The Judicial System of the East India Company: Precursor to The Present Pakistani Legal System

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I. INTRODUCTION

Muslims came to India when they conquered Sindh in 712 A.D. The Delhi Sultanate came into existence in 1206, when Qutbuddin Aibak of the Slave dynasty became the first independent Sultan of Delhi. From 1206 to 1526 five different Muslim dynasties – the Slaves, the Khaljis, the Thughluqs, the Sayyids, and the Lodhis ruled India. The Mughal dynasty was established in 1526 and continued till 1857, it was in decay since the death of Awrangzeb Alamghir in 1707. Before the 1857 take over by the Crown the East India Company had done the ground work for the colonization of the subcontinent. This work focuses on how the East Company arrived in India; what type of justice the Company was administering in the beginning for its own employees, especially in the three presidency towns of Calcutta, Madras and Bombay; how did the Company start penetrating the local judicial system; what mistakes were made by the local rulers; what was the role of Islamic law in the beginning and how was it gradually replaced by English statutes and English doctrines; and what role was played by the doctrine of precedent? The work discusses other issues that are also important in this discussion.

II. THE EARLY CHARTERS: TRADERS’ JUSTICE

The foundations of the British Empire in India were laid down by a company which was organized to further the British interests in overseas countries. The full official name of the Company was: “The Governor and Company of Merchants of London Trading into the East Indies.” Queen Elizabeth I granted it charter on 31st December 1600 for 15 years. All members of the Company were to form the General Court which was to elect annually the Court of Director consisting of a Governor and 24 directors for managing the Company's business. The Charter authorized the company to make laws, orders and constitutions for the good

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governance of itself, its servants, and for the advancement of its trade and traffic.\(^1\) The Company could also impose penalties and punishments by way of fines and imprisonment. The Company could not give capital punishment for serious criminal cases such as murder. The laws made by the company, however, could not be against the laws of England. The Charter did not mention the making of laws for any territory or factory probably because no territorial acquisition by the Company was contemplated at this stage. The Company was thus viewed as a commercial enterprise and not an instrument of political power acquiring foreign territories.

The representative of the Company set foot on Indian soil in the reign of Jahangir. The Company soon found that its legislative authority was not enough and it therefore secured the Royals prerogative for empowering the commander-in-chief of each voyage separately to inflict capital punishment for murder or mutiny. The first reported trial under one such Royal commission was held on the 28\(^{th}\) February, 1616 on board the ship Charles lying at the Surat port, before the commander of the fleet. Gregory Lillington was accused of killing Henry Barton, an Englishman, near Surat on the Bay of Bengal. Gregory confessed to the crime and was put to death.\(^2\) To carry out its trade effectively the Company needed to establish few factories. A factory was a place consisting of offices and residences of the Company's employees and warehouses for storage of goods. The representative of the Company wanted a factory in Surat which was a very good seaport in the Mughal Empire. The Portuguese had already established themselves in Surat. The British and the Portuguese fought a naval war in the water of Surat in which the Portuguese were beaten. The Company established its factory in Surat with the permission of the local Mughal governor in 1612. However, for securing permanent trading facilities the Company sought the permission of Emperor Jahangir. James I sent an ambassador, Sir Thomas Roe, to Jahangir in 1615 who issued a firman (decree) granting trading facilities to the Company.\(^3\) According to the firman the Company was allowed to trade and establish a factory in a hired house. Disputes among the British were to be settled by their President,\(^4\) but disputes between an Englishman and an Indian were

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\(^1\) See the text of the Charter in “Queen Elizabeth's Charter 1600”, in Constitutional Documents (Pakistan), Vol.1, 1964, pp. 1-20.

\(^2\) See John William Kaye, Administration of the East India Company, 1853, p. 66.


\(^4\) The head of each factory was called President or Governor.
to be settled by the established local native authority according to justice. The Surat factory was the headquarter of Company's activities in India till 1687 when the Company's headquarter was shifted to Bombay.

