Legal Systems in the Commonwealth

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LAW IN THE COMMONWEALTH

THE members of the Commonwealth consist—apart from the United Kingdom—of those countries whose 'Dominion status' was recognised by the Statute of Westminster, 1931 (Canada, Australia and New Zealand); and those former dependent territories which have since been granted independence by special statutes—India and Pakistan, Ceylon, Ghana, the Federation of Malaya, the Federation of Nigeria, Sierra Leone and Cyprus.

No Formal Legal Unity

The Balfour Declaration of 1926 described the members of the Commonwealth as united by a common allegiance to the Crown, and the 'common allegiance' of the non-republican members of the Commonwealth was confirmed in the London Declarations of 1949 and 1955 when the intention of India and Pakistan to become republics was announced. When this happened, and when Ghana made the same decision in 1960, the Prime Ministers of India, Pakistan and Ghana affirmed their acceptance of the Queen as the symbol of the free association of the independent member nations of the Commonwealth and as such the Head of the Commonwealth.

Yet unity of the Commonwealth does not rest on a unity of law. At common law it used to be said that the Crown was one and indivisible throughout the Queen's dominions. This is of course no longer applicable to the republican members of the Commonwealth, but even between the non-republican members the unity is one not of law but of convention, which governs the relations of the member States with each other. Just as there are as many independent governments as there are independent countries of the Commonwealth, so the expression 'the Crown' in any one country usually simply means the government of that country.

Moreover, just as the Queen has many Governments, so there are also, even in the non-republican countries of the Commonwealth, many different legal systems. Once a dependency was established the local legislature became the principal law-making body. The power of the United Kingdom Parliament to legislate for the dependencies was sparingly used and from the middle of the 19th century there was a convention against this Parliament legislating without their consent for the self-governing colonies, later known as the Dominions. One such law was the Colonial Laws Validity Act of 1865 which provided *inter alia* that any colonial law which was repugnant to the provisions of a United Kingdom Act of Parliament was, to the extent of such repugnancy, void and inoperative. Its intention was, however, to restrict the number of cases in which colonial laws could be held invalid on this ground. The Statute of Westminster, 1931, ended the power of the United Kingdom Parliament to legislate for the Commonwealth countries that were then known as Dominions (except with the Dominions' consent) and established the Dominions' legislative independence.[1]

[1]See COI reference pamphlet RF.P. 5047 of June 1961, *Constitutional Development in the Commonwealth*, for an account of the Statute of Westminster and of the evolution of the present Commonwealth association.

Each member State of the Commonwealth has its own courts, its own legislative organs and its own law.

English Common Law

The way in which the Commonwealth has evolved historically, however, has had a profound influence on the system of law prevailing in individual Commonwealth countries, and although the Commonwealth has no formal legal unity, observance of English common law is a real bond between its members. It is not universal, for the law of the Province of Quebec in Canada and of the colony of Mauritius is founded on that of France, and Roman-Dutch law forms the basis in Ceylon. In some parts of the Commonwealth the whole of the standing corpus of the law is English law, in others a foreign system exists alongside English law; in others, for example in India and Pakistan, the whole private law belongs to another legal tradition. But even in these last the English public law, the English manner of interpreting statutes, the English law of evidence and the English system of precedent, intrude to some degree. In countries like Australia and New Zealand, and in those like Nigeria and Sierra Leone which have more recently become independent, it has been the deliberate policy to follow English case law as the formal source of law, and everywhere in the Commonwealth (including the United Kingdom dependencies) legal precedent and decision remain important elements in maintaining a sense of common practice.

The origin of this supremacy of the English common law throughout the Commonwealth lies in the circumstances in which British rule was established in the dependent territories of the United Kingdom. In the 17th century the law first grew up round the 'plantations' or settlements which Englishmen founded in uninhabited countries or in countries inhabited by uncivilised peoples, and the 'factories' or trading posts which they established in civilised countries. In this process of colonisation there were two chief principles of law. The first was that in a conquered or ceded colony (of which Ashanti in Ghana, Quebec in Canada and several of the West Indies were examples) the existing legal system was retained. Often the existing system was supplemented by the importation of English common and statute law. An example of this is Nigeria where the reception of English law was made with respect for the indigenous system of customary rules, or for such of these as were not 'repugnant to equity, justice and good conscience'.

The second principle was that when Englishmen founded a colony in an uninhabited or savage country (for example the Australian colonies), they carried with them the common law of England and the statute law as existing at the time of settlement. Thus the personal law of Englishmen became the territorial law of the colony. The broad rule was that such settled colonies were possessed of as much of the general English law, common and statutory, as was conveniently applicable to the colonial conditions.

When English law was introduced—whether in conquered, ceded or settled colonies—the scope of the law so applied and the time when it was to be considered effective in the colony were decided either by the local courts or by formal enactment of the local legislative authorities. Subsequent Acts of the United Kingdom Parliament did not apply to the colony unless they were expressed to apply to that colony or to colonies generally. But the

original reception of English law, supplemented by local statute and judicial precedent derived from English sources, formed the basis of legal systems closely related to the English tradition.

Fundamental Liberties

The fundamental liberties of the subject were part of this inheritance. In the United Kingdom they emerged as the consequences of the principles of the supremacy of Parliament, the rule of law and equality before the law and were not embodied in a written constitution. They include immunity from arbitrary arrest; freedom of speech; freedom of assembly; freedom of religion; property rights; and freedom of access to the courts. 'The notion [of equality before the law] assumes that among equals the laws should be equal and should be equally administered, that like should be treated like. The right to sue and be sued, to prosecute and be prosecuted, for the same kind of action should be the same for all citizens of full age and understanding, and without distinction of race, religion, wealth, social status, or political influence.'[1]

The rest of the Commonwealth followed the United Kingdom in adopting these fundamental liberties as basic to their society. In most Commonwealth countries they were, as in the United Kingdom, unwritten. In others—India, Malaya, Canada, Cyprus, Nigeria and Sierra Leone—such rights are incorporated in the Constitution or established by statute. But everywhere they form the basis of the legal systems of the Commonwealth and find expression in such characteristic institutions as trial by jury and the independence of the judiciary.

This pamphlet gives a brief description of the legal and judicial system in operation in each of the Commonwealth countries, paying particular attention to the structure of the courts and the content of the law administered. These detailed accounts illustrate the similarities and interdependence which characterise the administration of the law throughout the Commonwealth, and the permeating influence of the law of the United Kingdom.

[1]Sir Ivor Jennings: *The Law and the Constitution.*

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AN IMPORTANT part in maintaining the quality of the law of the common law countries of the Commonwealth has been played by the Judicial Committee of the Privy Council in the United Kingdom, which represents the survival of the ancient judicial powers of the King's Council. By the early 19th century these survived only in the form of an appellate jurisdiction from the King's overseas dominions. The Judicial Committee Act, 1833, passed for 'the better administration of Justice in His Majesty's Privy Council' constituted a Judicial Committee. The Judicial Committee Act, 1844, authorised the Queen by Order in Council to admit any appeals to the Privy Council from any Court within any British colony or possession abroad, even though such Court might not be a Court of Error or of Appeal.

Composition

As a result of the Act of 1833 and various later statutes, the Judicial Committee is composed of:

(a) the Lord President of the Council, who is usually a layman and does not sit; the Lord Chancellor; the Lords of Appeal in Ordinary; and the Lords Justices of the Court of Appeal, who seldom sit;

(b) such other members of the Privy Council who hold or have held 'high judicial office';

(c) four Australian Judges, one Canadian and one New Zealand Judge and one Judge from the Federation of Rhodesia and Nyasaland (mostly Chief Justices and ex-Chief Justices).

The quorum is three. Judges from an independent Commonwealth country may be invited to sit in hearing appeals from their country.

Sources of Appeals

The Judicial Committee was until recently the final court of appeal on certain legal issues arising in any Commonwealth country except the United Kingdom. The Committee held that the Statute of Westminster enabled Dominions to which that Statute applied to abolish all appeals to the Privy Council and in 1949 Canada abolished the right of appeal. Canada's example has since been followed by India, Pakistan, Ghana and Cyprus. Appeals may now only come from Australia, New Zealand, Ceylon, Nigeria, Sierra Leone and (under a special arrangement) from Malaya, and from their dependencies and those of the United Kingdom. There is a restriction on appeals from Australia so that questions involving the federal distribution of powers should, save in exceptional cases, be finally determined by the High Court of Australia.

In 1959 appeals to the Judicial Committee were made from the following courts:

Australia (High Court)	1
Bahamas	1
Canada (Supreme Court)[1]	1
Ceylon	11
Eastern Africa (Court of Appeal)	9
Fiji	1
Ghana	5
Hong Kong	1
Nigeria	9
Rhodesia and Nyasaland	1
St. Helena	1
Singapore	1
West Africa (Court of Appeal)	8
West Indies (Court of Appeal and Federal Supreme Court)	2
Total Appeals from Commonwealth Courts	52

Appeals pending at the commencement of the year also included appeals from Barbados, Bermuda, British Honduras, Jamaica, Malaya, New South Wales and Trinidad. In all there were 104 appeals before the Judicial Committee in the course of 1959.

