1962 there were 14 working Saturdays. It has to be mentioned that this is apart from the work done by two Judges during the summer vacation and other vacations for urgent criminal as well as civil work.

The problem of arrears has therefore to be examined also from the point of view of the well-nigh impossibility of putting more strain on the judiciary except at the expense of efficiency. The attempt to control the working days of the High Courts and the power taken by the Union Government to prescribe their holidays and vacations, even though it has so far only taken the shape of directions, is regarded as a thin end of the wedge which, if pushed further, is calculated to affect the efficiency and independence of the judiciary.

CHAPTER XI

THE HIGH COURT MISCELLANY.

"The past has made the present, and we who are alive, have the future in our keeping; not that we can form it at will, but that it already exists in germ in us, and that we shall put upon it some impress, great or small, which will be traced back to us by the retrospect of the future. To those who realise this, history becomes a matter of high practical import as well as of theoretical interest." —F. S. Marvin.

The period after Independence witnessed many changes in the High Court and its jurisdiction. Some of them have been dealt with in the previous chapters. In this final chapter, it is proposed to notice a few other legal events and happenings connected with the High Court and the administration of justice.

1. LEGAL EDUCATION.

The beginnings of legal education in Bombay must be traced to a public meeting that was convened in November 1852 on the eve of the departure of Sir Erskine Perry, Chief Justice of the Supreme Court in Bombay, at which a resolution was passed to commemorate his memory by founding a Professorship of Jurisprudence in the Elphinstone Institution, which later on became the Elphinistone College, to be known as the Perry Professorship of Jurisprudence. A large sum was collected for the purpose, and ultimately the professorship came to be founded in March 1855 with the sanction of the Government of India. The first Perry Professor of Jurisprudence was Dr. R. T. Reid, LL. D., Bar-at-Law, a practitioner in Bombay.¶ Thus the Law School came into existence even before the establishment of the Bombay University, which framed and adopted the rules and regulations relating to the degree of Bachelor of Laws in 1861. Prior to that the Government Law School was affiliated to the Bombay University in September 1860. It would appear that in the beginning till 1866, the Law School even gave legal instruction to members of the Indian Civil Service in law and other kindred subjects before they took up their judicial appointments in the Bombay Presidency.

There can be no doubt that the members of the Bar and the High Court have had much to do with the growth of this seedling of legal education. The Government of Bombay had from the beginning an absolute monopoly in the matter of legal education through this Law School. It was the only institution in the Presidency for imparting legal instruction. Government guarded this monopoly zealously for years despite the fact that there was considerable criticism of the way in which the Law School was at first managed and conducted.

Some members of the Bar at one time thought of founding a private Law College. Mr. N. V. Gokhale (the Author's father), then practising on the Appellate Side, had already started a Law School with a view to developing it into a Law College with the help of a few friends. A board of management was constituted with Mr. Justice Badruddin Tyabji as chairman and Sir Narayan Chandavarkar, Sir Chimanlal Setalvad and Mr. N. V. Gokhale as members, with

¶ History of the Government Law College, Bombay, compiled by Mr. R. P. Karwe, Advocate and Registrar, Government Law College (1938), pages 1-4.

Mr. K. R. Cama, Solicitor, as the secretary. † The board applied to the University in November 1897 for the affiliation of this institution which it was proposed to name as the Bombay College of Law. Justice E. T. Candy, I. C. S., a Judge of the High Court, was Vice-Chancellor of the Bombay University at the time. He was opposed tothe affiliation of this college as he felt that some of the sponsors of this institution, who were taking active part in politics, might teach sedition to the students of this proposed college. Mr. Justice Ranade, Dr. Mackichan, Mr. Vasudeo Jagannath Kirtikar and many other members of the Senate were in favour of affiliation of this college. The Syndicate decided by a majority to recommend to the Senate the affiliation of the institution. When the matter came up before the Senate in 1898, Mr. Starling, a barrister, wanted the matter to be shelved. His proposal was, however, negatived and the Senate recommended to the Government in January 1898 that "the Bombay College of Law be recognised in the Faculty of Law". Government, however, was most unwilling to do so. The resolution passed by the Senate had at least one effect since it forced the hands of Government to examine the affairs of their own Law School and in February 1898 Government appointed a committee presided over by the then Director of Public Instruction to inquire into the working of the Government Law School and make recommendations. The committee recommended drastic reorganisation of the Law School. These recommendations were accepted by Government. The Senate's resolution, however, for affiliation of the new college remained in the pigeon-holes of the Secretariat. Ultimately in 1899 Government wrote to the Senate refusing affiliation of the proposed Bombay College of Law. This pioneer attempt to start another Law College illustrates what difficulties lawyers and public men had to contend with in those days even in matters of harmless and beneficial projects. One result of the reorganisation of the Law School was the establishment of a board of visitors for supervising the affairs of the School presided over by the Chief Justice.

Years after this, the policy of Government underwent a change. The University of Bombay had the dominating voice in the framing of law courses and maintaining standards of legal education, and the judges and lawyers who were members of the Senate and the Faculty of Law, the Board of Studies in Law, the Academic Council and the Syndicate played an active and prominent part in the improvement of these courses. The Chief Justice of the High Court was always an *ex-officio* member of the Senate. It was felt that there was need for establishing more law colleges at other centres of the Presidency on account of the rapid growth of education during the first quarter of the twentieth century. A law college was opened at Poona in 1924 and many leading members of the Bar in Bombay were connected with it as founders and professors. In Sindh which was part of the Province of Bombay then, a law college was started at Karachi in 1926. A Law College was also established in Ahmedabad known as the Sir Lallubhai Shah Law College in 1927. In Kolhapur, long before the merger of the State, a Law College was opened in 1933, and Law Colleges were also started in Surat in 1936 and in Belgaum in 1939. An application from the State of Baroda to have a law college there was, however, turned down by the Bombay University and the Government. Law Colleges have now also sprung up in the Bombay city itself putting an end to the monopoly of Government in the matter of legal

† See the *Gujarati*, dated September 22, 1929, and Recollections and Reflections by Sir Chimanlal Setalvad, pp. 161–162.

education. Apart from the Government Law College which came to be so known since 1923, there is now the New Law College, the Siddharth Law College and the Law College. In the districts in the State of Maharashtra, there are now many Law Colleges, the Poona Law College and the Kolhapur Law College both affiliated to the Poona University, the University College of Law at Nagpur, three Arts Colleges teaching law courses and affiliated to the Nagpur University and a Law College at Aurangabad under the Marathwada University.

Till 1938 legal education was imparted on a part-time basis in Bombay. The law classes of the Government Law College used to be held in the evening at the Elphinstone College. Many distinguished members of the Bombay Bar served on the staff of the Government Law College as part-time professors and principals. Admission to the degree course in law at that time was, under the Bombay University regulations, open only to graduates in Arts, Science and other subjects. Though the Government Law College produced many brilliant lawyers, as it was at first the only institution of its kind, the part-time instruction given therein as in other law colleges subsequently started, was considered deficient and unsatisfactory. The Government, therefore, appointed a committee in 1935 to go into the question of the reform of legal education. It was presided over by Sir John Beaumont, the then Chief Justice. This Legal Education Reforms Committee recommended the establishment of a full-time law college and the admission to law colleges was thrown open to students who had passed the Intermediate Examination in Arts, Science or Commerce. In 1949, the Government appointed another committee known as the Legal Education Committee, Bombay to examine how far the scheme of full-time legal instruction started in 1938 had succeeded. This committee was presided over by Mr. M. C. Chagla, the then Chief Justice. It came to the conclusion that admission at the Intermediate stage had resulted in efficiency and economy. The committee was of the view that an Intermediate student was of sufficiently mature understanding to study the law course which the committee were recommending for the law degree. It referred to the practice in England that a student who had passed the Matriculation Examination was capable of entering upon studies of subjects like jurisprudence. It may be mentioned that Mr. C. K. Daphtari, then the Advocate-General and subsequently Solicitor-General of India, and the Author, who gave evidence before the committee, pressed for the establishment of a separate law course from the stage of matriculation as in the case of science and commerce. That view, however, was not accepted by the committee. The committee was also not unanimous in its conclusions. Mahamahopadhyaya Dr. P. V. Kane and Mr. Justice Bhagwati recorded dissenting opinions. They felt that the experiment made by the Bombay University since 1938 had failed.

The Law Commission has considered this question and has come to the conclusion that the legal education imparted in India is extremely defective and not calculated to produce either jurists or competent legal practitioners. It has recommended that only graduates should be allowed to take the degree course in law which should extend for a period of two years and should be confined to teaching of the theory and practice of law and should not include procedural, taxation and other laws of a practical character. They have also recommended that law teaching should be imparted only in full-time institutions and law colleges should be manned by full-time law teathers. The first Bombay State

Lawyers' Conference in 1951 had passed a resolution recommending the constitution of an All-India Council of Legal Education and this resolution was repeated in some of the subsequent conferences. In the opinion of the Law Commission, the establishment of a Council of Legal Education was unnecessary. The Commission has recommended that the All-India Bar Council should be empowered to ascertain that the law colleges maintain the requisite minimum standards of legal education and to refuse recognition to the degrees conferred by institutions which do not conform to the minimum standards for the purpose of entry into the legal profession. It may be mentioned that the Advocates Act (XXV of 1961) passed by Parliament in 1961 constitutes an All-India Bar and a Bar Council of India. Under section 7 of that Act one of the functions of the Bar Council of India is to promote legal education and to lay down standards of education in consultation with the Universities in India imparting such education and the State Bar Councils, and to recognise Universities whose degree in law shall be a qualification for enrolment as an Advocate, and for that purpose to visit and inspect these Universities. There can be no doubt that, with the establishment of an All-India Bar Council, a big stride has been taken in the matter of attaining uniformity of standards in legal education in the whole of the country.