On December 14, 1615, the King conferred upon the Company a general power to issue such commissions to its Captains, subject to the provision that in case of capital offence, the verdict must be reached by a jury of 12 servants of the Company. On February 4, 1623, James I granted to the Company power of issuing commissions to any of its Presidents and thus chief officers in its settlements authorizing them to punish offences committed on land by the Company's British servants. The account of a murder case involving two employees of the company was held on board the ship Mary in 1636 with the help of a jury and the accused was convicted.

By 1639 the Company had acquired another fortified factory on the Eastern seacoast, from a Hindu Raja and constructed a fortified factory named Fort St. George. The Raja also granted to the Company power and authority to govern Madraspatnam – a small village near the fort. A large number of Indians were attracted to this village because of the facilities available there. The population of Madraspatnam increased and was known as the black town. The fort itself was called the white town – because the inhabitants were either British or other Europeans. The whole settlement comprising of the black and the white towns came to be known as Madras. Madras was not a Presidency town and was subordinated to Surat. Although the Raja had left the town to the Company it was not interested in the administration of justice between the locals. The village head called Adigar used to decide all cases of the locals. His court was called the Choultry court. He was dismissed because of his corruption in 1652 and the two English servants of the Company were appointed to set the Choultry. For Capital cases committed by non-English the Company referred the case to the Raja who would order punishment according to the English law.

The most important of the early Charters is the one granted by Charles II on April 3, 1661. It authorized the Governor (President) and Council of each factory to judge under to the law of England all persons,

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1 William Foster, *English Factories in India – 1618-1621*, 1906, pp. 8, 9, 38. (Hereafter Foster, *English Factories*).
3 See Foster, *English Factories*, p. 133.
whether belonging to the Company or living there. Its purpose was to create a judicial system for the Company’s territorial Possessions.

The Charter of 1661 was originally for Surat, but was made effective in Madras subsequently in the same year. The Agent of the Company was made governor who had to administer the Charter. The Island of Bombay was initially acquired by the Portuguese in 1534, by cession from the King of Gujrat, Sultan Bahadur. In 1661, the Portuguese King Alfonsus VI, transferred the Island to Charles II as dowery on the marriage of his sister Catherine with the English King, who gave it to the Company on lease in 1668 for an annual rent of £10. Bombay was a very small and poor town at that time. In 1668, Charles II gave the Company full Powers, Privileges, Jurisdiction for governance, legislation and administration of justice. Bombay was also subordinated in the beginning to Surat. But in 1687, the seat of the President and Council was transferred from Surat to Bombay. Madras which was an Agency, became a Presidency town in 1665. The charter of 1661 had stipulated that cases shall be decided according to the English law. However, neither the Governors nor the members of the Council knew English law. Therefore, they were applying their, commonsense.

In March, 1678, the Governor and council of Madras created a High Court of Judicature and resolved to decide all civil and criminal cases with the help of a jury of 12 men. The Choultry Court was reorganized as it was to consist of Company’s servants and was to sit two days a week to try small misdemeanors, matters of peace, civil actions, upto 50 pagods. All other cases and appeals lay to the High Court of judicature. Thus, a hierarchy of courts was established in Madras. The company was, in the meanwhile, put to a great loss by independent merchants indulging in trade against the monopoly of the Company granted to it in the Charter of 1600. Moreover, the crime of piracy was also rampant on the high seas. Consequently on August 9, 1683, Charles II granted a Charter to the Company authorizing it to establish one or more such courts. The court was to consist of a person ‘learned in civil law’ and two merchants appointed by the Company. It had jurisdiction to hear all mercantile cases committed on the high seas. In 1687, the Company sent from England Sir John Biggs, a professional lawyer to act as the judge – advocate. Thereafter, the Governor and the council relinquished their

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2 A Gold coin equal to three rupees.
3 A Court of Admiralty was thus established in Madras on July 10, 1686.
judicial functions. They however, sat occasionally to decide cases of fugitives.