Procedure

Appeals, or requests for leave to appeal, are commenced by petition to the Crown. Only one 'judgment' is given in each case. This is in theory a report made to the Queen of the reasons why judgment should be given in favour of a particular party; but the Committee is regarded for practical purposes as a court, and the Queen is bound by convention to give effect to its advice, which is done by Order in Council.

Special Reference

While most of the Judicial Committee's work consists of hearing appeals arising in the ordinary course of litigation, the Judicial Committee Act, 1833, provided that the Crown might refer to the Committee any question it thought fit. Most of the Committee's opinions have been given on questions arising in overseas Commonwealth countries. Thus in 1927 the Committee was asked to give an opinion on the Labrador boundary dispute between Canada and Newfoundland.

Appeals from Courts in the UK Dependencies

Appeals from the United Kingdom Dependencies come to the Judicial Committee in two ways; as of right, and by a special leave of the Judicial Committee itself. Appeals as of right exist only where a right of appeal in prescribed categories of cases has been specially created by statute, Order in Council or otherwise. The instrument creating the right of appeal usually entrusts to the court appealed from the duty of granting or refusing leave to appeal in accordance with its terms.

[1]An action which started before 1949.

The Judicial Committee will only grant special leave to appeal 'where the case is of gravity involving a matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character'.[1]

Special leave to appeal may also be granted in criminal cases, but this is exceptional. The position was described by the Judicial Committee in *Re Dillet* (1887), where it was said: 'Such appeals are of rare occurrence; because the rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done'.

Value of the Judicial Committee

The influence of the Judicial Committee is not confined to the number of appeals it hears. The existence of the Committee is also a unifying influence of great importance in the formulation of judicial precedent throughout the Commonwealth.

[1] *Prince* v. *Gagnon* (1882).

THE UNITED KINGDOM

THE courts in the United Kingdom administer a law which is derived in the main, from three sources: common law, equity and statute law.

The common law has been defined as 'a system which consists in applying to new combinations of circumstances those rules which we derive from legal principles and judicial precedents'. It originated in unwritten traditions and has been built up over the centuries, largely by the decisions of judges in individual cases. Judges legislate by the extension of old rules to new sets of circumstances or even in exceptional circumstances by laying down a new rule where there is no precedent. Rules are susceptible of constant change to suit the changing conditions of society.

The need for equity as a supplementary source of law arose in the Middle Ages when the rigid adherence to precedent in the common law courts made it necessary to establish a separate Court of Chancery with distinct principles. For the most part common law and equity deal with different topics. In 1873 the Judicature Act merged the common law courts and the Court of Chancery into one High Court of Justice which administered both law and equity (causing equitable principles to prevail over those of common law where they conflict). There is, however, still a Queen's Bench Division of the High Court and a Chancery Division of the High Court and most law administered in the former division is common law, and most law administered in the latter division is equity.

Statute law includes Acts of Parliament and subordinate legislation made under them (for example, statutory instruments and local authority by-laws). In the 20th century this has greatly increased in volume; there are very few branches which remain entirely untouched by the legislator. In all cases statute law takes precedence over other law, for Parliament is the supreme law-making body in the United Kingdom, and when necessary the authority of Parliament is invoked to simplify, clarify and modernise the law. Legislation is interpreted by the courts and through judicial constructions statute law often becomes case law.

Although the United Kingdom is a unitary State, it does not have a single body of law applicable universally within its limits; and in England and Wales, Northern Ireland, and Scotland, respectively, separate systems are in force. There are, however, similarities within the systems. As between England and Wales on the one hand and Northern Ireland on the other the similarity is general, due to the association between these countries since the twelfth century. As between Scotland and the rest of the United Kingdom the differences are more extensive, although the existence, during the past 250 years, of a common Parliament, a common public opinion on broader issues, and a common course of appeal for civil cases has resulted in substantial identity at many points.

In Scotland, the basis of the modern common law is embodied in the writings of certain seventeenth, eighteenth and early nineteenth century lawyers of great repute who, between them, described systematically almost the whole field of private and criminal law as existing in their times. Broadly

speaking, the principles enunciated by these lawyers, together with the many judicial decisions which have followed and developed those principles, form the body of Scots non-statutory law. Scotland has never had a separate system of equity—equitable principles having always permeated the ordinary rules of law.

The Branches of Law

The leading branches of law are civil law, the purpose of which is to maintain private rights and to provide compensation for infringement of them, and criminal law, which is chiefly concerned with wrongs considered injurious to the community and consequently punishable by the State. There is also constitutional law which relates to the organisation of Parliament and of the administration.

The civil law comprises such matters as the law of property, the relation between landlord and tenant, family law, mercantile law, the law of contract, company law and the law of tort.[1] Of these, some, like company law, are wholly statute law. Others like the law of tort and the law of contract are achievements of the common law and have been developed by judicial decisions over the centuries.

English criminal law is the product of a thousand years of legal development. It consists of a small number of common law crimes and a very large number of statutory offences. There has been no attempt at codification but certain important parts of the criminal law have been the subject of consolidating statutes. The criminal law of the United Kingdom is accusatory or litigious in form—in other words, it presumes the innocence of the accused until his guilt has been proved by the prosecution 'beyond reasonable doubt'.

The Law of Evidence

The law of evidence is, in general, the same in criminal and in civil actions; but some of the rules that comprise that law, particularly when they relate to the proof of the case, are applied with greater rigour and severity in the course of criminal than in the course of civil proceedings. These rules are designed to determine four main problems. First, who is to assume the burden of proving facts. Second, what facts must be proved. Third, what facts must be excluded from the cognizance of the court. Fourth, how proof is to be effected.

The Judicial Process

The English procedural law exhibits some fundamental characteristics which are sharply contrasted with that of other legal systems. English litigation is contentious rather than inquisitorial. 'In any criminal proceedings someone has to make an investigation in order to formulate a charge, and someone has to exercise a judicial function in deciding whether the charge is substantiated. In England we divide these functions, so that the judicial process in our criminal law is commonly called accusatorial. All prosecutions are nominally at the suit of the Crown, which means that the case against the accused must be presented by one party, called the prosecutor

[1]Tort is any wrong, not arising out of contract, for which the ordinary remedy is an action for damages.

or the prosecution, and met by the other party called the defendant or the accused or the prisoner. The work of investigating, preparing and presenting the case for the prosecution falls upon the prosecutor and not upon magistrates or judges. An issue must be presented to a tribunal that is unacquainted with the matter, and that tribunal must try the issue between the two contesting parties.'[1]

Trial by jury also emphasises the contentious nature of English procedure. In England and Wales the jury consists of 12 (and in Scotland of 15 in criminal and 12 in civil cases) ordinary members of the public (except that they must usually be property owners or rate-payers) who are completely independent of both the legislature and the executive. The proportion of cases tried by jury is not high. Crimes are divided broadly into indictable offences and non-indictable offences, i.e. into offences which are tried on indictment before a jury and offences which can be dealt with summarily by a magistrate. At present about 85 per cent of indictable offences are tried summarily. Of the 15 per cent sent for trial by jury about two-thirds of the defendants plead guilty. Thus only about 5 per cent even of indictable offences are actually tried by jury. In civil cases the proportion of jury trials in the High Court is now less than 3 per cent.

Civil Courts

The most important of the primarily civil courts in England and Wales are:

(1) *The Court of Appeal*, which, together with the High Court, forms the Supreme Court of Judicature. The Court of Appeal hears civil appeals from the county courts and from the High Court. It normally sits in three divisions.

(2) *The High Court of Justice*, which sits in three divisions: the Queen's Bench Division, staffed by judges who are mainly concerned with the more important civil actions, but also hear criminal cases at assizes; the Chancery Division, in which actions involving settlements, trusts, the administration of the estates of deceased persons, company and bankruptcy matters, and some tax cases, are heard; and the Probate, Divorce and Admiralty Division. The jurisdiction of the High Court is both appellate and original; its divisional courts hear appeals on points of law from quarter sessions and magistrates' courts.

(3) *County courts*, which are exclusively civil courts, and deal with the great bulk of civil litigation. There are some 400 county courts in the country and they are so arranged that there is no part of the county more than a reasonable distance from one of them. Their jurisdiction includes nearly all common law actions provided that the amount claimed does not exceed £400. County courts deal with the vast bulk of judicial work.

Criminal Courts

Courts which deal predominantly with criminal actions include:

(1) *The Court of Criminal Appeal*, the jurisdiction of which covers appeals by persons convicted of crime at the Central Criminal Court, assizes

[1]*The Machinery of Justice in England* by R. M. Jackson, LL.D.

or quarter sessions. (Appeals against conviction and sentence from magistrates' courts are heard at quarter sessions.)

(2) *Courts of assize*, which are branches of the High Court, held in the county towns and certain big cities three times a year. The assize judges work on circuits covering England and Wales, trying the most serious criminal offences committed in the county. They may also hear certain civil cases.