As previously mentioned, as a part of the reorganisation scheme introduced by Government in connection with the Government Law School in 1899, it was decided by Government to have a board of visitors to maintain general supervision of the school. The board of visitors was always presided over by the Chief Justice. Two judges were also nominated on this board, one having experience of Appellate Side and the other of the Original Side. The Advocate-General and the Government Pleader used to be always members of this visitors' board. There used to be five members of the Bar on this board drawn from the Appellate Side, the Original Side, the Incorporated Law Society and the Small Cause Court Bar. Government, however, were not very anxious to widen the scope of the powers of supervision of the board of visitors. In 1953 there was a difference of opinion between the board and the Government on the question of morning divisions of law classes as also the power of the board over the Principal of the Government Law College, who used to act as its honorary secretary. It appears that the board had given the Principal discretion to start three or at the most four morning divisions. But the Government allowed the Principal to open as many as eleven morning divisions. Formerly the Government Law College used to hold its classes at the Elphinstone College. But it has its own building since 1942 near the Churchgate Station. The opening of as many as eleven morning divisions necessitated some of these classes being held at the Elphinstone College again. The board protested against this action of Government. It also appears that, in the selection of full-time professors of law by the Public Service Commission, the board of visitors used to send one of its representatives to assist the commission. But the board wanted that the Public Service Commission should forward the list of candidates to the board first, to enable the board's representatives to consult the board in the matter of selection. As this was not accepted by the Commission and the Government, the board refused to send its representative to assist the Public Service Commission at the time of selection of full-time professors of law. The correspondence between the board and Government at this time might help to recall what Sir John Heaton had hinted

in 1912 that if Government were sometimes blunt in their letters, the High Court would pay them in the same coin. †

Being dissatisfied with the attitude of Government on some of these matters of policy, all members of the board tendered their resignations *en bloc* in November 1953. The Government accepted these resignations with regret. Since then, the High Court and the Judges have no connection with the supervision of the Government Law College. Its working is now supervised by an independent committee on which no Judge is nominated.

2. ABOLITION OF THE JURY SYSTEM.

With the establishment of Courts of Justice in this country, the jury system which had its original home in England also came to be adopted in India. In his presidential address at the eighth session of the Indian National Congress at Allahabad in December 1892, Mr. W. C. Bonnerjee, himself a distinguished lawyer, pointed out that it was on the basis of the Panchayat system that Lord Cornwallis decided in 1790 to have trial by jury. He further stated that it was on the jury system that Sir Thomas Munro based his regulation which his successor promulgated in 1827 and it was on that system that the Bombay Regulation on the subject was introduced and when the Regulations were codified in 1861, it was on that system that the law as to jury was passed. ¶ In Poona, the system of trial by jury was introduced in 1866. In 1890 when inquiries were made from the District Judge at Poona about the working of the system there, he reported that the jury system was working properly in his district. If there was failure of justice, the District Judge ascribed it to the police who were responsible for the "introduction of little bits of made-up evidence which throws discredit on the whole case."

It might be mentioned that there was no uniformity in the working of the jury system as it obtained in the city of Bombay and in the mofussil. In the mofussil itself there was difference in the way trials were held in different Sessions Courts. In some districts, trials used to be held with the aid of assessors, while in important districts trials were held with the aid of a jury but not in the case of all offences. Unlike England, the unanimous verdict of the jurors was not essential for being accepted by the judge. In trials before the High Court, the jury consisted of nine persons, whereas in trials before a Court of Session in the mofussil the number was an uneven number, not being less than 5 or more than 9 as the local Government directed. Even in districts where there was trial by jury the directions of Government were not always identical. In the High Court Sessions, the Judge was bound by the unanimous verdict of the jurors and had to decide in accordance with the verdict of the majority of the jurors when he was in positive agreement with that verdict. In that case, however, the majority of the jurors had to be not less than six. In the mofussil the Sessions Judge had to decide in accordance with the verdict of the majority of the jurors if he did not think it necessary to express his disagreement with the verdict. If he disagreed with it and was of opinion that it was erroneous or

† See Chapter III, pp. 13-14.

¶ Presidential Address of Mr. W. C. Bonnerjee at the 8th Session of the Indian National Congress at Allahabad in December 1892.

perverse, he had to submit the case to the High Court by a jury reference under section 307 of the Criminal Procedure Code. ¶

In 1934, Government once again made an inquiry as to the working of the jury system in the districts. The present Chief Justice Mr. H. K. Chainani, who was then the District Judge at Poona, was of the view that the system of trial by jury had succeeded in the Poona District and should be extended to cover all cases. He was further of the opinion that it was difficult to see why the right of trial by jury of minor offences should be withheld from the jury when they were allowed to try serious offences such as murder and dacoity.

In February 1938, the High Court received a letter from the Home Department, Government of Bombay, again asking for its opinion as to whether the working of the jury system in the Province had been satisfactory and whether it was desirable to extend the system to districts where it was not in force and whether it should be introduced in the Kolaba district. Mr. N. S. Lokur, then District Judge at Poona, expressed his opinion that on the whole the jury verdicts were justifiable on evidence, and sufficient number of the right kind of persons for being empanelled on the jury were available in Poona. He, however, admitted that there was a tendency to be lenient noticeable amongst jurors particularly in murder cases, convictions under section 302 of the Indian Penal Code being sometimes avoided. He, however, agreed with Mr. Chainani's view that the jury system should be extended to the trial of all sessions cases in the district of Poona. The opinions of other District Judges, however, were conflicting. It appears that as early as 1926, Mr. K. B. Barlee, then District Judge at Surat, had expressed his view that the system of jury was not working satisfactorily in Surat District. He stated that even in riot cases jurors, though predominantly Hindus, acquitted most of the Mahomedans, and he found that they were refusing to convict accused persons even when they put forward no defence and had offered no intelligible explanation of the evidence against them. That was also the view of the District Government Pleader and Public Prosecutor of Surat regarding the working of the system in murder cases. The system also did not appear to have worked well at Belgaum. In the district of Ahmédabad it appeared to be working satisfactorily. The view of the District Judges of Thana and Ahmedanagar was in favour of the jury system. Ultimately the High Court decided in September 1938 to express its opinion to Government that, except in Surat and Belgaum, the system had on the whole worked well.

In November 1950, a letter was received by the Bombay Government from the Ministry of Home Affairs of the Union Government, proposing to abolish the jury system. The Bombay Government forwarded the letter to the High Court which called for the opinion of the judges of the City Civil and Sessions Court in Bombay and in the districts. The Principal Judge of the City Civil Court, Mr. M. B. Honavar, reported that all the five colleagues of his and he himself were not in favour of the abolition of the jury trials in Greater Bombay. They expressed, however, that the trial with the aid of assessors and jury in the mofussil may be done away with. The opinion among the District Judges was divided. The opinions of Mr. N. M. Miabhoy (later on Mr. Justice Miabhoy), then Sessions Judge, Poona, of Mr. G. H. Guggali, I. C. S., District Judge, Surat, and of Mr. R. S.

¶ See the observations of Weston J. in *Government of Bombay v. Fernandez*, (1945) 47 Bom. L R 363, at p. 374.

Vaze, then District Judge, Thana, were not in favour of the abolition of the jury system; and that was also the opinion of Mr. V. B. Raju (subsequently Mr. Justice Raju), who was then the Sessions Judge at Dharwar. But some of the other District Judges were in favour of the abolition of the jury system. Even the Sessions Judge of Ahmedabad, Mr. M. S. Patil, gave his opinion that the jury system was not suited to the conditions prevalent in India then. The matter was discussed at a chamber meeting of the High Court in January 1951 and it was resolved that the jury systems should continue at least for the time being in Poona, Ahmedabad, Thana and Bombay, as the Judges were not satisfied that it had failed in these four places. They wanted the working of the system to be watched in these cities. It was recommended, however, that the system should be done away with in Belgaum and Surat. It was further suggested that the system of assessors should continue as that gave an opportunity to the public to be associated with the administration of justice. A letter was accordingly sent to Government on February 1, 1951.