The Admiralty Court became the general court in Madras. Sir Biggs died in 1689 and the Governor and the council appointed the Governor and the judge-advocate with two members of the council as the judges of the Admiralty Court. In 1692, a new judge-advocate John Dolbon, was sent from England, but he was dismissed in 1694 on corruption charges. The next judge-advocate was a civil servant Mr. William Fraser.

In Bombay an Admiralty Court was established in 1684 and Dr. John St. John, a professional lawyer, was sent from England. Relations between Dr. John and Governor Child worsened and the later took the powers from the former to try ordinary civil and criminal cases. The Governor established another court to try civil and criminal cases headed by Vaux, who was not legally trained. Dr. John was dismissed by the Governor in 1687 for his judicial independence. It is because of this episode that the Company was very reluctant to bring professional lawyers from England although it was provided in the Charters.

Bombay remained under the Mughal occupation from 1690 to 1718. In 1718 another court appeared in Bombay. It consisted of nine judges and a chief justice. Four judges were Indians and were called black judges.¹ The court had jurisdiction in all cases and was not using any jury. It was setting once a week and was not bound by any precedent. The system continued till 1726 and there are many cases of gross injustices carried out by the court to innocent Indians.² In 1688, the Company established the Madras Corporation and created a Mayor’s court as part of it. The court had one Mayor and 12 aldermen and was also called the Court of Record. A skilled lawyer had to be appointed as the Recorder. In the Madras Mayor’s Court the first Recorder was Sir John Biggs who was also judge-advocate in the Admiralty Court. The Mayor’s Court had jurisdiction in civil cases as well as criminal cases. In civil cases valuing over three pagodas, and in criminal cases when the offender was sentenced to lose life or limb appeals from the Mayor’s Court lay to the Admiralty Court. It is important to note that Sir John Biggs was a judge in both courts. The Mayor Court used jury in criminal cases. In 1712, the Governor and council in Madras decided that death sentences will be given to the natives only and not to an Englishman. The Admiralty Court did not set regularly after 1704 and appeals from Mayor’s court lay to the

¹ See Malabari, Bombay in the Making, p. 453.
² Ibid., pp. 328-345; Edwards, Rise of Bombay, p. 155.

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Governor and council. The Choultry Court was to try petty cases, civil cases of up to two pagodas.

Thus, from 1686 to 1726, three courts functioned in Madras. They were the Choultry Court, the Mayor's Court, and the Admiralty Court. Since justice under the early charters was exclusively administered by traders, it may well be called 'traders' justice.'

(a) Administration of Justice in Calcutta

Foundation of Calcutta was laid down on 24th August, 1690 by few Englishmen headed by Job Charnock on the site of three villages, Calcutta, Sutanati and Govindpur. Calcutta became a Presidency in 1699. The Company secured the Zemindari of these three villages, for an annual revenue of 1195 rupees, from Prince Azimushan, Grandson of Awrangzeb, Subahadar (governor) of Bengal. The acquisition of the Zamindari was very significant because it gave the Company a legal and constitutional status within the framework of the Mughal administrative machinery. The Company's Zemindari's functions were entrusted to an English officer who was also known as Collector. He discharged judicial powers relating to revenue that also included criminal and civil cases. Capital punishments had to be confirmed by the Nawab and appeals in civil cases also lay to him. This arrangement continued till 1726.