(3) *Courts of quarter sessions*, where all but the most serious cases may be tried by jury. County and borough sessions are normally held four times a year.

(4) *Magistrates' courts*, which try the large number of lesser offences (over 97 per cent of all criminal offences) that may be tried without a jury.

The House of Lords is the final appeal tribunal in civil and criminal cases from all courts in Britain, except the High Court of Justiciary in Scotland from which no appeal lies.

Courts in Scotland

The main courts in Scotland are:

(1) *The High Court of Justiciary*, which is the supreme criminal court and has both original and appellate jurisdiction.

(2) *The Court of Session*, which is the highest civil court in Scotland. It is divided into two parts: the Inner House, which is mainly an appeal court, and the Outer House, which has original jurisdiction.

(3) *Sheriff courts*, which exercise a very wide civil and criminal jurisdiction. Criminal cases may be heard either with or without a jury, depending on the nature of the offence.

(4) *Burgh and justice of the peace courts*, where minor offences are tried without a jury.

Courts in Northern Ireland

The civil and criminal courts in Northern Ireland are similar to those in England and Wales with a Court of Appeal, a High Court of Justice, county courts, quarter sessions and magistrates' courts.

The Judiciary and the Legal Profession

The judiciary in the United Kingdom is independent; it is free to administer the law without fear or favour under protection of the law; since the end of the seventeenth century it has been established that the executive cannot disturb or delay the course of justice, and that the decisions of the judges are inviolate, subject only to the right of appeal to a higher court, and to the exercise of the Royal Prerogative of Mercy. There is no Minister of Justice; the judges are judges of the Queen's courts, and nearly all judges are appointed by the Crown on the recommendation of the Prime Minister (for the highest judicial appointments throughout Britain), or of the Lord Chancellor (for most other judicial appointments in England and Wales), or of the Secretary of State for Scotland on the nomination of the Lord Advocate. Once a superior judge has been appointed he holds office during good behaviour, and cannot be removed except on an address to the Sovereign

presented by both Houses of Parliament which, in practice, never interfere with judicial independence.

The salaries of superior judges are not voted annually like those of most other Crown servants, but are permanently charged upon the Consolidated Fund. Thus their administration cannot be debated in Parliament when the Civil Estimates are presented, as can the administration of most Crown servants, although they can be altered by Act of Parliament. Further, they are immune from proceedings of any sort for any action which they may take or words which they may speak when acting in their judicial capacity.

A remarkable feature of English criminal justice, as compared with most other legal systems, has been the continuing importance of the English justice of the peace. Justices of the peace, who are unpaid and do not necessarily have any legal knowledge, are appointed to the Courts of Quarter Sessions and the Magistrates' Courts, although there are legally trained magistrates in London and some of the larger cities; recorders at borough quarter sessions, are barristers, and there are legally qualified chairmen at county quarter sessions.

The legal profession is divided into two classes of lawyer: barristers and solicitors in England and Wales, and advocates and solicitors in Scotland. In general it may be said that solicitors undertake legal business of all kinds for lay clients, while barristers and advocates advise on legal problems submitted through solicitors, and conduct legal proceedings in the higher courts in which they have the exclusive right of audience.

Judicial Control of Administrative Authorities

Wide powers of deciding disputed questions have been conferred by modern statutes upon Ministers of the Crown or their deputies, and upon independent or semi-independent and advisory bodies. Apart from their main function of administering the civil and criminal law, the law courts also exercise certain functions in regard to this administrative law. Thus they hear appeals from some of the decisions of administrative authorities, may if requested compel statutory authorities to carry out their duties and keep within their statutory powers, and they decide cases in which proceedings are taken against administrative authorities.

CANADA

IN THE Dominion of Canada which, except for Quebec, was acquired by settlement, the courts held that British subjects were assumed to have taken with them all English laws and liberties in so far as they were compatible with local conditions. Canada has therefore inherited the English common law and doctrines of equity and as in England the two remain distinct, although the old duality of courts has been ended. There are also in existence a number of British statutes which apply to Canada, although many of these are of small importance.

Quebec was a conquered colony with an established and quite different legal system derived from France and based on the Roman law. French civil law was formally confirmed by the Quebec Act, 1774 (which, however, retained the English criminal law for Quebec).

The present position is that English common law furnishes the great bulk of the Canadian civil law, although the statutory law has made substantial alterations in many fields. In Quebec the civil law is different from that in the rest of Canada, and matters concerning personal, family and property relations are governed by another and very different set of legal principles embodied in the Civil Code. Even in Quebec, however, the law concerning commercial relations has been substantially modified by the influence of the common law, and very substantial portions of the law relating to property and civil rights are uniform throughout Canada as they are under the jurisdiction of the federal parliament; examples of the latter being banking, navigation and shipping, bankruptcy and insurance. Criminal law and procedure is also a federal concern and so is uniform throughout the country. The criminal law has been almost entirely derived from the common law, although it is now in codified form as the Criminal Code of Canada.

Canadian courts may be required to decide questions which have not come up in the ordinary course of litigation but which have been specially formulated for the purpose and are referred to them for an opinion. An example is the reference to the Supreme Court of questions involving the interpretation of the British North America Act or the constitutionality of Dominion or provincial legislation.

System of Courts

The British North America Act established a plan of federal and provincial courts. The province has jurisdiction over 'the administration of justice in the province, including the constitution, maintenance and organisation of provincial courts, both of civil and criminal jurisdiction and including procedure in civil matters in those courts'. Procedure in criminal matters is under the Dominion; and it also has control of the appointment, the remuneration, and if necessary, the removal of the judges of both Dominion and provincial courts. The Dominion Parliament may impose new duties upon existing provincial courts, and may give them new powers in the matter of subjects not assigned exclusively to the provinces.

The Dominion courts are the Supreme Court of Canada and the Exchequer Court of Canada. Each province has a Supreme Court, which consists of a Court of Appeal and a High Court of Justice, and County Courts. There are also minor provincial courts known as Surrogate Courts, Division Courts and Magistrates' Courts.

The Supreme Court of Canada

The Supreme Court of Canada was established in 1875, under the express authority of the British North America Act, to exercise appellate civil and criminal jurisdiction for the Dominion. The conditions under which appeals are allowed from provincial courts are determined by the Canadian Parliament. The Supreme Court also hears appeals from the Exchequer Court, from the Board of Transport Commissioners, and in controverted election cases. The Court consists of the Chief Justice and six judges, selected on a representative basis from the provinces and appointed by the Governor in Council.

Exchequer Court of Canada

The Exchequer Court possesses exclusive original jurisdiction in all cases in which demand is made or relief sought against the Crown or any of its officers. It enforces the law relating to revenue, and has concurrent jurisdiction in copyright, patent and trade mark actions. It consists of the President and three other judges, appointed by the Governor-General in Council.

Supreme Court of a Province

The Supreme Court of, for example, Ontario, consists of two Divisions, an Appellate Division and the High Court Division. The Court of Appeal has general appellate jurisdiction in civil and criminal cases coming from the High Court. The High Court is the superior court of record of original jurisdiction, both civil and criminal, and deals with the great bulk of litigation of moderate and major importance.

The Court of Appeal for Ontario is composed of the Chief Justice of Ontario and seven other justices of appeal; the High Court of Justice for Ontario is composed of the Chief Justice of the High Court and 14 other judges. Judges are appointed by the Governor in Council.

County Courts

County Courts have jurisdiction over civil cases involving small amounts and authority to try cases involving minor criminal offences.

Other Courts

Surrogate Courts deal with the estates of deceased persons. *Division Courts* are civil courts for the trial of minor personal actions. *Magistrates' Courts* are responsible for the trial of minor criminal offences and a few civil cases.

There are other minor provincial courts with jurisdiction over special classes of cases, such as juvenile courts and family courts, coroners' courts and courts of arbitration.

The Judiciary

All judges hold office during good behaviour and may only be removed by the Governor-General in Council following a joint address by both Houses of Parliament. Judicial salaries are fixed by statute and are given special security by being made a charge on the Consolidated Revenue Fund.

AUSTRALIA

A UNITED KINGDOM statute of 1829 provided that all laws and statutes in force in England on 25th July, 1828, should be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land[1] 'so far as the same can be applied within the said colonies'. This reception of English law was later extended to other States and to the Commonwealth of Australia when this was established in 1901. Subsequent to 1828 no decision of an English court has imperative authority in Australia. However, special efforts have since been made to keep the common law uniform with that of England and authorities are cited not only from England and the various Australian States but also from New Zealand, Canada and the United States. In recent years the percentage of English and United States citations has fallen somewhat as Australia has built up its own body of case law.

Statute law also shows a general uniformity with English law, so far as local policy allows, although even where there is uniformity of principle there are many minor differences between the States. Codification and consolidation of laws has been taken much further than in England and Commonwealth statutes are so drafted that the laws are kept consolidated.