In 1952, Mr. S. V. Ramaswami, M. P. introduced a private bill in the Lok Sabha for the abolition of the jury system on the ground that it was unnecessary and useless and had become outmoded. It was also felt that the economy involved in the abolition would be considerable. This time also the Government requested the High Court to give its opinion and the High Court asked for the views of the District Judges and also of the Bar Associations. The District Judge, Ahmedabad, wrote strongly against the continuance of the system. In his letter he gave cogent reasons for the discontinuance of the system. The Bar Association of Kolhapur wrote a fairly lengthy memorandum expressing its fundamental opposition to the abolition of the jury system which, according to it, would be a retrograde step. That memorandum gave several reasons for the continuance of the jury system. It may be said that generally the Bar Associations were against the abolition of the jury system though they favoured the doing away of trial by assessor. The Bombay Bar Association was in favour of retention of the jury system. The Advocates Association of Western India urged that the jury system should not be discontinued but that the system of criminal trial by jury should be introduced in all districts. It, however, said that as a safeguard against erroneous verdicts by the jury an appeal on facts as well as on law should be provided. The system of trial with the aid of assessors should, however, be abolished. It is interesting to note that this reply from the Advocates Association of Western India was under the signature of Mr. Y. V. Chandrachud, then the Secretary of the Association, now Mr. Justice Chandrachud. The High Court considered these conflicting views and expressed its agreement with the views of the Bar Associations that the system of assessors should be done away with. Regarding the jury, the High Court adhered to its views expressed in its earlier letter dated February 1, 1951, and a reply was accordingly sent to Government. It might be mentioned that the question of the abolition of the jury system had also been considered at lawyers' conferences. Mr. Jahagirdar at one time Government Pleader and an ex-Judge, in his presidential speech at the third session of the Bombay State Lawyers' Conference at Sholapur in 1953, had advocated that the list of jurors should be prepared on the basis of educational qualifications and a regular appeal on merits should be allowed to the High Court against an order of conviction by a jury. That was the view expressed also at the previous conference held at Nasik in 1952, when Mr. M. C. Setalvad presided,

in a resolution moved from the chair. At the fifth session of the conference at Dharwar, Mr. Purshottom Trikamdas though he stated that he was not enamoured of the jury system as it worked then, he was in favour of having the jury system based on an unanimous verdict which would, in his opinion, well-nigh make it impossible to attempt to corrupt the jurors.

In December 1955, there was correspondence between the Chief Minister and the Chief Justice as to the working of the jury system. It was felt that it was difficult to get the required number of jurors of the right type and calibre and that jurors were not competent to come to a reasonably correct conclusion on facts as they were not equipped by training or experience to understand and decide complex questions. Many of the jurors appeared to think that it was a burden to act as jurors. It was further felt that jurors were easily approachable and moved by extra-judicial considerations. Another important reason was that trial by jury took more time than an ordinary trial and was, therefore, more expensive. Though the jury system had good points, the disadvantages appeared to outweigh the advantages. This question was considered at considerable length by the Judges and it was ultimately decided that the jury system should be discontinued in the mofussil. Government accordingly issued a notification on September 3, 1956, abolishing the jury system in Sessions Courts in the mofussil. The trial by assessors was also done away with.

After reorganisation, it was also decided to do away with the system of trial by jury in the Vidarbha districts and an order was accordingly issued abolishing the jury system from that area from September 2, 1957. The trials in sessions cases in Marathwada, Saurashtra and Kutch were not with the aid of juries. So the question of abolition of the jury system did not arise in those areas.

There were complaints also regarding the working of the jury system in the Sessions Court in Greater Bombay. In April 1958, the Chief Justice, Mr. Chagla, directed the Principal Judge to consider whether the time had not come to abolish the jury system and whether trials would not be much more satisfactory if they were held before a judge without a jury. The report submitted by the Principal Judge disclosed a sharp difference of opinion amongst the judges of the City Civil Court. Half his colleagues were in favour of retaining the jury system, the other half including the Principal Judge himself were in favour of its abolition. The grounds urged in favour of the abolition of the system were similar to those which prevailed with the High Court in its decision to abolish the jury system in the mofussil. The system, it was felt, had outlived its purpose and was outmoded in the modern context and it was stated that in the interests of uniformity also it was better to abolish the jury system in Greater Bombay. Jurors were not very enthusiastic to serve as jurors and attended the courts reluctantly. It was felt that they did not possess the necessary legal knowledge and experience in weighing evidence and were liable to be swayed by sentiment and sympathy and by the eloquence of counsel. It was difficult for them to remember the whole evidence in a big case without notes. The jury trial took more time than a trial by a judge and, if the trial was protracted, it was thought that there was always the danger of jurors being approached by agents of the parties. It was finally felt that the independence and training of judges in the City Civil Court had kept them free from executive interference and influence and the judge alone was in a better position to appreciate evidence aud decide the case satisfactorily. The

report of the Principal Judge was considered by the Chief Justice and Judges and it was decided that the jury system should be abolished in Greater Bombay also. Government was accordingly informed that the system of jury had outlived its utility and should be discontinued. This view of he High Court was accepted by the Government of Bombay. With the enactment of the Code of Criminal Procedure Amendment Act XXIII of 1961, trial by jury in Greater Bombay also came to an end from May 4, 1961.

It is true that this step of the abolition of trial by jury has been regarded by some as a retrograde step. It is said that while wider powers including judicial powers are being conferred on Village Panchayats in the interest of associating the public with the administration of justice, an inconsistent step was taken regarding towns and cities where the percentage of literacy is higher. There can be little doubt, however, that the system of jury as it worked both in the mofussil and in Greater Bombay was very unsatisfactory. In view of the strong grounds urged in favour of the abolition of the jury system, which on a careful consideration the High Court accepted, the decision which the High Court took appears to be justified.

3. INTRODUCTION OF *Ad Valorem* COURT-FEES ON THE ORIGINAL SIDE OF THE HIGH COURT AND PROVISIONS FOR REFUND OF COURT-FEES.

In 1951, Government appointed a committee to consider the revision of court-fees levied in the State of Bombay including those levied on the Original Side of the High Court. The committee recommended that the rates of court-fees that had prevailed on the Original Side should be revised in order to bring them into line with those levied in other courts of the State. The report of the committee was considered by the High Court which did not accept the proposals contained in the report on the ground that they were contrary to the ideals of free justice. The High Court made its own proposals as a compromise. It was suggested that the institution fees on the Original Side should be increased from Rs. 30 to Rs. 100 except in matrimonial suits. It was further suggested that in summary suits and all undefended suits, other than suits under the Matrimonial Jurisdiction, the plaintiff should pay, before the sealing of the decree, court-fees leviable under the Court-Fees Act. It was also proposed that the plaintiff should be entitled to a refund of court-fees in those cases in which he was entitled to get a refund in the City Civil Court. Government did not accept these suggestions of the High Court to increase the institution fees but adhered to its decision that the rates of court-fees leviable on the Original Side should be on the same scale as that in other courts, namely, on an *ad valorem* basis. The High Court in its letter of November 1953 had also requested Government to stay their hands and not to give effect to the proposals to introduce *ad valorem* court-fees on the Original Side because it appeared that the question of judicial reform including that of the dual system was then under the active consideration of the Union Government. Government, however, did not agree with this view of the High Court and passed the Court-Fees (Bombay Amendment Act) (XII of 1954). The result was that *ad valorem* court-fees came to be introduced in the High Court from April 1, 1954, which effected a revolutionary change in litigation on the Original Side.

It is difficult to say how the Government could have accepted the suggestions made by the High Court. The ideal of free justice is not a new ideal and the

earliest and severest criticism of the Court-Fees Act of 1870 is to be found in the following observation of Mr. Justice Mahmood of the Allahabad High Court in 1890: "I hold following the views of Jeremy Bentham, that law taxes, the more stringent they are, the less do they achieve their aim, for they are stringent not in the interests of justice, but make the administration of justice difficult and in many cases impossible." ¶ As against this view, the imposition of court-fees has been defended from the beginning on the ground of their desirability in checking litigation. It cannot now be disputed that court-fees are regarded by the State Governments as an ideal source of revenue. It is true that the scale of court-fees which were raised as a temporary measure during the second World-War in Bombay has been now confirmed as a permanent measure. The Law Commission in its report expressed strongly against a high scale of court-fees: "A modern welfare State", says the Law Commission, "cannot with any justification sell the dispensation of justice at a price. Perhaps a small regulatory fee may be justified; but the present scales of court-fees are wholly indefensible." †

It must also be observed that the Court-Fees Act, as amended by the Government of Bombay in 1954 and again in 1959, has removed some at least of the glaring anomalies which disfigured the original Act, and has introduced some rational basis for the levy of court-fees. Besides, these amendments have provided for refund of court-fees in case of settlement or withdrawal of suits and appeals. Originally the only provision for repayment of court-fees when matters were settled out of court was to be found in section 73 of the Presidency Small Cause Courts Act of 1882. Section 11 (2) of the Bombay City Civil Courts Act, 1948, similarly empowers the Provincial Government to provide by order for repayment of any part of the institution fees to plaintiffs in case suits were disposed of under circumstances to be specified in the Government order. Accordingly Government issued a notification on August 14, 1948, providing for such repayments. A disparity was, however, observed on this point between the refund allowed in the Small Cause Court and that in the City Civil Court in view of an article published in a local newspaper. The Government of Bombay consequently amended section 73 of the Presidency Small Cause Courts Act by conferring a power upon themselves to provide by notification for repayment of court-fees and Government thereafter issued a notification in October 1959 remedying the anomaly. Rules 14 and 15 framed by Government under the Bombay Rents, Hotels and Lodging House Rates Control Act (LVII of 1947) in exercise of the powers conferred by section 49 of the Act provide for levying of court-fees in suits, appeals, etc. under this Act in Greater Bombay as well as outside Greater Bombay, and rules 14 (4) and 15 (3) provide for refund of such fees if the matter is settled by agreement between the parties before the hearing. There was, however, no provision for refund in the Court-Fees Act itself with regard to other suits instituted in the mofussil and appeals therefrom. In one appeal filed against a decree passed by the City Civil Court, this question of refund was raised when permission was sought to withdraw the appeal, as the dispute between the parties was settled out of court. The High Court held that it had no jurisdiction to order the refund of court-fees which the appellants were

¶ *Balkaran Rai v. Govind Nath Tiwari*, (1890) I. L. R. 12 All. 166 (F B).