Before 1726, judiciary developed in the three presidency towns followed a course of its own without any uniformity. The Charter of 1726 focused on uniformity in all the three places. The courts established under the 1726 Charter derived their authority from the King and not from the Company. Municipal institutions were established in the presidency towns for the first time on firm basis and the English common law and statute law of England were introduced.1

Under the new Charter Madras had a Mayor court consisting of a Mayor and nine aldermen. Appeal lay to the Governor and council.2 Further appeal lay to the King-in-Council. The Company was allowed to appoint for Madras and its dependencies a general or generals to command the land and sea forces which the Company was allowed under the Charter. Same was the case of Bombay and Calcutta. In all the three

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2 Their decision was final if the value of the suit was under a thousand pagodas for criminal cases the governor and the council were justices of the peace and the court of Quarter session was created.
places cases between the natives were not entertained by the English Courts; but if they requested the Mayor's court, then it assumed jurisdiction. Thus, the Company tried to respect the sovereignty of local rulers. The only additions in this Charter were the creation of a Court of Requests while appeal in civil cases lay to the Privy Council in England. Madras was conquered by the French in 1746 and held it till 1749.

(b) The Acquisition of Territory and Adalat System

The Company's main role till 1757 was not the acquisition of territory but rather facilitation of trade and commerce. In 1717, the Company had secured the right to collect revenue over 38 villages near Calcutta. In 1756, Nawab Siraj-ud-Dula captured Calcutta. However, the British took it back in the famous battle of Plassey but it did not annex the territory and installed Mir Jafar as Nawab. In 1765, he was succeeded by his minor son Najm-ud-Dula. Mir Jaffar had ceded the Zamindari of the 24 Parganas to the Company, which now controlled an area of more than 800 square miles thus expanding its territories surrounding the presidency towns under its control. This territory was known as the 'moffussil'. The Company provided the adalat system for the administration of justice in the moffussil.

In 1765, the nominal Mughal Emperor Shah Alami granted the Diwani of Bengal, Bihar and Orissa to the Company for an amount of 26 lacs of rupees per annum. The cession of the Diwani or revenue administration of Bengal, Bihar and Orissa marks the beginning of a new era. The Company was trying to show that it has acquired no sovereignty and that its administration was within the Mughal Law. As Diwan, the Company also controlled and collected customs. Although natives were exercising administration they were supervised by the Company officials. The Company assumed full responsibility for collecting revenue itself in 1771. In 1772, Warren Hasting, the first Governor-General in Bengal, divided Bengal, Bihar and Orissa into a number of districts. In each district, there was an English Collector. Moreover, under the 1772 plan, there was a Mofussil Diwani Adalat in each district with Collector as judge. It was to decide all types of civil cases between the natives as well. For Muslims the court was to apply the Qur'an while for Hindus it was

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1 Archbold, Outline, p. 44.
2 The Company was not assuming the direct responsibility of Bengal because their Parliament could interfere directly.
3 Archbold, Outline, p. 47.
applying Shaster. This focus on scriptural law was soon modified as the Regulations of 1793 referred to ‘Hindu Law’ and ‘Mohammedan Laws.’

The Collector was to be advised in the case of Muslims, by Qazi and in the case of Hindus, by a Pundit. Disputes upto ten rupees were decided by the Head farmer of the pergana (town) and his court was called Small Causes Adalat. A Mofussil Fozdari Adalat was established in every district to try all criminal cases. The Adalat consisted of Muslim law officers; qazi, mufid and maulavi. The Maulvi and mufid were to expound the law and the qazi was to give judgment. The Collector was to supervise the court. Appeal lay to the Sadar Adalat. There were two superior courts – Sadar Diwani Adalat and Sadar Nizamat Adalat in Calcutta. The former consisted of Governor-in-Council and was to hear appeals from the Mufossil Diwani Adalat. The Sadar Nizamat Adalat consisted of a Chief Judge the Daroga-i-Adalat and was assisted by the Chief Mufid and three Maulvis.

The Regulating Act of 1773 established a Supreme Court at Calcutta consisting of a Chief Justice and three judges. Appeal lay to the King-in-Council. The Governor-General and the Council were to act before the Supreme Court replaced the Mayor’s Court. The Sadar Fawzadari Adalat was transferred from Calcutta to Murshidabad in 1775 and left the Sadar Dewani Adalat with nothing to do. In 1782 the Governor-General and the Council resumed jurisdiction over the Sadar Dewani Adalat which became a King's Council.