The Branches of the Law

Three States—Queensland, Western Australia and Tasmania—have adopted criminal codes. The other States still remain under the common law as modified by the relevant statutes; there the criminal law has been consolidated. In civil law the law of tort and the law of contract are particularly close to the English model.

The fact that the constitution of the Commonwealth of Australia is a federal one embracing seven governments has given a special importance to constitutional law and the judicial interpretation of the constitution. This has fallen almost entirely to the High Court of Australia, aided occasionally by the Judicial Committee of the Privy Council. Questions have centred on federal distribution of powers; the validity of laws; the interpretation of the conventions governing the relations between the Crown (represented by the Governor-General and the Governors) and Cabinets; and between upper and lower houses.[2]

In Australia as in Britain there has been a growth of administrative law through the spread of social services and of regulatory State activities. Legally this has been reflected in the growth of power delegated by Parliament to ministers or special statutory bodies. The setting up of public corporations to operate social and economic services has been accompanied, as in the United Kingdom, by the establishment of a number of administrative tribunals. Most administrative services such as railways, housing and forestry, are State responsibilities and many of the most important contributions to administrative law come from the State Supreme Courts. As an

[1]Now Tasmania.
[2]See COI reference pamphlet R.F.P. 5047, *Constitutional Development in the Commonwealth.*

appeal lies from them to the High Court of Australia, this federal court has been able to co-ordinate the principles of administrative law.

Procedure and Pleading

The system of pleading and of procedure in the High Court of Australia, the Supreme Courts of the States other than New South Wales, and the territories of the Commonwealth have been modelled on the English Judicature Acts. In New South Wales the merger of common law and equity has not occurred and the system of pleading and procedure at law remains radically different from the system obtaining in equity.

System of Courts

The judicial power of the Commonwealth is vested in the Federal Supreme Court, the High Court of Australia, consisting of a Chief Justice and six judges. The High Court is a general Court of Appeal from the State Courts. If a decision, on appeal from a State Court, is given by the High Court, the decision binds all State Courts. The High Court therefore plays an important part in developing a uniform common law rule for Australia. It is also a court of original jurisdiction in a number of matters, the most important being suits between the Federal and State Governments and suits involving the interpretation of the constitution.

Each of the States has a Supreme Court and there is also one for the Northern Territory and the Australian Capital Territory. The Supreme Court is part of the judicial structure of the State; but for certain purposes it is invested with federal jurisdiction by the Commonwealth.

The names, organisation and jurisdiction of inferior State courts vary greatly:

(1) All States have magistrates and justices of the peace making preliminary investigation into serious criminal charges with a view to committing the accused for trial in a higher court.

(2) There are Courts of Petty Sessions, consisting of magistrates and justices of the peace trying minor criminal cases.

(3) There are courts consisting of magistrates and justices of the peace trying minor civil cases.

(4) There are intermediate criminal courts, consisting of judges sitting with a jury, trying more serious criminal charges but not the most serious.

(5) There are intermediate civil courts, consisting of a magistrate or judge, sometimes with a jury.

NEW ZEALAND

WHEN British sovereignty was proclaimed in 1840, New Zealand became subject to the laws of England in so far as they were reasonably applicable to the circumstances of the dependency. In addition, an Ordinance of the Legislative Council of New South Wales provided that the laws of New South Wales, so far as they could be made applicable to the conditions of the dependency, were to be in force in New Zealand. When New Zealand became a separate colony many Ordinances were passed modelled on Ordinances in force in Australian colonies. The effective reception of English law followed upon the establishment of an adequate judicial system, coupled with the means of enforcing the law. It remains the settled policy of the New Zealand courts to follow English decisions.

The rapid changes which have taken place in New Zealand in the past hundred years has been reflected in the legislation, much of which has been borrowed from the United Kingdom and other countries. Much of this has been social legislation dealing with such matters as health, education, child welfare, social security and Maori welfare. Much of it has encroached on the common law; examples of the law which has been affected being freedom of contract, title to property, freedom to dispose of property by will and freedom of the person.

The adoption of the English criminal law was expressly effected by the English Laws Act, 1858, but this merely confirmed the rule of the common law. The law relating to indictable offences was codified, and the criminal law simplified and improved, by the Criminal Code Act, 1893. New Zealand was incidentally the second country in the world to introduce probation—in 1886.

In the civil law, the greatest changes in comparison with the law of England have occurred in the law relating to property and the fewest in that relating to torts. At a very early stage in the history of New Zealand a system of land law had to be evolved which met the needs of a pioneer community; and this fact has left a deep and lasting impression on the property law of the country. The general principles of contract are still the same in both countries and New Zealand has been largely content merely to copy English legislation, but there is a large amount of legislation in New Zealand dealing with types of contract which are more or less peculiar to the economy of the country.

The Supreme Court

The Supreme Court was created in 1841, combining in itself even at that early date the jurisdiction of a court of equity with that of a court of law. It is a court of first instance and an appeal court from the decisions of the inferior courts in both their civil and criminal jurisdiction. Trials are either before a judge and jury or before a judge sitting alone or a bench of judges. The Court consists of the Chief Justice and eleven other judges.

Court of Appeal

The Court of Appeal exercises original jurisdiction in its civil capacity in certain matters. In addition the Court of Appeal has jurisdiction to hear appeals from the Supreme Court. The Court's judges are taken from the Supreme Court and elsewhere.

Magistrates' Courts

Magistrates' courts are presided over either by justices of the peace or by stipendiary magistrates. Where a stipendiary magistrate presides, his summary jurisdiction to try (with the consent of the accused) extends to such a large list of indictable offences that only the most serious crimes are left to the exclusive jurisdiction of the Supreme Court. These courts account for an overwhelming proportion of the judicial business of the country. Persons eligible for appointment to the magisterial bench are barristers or solicitors of seven years' standing. The court is not empowered to sit with a jury.

Courts of Special Jurisdiction

These include:

Maori Appellate Court and Maori Land Court.
Court of Arbitration (an industrial court with compulsory powers).
Compensation Court (which determines claims for workers' compensation).
Land Valuation Court.

The Judiciary

Judges and magistrates hold office during good behaviour, subject to retirement at the age of 72 in the case of judges and 68 in the case of magistrates, and subject to Parliament's right to remove by way of a specially prescribed parliamentary procedure. The salaries of judges are fixed by statute and are thus not subject to annual appropriation.

INDIA

WHEN THE British first came to India they found an elaborate procedure of inheritance and family law, the Moslem uniform, the Hindu much diversified, but both of them based on writings and text-books having religious authority. There was a body of well-defined custom relating to land; and penal rules drawn from Moslem law and enforced throughout the Mogul Empire.

At first administrators carried on with what they found, applying English law to the English and Indian law to the Indians. However there were gaps in the legal principles available and it was gradually found necessary to regularise the law of judicial procedure and the law of crimes; in particular the penal law of the Moslem Courts.

When in the early nineteenth century reforms based on English law were introduced the administration preferred to issue local regulations suited to Indian conditions rather than to reproduce in India the actual forms of English law. All law, moreover, including Indian customary law, was administered through the regular tribunals; no special courts were instituted or recognised for administering Indian law.

The Indian Law Commissions of 1833, 1853 and 1861 laid the foundations of a uniform system of codified law, including the law of crimes, of criminal and civil procedure, of evidence and of contract. In drawing up these codes the conceptions of English law prevailed, though the form was adapted to Indian conditions. However, this process left untouched the body of family law and the law of inheritance, and the law of land tenures also retained its local characteristics. Some systematization of the customary law dealing with matrimonial issues and the procedure of succession has arisen from the fact that it has been administered by the same courts as statutory law and from the study that has been given to it in Indian text-books.

All laws in force at the inauguration of the Republic (1950) which are not repealed remain in force, except in so far as they were inconsistent with the constitution. The general body of law built up during the British period thus remains. On the criminal side, there is a great measure of uniformity throughout India, as the basic crimes are defined in the Indian Penal Code, supplemented by Central and Provincial Acts. The Code of Criminal Procedure applies to all courts. The Code of Civil Procedure derives from the British Judicature Acts and the Rules framed under them. The Indian Evidence Act is similarly based on English rules of evidence. English models have been followed in such matters as the law of contract, company law, insurance, factory legislation and workmen's compensation. One of the directive principles of State policy in the Indian Constitution reads 'The State shall endeavour to secure for the citizens a uniform Civil Code throughout the territory of India'.

The matters in which the courts apply the personal law of Hindus and Moslems are partly set out in statutes, and partly determined by the courts' interpretation of 'justice, equity and good conscience'. Hindu law is applicable in matters of succession, inheritance, marriage, religious usage and institution, adoption, minority, guardianship, family relations, wills,

gifts, and partition. The Mohammedan law is applicable in matters of succession, inheritance, marriage, dower, dissolution of marriage, family relations, minority, guardianship, pre-emption, gifts, *wakfs*[1], religious usage, and institution.