† Law Commission of India, Fourteenth Report, (Reform of Judicial Administration), Vol. I, Chapter 22, para. 8, p. 490.

in law liable to pay. It was, however, observed that "Government should realise the very great desirability of encouraging litigants not to indulge in unnecessary litigation and of putting an end to such litigation as soon as possible. One of the ways of doing this is to induce litigants to withdraw suits and appeals, or to compromise suits or appeals; and one way of helping them to do so is by tempting them by return of court-fees." After referring to the provisions in some of the other Acts noted above and the omission of such provisions in the Court-Fees Act, the High Court strongly recommended to Government to amend the Court-Fees Act and to bring it in line with the other Acts.* Partly as a result of this recommendation and subsequent correspondence carried on between the High Court and the Government, when the Court-Fees Act, 1870, was amended by Bombay Act XII of 1954, section 31 was inserted providing for refund of court-fees in suits settled by agreement between the parties before issues were settled and further powers were given to the Government to refund court-fees in different proportions in suits which were disposed of under different circumstances by settlement between parties, by issuing the necessary notification in that behalf. But even under this amendment, refund could not be claimed in appeals so settled or compromised. The High Court, therefore, decided to take up the matter with the Government. In the meanwhile, the Government of Bombay appointed a committee for the revision and unification of court-fees in the various component areas of the State of Bombay in 1958. That committee submitted its report in June of that year. A bill seeking to amend the Court-Fees Act was circulated to the High Court for its opinion. It was decided by the High Court that without attempting to give its views or opinion on the measure, in accordance with the settled policy of the High Court, the omission about any provision for refund of court-fees in appeals might be brought to the notice of the Government. A letter was accordingly sent on April 2, 1959. In the Act, which ultimately came to be enacted, *viz.*, Bombay Act XXXVI of 1959, section 43 made provision for refund of court-fees in suits, appeals, etc., settled by agreement between the parties and also empowering Government to order refund of court-fees in different circumstances by issuing a notification. A further communication was, thereafter, addressed by the High Court on July 26, 1959 to Government regarding refund of court-fees to be allowed at different stages in an appeal. Two notifications accordingly came to be issued in August 1959 permitting a refund in case of suits disposed of by the High Court on the Original Side, and those disposed of by District Courts or subordinate civil courts constituted under the Bombay Civil Courts Act, 1869, or the Courts of Small Causes constituted under the Provincial Small Cause Courts Act, 1887, and a third notification was also issued permitting refund in appeals and cross-objections settled by agreement between the parties at different stages.

One Mr. V. B. Oka, a pleader of Dhulia, it appears, subsequantly drew the attention of the Government of Bombay that petitions under the Hindu Marriage Act, though they were for all practical purposes suits, would not be governed by the notification issued under section 43 of the Bombay Court-Fees Act, 1959. Government sought the views of the High Court on this point, and on June 27, 1960 the High Court wrote to Government pointing out the desirability to amend section 43 of the Act to bring within its purview applications and petitions

**Karfule Ltd. v. Varghese*, (1952) 54 Bom. L R 664, 667.

generally. Government, it seems, have not as yet taken any action on this point.

It would thus be observed that it was because of the suggestions made by the High Court itself that the Court-Fees Act has undergone amendments which provide for refund of court-fees under certain circumstances and at certain stages. This, it is hoped, would induce litigant to settle disputes amicably at an early stage in suits as well as appeals.

4. LANGUAGE OF COURTS.

The provisions of the Constitution regarding the official language of the Union are contained in Part XVII. Under Article 343 the official language of the Union is to be Hindi in Devanagari script. But for a period of 15 years from the commencement of the Constitution, the English language is to continue to be used for all the official purposes of the Union. During this period, the President may by order authorise the use of the Hindi language in addition to the English language. Article 345 allows the Legislature of a State to adopt by law any one or more of the languages in use in the State or Hindi as the language or languages to be used for all or any of the official purposes of that State, but till then the English language is to continue to be used for official purposes. Under Article 346 the language for the time being authorised for use in the Union for official purposes shall be the official language for communication between one State and another State and between a State and the Union. But two or more States may agree to have Hindi language as the official language for communication between such States. Under Article 348, notwithstanding the foregoing provisions, until Parliament by law otherwise provides, all proceedings in the Supreme Court and in every High Court are to be in the English language as also the authoritative texts of all Bills or Acts or orders, rules etc. made by Parliament or the Legislature of a State. It would be noticed that nowhere under the Constitution Hindi has been referred to as the national language, but only as the official language. That was possibly done in the interest of avoiding unnecessary controversy.

The question of the future language of proceedings in court is of vital importance in view of the foregoing provisions of the Constitution. It has been discussed by members of the Bar and the Bench after the coming into force of the constitution. The general consensus seems to be that if and when English has to be replaced it should be replaced only by Hindi, the official language, and not by any regional language so far as judgments and orders of all the courts are concerned, if confusion and chaos is to be avoided and national unity preserved. As early as July 1948, Sir Harilal Kania, Chief Justice of India, while inangurating the Orissa High Court at Cuttack, uttered a note of warning on this point. He stressed that while it was desirable to have one national language so as to unify India as a whole, the matter could not be worked out at a moment's notice and that one has to be patient with the question of turning over from one language to the selected language for the whole of India.*

In the memorandum submitted on behalf of the Bombay High Court to the Law Commission on the question of the future language of courts, it was suggested that whenever English came to be replaced, Hindi alone should replace it. All judgments which are now written in English will have to be written in Hindi,

*(1948) 50 Bom. L R (Journal Section), p. 103, at p. 105.

but depositions in mofussil courts should be recorded in the regional language or languages and Hindi, instead of the regional language or languages and English as at present. It was emphasised that if the regional language was adopted for judgments or orders, it would lead to confusion if the matter came up before the High Court in appeal or revision. It was further stated that if Hindi was not adopted at all the levels of the judiciary from the top to bottom, the unity of judicial administration would break resulting in deterioration in the standards of efficiency. It was urged besides that co-ordination between the judiciary in the different States and the Union as well as between members of the Bar throughout India would be rendered difficult if Hindi did not replace English. To achieve the object of Hindi substituting English, it was suggested that there should be a standardized and uniform legal terminology in Hindi and further that Hindi should not replace English unless a generation grew up steeped in Hindi, which could think its thoughts in Hindi and express itself with facility in Hindi. It was further suggested that to train up lawyers who would be able to argue in Hindi the courses of study in schools and Universities must have Hindi as a compulsory subject and Hindi would have to be adopted as the medium of instruction in the University, at any rate, for legal courses. The Law Commission's recommendations on this subject have generally followed this line of reasoning. It has expressed its agreement with some of the recommendations made by the Official Language Commission and disagreed with others and concluded that "the ultimate change-over from English into Hindi will have to wait not only till the ground has been prepared by the compilation of a standard legal lexicon and by the re-enactment of the Statute Book in Hindi, but till large groups of lawyers and judges proficient in Hindi and Hindi legal phraseology are available" *. None who is interested in maintaining uniformity and continuity of judicial standards and efficiency can disagree with this view, though there can be no gainsaying that the sooner the ideal is achieved the better will it be for the country.

5. UNVEILING OF THE TILAK TABLET.

On July 24, 1956, the whole of India celebrated the birth centenary of Lokmanya Bal Gangadhar Tilak. A suggestion was made by the Government of Bombay that the High Court should consider the putting up of a tablet in Tilak's memory on the outer wall of the Central Court where Tilak's trial for sedition was held in 1908. It was felt by the judges that it would be a graceful act on their part if they were to agree to this suggestion. The tablet was to have an inscription containing the famous words which Tilak uttered at the conclusion of his sedition trial of 1908. It was to be a tribute to the memory of the great patriot in the centenary year of his birth.

In 1908 Tilak was charged with offences of sedition and of promoting feelings of enmity or hatred between classes under section 124-A and section 153-A of the Indian Penal Code respectively for certain articles which appeared in his well-known newspaper the *Kesari*. Prior to this, Tilak was involved in three criminal prosecutions. The first was in 1882 for defamation of the then Dewan of Kolhapur, when he was convicted and sentenced along with the great social reformer Gopal Ganesh Agarkar. The second trial was for sedition in 1897 in which he was sentenced to eighteen months' imprisonment. The third prosecution for

* Law Commission of India, Fourteenth Report (Reform of Judicial Administration), Vol. I, Chapter 29, para. 22, p. 656.

perjury in 1901 arose out of what came to be known as the Taimaharaj Case, in which he came to be acquitted in the Bombay High Court though he was convicted and sentenced by the lower Courts. The fourth trial in 1908 ended in his conviction and led to his giving expression to the inspiring and well-known words which were proposed to be inscribed on the tablet.