The Pitt’s India Bill of 1784 and the Charter Act of 1793 did bring noticeable changes to the judicial institutions of the Company’s territories. The 1793 Act established an efficient and independent system of courts. For civil cases the lowest courts consisted of the native Commissioners, Anleen Salisan or Munsiffs: these settled cases where the value at issue was not over 50 rupees and an appeal lay from them to the courts of the city or Zillah/district judges. Then came the Registrar, who would try

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1 See Tahir Mahmood, The Muslim Family Law of India, Butterworths India, 2002, 3rd ed., pp. 4-7. (Hereafter Mahmood, The Muslim Family). Tahir Mahmood has given a detail history of how the term(s) were coined, how were they transformed, put into various Indian legislations, and whether it should be used as such or not. Ibid., Also see David Pearl, & Werner Menski, Muslim Family Law, Sweet & Maxwell, London, 1998, p. 37 (Hereafter Pearl & Menski, Muslim Family). There is endless debate about the use of the word Mohammedan Law. For details see my “Marriage in Islam: Civil Contract or a Sacroscant?”, Hamdard Islamicus, January-March, 2008, forthcoming.

2 A fee of 5% was fixed on the petition of appeal.

3 Under the Mughal judicial system he used to receive applications in the court.
cases up to 200 rupees. There were Zillah and city judges. Appeal from their decisions lay to the Provincial Courts of Appeal. The Sadar Diwani Adalat consisted of the Governor-General and the members of the Council. It was to hear appeal against the decision of the provincial courts if the value of the suit exceeded 1,000 rupees. Appeal against its decision lay to the King-in-Council if the disputed amount exceeded pounds 5000.

For criminal cases there were magistrates but they did not have authority within the jurisdiction of the Supreme Court. Appeal lay to the Court of Circuit while serious cases were transferred to it. The Court of Circuit consisted of judges of the Provincial Courts of Appeal aided by the Qazi and Mufti. British subjects accused of crimes had to be sent to the Supreme Court in Calcutta. The Court of Circuit could pass death sentence but had to send the proceedings to the Nizamat Adalat held in Calcutta. The later consisted of the Governor-General and members of the Council assisted by a Qazi and two Muftis.¹

In 1821, it was provided that one or more Sadar Ameens could be appointed to help the Registrar in his work. Sadar Ameens could try civil suits referred to them worth 500 rupees. Appeal lay to the Zillah or city judge. A Monsiff could try case of upto 150 rupees. The 1827 Regulation provided for an Ameen with original jurisdiction upto 1,000 rupees. In 1831, the jurisdiction of the lower courts was enhanced. The Provincial Courts of Appeal were abolished in 1843. The Courts of Circuit were abolished in 1830 and its powers were given to criminal judges.²

We may recall that the Settlement Act of 1781 left the courts intact. However, Calcutta was now considered as her Majesty’s colony. Supreme Courts were established in Madras in 1801 and in Bombay in 1823. One of the most drastic changes introduced by English was the abolition of the last vestiges of the shadowy authority of the Nawab which has lingered on till then in the area of criminal justice. Till then, the criminal justice system was in the hands of the Nawab while the Company was the Diwan. However, the Company was supervising the Fawzdar Adalat System. On December 3, 1790, the criminal justice system was taken from the Muslim Qazis, Muftis and Maulavis and was given in the hands of the Company’s English servants.³ Under the new criminal justice system there were magistrates in every district above them were the courts