The Supreme Court

The constitution provides for the establishment of a Supreme Court of India. The Supreme Court exercises exclusive jurisdiction in any dispute between the Union and the States and between the States *inter se*. It has appellate jurisdiction over any judgment, decree or order of the High Court where this Court certifies that either a substantial question of law or the interpretation of the Constitution are involved. The Supreme Court has advisory jurisdiction in respect of questions which may be referred to it by the President for an opinion. It also hears appeals which are certified by High Courts to be fit for appeal. Parliament may by law confer on the Supreme Court any further powers of appeal.

Lower Courts

Provision is made in the Code for Criminal Procedure for the constitution of lower criminal courts called Courts of Session and Courts of Magistrates. The Courts of Session are competent to try all persons duly committed for trial, and inflict any punishment authorised by the law. Appeals from the Court of Session lie to the High Court. Appeals from the Courts of Magistrates lie usually to the Courts of Session.

The District Court

The District Court is the principal civil court. It has wide powers under special Acts. It is also a Court of Appeal and has powers of superintendence over the other subordinate courts of the district.

City Civil Courts

City Civil Courts with limited pecuniary jurisdiction have been established in Madras and Bombay.

[1]Property in trust for a pious purpose.

PAKISTAN

PAKISTAN is an Islamic State, which came into existence to enable its Moslem population to lead their lives in accordance with the teachings in the Qur'an and the Sunna. However, though its roots go back to the Mogul Empire, there has been an absorption of Western institutions within the inherited traditions of Islam. Thus most law is statute law dating from the period of British administration. The 19th century penal code is still in force, although much amended, and with the exception of the personal law and the law of tort all law is codified.

As early as the 18th century a regulation of the East India Company laid down that in matters of marriage, succession, religious usage and institution, Moslems and Hindus were to receive the benefit of their personal laws, and Mohammedan and Hindu law was later extended to other matters, for example guardianship and wills. Mohammedan law also has rules governing contract and conveyance, and there are in it provisions governing some criminal offences.

The Supreme Court

The Supreme Court consists of a Chief Justice and not more than six other judges. It normally sits at Karachi but must sit at Dacca twice a year. It has original and appellate jurisdiction and may also give an advisory judgment on any question of law of public importance that has arisen. It has original jurisdiction in disputes between the federation and a province, or between the two provinces, or between a province on the one hand and a province and the federation on the other. An appeal lies to the Supreme Court from any judgment of a high court.

The High Courts

There is a High Court for each province. Each consists of a chief justice and such number of puisne judges as is fixed by the President.

District Courts

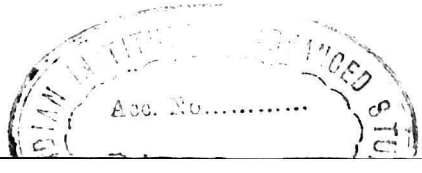
Below the High Courts on the civil side are the District Courts which are presided over by District Judges. Their pecuniary jurisdiction is unlimited and they sit in appeal over the subordinate judges of the whole district or division formed of several districts.

Below the District Judges are the *Subordinate Judges* who preside over sub-divisions of districts and have pecuniary jurisdiction up to £700.

There are also *Small Cause Courts* in most of the large towns. Their pecuniary jurisdiction is very small and litigation which concerns title is barred to them; they exist chiefly as a means of speedy and cheap recovery of small debts or enforcement of petty contracts.

Courts of Session

On the criminal side there are Courts of Session and Magistrates' Courts. Courts of Session are manned by Session Judges, whose jurisdictions



normally extend through the district, but in some cases over two or more districts. Appeals from the decisions of first-class Magistrates and District Magistrates go to the Sessions Court. The Court has the power of imposing any punishment, including death; but the death sentence is subject to confirmation by a Bench of two Judges in the High Court. Trials before the Courts of Session are held in certain cases with Assessors and others with a jury.

Magistrates' Courts

There are magistrates of the first, second and third class, stationed at various towns in each district and under the control of the District Magistrate, who is the Head Magistrate for the whole of his district. Appeals from second and third class magistrates go to the first class magistrate with appellate powers, or to the District Magistrate, who is assisted by one or more additional District Magistrates stationed in the large towns and subordinate to him.

Proclamation of Martial Law

In October 1958 the constitution was abrogated and martial law was proclaimed. The proclamation set up Special Military Courts and Summary Military Courts as special courts of criminal jurisdiction. The proclamation stated that these courts would have the power to try and punish any person for contravention of Martial Law Regulations or Orders or for offences under the ordinary law. It further stated that the criminal courts as by law established would continue to exercise jurisdiction over persons accused of all offences committed under the ordinary law and also under Martial Law Regulations.

Law Reforms Commission

A Law Reforms Commission which reported in September 1959 recommended sweeping changes in the present legal system of the country. The recommendations included the reduction of court fees, arrangements for a quicker dispensation of justice at the higher levels, and the establishment of special family courts, juvenile courts and permanent labour tribunals for the settlement of industrial disputes.

CEYLON

THE COMPLEXITY of the history of Ceylon is reflected in its law. The law in the Maritime Provinces is the Dutch law in operation in 1796, and this in turn was fundamentally Roman-Dutch modified by the legislation of the United Provinces, the Dutch East India Company and the local Governor and modified also by local customs—Hindu customs, Islamic law and the customs of the Sinhalese. In the Kandyan Provinces the common law is Kandyan law. There are at present four inherited systems—the Roman-Dutch, the Thesawalamai (Hindu custom applicable to Tamils in Jaffna), the Islamic and the Kandyan.

The Roman-Dutch system has since its introduction been profoundly modified by English influences. Virtually the whole of the criminal law and procedure, the civil procedure and the commercial law have been imported from England by legislation. Even such aspects of the civil law as the law of contract and delict and the law of property, which are basically Roman-Dutch, have been greatly influenced by English law because justice has been administered and precedents have been established by judges educated in England or educated in Ceylon by those educated in England. English is the principal spoken language of the courts, the language of legislation and the language of law reports.

The laws governing personal status, i.e. marriage and divorce, parents and children, depend upon the community to which a person belongs. If he is a Kandyan Sinhalese, a Tamil inhabitant of Jaffna, or a Moslem, these matters are decided by his personal law; in other cases they are regulated by Roman-Dutch law modified by English law.

Where English law applies the Ceylon courts usually follow English decisions, although Indian cases are also quoted. With Roman-Dutch case law the decisions of South African courts are often followed.

As in other countries, the development of administrative law has resulted in the growth of delegated legislation and the use of administrative tribunals. In Ceylon, as in England, the development of administrative law has increased the importance of the powers possessed by the courts to control the actions of administrative authorities.

The Supreme Court

The Supreme Court consists of the Chief Justice and eight Puisne Judges appointed by the Governor-General. It has appellate and revisional jurisdiction in civil matters and, as a general rule, it exercises no original jurisdiction in civil cases. It has original jurisdiction in criminal cases and exclusive jurisdiction in respect of more serious offences, trial being by jury before a judge or—if the Chief Justice so orders—three judges.

Court of Criminal Appeal

This Court was established in 1938 as a superior Court of Record. The Ordinance followed closely the Act which introduced the Court of Criminal Appeal in England. The Court consists of the Chief Justice and the Puisne

Justices of the Supreme Court and it hears appeals by persons convicted on trial before the Supreme Court. It is usually constituted of three judges.

District Courts

There are 24 District Courts. Every District Court is a Court of Record and has original jurisdiction in all civil, criminal, revenue, matrimonial, insolvency and testamentary matters except where exclusive jurisdiction has been assigned to the Supreme Court. It has unlimited jurisdiction to hear civil cases up to any amount.

Other Courts

Courts of Request (30) and *Rural Courts* (48) exercise a limited civil jurisdiction. The former are presided over by a District Judge or Magistrate. *Magistrates' Courts* have power to try in a summary way certain offences in the Penal Code. There are 35 of them.

The Judiciary

Judges of the Supreme Court are not removable except on an address by the Senate and House of Representatives. Their salaries are charged on the Consolidated Fund and may not be diminished during their term of office. Appointments to judicial offices other than those of the Supreme Court are controlled by the Judicial Service Commission, consisting of the Chief Justice, a Judge of the Supreme Court and one other person who is or has been a Judge of the Supreme Court.

GHANA

THE CIVIL law in force is based on the Common Law, doctrines of equity and general Statutes which were in force in England in 1874, as modified by subsequent Ordinances. Ghanaian customary law is however the basis of most personal, domestic and contractual relationships and the Supreme Court has power to enforce it. Criminal law is based on the Criminal Code, enacted at the end of the 19th century, dependent on English criminal law and since amended at intervals.

The Supreme Court

The Supreme Court consists of the High Court of Justice and the Court of Appeal.

The Court of Appeal hears appeals from the decisions of a Divisional Court of the High Court of Justice on appeal from a Magistrates' or a Native Court. It has civil and criminal jurisdiction.