The presiding Judge over the trial was Mr. Justice Dinsha Davar, later Sir Dinsha Davar, who had himself successfully appeared in the bail application preferred on behalf of Tilak in the sedition trial of 1897. Then Tilak had been granted bail by Mr. Justice Badruddin Tyabji in the sum of Rs. 50,000 in cash which was produced by Mr. Dwarkadas Dharamsey, who had interested himself in the defence of Tilak. In 1908 Mr. Dwarkadas Dharamsey was the Sheriff of Bombay and, as was the practice then, he sat throughout Tilak's trial in the Sessions Court in his capacity as the Sheriff of Bombay. † Mr. Justice Davar, who had been successful in obtaining bail for Tilak in 1897, rejected Tilak's application for bail and Dr. M. R. Jayakar, who appears to have been present throughout the trial, has stated in his autobiography that it was 'a timid decision'. A special jury was also ordered by the learned Judge though it was opposed by Tilak on the ground that such a jury would contain many Europeans who would be unable properly to understand and appreciate the Marathi articles in the *Kesari*. It appears from Dr. Jayakar's narrative that Mr. Justice Davar had given an assurance to give more Indians in the jury, but ultimately the jury came to be composed of 7 Europeans and 2 Indians. According to Dr. Jayakar, the chief prosecuting Counsel, Mr. J. D. Inverarity, whenever he was present, handled the prosecution with dignity and decorum, but Mr. R. M. Branson, the junior Counsel in charge of the prosecution, was quite the opposite and his address was 'vulgar, vindictive and gross' and his behaviour 'unworthy of the tradition of the Bar'. ¶ As regards the summing-up of Mr. Justice Davar, in the opinion of Dr. Jayakar, himself a great Sanskrit and Marathi scholar, the presiding Judge appeared to have completely misconceived the true purpose of the articles in the *Kesari* for writing which Tilak had been charged, and that was due to the Judge's unfamiliarity with the high-flown Marathi diction in which the articles were written, as the Court had to rely entirely on official translations.

The jury, by a majority of 7 to 2, returned a verdict of guilty on all the three charges preferred against Tilak, two under section 124-A and the third one under section 153-A of the Indian Penal Code. It may be mentioned that during his defence speech, Tilak had submitted that he would be satisfied if at least one of the jurors returned a verdict in his favour. Before Mr. Justice Davar proceeded to pass sentence in accordance with the verdict, Tilak was asked the usual question whether he wished to say anything before the Judge passed sentence. It was then that Tilak uttered those famous words which have been inscribed on the Tablet:

> "In spite of the verdict of the jury I maintain that I am innocent. There are higher powers that rule the destiny of men and nations and it may be the will of Providence that the cause which I represent may prosper more by my suffering than by my remaining free."

These words are said to have electrified the spectators present at that time, and the Author was once told by his father N. V. Gokhale, who had witnessed that scene, that the people present were amazed at the sheer courage, dauntlessness

† Recollections and Reflections by Sir Chimanlal Setalvad, p. 77.

¶ The Story of My Life, by Dr. M. R. Jayakar, Vol. I, (1873-1922), pp. 93–99.

and spirit of self sacrifice of the great man who uttered them despite the verdict of the jury and the severe sentence which appeared to be in prospect. It was then that unfortunately the presiding Judge said something that was not at all in keeping with the dignity of his high office. This is what he said before passing sentence:

> "It seems to me that it must be a diseased mind, a most perverted mind that can think that the articles that you have written are legitimate articles to write in political agitation. They are seething with sedition. They preach violence. They speak of murders with approval: and the cowardly and attrocious act of committing murders by bomb not only seem to meet with your approval but you hail the advent of bomb in India as if something had come to India for its good. As I said it can only be a diseased and a perverted mind that could consider that bombs are the legitimate instruments in political agitation and it would be a diseased mind that could ever have thought that the articles you wrote were articles that could have been legitimately written. Your hatred of the ruling class has not disappeared during these 10 years and these articles deliberately and defiantly written week after week,—not written as you say on the spur of the moment but a fortnight after the cruel and cowardly outrages committed upon two innocent English women,—persistently and defiantly refer to a bomb as if it was one of the instruments of political warfare. I say such journalism is a curse to the country."

This has been characterised by Dr. M. R. Jayakar as an "unnecessarily offensive homily" inflicted by the judge on Tilak.* In passing the sentence of 6 years' transportation and a fine of Rs. 1,000, the Judge also said:

> "I have considered whether I should give you a sentence of imprisonment or a sentence of transportation. Having regard to your age and other circumstances, I think it is most desirable in the interests of peace and order and in the interests of the country which you profess to love that you should be out of it for some little time."

Sir Chimanlal Setalvad has written in his autobiography that "the veiled insinuation contained in the words 'the country which you profess to love' was very much criticised as an undignified sneer on the part of the Judge". † The reference to Tilak's journalism as a curse to the country was also not warranted. It is the duty of a judge to observe restraint, dignity and decorum in the use of his language. That is all the more so in a political case. The dignified language used by Mr. Broomfield (later Mr. Justice Broomfield) as District Judge in passing a similar sentence of six years on Gandhiji at Ahmedabad affords a study in contrast. Gandhiji himself then responded by stating that, so far as the proceedings in his trial were concerned, he could not have expected greater courtesy.

The judges of the High Court and the members of the Bar assembled together in the Central Court on July 24, 1956 to pay their tribute to Tilak for the great work that he did in the cause of Indian Freedom by his patriotism, courage, self-sacrifice and scholarship. This function has to be appreciated and looked at in the light of the background of what had happened at the time of Tilak's trial in 1908 which has been briefly described above and the fact that the country had attained its freedom. No wonder, Mr. M. C. Chagla described it as an act of atonement in his speech delivered at that time.

The High Court also waived its convention on this occasion not to allow photographers to take photographs of proceedings in Court, and the entire unveiling function was allowed to be filmed.

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* The Story of My Life, Vol I, (1873-1922), by Dr. M. R. Jayakar, p. 97.

† Recollections and Reflections by Sir Chimanlal Setalvad, p. 78.

6. LAW REPORTING.

The official series of law reports for Bombay known as the Indian Law Reports, Bombay Series, commenced publication in 1876-77 with the passing of the Indian Law Reports Act XVIII of 1875. Similarly official law reports also came to be issued in Calcutta, Madras and Allahabad. Under the original rules, the publication of these official reports was under the direct control of the Legislative Department of the Government of India. That system led inevitably to considerable delay in the issue of these reports. In 1885, therefore, important changes were introduced in the rules. The editing of the reports under the Legislative Department was discontinued. A Council of Law Reporting was established for each High Court consisting of Barristers, Vakils or Solicitors and one or two judges of the High Court for each of the series with an Editor or Reporter for each High Court, and the entire work of supervision came to be entrusted to these councils, while the provincial governments became responsible for providing funds, printing, publication and distribution of the reports. In Bombay, the Council of Law Reporting consists of the Chief Justice as Chairman, two judges nominated by him and the Advocate-General and the Government Pleader as members. The Editor of the Reports acts as the Secretary of the Council.

In 1922, the Government of India appointed a Committee under the chairmanship of Sir Tej Bahadur Sapru, Mr. Ratanlal Ranchhoddas, then one of the Law Reporters in the Bombay Series being a member of the Committee. This Committee submitted its report in September 1922 and recommended that the get up of the Indian Law Reports should conform to that of the English Law Reports. It appears from the report of this Committee that in Bombay at that time special facilities used to be given to the students to get all the Indian Law Reports at half the price but the privilege was said to have been abused and the Committee suggested its abolition. The Committee also recommended that not only should the facts of a case be stated in the report by the Editor in his own language or in the language of the judgment, which is always done, but that the arguments of counsel in important cases with reference to questions of law argued in a case should be reported and that, in Full Bench decisions, the report of the arguments of Counsel should be as complete as possible. The Committee expressed its opinion that if it was necessary to increase the staff of reporters for this purpose or their emoluments, that should be done.

In Bombay, the Editor is assisted by three reporters, one from the Original Side and the other two from the Appellate Side. The posts of the Editor and of the reporters are filled from the Bar, and the Editor is always a senior member of the Bar, Sir Harilal Kania, before his appointment as a judge of the Bombay High Court, was for some time acting as the Editor, and Mr. J. G. Rele from the Appellate Side was also for some time an acting Editor. The editorship of the Bombay Series was for years in the capable hands of Mr. P. B. Vachha and thereafter of Mr. S. V. Gupte.

In September 1959, the Council of Law Reporting in Bombay recommended the appointment of two more full-time reporters for reporting arguments in important cases, constitutional or otherwise, and suggested that the number of part-time reporters may be reduced in that case from three to two. Though this recommendation was in accordance with the suggestion of the Sapru Committee made as far back as 1922, Government have turned down the suggestion on the

ground that no case was made out for the same. Even democratic Governments do not necessarily move with the times especially when it is a matter of providing additional funds.