¹ The decision of the Nizamat Adalat was final but the Governor General and council could pardon or commute the punishment.
² The Zillah Judge became criminal judges in 1827.
³ The same was done in 1772 to civil justice system by the company.
of circuit and the ultimate court was the Sadar Nizamat Adalat. The Muslim Law officers were to advise the above courts. The Regulation Act, 1773 had authorized the Supreme Court in Calcutta to "approve, admit and enrol such and so many advocates and attorneys at law" as the court "shall seem fit." These were only English, Irish, and Scottish attorneys and solicitors. Later on the Supreme Courts of Bombay and Madras were also empowered to enrol attorneys. No Indian Lawyer had a right to appear before the courts. The reform of Cornwallis in 1793 created a regular profession authorizing the Sadar Diwani Adalat to enrol pleaders or vakeels, both Hindus and Muslims, for all Company's courts.

The most significant event that changed the destiny of India was the War of Independence in 1857 (called the War of Mutiny by the British) which was the final attempt to get rid of the English. The English succeeded in beating the Muslim forces and massacre took place on a large scale. The British Parliament passed the Bill in 1858 which vested all territories in the possession or under the government of the East India Company in the Crown. An important step in the legal history of India was the creation of the Privy Council in 1833. Its full name was the Judicial Committee of the Privy Council. The Privy Council heard appeals from Sadar Dewani Adalat. Under the Judicature Act of 1861, High Courts were created in Calcutta, Madras and Bombay. Moreover, the Supreme Court and the Sadar Diwani Adalats disappeared permanently. The Allahabad High Court was created in 1866. The 1866 Regulation established a Chief Court for the Punjab. The India High Court Act, 1911 raised the possible number of judges in a High Court to twenty and provided for new High Courts to be established. Moreover, a

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1 The Governor General and the Council were to sit as judge of Sadar Nizamat Adalat.
2 The operative law was to be Islamic Law.
5 Archbold, Outline, p. 114.
6 Ibid., p. 145.
7 Appeal had to be made within six months and the amount in dispute was reduced from 5,000 pounds to 10,000 rupees in 1838.
8 It is important to note that in England itself the Judicature Acts were passed in 1881-83 and a High Court with five divisions was created.
9 Each High Court was to have a chief justice and not more than fifteen judges.
10 It was similar to a High Court.
Federal Court for India was established in 1937. In Pakistan the Federal Court was replaced by the Supreme Court on March 24, 1956 and in India on January 26, 1950.

(c) The Privy Council and the Evolution of the Doctrine of Precedent

After describing the development of court system since the early settlement of the East India Company to the creation of the Privy Council in 1833 and the High Courts in 1861 it is necessary to mention the role played by the Privy Council, which was the highest Court of Appeal for Indian Courts in the evolution of the doctrine of precedent in India. As stated above, from the very beginning of the court system of the Company judges were supposed to follow the law of England. Unfortunately, for well over 150 years the Company did not bring professional judges, with the exception of Sir John Biggs and Dr. John St John in Calcutta and Bombay respectively, to preside as judges. Later on, professional judges were brought in by the Company to apply the law of England between the English subjects. With the consolidation of the judicial system in the territories of the Company, law reporting started on a very small scale. The history of the doctrine of precedent, both in India as well as in England, has been bound up with the history of law reporting. Dorin, who later on became a judge of the Sadar Diwani Adalat at Calcutta advocated in 1831 that statutory force should be accorded to the English doctrine of precedent in India so that judgments of a court shall be considered as binding upon itself and upon courts lower down in the hierarchy.¹

Early Law reporting was private enterprise. Sir Francis Macnaughten, formerly a judge of the Supreme Court of Calcutta, inserted questions of Hindu law decided by him by way of illustration in his Considerations upon Hindu Law, published in 1824. Sir William Macnaughten did like wise in his Dissertations on Mohammedan Law, published in 1825. Upto 1850 various judges of the courts had published numerous law reports.² Similarly, reports of Sadar Diwani Adalat, Sadar Fawzdar Adalat and different High Courts working since 1861 are also reported.³ The era of authentic law reporting began with the Indian Law Reports Act, 1875. The Indian Law Reports Calcutta series started in the