The High Court of Justice has in Ghana the same jurisdiction as the High Court of Justice in the United Kingdom, together with like powers of the Lord Chancellor in respect of guardianship. In its appellate jurisdiction it has power to hear and determine all appeals from the decisions of the Magistrates' Courts in civil and criminal cases. Trial by jury is practised in criminal cases. For the purposes of the administration of justice the whole of Ghana has been divided into four Judicial Divisions, in each of which there is at least one Divisional Court. The Court may be constituted by one or two Puisne Judges. A Lands Division deals with the problems of litigation over land and a court of the Lands Division is called a Land Court.

Magistrates' Courts

District Magistrates, or Government Agents sitting as Magistrates exercise summary jurisdiction throughout the country. In criminal cases Magistrates may impose sentences of imprisonment of up to one year and fines not exceeding £100 and they may hear civil suits involving up to £150. They have power to hear appeals from Native and Local Courts in civil and criminal cases.

Native Courts

There are Native Courts of various grades which exercise both civil and criminal jurisdiction and which are traditional institutions which have been adapted to meet modern needs. Separate Ordinances operate within each of the four Judicial Divisions in Ghana and there is thus no uniform system of native courts extending throughout the country. Until recently the court members were almost exclusively chiefs and their elders. This system still operates in Northern Ghana and Ashanti but elsewhere non-chiefs have been increasingly and extensively appointed as members of courts. In civil cases Native Courts enjoy exclusive jurisdiction in cases between Africans involving land, succession and marriage; and in personal suits up to £100. They also have limited criminal jurisdiction. Appeals lie in the first instance to

Magistrates and in relevant cases direct to the Lands Division of the Supreme Court. There are also Native Appeal Courts in certain areas.

Local Courts

An Act was passed in 1958 to provide for non-traditional Local Courts in place of Native Courts. These have civil and criminal jurisdiction and are presided over by magistrates known as Local Court Magistrates. The law administered is both English and customary and the courts are empowered to enforce some of the provisions of the Criminal Code which is based on English criminal law. Appeal lies to the Magistrates' Courts.

Juvenile Courts

Juvenile Courts have been set up in the main towns. They consist either of three citizens selected from a panel of Juvenile Court Magistrates or of a Stipendiary Magistrate sitting with two of the panel. The public is excluded from the proceedings of Juvenile Courts which are empowered to place a child in the care of a relative, Probation Officer or other suitable person, to negotiate with parents to secure the good behaviour of a child, and to order whipping. Within these limits their jurisdiction is exclusive.

The Legal Profession

Ghana has a Law School and there is a separate Department of Law at the University College of Ghana. It is obligatory for foreign-trained Ghanaian barristers to qualify at the Ghana School of Law.

FEDERATION OF MALAYA

FOR historical and constitutional reasons, the written laws of the Federation of Malaya are contained in no less than twenty-five separate sets of Acts, ordinances and enactments, each with its attendant body of subsidiary legislation (rules, regulations, or by-laws). The laws are derived from a number of sources. For the purposes of mercantile law, dealing with matters such as companies, bankruptcy, merchant shipping, and in matters of personal status, such as adoption and divorce, the Acts of Parliament in the United Kingdom have generally been taken as the model for local legislation. The Penal Code, the law of evidence, and, to a large extent, the Criminal Procedure Code have been adopted from India. The Civil Procedure Code, based on the Indian Code of Civil Procedure, was superseded in 1958 by Rules of the Supreme Court which follow very closely the Rules of the Supreme Court in England. The law of contract is taken from the Indian Contract Act, although in the States of Penang and Malacca the English law of contract is followed at present. The law governing the compulsory acquisition of land for public purposes is largely borrowed from India, but the ownership, tenure and transfer of land is governed, except in Penang and Malacca, by land codes based on the Torrens system of registration of title which is taken from Australia.

There is a great deal of Malayan custom (Malay, Chinese and Indian) but little of it has been expressly enacted as substantive law. The more common case is legislation which establishes administrative machinery to regulate or register marriage, divorce or inheritance, and stipulates that the authority charged with dealing with such questions shall apply the custom or personal law of the parties. Where there is a right of appeal from such decisions to a court, the court has no code of customary law to consult but must call expert witnesses. For example, the Malay law of property is in general Islamic. The law governing administration of estates provides for the application of such law in distribution of estates. It is left to Moslem officials (*kathis*) to certify how the shares should be divided and the legal apportionment is made accordingly.

The Civil Law Ordinance, 1956, provides that save in so far as other provision has been made or may be made by the written law of the Federation, the Court shall apply the common law of England and the rules of equity in force in England, so far as local circumstances permit and subject to such local qualifications as local circumstances may render necessary.

System of Courts

The Constitution provides for a *Supreme Court* which comprises both a High Court and a Court of Appeal. The Supreme Court has original, appellate and revisional jurisdiction. It can settle disputes between States or between a State and the Federation. It has advisory jurisdiction as to the interpretation of the constitution. The Supreme Court consists of a Chief Justice and not more than 15 other judges. In appointing the Chief Justice, the Head of State may act in his discretion after consulting the Conference

of Rulers and considering the advice of the Prime Minister. Other judges of the Supreme Court are appointed on the recommendation of the Judicial and Legal Service Commission after the Head of State has consulted the Conference of Rulers.

There is an almost unlimited right of appeal from the High Court to the Court of Appeal and limited right of appeal from the Court of Appeal to the Head of State, who refers such appeals to the Judicial Committee of the Privy Council.

Trial by jury has been for many years a feature of the administration of justice in Penang and Malacca and was extended to other States of the Federation after Independence.

Sessions Courts

There are Sessions Courts in the principal urban and rural centres; they are presided over by a President, who is a member of the Federal Legal Service and is a qualified barrister or solicitor. Their criminal jurisdiction covers the less serious indictable offences, excluding those which carry penalties of death or life imprisonment. Civil cases are usually heard without a jury. The Presidents are usually appointed by the Head of State.

Magistrates' Courts

Magistrates' Courts have been established in the main urban and rural centres and have both civil and criminal jurisdiction, although of a more restricted nature than that of the Sessions Courts. The Magistrates consist of officers either from the Federal Legal Service or seconded from the administration to the Judicial Department for varying periods up to three years. They are appointed by the Rulers of the States in which they officiate on the recommendation of the Chief Justice.

The Legal Profession

Unlike its prototype in the United Kingdom the legal profession is 'fused'—i.e. Barristers may do Solicitors' work and vice versa. The professional association of the profession is the Bar Council.

FEDERATION OF NIGERIA

THE LEGAL system of Nigeria consists of English law and local law and custom. After the cession of Lagos, English law was introduced into the Colony with effect from 1863. This was subsequently extended, and the present body of English law consists of the common law, doctrines of equity and the statutes of general application which were in force in England in 1900. The traditional courts administer customary law—particularly in such matters as land tenure, succession and inheritance, marriage and the family—and they also deal with a certain amount of statutory law coming within their sphere. British established courts administer in the main English law but they also have to handle a fair amount of customary law brought up to them on appeal from the Native and customary Courts. In the North there is Islamic law which through centuries of observance has become assimilated to the position of a primary code of customary rules.

The basis of the criminal law of Nigeria is the Criminal Code which has been modelled for the most part on the principles of English criminal law. It has been adopted as a constitutional rule that there should only be written criminal law, and the different regions of Nigeria are introducing legislation to abolish their unwritten criminal laws, which are mainly Islamic and customary laws of crime. In the Northern Region where Native Courts have wide powers in administering criminal law it has been decided to establish a uniform system and to adopt throughout the region in preference to the Nigerian Criminal Code, the Sudan Penal Code and the Sudanese Criminal Procedure Code, which are closely related to Indian codes. The effect of this major reform is that no one can be convicted of a criminal offence under any Native Law or Custom, and that all convictions can only be by reference to the Penal Code or some other ordinance or law.

The principles governing cases in contract and tort are broadly the same as those of English law, with necessary differences of approach and interpretation. Local enactments are based on equivalent English statutes, and the basic principles are the same as those of English common law. Family law is governed by both customary law and local ordinance.

Federal Supreme Court

The Federal Supreme Court is established as the Court of Appeal from the High Courts. It also has original jurisdiction in any legal dispute between the Federation and the Regions; in any matter affecting an officer or authority of the Federation; in any matter arising under a treaty or affecting representatives of other countries; and in determining questions on the interpretation of the constitution.

High Courts

In Nigeria there are four High Courts; each Region has its High Court and the Federal territory of Lagos has a High Court. Each consists of a Chief Justice and Puisne Judges. The Courts have unlimited jurisdiction

except for those matters reserved to the Supreme Court. Appeals to the High Courts lie from the subordinate courts of the Regions.

Provincial Courts

In the Northern Region each of the 13 Provinces has a Provincial Court which hear appeals from certain Native Courts.

Magistrates' Courts

Magistrates' Courts have civil and criminal jurisdiction throughout the country. Each Region and Lagos have their own organisation of Magistrates' Courts and powers vary from Region to Region. Thus in the Western Region a Chief Magistrate has power to try civil cases up to suit values of £500, a Senior Magistrate up to £200 and a Magistrate up to £100. On the criminal side there is power to try summary offences. Magistrates have power to hear appeals from customary courts. In the Northern Region Magistrates' Courts only administer criminal justice and civil cases are now dealt with by new District Courts (with District Judges).