There has usually been a delay in the publication of this official series, perhaps due to reasons beyond the control of the Editor, because these reports are printed at Government Printing Press at Yeravda in Poona. Naturally, therefore, in the Bombay High Court reliance has usually been placed by the Bar as well as the Bench on the Bombay Law Reporter which commenced publication in 1899. From the very commencement these reports were edited by Messrs. Ratanlal Vakil and Dhirajlal Thakore whose friendly combination in this field for nearly sixty years had been a unique feature of legal life in Bombay. Mr. Ratanlal's son, Mr. M. R. Vakil, has stepped in the gap created by Mr. Ratanlal's death in September 1955. Mr. Dhirajlal fortunately, despite his age, continues to be at the helm of this legal publication. Head-notes of cases reported in the Bombay Law Reporter have earned a well-deserved reputation for their accuracy and exactness. Since 1911, on the suggestion of Sir Basil Scott, then the Chief Justice, the proprietors of the Bombay Law Reporter have been also publishing a separate monthly journal called the 'Criminal Cases of the Bombay High Court'.

Besides the official series and the Bombay Law Reporter, there is the Maharashtra Law Journal at Nagpur formerly known as the Nagpur Law Journal, and there are other non-official law reports also. The Maharashtra Law Journal has a good circulation and enjoys the same popularity in Vidarbha as the Bombay Law Reporter in the original Bombay area. The editorial charge of the Journal is in the competent hands of Mr. N. B. Chandurkar and his sons. It is only those judgments which the Judges indicate as fit to be referred to the law reporter that can be published either in the official series or the other law reports.

Under the convention obtaining in Bombay with regard to reporting of judgments, it is the Judge who, with the approval of his colleague if the judgment is of a Division Bench, signifies whether any particular judgment of his or such parts thereof as are indicated be referred to the law reporter. It is now settled that this indication does not make it obligatory on the Editor to report that judgment but usually such judgments are in fact reported. In the conferences of lawyers it had been suggested that there should be a central council of law reporting having a branch in each State as well as in the Supreme Court and the cases approved by the council should alone be reported and permitted to be cited before the courts. Some senior lawyers are also of the view that no single judge's judgment should be allowed to be reported.

In its memorandum submitted to the Law Commission, on the subject of law reporting the Bombay High Court had expressed the view that there should be an editorial board in every State which should exercise its discretion in the matter of judgments referred to it. The discretion of this board was in no way to be fettered by the views of judges. As regards non-official law reports, a similar suggestion was made and it was stated that only those judgments which were so published should be allowed to be cited from these reports. The Law Commission has recommended that judges should have no say in deciding whether a case should or should not be reported, but that the responsibility should be taken up by the legal profession, and an independent Council of Law

Reporting should be established for this purpose in each State and also for the Supreme Court. According to the Law Commission, the idea of an All-India Council of Law Reporting is impracticable. The Commission has, however, recommended that the reports published by the Council of Law Reporting should contain the arguments of counsel. As already stated, this was also the view of the present Council of Law Reporting in Bombay, but that was not accepted by the Government.

7. JUDGES, LAWYERS AND SPORTS.

The members of the Original Side Bar had for many years a Bar Gymkhana which was situated just behind the Chowpatty Bandstand in Bombay. Bar functions and dinners occasionally used to be held there and the gymkhana provided the members with a suitable place where they could meet and chat in the evenings and on Sunday mornings. After unification, some members of the Appellate Side Bar and the other Bars also joined this gymkhana. Its popularity, however, declined and it has now ceased to exist. The members of the High Court staff, however, have a sports club, known as the Bombay High Court Sports Club, since 1925.

The judges, the members of the Bar and the members of the staff of the High Court have sometimes played cricket matches. During the time of Chief Justice Sir Leonard Stone there was a cricket match played between the High Court Bar on the one side and the other Bars in the city on the other. That was played at the Brabourne Stadium. There was another cricket match, some years thereafter, played between the members of the Bar and judges on the one hand and members of the staff on the other. That was during the time Mr. M. C. Chagla was the Chief Justice, and it was played on the grounds of the Islam Gymkhana. Justices Mr. J. C. Shah and Mr. S. T. Desai batted well in this match. One cannot say whether this performance was due to the mildness of the attack on the part of the bowlers. One of the highlights of the Centenary Celebrations in April 1962 was the festival cricket match played between two teams consisting of the members of the Bar and the staff. Mr. Justice K. K. Desai led one of the sides and the other was captained by Mr. Justice Y. V. Chandrachud, whose team won the match despite prophecies to the contrary. Mr. Justice K. K. Desai is said to have lost a friendly bet as well which cost him a dinner.

A few members of the Bar and Judges have shown keenness for the game of golf. Before the second World-War there used to be for a few years annual golf fixtures at the Willingdon Sports Club and the Bombay Presidency Golf Club at Chembur. The matches used to be played between the Bench and the Bar on the one side and Solicitors on the other. Sir John Beaumont used to take keen interest in these matches. Due to the war, these fixtures were stopped and were not revived till 1953. Mr. J. S. Lam, Solicitor, took the lead in this matter and his effort was fully supported by Mr. M. C. Chagla, when he became Chief Justice. A committee was appointed for this purpose, and Mr. Lam and Mr. D. P. Sethna, Solicitor, were appointed Hon. Secretaries. The fund that was created made it possible to have a shield which came to be known as "the Chief Justice Trophy". Every year there is a golf fixture in connection with this Trophy, and players, Judges as well as Advocates, and non-playing Judges and Advocates participate in the lunch that follows, at which stories are related in an atmosphere of gaiety

and fun. Talking about professional matters is tabooed. The Chief Justice's Trophy has a beautiful design and the shield bears a carved silver replica of the High Court in the centre. The presentation is made in an atmosphere of cordiality and hilarity and the function is thoroughly enjoyed by all the participants.

Every year, before the end of the term previous to the summer vacation, the judges have a term ending lunch together at the Willingdon Sports Club, to which ladies are not invited so far though not without protest on the part of some judges. Golf-enthusiasts amongst the judges and some who do not regularly play the game take part in a match and a cup is presented to the successful player. The majority of the judges have, however, displayed no enthusiasm for golf, though latterly younger judges are taking keener interest in the game. It has been, however, authoritatively said that the caddies in the Willingdon Sports Club entertain no very high opinion about the judges' play. There is a story told about a well-known caddy at St. Andrews who becoming exasperated with the play of a university professor, who did not prove to be an adept pupil, told him that so long as he was teaching his students at the college, Latin and Greek, it was easy work, "but when you come to play golf you maun hae a head !" The caddies at the Willingdon Sports Club seem to be more tolerant with the judges.

Cricket Test Matches have always aroused keen interest amongst members of the Bar and the Judges. Judges have been known to grant adjournment to junior members of the Bar to enable them to go and see the Test, if they evince their keenness to attend. As these test matches are now held at the Brabourne Stadium, the enthusiasm of the crowds there finds its echo in the corridors of the High Court on both sides. Occasionally a radio set has made its appearance in the Judges' Library and transistor sets have appeared in the Advocates' Room and one or two Judges' chambers at these times. One Judge was reported long ago to have risen early once because the whole of the board before him conveniently collapsed at the time the test match reached an exciting stage. Once in one heavy First Appeal on the Appellate Side, the matter was compromised and the junior advocates wanted to run away to see the test match which was at an exciting stage, and the senior Counsel on both sides had agreed to move for priority being given to the appeal in order that the compromise should be recorded and the matter disposed of. But the appeal was on the board of Mr. Justice Broomfield and Mr. Justice Macklin and though Advocates, senior and junior, came to the Court after recess ready to make the necessary motion, actually they did not dare to beard the lion in his den when the judges entered the Court, Mr. Justice Broomfield looking very grim and grave. These are of course rare occasions. Normally when the test matches are being played and when the courts are working, the Sheristedar or the Associate quietly hands over to the Judge or Judges a chit containing the latest score and the information is made available to members of the Bar also.

8. VISITS OF DIGNITARIES TO THE HIGH COURT.

Since Independence, there have been distinguished visitors to the High Court from other parts of India as well as abroad. The Chief Justices of India since 1950, as has been already mentioned, have visited the High Court soon after assuming charge of their high office to establish personal contacts with the judges

and the members of the Bar. The other dignitaries who visited the High Court were: Sir John Latham, a distinguished Australian Jurist, who was at one time Chief Justice of the High Court of Australia, Deputy Prime Minister, leader of the opposition and Chancellor of the University of Melbourne, as also Chairman of the Australian Committee for Cultural Freedom, who visited the High Court on September 9, 1955; Chief Justice Mr. K. Tanaka of the Supreme Court of Japan and Chief Justice Mr. Earl Warren of the Supreme Court of United States, who visited the High Court on February 2, 1956 and August 20, 1956, respectively. Apart from the round of functions arranged for Mr. Warren outside, the High Court Judges entertained him to a lunch during the recess and on this occasion the Courts assembled 15 minutes late, as the usual lunch-hour break is only for 45 minutes. Chief Justice Warren was surprised to know that the High Court judges have to retire at the age of 60 and that after a judge's death his wife receives no pension. He explained how the time-limit on arguments worked in some of the American Courts. It might be mentioned that recently there have been almost unmanageable arrears of work in several Courts of the United States of America and serious attempts are being made to tackle with the problem. The other distinguished visitors included Judge Charles W. Froessal, Judge of the State of New York Court of Appeals, Mr. Ahmed Saussnar, Dean of the Faculty of Law and Professor in charge of economics at the University of Damascus, a delegation of Soviet Judges and lawyers led by the Chairman of the Soviet Supreme Court, Mr. Gorkin, and a Polish delegation of jurists under the leadership of Poland's Minister of Justice, Mr. Marian Rybicki. While thanking the High Court for its welcome to the Soviet delegation, Mr. Gorkin expressed the hope that "such visits will promote a better understanding between our peoples and bring us nearer to one another."