¹ See A. Lakshminath, Precedent in the Indian Legal System, Eastern Book Company. 1990, p. 11. (Hereafter Lakshminath, Precedent); Kulshreshta, Landmarks, p. 493.
² For details see Jain, Outlines, p. 729.
³ See Ibid., pp. 731-733.
same year. Thus, the two indispensable requirements for the requirement of the doctrine of precedent – hierarchy of courts and the emergence of authentic law reporting were fulfilled in 1875. A series of Indian Law Reports (I.L.R.) of each High Court started. Bombay, Madras and Allahabad started in 1876. Moreover, the landmark decision in Beamish v. Beamish (1861), the forerunner of the rule (as it was followed then) that a higher court is bound by its own previous decisions, coincided with the passing of the India High Courts Act, 1861.

The Privy Council had earlier declared in Mata Prasad v. Nageshwar Sahai3 that “it is not open to the courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applied to the facts of the particular case. Nor is it open to them, whether on account of ‘Judicial dignity’ or otherwise, to question its decision on any particular issue of fact.” The High Courts held in a number of cases that subordinate courts were bound by the decisions of the High Courts even if the lower courts did not agree with the correctness of a particular decision.4 Statutory recognition to the authority of precedent was given in section 212 of the Government of India Act, 1935. It laid down that the decision of the Privy Council and the Federal Court would be binding upon the courts in India.

The Privy Council, however, did not bind itself by its own previous decisions. In Read v. Bishop of Lincoln5 the Judicial Committee asserted its freedom to consider previous decisions on merits. It is important to note that this position was against the rule laid down by the House of Lords in Beamish v. Beamish.6 It stated that “Whilst fully sensible of the weight to be attached to such decisions, their lordships are at the same time bound to examine the reasons upon which the decisions rest and to give effect to their own view of the law.” The Privy Council held in The Compensation to Civil Servants case7 that it is bound in law, and without independent examination on merits, to follow a prior ruling in an appeal irrespective of whether it is right or wrong. This was similar to

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2 1861 9 H.L.C. 274.
3 AIR 1925 PC 272, 279: 52 I.A. 398, 417.
5 (1892) AC 644.
6 1861, 9 H.L.C. 274. The case will be examined in detail below.
7 A.I.R. 1929 PC 84.
the position of the House of Lords at that time. In *A.G. Ontario v. Canada Temperance Federation*¹ the Privy Council clearly asserted its independence and observed that the Judicial Committee is not absolutely bound by its own prior decisions. Yet the Board would seldom depart from its own old standing on constitutional questions. This was once again against the firm practice of the House of Lords which was reaffirmed in the famous *London Tramways Case*.²

The Indian Independence Act, 1947 was enacted by the British Parliament, which provided for the partition of India and the establishment of two independent dominions to be known as India and Pakistan, with effect from 15 August, 1947. Section 18(3) of the Act provided that the law of British India existing before 15 August, 1947 shall remain applicable and shall continue law of India and Pakistan.

The expected adaptations were made by the Pakistan (Adaptation of Existing Laws) Order 1947 and by the Adaptation of Central Acts and Ordinances Order 1949. All Pakistani Constitutions from 1956 till the present Constitution of 1973 included provided protection to such laws. Article 224(a) of the 1956 Constitution, Article 225(1) of 1962 Constitution and Article 280(1) of the 1972 Interim Constitution all provide for continuation of pre-existing laws.³ Article 268(1) of the present 1973 Constitution provides that:

> Except as provided by this Article, all existing laws shall subject to the Constitution, continue in force so far as applicable and with the necessary adaptations until altered, repealed or amended by the appropriate Legislature.⁴

Continuation of existing laws also applies to periods of Martial Laws, each of which was governed by a Laws (Continuance in Force) Order or something similar. Such laws were promulgated in 1958, 1969, 1977 and 1999 and provided for the continuation of law during the Martial Law period.