Native Courts and Customary Courts

In the Northern Region the personal law of Moslems is specially safeguarded by a Sharia Court of Appeal, which is a final court of appeal for all cases governed by Moslem personal law arising from the Native Courts. The Native Courts Appellate Division of the High Court hears all appeals from Native Courts except those governed by Moslem personal law. There is a Court of Resolution to resolve any conflict of jurisdiction that may arise between the High Court and the Sharia Court of Appeal. There are five grades of Native Court, the degree of their responsibility ranging from Grade A which has unlimited jurisdiction in criminal cases to Grade D where the maximum penalties are a fine of £15 or a sentence of 9 months. In the North 95 per cent of litigation is handled by the Native Courts, although they are, as elsewhere, largely staffed by men without professional training.

In the Western and Eastern Regions the Native Courts are being replaced by non-traditional courts which are known as Customary Courts. In the West there are different grades of customary courts and in the East these courts are known as County Courts and District Courts. Customary Courts are empowered to administer any enactment or local government by-law as well as the appropriate customary law. A Grade A Court in the West has unlimited jurisdiction in all civil cases and jurisdiction to try offences against customary law other than the most serious crimes. Appeals from the decisions of a Grade A customary court lie to the High Court. Members of the Court are appointed by the Local Government Service Board.

The Judiciary

The Chief Justice of the Federation is appointed by the Governor-General, acting in accordance with the advice of the Prime Minister. Federal Justices are appointed by the Governor-General, acting in accordance with the advice of the Judicial Service Commissioner of the Federation. A comparable procedure is followed in the Regions.

The Legal Profession

Nigeria has no Inn of Court of its own and no organised system of legal education for local members of the profession. In order to become a lawyer therefore it is usual for the Nigerian aspirant to qualify at the English or Scottish Bar or at other centres in the Commonwealth. Difficulties are being experienced in the Northern Region in providing sufficient legally trained persons to operate the new judicial and legal reforms. A Government school has been established at Zaria which educates men up to the standard of Part I of the Bar Examinations conducted by the Council of Legal Education in England. They will then come to the United Kingdom to be tutored for the Bar Final. Students' expenses are being met by the Northern Region Government. The Zaria school is also providing re-orientation classes for members of Native Courts who will be administering the new Penal Code (see p. 29).

A Law Faculty has been established at the University College of Ibadan to give would-be barristers a grounding in local law. After a three-year university course candidates go to a law school in Lagos for a one-year course giving the training required by a solicitor—the object being to achieve a 'fused'[1] profession.

[1]That is, where individual lawyers normally undertake the roles of both barrister and solicitor.

THE COMMON law of England and the doctrines of equity and statutory law which were applicable in 1880 are in force in Sierra Leone and certain English statutes after 1880 have from time to time been brought into force by Ordinance. The Supreme Court has a power to enforce the observance of African law and custom provided it is not 'repugnant to natural justice, equity and good conscience' or to any express enactment. Where it appears that the parties intend their obligations to be governed by English law, the customary law is inapplicable.

The Supreme Court

The Supreme Court has the same jurisdiction as the High Court of Justice in the United Kingdom. It is the Court of Appeal for all subordinate courts.

Magistrates' Courts

Magistrates' Courts have jurisdiction in civil cases where claims do not exceed £100. In criminal cases the jurisdiction of the Magistrates' Courts is limited to summary cases and to preliminary investigations to determine whether a person charged with an offence triable by the Supreme Court shall be committed for trial.

Native Courts

Native Courts have jurisdiction according to native law and custom in all matters between Africans which are not triable by any other court. There are Native Appeal Courts, Native Courts proper and Combined Courts which try civil cases in which both natives and non-natives are involved. In some cases, for example in land disputes involving two or more chiefdoms or cases which are of particular importance, the District Commissioner has the right to inquire and to decide whether the case shall go before the Supreme Court. The Magistrate is empowered to review and revise the decisions of Native and Combined Courts and to transfer cases to the Magistrates' Court.

CYPRUS

The law administered by the courts in the Republic of Cyprus consists of the following:

(a) the Constitution of the Republic;
(b) all local laws in force on the date of the coming into operation of the Constitution;
(c) the common law and the doctrines of equity in so far as they are not inconsistent with, or contrary to, the Constitution;
(d) the Laws and Principles of Vakf (including properties belonging to Mosques and other Moslem religious institutions);
(e) the Acts of Parliament of the United Kingdom which were applicable to Cyprus immediately before Independence Day (16th August, 1960).

There is also certain customary law (administered by communal courts) in relation to personal status and religious matters.

Supreme Constitutional Court

The Supreme Constitutional Court of the Republic was set up by the Constitution. It is composed of a Greek, a Turk and a neutral judge (who must not be a Greek, a Turk, a Cypriot or a United Kingdom citizen). The neutral judge is President of the Court. Judges of the Court are appointed jointly by the President and the Vice-President.

The Constitution prescribes a number of matters which may be referred to the Court. Thus the President and Vice-President, acting either separately or jointly, have the right of recourse to the Court on the ground that any law or decision of the House of Representatives discriminates against either of the two communities. The Court has jurisdiction to adjudicate on disputes arising between the House of Representatives and the Communal Chambers and between any organs or authorities in the Republic. Any party to any judicial proceedings may raise a constitutional issue; and any person may question the action of any executive organ, authority or person if contrary to the provisions of the Constitution or in excess of the powers vested in the executive.

High Court of Justice

The High Court is provided for in the Constitution. It is composed of two Greek judges, one Turkish judge and a neutral judge. The neutral judge is President of the Court and has two votes. The judges are appointed jointly by the President and Vice-President of the Republic.

The High Court is the highest appellate court in the Republic and has jurisdiction to hear and determine all appeals from any inferior court. It also has exclusive original jurisdiction in certain matters, particularly as a Court of Admiralty and in certain matrimonial causes.

Subordinate Courts

The Constitution lays it down that civil disputes, where the plaintiff and defendant belong to the same community, shall be tried by a tribunal

composed of judges belonging to that community. If the plaintiff and defendant belong to different communities the composition of the tribunal is mixed and is determined by the High Court of Justice. The same principle is followed in criminal cases, where it is laid down that the tribunal shall consist of judges belonging to the same community as the accused.

The subordinate courts are known as *Assize Courts* and *District Courts.* The two grades of judge for these courts are that of President of a District Court and District Judge. It is prescribed by statute that the total number of Presidents in the Republic shall not exceed six, and that the total number of District Judges shall not exceed 23.

Assize Courts are composed of a President of a District Court and two District Judges, all to be nominated by the High Court. They have unlimited criminal jurisdiction and power to order compensation up to £800 and they exercise this jurisdiction in the Republic or within the Sovereign Base Areas (the latter when the offence is by a Cypriot against or in relation to a Cypriot). There is an Assize Court in each of the Districts.

District Courts are composed of one or more Presidents and such number of District Judges as the High Court shall direct. They have jurisdiction to try summarily all offences punishable with imprisonment for a term not exceeding three years or with a fine not exceeding £500; they also have civil jurisdiction within stated limits.

Communal Courts

The Constitution prescribes that the judicial power with respect to civil disputes relating to personal status and to religious matters shall be exercised by such courts as a communal law—made by the Communal Chamber concerned—shall provide.

FEDERATION OF RHODESIA AND NYASALAND

THE ROMAN-DUTCH system was introduced in Southern Rhodesia by the Order in Council of 1898, which laid it down that the law to be administered by the courts should be the same as that in force in the Cape Colony in 1891. Inroads have been made upon the Roman-Dutch system by local legislation and by the adoption of English legal principles. In Northern Rhodesia and Nyasaland English common law and the doctrines of equity are applicable.

In all three territories, native customary law is respected and applied where appropriate. In Southern Rhodesia an Order in Council of 1898 directed that in civil cases between Africans the courts should be guided by native law, so far as it was not repugnant to natural justice or morality or to any enactment in force. In practice Africans are subject to the criminal law applying also to Europeans. In regard to the civil law regulating matrimony, succession and the like, the customary law has been maintained, though affected in some respects by enactments intended to eliminate what was thought undesirable. In Northern Rhodesia the customary law is held to apply in civil causes where the parties are Africans, especially in cases relating to marriage, property and inheritance.

Federal Supreme Court

The Federal Supreme Court was set up in 1955, consisting of the Chief Justices of the Federation and of each of the three territories, and of not less than two nor more than six other judges. The Supreme Court has exclusive original jurisdiction in certain matters, including disputes between the Federation and a territory, or between territories, and exclusive appellate jurisdiction in others, including questions concerning the interpretation of the constitution of the Federation or of a territory.

High Courts

There are High Courts in all three territories with full original and appellate jurisdiction, civil and criminal.