Occasionally judges of the Supreme Court and other High Courts have also paid visits to the Bombay High Court and have been received by the judges. Many visiting judges from other High Courts have been agreeably surprised to see all the Bombay judges chatting merrily in the corridor at 10.50 a. m. before they disperse to the several courts, and to know that the High Court judges in Bombay have always taken their lunch together in the afternoon. It has been mentioned that in some High Courts the judges often do not meet each other, for weeks together, unless they are sitting together in a Division Bench. The meeting together in the morning in the corrider near the Chief Justice's chamber and at lunch time in the Judges' Library, when all kinds of topics under the sun are freely discussed, is one special feature of the High Court judiciary in Bombay which has contributed to the cultivation of a better understanding and team-spirit amongst the judges.

There have been three gubernatorial visits after Independence, one in April and again in November, 1949 and the last one in November 1959. The Governor Shri Raja Maharaj Singh visited the High Court twice in 1949, and Shri Sri Prakasa in 1959. According to the convention of the High Court, no red carpet was spread during the visit of such dignitaries, not even, it appears, when His Excellency the Viceroy, Lord Linlithgo, visited the High Court in 1940. There was no speech-making at the time of the Governors' visits which are more or less of an informal character. When Sir Malcolm Hailey, the Governor of the United Provinces (now Uttar Pradesh), visited the Allahabad High Court in 1934, he replied to the welcome speech of the Allahabad Chief Justice and is reported

to have said: "I would not do anything to arouse the delicate susceptibilities of those who hold that the separation of the judiciary and executive should be so complete that, to use the words of the poet, even in heaven they shall never meet." * The Governors' visits to the Bombay High Court were quiet affairs with no speech-making. The visit in 1959 was after the separation of the judiciary from the executive.

During such visits, the judges, except the Chief Justice, do not rise to receive the Governor at the entrance. The courts continue to work as usual. When a visiting judge or the Governor enters the court and takes his seat near the judges, the latter do not rise from their seats but merely welcome him with a bow. One of the distinguished foreign Chief Justices mentioned in his talk at the lunch-table that judges who are inclined to doze on the Bench might ward off the tendency by occasionally closing their fists tight and clenching them, if sweet slumber was inclined to overcome them in the midst of arguments at the Bar. But this method of clenching the fists to keep off drowsiness does not appear to have been tried so far by the judges apparently because it might be misunderstood if it is resorted to in the midst of a tenacious and wearisome argument by counsel. Yawning and dozing on the Bench is not unknown in the annals of the Bombay High Court in olden as well as recent times.

9. CHIEF JUSTICESHIP OF MR. M. C. CHAGLA.

Since the appointment of Mr. Chagla as the first permanent Indian Chief Justice of the Bombay High Court in February 1948 till his resignation in 1958 on his appointment as the Indian Ambassador to the U. S. A. at Washington, he dominated the High Court scene by his outstanding judicial qualities as well as his personal popularity. Even before he became Chief Justice he had been appointed once as a member of the Indian delegation to the United Nations. In June 1946 the Government of India appealed to the General Assembly of the United Nations alleging that, as a result of the policy of discrimination against 2,50,000 Indian residents in South Africa, a situation had arisen that was likely to impair friendly relations between India and South Africa. The Indian delegation was led by Mrs. Vijayalakshmi Pandit, and Mr. Chagla's forensic duel with General Smuts in the Assembly created a favourable impression in this country. It might be mentioned, however, that when Mr. Justice Chagla was appointed as a member of the delegation, Sir Chimanlal Setalvad publicly criticised the appointment of a sitting judge of the High Court on a political mission. But there have been precedents of this type, a notable one being that of Sir Rufus Isaacs, later Lord Reading, who during his tenure of office as Chief Justice twice crossed the Atlantic on important political missions. In 1915, during the first World-War, he headed the Anglo-French mission to the United States and secured substantial financial assistance, and again in 1917 as a Special Envoy he succeeded in obtaining essential credits from America besides winning many diplomatic victories. † In the United States also there have been instances of this type, one of them being of Chief Justice Jay, who while he was Chief Justice undertook the negotiation of a treaty with England. ¶

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* *Leader* of Allahabad dated November 23, 1934.

† Rufus Isaacs, First Marquess of Reading, by Stanley Jackson, pp. 190 and 218.

¶ The Judicial Office in the United States, an article by Hon. John J. Parker. (1951) 53 Bom. L R (Journal Section) 5, 9.

After Independence, the most important events that have taken place from the point of view of judicial administration have been already mentioned. The establishment of the City Civil Court, the unification of the Bar, the merger of States, the separation of the judiciary from the executive and the first reorganisation which led to the creation of the bilingual State of Bombay, all took place during Mr. Chagla's regime. All these problems created difficulties which were successfully solved and overcome. As head of the judiciary in the State, Mr. Chagla succeeded to a great extent in establishing the important principle that the executive should have no influence over and should not interfere with the judiciary. In his farewell address in 1958 on his appointment as Ambassador to the United States, Mr. Chagla referred to the "long struggle, sometimes acrimonious" which he had to wage with the Executive to achieve this object. The conflict arose regarding appointment of High Court Judges, as well as, in some cases, of Assistant Judges. The Chief Justice maintained that the political opinions of a lawyer ought not to come in the way of his judicial preferment. Mr. Chagla had to fight for this principle. As regards appointments of High Court Judges, the principal dispute appears to have been as to who was to have the initiative, whether the Chief Justice or the Chief Minister. Under Article 217 of the Constitution, every Judge of a High Court has to be appointed by the President after consultation with the Chief Justice of India, the Governor of the State and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. It appears that the dispute between the High Court and the Government was as to whether once the recommendation was made by the Chief Justice of the High Court, the Government could put forward its own alternative choice. Mr. Chagla's view was that Government could object to a particular name and could request the Chief Justice to propose another name but could not put forward a name of their own. That view appears to have been ultimately accepted, though the question cannot be said to have been finally decided as yet.

Mr. M. C. Chagla was appointed a member of the Law Commission in 1955. The next honour that went to him was his appointment as the Acting Governor of Bombay in October 1956 after Shri Harekrishna Mehtab relinquished charge of his office of Governor and before Shri Sri Prakasa was appointed as the Governor of Bombay. This was the second time in India that a Chief Justice was appointed temporarily to act as Governor of a State after the birth of the Republic of India. It appears, however, that in December 1954, when a temporary vacancy occurred owing to the death of Sir Girja Shankar Bajpai, Mr. Chagla was not given the temporary appointment, but Mr. Mangaldas Pakvasa acted temporarily as the Governor of Bombay. Mr. Chagla's temporary elevation as Governor was hailed by the members of the Bar and he had the honour of swearing in the first ministry of the bilingual State of Bombay which was headed by Mr. Y. B. Chavan. Mr. Chagla had also the further distinction of being appointed in 1957 as an *ad voc* Judge of the International Court of Justice at the Hague in connection with the dispute between India and Portugal regarding the right of passage to Dadra and Nagar Haveli.

In 1958 Mr. Chagla was appointed the chairman of the commission of inquiry set up by the Union Government regarding certain affairs of the Life Insurance Corporation which came to be popularly known as the Mundhra Enquiry. Mr. Chagla successfully completed the enquiry in a short time and submitted his

report. The enquiry which was public led to sensational disclosures, the resignation of the then Finance Minister, Mr. T. T. Krishnamachari and retirement of some high officials.

Mr. Chagla always held the view and expressed it publicly that if the State required the services of a Judge in any important enquiry, it was the duty of the Judge to offer his services and co-operate with the State.* The opinion among the judges on this point is, however, not unanimous. Some Judges, like Mr. Chagla, hold that it is the duty of a judge to help Government in such enquiries, especially as the public feel more confidence when an enquiry is conducted by a Judge. The other view is that Government should not entrust such enquiries to a Judge as it is likely to involve him in public controversy or criticism. Besides it deprives the High Court of the services of a Judge during the time the enquiry is conducted, which sometimes may take months or even a year or years as was the case with the two Bank Commissions or the Panshet Enquiry. It has also been said that while the decision of a Judge in a Court of Law has a binding force, the decision of a Judge in an enquiry has no such sanctity and does not bind Government, and that also is not desirable.