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¹ A.I.R 1946 PC 88.
² *London Tramways Co v. LCC* [1898], 14 TLR 360, HL. The House of Lords once again stated that it is bound by its previous decisions.
⁴ See the *Constitution of the Islamic Republic of Pakistan*, Ministry of Law, Justice and Human Rights, 2004. It should be noted that title of the chapter regarding adaptations of previous laws is “transitional.”
Muslims ruled India from 1206 to 1857 but their rule was in decay since the death of Awrangzeb in 1707. The foundations of the British Empire in India were laid down by a company which was organized to further the British interests in overseas countries. The representative of the Company arrived in India in 1604. By 1661 the Company had factories in Surat, Madras and Bombay. The Company delivered justice arbitrarily which could be called as 'traders' justice' because the Company's officials were all traders and had no knowledge of law. Before 1726, judiciary developed in the three presidency towns followed a course of its own without any uniformity. The Charter of 1726 focused on uniformity in all the three places. The courts established under the 1726 Charter derived their authority from the King and not from the Company. Municipal institutions were established in the presidency towns for the first time on firm basis and the English common law and statute law of England were introduced. At this stage, the Company tried to respect the sovereignty of local rulers.

The Company's main role till 1757 was not the acquisition of territory but rather facilitation of trade and commerce. In 1717, the Company had secured the right to collect revenue over 38 villages near Calcutta. After the battle of Plasssey, the Company installed Mir Jaffar as the Nawab of Calcutta who ceded the Zamindari of the 24 Parganas to the Company which now controlled 800 square miles of area called the 'mofussil'. The Company provided the adalat system for the administration of justice in the mofussil. In 1765, Shah Alam granted the Diwani (revenue administration) of Bengal, Bihar and Orissa to the Company for an amount of 26 lacs of rupees per annum. The Company also controlled and collected customs. The 1772 plan provided for a Mofussil Diwani Adalat in each district with Collector as judge to decide civil cases. For Muslims the court was to apply the Qur'an while for Hindus it was applying Shaster. The Regulations of 1793 referred to 'Hindu Law' and 'Mohammedan Laws' instead of the Qur'an and Shaster. The Collector was to be advised in the case of Muslims, by Qazi and in the case of Hindus, by a Pundit. The 1781 Settlement Act considered Calcutta as her Majesty's colony. On December 3, 1790, the criminal justice system was taken from the Muslim Qazis, Muffis and Maulavis and was given in the hands of the Company's English servants. Muslim Law officers were to advise the courts. The Regulation Act, 1773 authorized the Supreme Court in Calcutta to enrol English, Irish and Scottish attorneys at law. In 1793 Cornwallis created a regular profession
authorizing the Sadar Diwani Adalat to enrol pleaders or vakeels, both Hindus and Muslims, for all Company's courts. The 1857 war of independence changed the fate of India. The Bill of 1858 gave all territories in the possession or under the government of the East India Company to the Crown. In 1833 the Privy Council was created. In 1861, High Courts were created in Calcutta, Madras and Bombay. A Federal Court for India was established in 1937 which was replaced in Pakistan in 1956. Early Law reporting was private enterprise. Authentic law reporting began with the Indian Law Reports Act, 1875. Thus, the two indispensable requirements for the requirement of the doctrine of precedent – hierarchy of courts and the emergence of authentic law reporting were fulfilled in 1875. Statutory recognition to the authority of precedent was given in section 212 of the Government of India Act, 1935. It laid down that the decision of the Privy Council and the Federal Court would be binding upon the courts in India. The Privy Council, however, was not bound by its own previous decisions. The Indian Independence Act, 1947 provided that laws existing in British India before independence would shall remain, with necessary changes and adaptations to be made, applicable and would continue to be law of India and Pakistan. All the Constitutions of Pakistan including the 1973 Constitution gave protection to all such laws.

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