Other Courts

In Southern Rhodesia regular and periodical courts are presided over by Magistrates and Assistant Magistrates. *Magistrates' Courts* have jurisdiction in civil cases up to stated limits and jurisdiction over all criminal offences except the most serious. In Northern Rhodesia and Nyasaland there are four classes of subordinate court with varying jurisdiction. All three territories have *Native Courts* with both civil and criminal jurisdiction in the two northern territories and civil jurisdiction only in Southern Rhodesia. There are Native Courts of Appeal in Northern Rhodesia and Nyasaland and in Southern Rhodesia appeal lies to the court of the Native Commissioner.

THE UNITED KINGDOM DEPENDENCIES

THE UNITED KINGDOM dependencies include Colonies, Protectorates and Protected States. A British colony is any part of the Queen's dominions exclusive of the British Islands, and exclusive of the independent members of the Commonwealth and their Provinces and States. British Protectorates are territories under the protection of the Crown. The Crown is responsible for their foreign affairs. Internally they are administered in a similar way to Colonies. Protected States are administered, with varying degrees of United Kingdom supervision, by their native rulers. The inhabitants of Protectorates and Protected States are British protected persons. There were also trust territories under the administration of the United Kingdom Government; but the last two trust territories, Tanganyika and the Cameroons, were granted independence in 1961.

Colonies may be classified according to the manner in which they were acquired, which may have been (i) by settlement in territories where there was no population or only primitive tribes, or (ii) by conquest or cession of territory having an organised society. Protectorates are administered under the Foreign Jurisdiction Acts in the same way as if the Queen had acquired jurisdiction by cession or conquest.

The Sources of Law

As has already been intimated (see p. 2) this distinction determines the system of law that prevails in a colony or protectorate. In settled colonies, like some of the West Indian islands, British settlers have taken with them the common law of England and the statute law as existing at the time of settlement in so far as such law is applicable to their new situation. Acts of Parliament later than the time of settlement do not apply to the colony unless they are expressed to apply to that colony or to colonies generally. Examples of English laws that have been held applicable to certain settled colonies are the law of torts and the law of inheritance. In conquered and ceded colonies like Mauritius or Malta the existing legal system is retained unless and until it is altered or abrogated by the Crown. Examples of such retention in former dependencies have been the retention of Roman-Dutch law in South Africa and Ceylon and of French law in Quebec, and, in existing dependencies, the retention of French law in Mauritius and the Seychelles, of native custom in various African dependencies and of traces of Spanish law in Trinidad.

English law has been introduced by Act of Parliament or local legislation into some conquered or ceded colonies. When this is done it is defined as the common law and statute law as they existed either at the date of the application of English law to the colony or at some specified date. Subsequent Acts of Parliament of the United Kingdom do not apply, except expressly. It is in this way that English law has been introduced into most of the African territories, with due respect to African customary law. English law has also been applied to Grenada and several other islands of the West Indies and to Gibraltar, and has displaced Roman-Dutch law in British Guiana.

Where English law has been introduced in this way, whether in a settled colony or a conquered or ceded one, it constitutes the basic law of the territory. There is no restriction on the power of the United Kingdom Parliament to add to this deposit by legislating for the dependencies but in fact it has rarely done so and then only for matters of general concern, such as copyright or extradition. Where Parliamentary authority is necessary for legislative action in respect of colonies, for example to effect constitutional changes, the United Kingdom Parliament usually prefers to authorise the issue of Orders in Council by the Crown. The great body of existing law in the dependencies has been secured by local legislation, the basic English law tending to assume the character only of a residual law, still operative within certain limited fields (as for example the law of contract and of torts) but providing elsewhere guiding principles rather than substantive law. However the influence of English law continues by other means. Many of the major projects of reform in the law of England have been introduced in the dependencies through local legislation. Secondly, in the sphere of judicial interpretation English decisions are widely followed in the dependencies.

Local Legislatures

Local legislatures have derived their authority from the United Kingdom, either by virtue of direct legislation by Parliament or by issue of a Crown Instrument. Within the limits imposed by their status as subordinate legislatures they have full power to legislate 'for the peace, order and good government' of the territory concerned. Statutory law is administered by the courts of the dependency; the Crown has a prerogative power to establish colonial courts and to administer the common law and a colonial legislature also has power to establish courts of judicature and to provide for the administration of justice in the dependency.

The Rule of Law

In the dependencies the 'rule of law' is maintained in the same way as in the United Kingdom, in the sense that the Executive is assumed to have no powers which entitle it to take action against personal liberties or individual property, otherwise than in strict accordance with statute or common law.

Customary Law

In the African dependencies (as in the independent Commonwealth countries of Africa) a special problem is constituted by the existence of a body of unwritten customary law, embodying for the most part the personal law of the various indigenous communities. When English law is introduced it is always provided in the local legislation concerned that the courts should be guided by or should observe native law and custom so far as it is applicable in all cases to which natives are parties, and in so far as such native law is not repugnant to natural justice, equity and good conscience or inconsistent with any written law. This customary law is administered by the Native Courts, which are supervised by officers of the administration, but are in the majority of the dependencies linked with the English courts through the process of appeal. The effect is to bring into the general body of civil law as administered

by judicial processes those aspects of unwritten native law which deal with land, inheritance or marital relations. This customary law varies in content both within a particular dependency and between one dependency and another, and the whole body of custom is evolving gradually in most areas of Africa in order to adjust itself to meet the new economic and social conditions with which African society is faced.

Another source of law in the African dependencies is Islamic law. This is at different stages of development in different territories. In some areas it is just beginning to infiltrate: in other areas the people have adopted a law which is an amalgam between their indigenous law and Islamic principles; and in other places Islamic law has been imposed by authority of a Moslem ruler. It is sometimes applied as a variant of native law and custom and sometimes as a distinct system; the situation varies according to whether only individuals have embraced Islam or whether the greater part of a tribe or community have done so.

System of Courts

Each territory has its own Supreme or High Court, which serves as a Court of Appeal as well as exercising original jurisdiction in certain classes of case—comprising, in general, the most important cases, both civil and criminal. Some measure of co-ordination is effected by the creation, where it is feasible, of Regional Appellate Courts, such as the Court of Appeal for Eastern Africa. From these Courts of Appeal a further appeal lies in certain cases to the Judicial Committee of the Privy Council in the United Kingdom (see p. 5).

Magistrates' Courts normally make the preliminary inquiry in certain serious charges such as homicide, rape and other serious offences, and either dismiss the case or commit it for trial before a Judge of the High or Supreme Court. Less serious cases are disposed of within the limits of the Magistrate's own jurisdiction. Variations of competence are considerable; a common proviso is a maximum of six months' imprisonment; but in some cases it extends to two years, in others up to the full limits imposed by law on any class of offence.

Native Courts are of great diversity, alike in their composition as tribunals and in the competence assigned to them. Sometimes the Chief functions as a Court, in others a Chief and his councillors, in others a federation of Chiefs, in others a body of headmen. In general there is a tendency to incorporate non-traditional elements as members of the courts and to separate the judicial from the executive element in the membership. Native Courts deal not only with the personal law of Africans but with a wide range of civil and criminal issues, which includes in some territories a number of offences against the statutory law. The number of cases disposed of by the Native Courts in the African dependencies far exceeds those disposed of by the English courts, who deal generally with the most important civil issues and the graver criminal charges.

In some territories (Zanzibar, Kenya and the Gambia) there are courts exclusively concerned with Islamic law; in others there are courts concerned with both Islamic and customary law. The courts applying Islamic law are sometimes part of the English system and sometimes part of the local courts system.

The Judiciary

Judges of the superior Courts are chosen from the Overseas Civil Service, and from the local Bar. Formerly they were appointed at the pleasure of the Crown. But the policy is now to safeguard the tenure of the office of judge by special provisions in the constitution. Magistrates usually have professional qualifications although some belong to the administrative cadre.

The Legal Profession

There are still comparatively few facilities available for the study of law in the United Kingdom dependencies and most law students come to the United Kingdom. In 1959 there were 2,237 law students in the United Kingdom and the Irish Republic. The legal education being provided at British universities is being broadened in many cases, for example at Southampton and London, with an eye on the special needs of overseas law students. On the practical side the United Kingdom Council of Legal Education offers a three-month Post-Final Course. This is specifically designed to give assistance in the etiquette of the Bar and the practical side of a lawyer's business. A United Kingdom Committee on African Legal Education, which reported in 1961, recommended that the Bar Examinations should be remodelled so as to include alternative subjects more suited to the needs of students from overseas. It also recommended that the Council of Legal Education and the Law Society should be invited to arrange a substantial period of practical training so as to fit a student from overseas for practice in a territory where the profession is 'fused'.

At the same time attention is being paid to the development of Faculties of Law in the territories. The teaching of law is beginning at the University of Rhodesia and Nyasaland (which caters for Northern Rhodesia and Nyasaland as well as Southern Rhodesia) and there is a Faculty of Law in the University of Malaya (which also serves Singapore).

Also important is the training of Native Court staff—members, judges, clerks and registrars. In some territories there are special courses. In others Judicial Advisers are responsible for instructing and supervising court members and clerks in their duties and so enhancing the efficiency of Native Courts.

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