The appointment of Mr. Chagla as the Indian Ambassador to the U. S. A in October 1958 was generally acclaimed by the Bar as a fitting tribute to so successful a career on the Bench. Though Mr. Chagla was the first permanent Indian Chief Justice to adorn the Bench of the High Court, he was the thirteenth of the Chief Justices of the Bombay High Court. Mr. Chagla, as some others, never liked the number thirteen especially at lunches. On one occasion, provision was made for fourteen judges to lunch at the Willingdon Sports Club. It was discovered when the judges took their seats that one judge was absent, and there were only thirteen judges left. The son of a judge who happened to be at the Club was hastily but cordially invited to join and did join in the lunch to avoid the unlucky number of thirteen. In spite of the fact, however, that Mr. Chagla was the thirteenth Chief Justice of the Bombay High Court, his successful tenure of office possibly proved that thirteen is not an unlucky number at least in the judicial field. In recent times on many occasions the judges sitting at the lunch table have been thirteen in number and the fear of thirteen no longer haunts them.

10. CHIEF JUSTICESHIP OF MR. H. K. CHAINANI.

After the relinquishment of his office of Chief Justice by Mr. Chagla, Mr. H. K. Chainani assumed charge as the Chief Justice of the Bombay High Court. He has the honour to be the first member of the Indian Civil Service to be appointed the permanent Chief Justice of the Bombay High Court. Before him, ten I. C. S. Judges had acted temporarily as Chief Justices, but owing to the convention then prevailing no civilian became a permanent Chief Justice. The opinion of the Bar had generally been against the appointment of any civilian as a Judge of the Bombay High Court. Men like Sir Chimanlal Setalvad openly expressed themselves against such appointments, though it was admitted that the Indian Civil Service had produced some good Judges. Sir John Beaumont, after his retirement, also expressed himself against recruitment from the Indian Civil Service, though he did not deny that many members of the I. C. S had made

* (1948) 50 Bom. L R (Journal Section), p. 28.

excellent Judges. † In the Author's own time, there have been Judges from the Indian Civil Service who won genuine respect from the members of the Bar as, for instance, Justices Crump, Fawcett, Madgavkar, Baker, D. D. Nanavati, N. J. Wadia, Weston and Rajadhyaksha. Mr. Nanavati was unfortunate in not being made permanent and it was always felt that great injustice was done to him for perhaps political reasons. Justice Madgavkar was brilliant, and was the first Indian member of the I. C. S. to be made a permanent Judge of the Bombay High Court. He will always be remembered for the great farewell speech that he made in the Central Court on the eve of his retirement in 1931. Sir Robert Broomfield came with a great reputation as a Judge who had tried Gandhiji at Ahmedabad and, in spite of his rough manners, became known for his thoroughness and capacity to take infinite pains in the hearing and disposal of cases. Justice R. S. Bavdekar, whose unfortunate death under tragic circumstances has been mourned by all, was known to have an extra-ordinary memory and an open mind till the last stages of a case. The Division Bench presided over by Mr. Justice Rajadhyaksha and Mr. Justice Chainani was regarded as an ideal Court which worked in an atmosphere of serenity and dignity and absence of hustle and hurry, such as it should be in the highest Court of Justice in the State.

Mr. Chainani's tenure will be remembered for the great sensation that was created in March 1960 by the unprecedented order issued by the Governor Shri Sri Prakasa in what has come to be known as the Nanavati Case. Commander K. M. Nanavati was found guilty of the offence of murder of his wife's lover and sentenced to imprisonment for life by a Division Bench of the High Court in a Criminal Reference made under section 307 of the Criminal Procedure Code by the Sessions Judge, Greater Bombay, disagreeing with the verdict of not guilty by a majority of eight to one of the jury. A warrant for the arrest of the accused was issued by the High Court on an application made by the Government Pleader himself. It was, however, returned unserved because of the order passed by the Governor of Bombay under Article 161 of the Constitution suspending the sentence passed by the High Court on the accused until the appeal of the accused intended to be filed by him in the Supreme Court against his conviction and sentence was disposed of. The order was subject to the further direction that Nanavati would be detained in naval jail custody in the meanwhile. This order bore traces of hasty, perfunctory and defective drafting. It created almost an unparalleled situation.

When the warrant was returned unserved, the Division Bench which had convicted Nanavati directed that the matter should be placed before the Chief Justice for constituting a larger Bench. In view of its importance, the Chief Justice constituted a Full Bench of five senior judges of which the Author was one. The matter was argued at length on the question as to the constitutionality of the Governor's order for five days before the Full Bench. In view of the importance of the issues involved and raised, apart from the Advocate-General, the Government Pleader and Counsel for the accused, Advocates who appeared on behalf of the Advocates' Association of Western India and the Bombay Bar Association were also allowed to appear and address arguments before the Full

† Indian Judicial System: Some Suggested Reforms — Paper read by the Rt. Hon. Sir John Beaumont before a meeting of the East India Association, London, (1946) 48 Bom. L. R. (Journal Section) 12, 15.

Bench. It was held by the Full Bench that the order made by the Governor was not shown to be unconstitutional or contrary to law. It was further directed that unless the Governor's order was cancelled or withdrawn the warrant should not be re-issued until the appeal to be filed by the accused in the Supreme Court was disposed of.

Though the High Court decided in favour of the constitutionality of the Governor's order, it felt that the order was unusual and unprecedented and likely to create an impression that it was made in order to accord special treatment to a particular person and as such likely to impair the confidence of the public in the impartial administration of justice. It was observed that though wide and unfettered powers were conferred on the Governor under Article 161 of the Constitution, they were not intended to be exercised arbitrarily and except for good and sufficient reasons. In fact no reasons were disclosed on behalf of the State for this extraordinary order. "The very amplitude of these powers", observed the Chief Justice in his judgment, "makes it necessary that they should be used sparingly and with considerable restraint. They must be used only for the purpose for which they have been conferred and that is to promote justice and not to circumvent the due processes of law. Ordinarily they should not be exercised when judicial proceedings are pending. They should also not be used so as to short circuit legal processes and give relief which could be granted by a Court". The Chief Justice finally expressed the hope that those on whom the Constitution had conferred this extraordinary power would exercise it with wisdom so as not to interfere with the due administration of justice. *

Despite the shield of the Governor's order, the accused Nanavati had another hurdle to cross. He applied to the Supreme Court for special leave to appeal against his conviction and sentence. He also filed an application for exemption from compliance with the Supreme Court rule which required the accused to surrender himself to his sentence before the application for leave could be considered. The ground for exemption was that as the Governor's order had directed his being kept in naval custody, it was not possible for him to comply with the requirements of the Supreme Court rules. It was held by a majority of the judges of the Constitution Bench of the Supreme Court that the order passed by the Governor under Article 161 could not operate when the Supreme Court had been moved for granting special leave to appeal from the judgment and order of the High Court. † The result was that on the application of the accused the Governor's order was withdrawn in order to enable Nanavati to surrender to his sentence and prosecute his special application for leave to appeal to the Supreme Court. Possibly none of Nanavati's well-wishers official or non-official ever dreamt of such a development.

Recently the appeal of Nanavati was heard by the Supreme Court which dismissed it confirming his conviction and sentence of imprisonment for life. It would appear that the sensation created by this case was partly due to the position of the accused in the Indian Navy, the love affair involved in the case and the undue publicity given to it by newspapers, which, like the priest in a Marathi proverb who gets his *dakshina* irrespective of whether the bride or the bridegroom dies, make money whatever the outcome of the case.

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* *The State of Bombay v. K. M. Nanavati* (1960) 62 Bom. L R 383 (F B).

† *K. M. Nanavati v. The State of Bombay* (1961) 63 Bom. L R 221 (S C).

Since the assumption of his office by the present Chief Justice, the administration has been tightened up and the emphasis has so far been upon judicial and administrative efficiency with the result that the arrears of work in the mofussil are being brought steadily under control.

11. A CENTURY OF PROGRESS.

The High Court of Bombay has completed its 100 years on August 14, 1962. It has built up great traditions, the result of a century of co-operation between the Bench and the Bar. A political history is the biography of great men, but the history of an institution like the High Court is not merely the story of its Chief Justices or Judges or of its eminent lawyers, however interesting it might be, but of the numerous constituent elements, great or small, which have combined to build up its greatness. While men may grow old, an institution with the passage of years attains maturity and must look forward to rendering greater and more efficient public service in the field of its activity, which in the case of the High Court is the administration of justice. It has been said that to look back to antiquity is one thing, but to go back to it is another; if we look back to it, it should be as those who are running a race only to press forward the faster and to leave the beaten way still further behind. In the case of the judiciary, the purpose of a retrospect is that good precedents may be followed and the best traditions nurtured and preserved. Old, outmoded methods have to be discarded. The interpretation and the enforcement of the law cannot ignore the spirit of the times. In this task the Bench and the Bar must both work in close collaboration to uphold the rule of law. Care must be taken that nothing is done to weaken or to undermine the influence of the High Court. The High Court of Bombay, whatever the area of its jurisdiction, has been always a unifying force of incalculable value. It is in the interests of the people and the Government of the State, no less of the Bar and the Bench, to preserve that force, to guard the great heritage and still strengthen it further for the good of the State and of the Nation they serve.

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