

Friday, February 25, 1870

ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

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*Abstract of the Proceedings of the Council of the Governor General of India,
assembled for the purpose of making Laws and Regulations under the
provisions of the Act of Parliament 24 & 25 Vic., cap. 67.*

The Council met at Government House on Friday, the 25th February 1870.

P R E S E N T :

The Hon'ble G. Noble Taylor, Senior Member of the Council, *presiding*.
Major General the Hon'ble Sir H. M. Durand, c. B., K. C. S. I.
The Hon'ble Sir Richard Temple, K. C. S. I.
The Hon'ble J. Fitzjames Stephen, Q. C.
The Hon'ble Gordon S. Forbes.
The Hon'ble D. Cowie.
Colonel the Hon'ble R. Strachey, C. S. I.
The Hon'ble Francis Steuart Chapman.
The Hon'ble J. R. Bullen Smith.
The Hon'ble F. R. Cockerell.

COURT FEES BILL.

The Hon'ble MR. COCKERELL presented the second Report of the Select Committee on the Bill to provide for the better regulation of Court Fees.

OBSOLETE ENACTMENTS BILL.

The Hon'ble MR. STEPHEN, in moving for leave to introduce a Bill for the repeal of certain obsolete enactments, begged leave to make a few remarks on the principle involved in the Bill, inasmuch as it was part of a general scheme on which he should like to offer a few explanations. So long ago as the year 1797, it was enacted by the Statute 37 Geo. III, c. 142, s. 8, "that all Regulations which shall be issued and framed by the Governor General in Council at Fort William in Bengal, affecting the rights, persons, or property, of the Natives, or of any other individuals who may be amenable to the provincial courts of justice, shall be registered in the Judicial Department, and formed into a regular Code, and printed, with translations, in the country languages, and that the grounds of each Regulation shall be prefixed to it." He (MR. STEPHEN) was sorry to say that, except to a very limited extent, that provision had never been carried into effect. The exception to which he referred was the case of Bombay. The

Bombay Regulations were in 1827 formed into a Code, which had many merits. There was no scheme under the consideration of the Government as ambitious as that which was suggested by the Statute to which he had referred, but the present Bill was part of a scheme for carrying into effect the more modest intention of consolidating and re-arranging the written law of India. The process of consolidation was now thoroughly understood, and had been carried to a considerable extent in England, but its importance here was, if anything, even greater than in England. It might be thought that any extensive scheme of legislation in India required an apology. A great deal had been said of late, both here and in England, on the evils of over-legislation in India, and there could be no doubt that every needless or ill-considered act of legislation was an evil; but he thought that, if the subject were carefully looked into, it would appear that the accusation made against the Indian Government of legislating too much was unjust, although there was some justification for the charge that their legislation was intricate and ill-arranged. Nothing, however, could be more natural than that persons who had not studied the subject carefully should suppose that there was too much of it. When people saw four separate Legislative Councils sitting for a great part of the year and passing a large number of laws relating to every sort of subject, it was natural enough to speak of over-legislation, and to say that it was time that the process should be arrested. With regard to such remarks, there were several matters to be taken into consideration, which people were very likely to overlook. In the first place, it was easy to under-rate the demands of so vast a territory, and in the second place it was still more easy to confound the apparent with the real additions made by legislation to the body of law actually in force. If any one took the trouble to look closely into the matter, he would find that, so far from the whole body of law being rapidly increased by current legislation, a very large proportion of the enactments tended to diminish the number of laws. The work done was rather the adaptation of old laws to fresh circumstances, than the production of new ones. He (MR. STEPHEN) could hardly give a better illustration of this than the Court Fees Bill, the second report on which Mr. Cockerell presented this day. That Bill certainly, in one sense, was an addition to the law: it would put one new Act into the statute-book, but it repealed six Acts entirely and thirty others partially, and the consequence was that the effect would be, not to increase, but to diminish, the existing body of law on the matter. The process to which he referred, when thoroughly carried out, would result in this, that all Acts which related to the same subject, at least which related to subjects of importance, would be thrown each into one statute, and the repealed Acts and the enactments by which they were repealed

would be omitted from the collection of statutes. If a distinction were made between Acts of local and Acts of general application, if the Acts which referred to British India generally were put into one collection, and if all those portions which related to separate provinces were separately published, the real extent of the law would be found to be far smaller than was supposed; the law itself would be rendered far more intelligible, and people would no longer be at a loss where to look for the information which they required. The advantages in fact of such an operation would be so great and obvious that he did not think it necessary to dwell on them.

He would now proceed to point out the reasons which made it specially desirable that the task in question should be undertaken. He did not think that the nett amount of the written law of the country was very large—it was rather, he thought, exceedingly small—when you took into consideration the number of provinces to which those laws related, their great extent, and the variety of circumstances in which they were placed. No doubt, however, the absence of an arrangement of the laws was a great evil, and few persons who had not specially directed their attention to the subject, had any idea of the extent of intricacy in which the written law of India was involved. He (MR. STEPHEN) would go into a short detail on this point, with the object of stating, for the information of the Council and of the public, what the actual state of the written law of British India was. The English Government had not enacted any written laws in India with which we need now concern ourselves before 1792, at which time began the Bengal Regulations made by the Governor General in Council. The Madras Regulations made by the Governor of Madras in Council date from 1802; the Bombay Regulations from 1827. Those Regulations applied to the Provinces in which they were made, and were the first of a series of repositories in which the written law of India was contained. They came down in each case to the year 1834. There, therefore, we had three bodies of local law, each separate and independent, affecting respectively the Presidencies of Bengal, Madras and Bombay. But the Bengal Regulations had a wider operation, because, as new Provinces, previously independent, were brought within the Empire, in some instances the Regulations themselves, and in other instances what was called the spirit of the Regulations, was extended to them; and the effect had been that those Regulations not only extended over Bengal, but also, to a somewhat indefinite extent, over the Non-Regulation Provinces.

In 1834, when the Charter of the East India Company was extended for the last time but one, power was given to the Governor General in Council to legislate for the whole of British India, and the power to legislate, which

the Governments of Madras and Bombay previously had, was taken away. The Act of 1834 was the foundation of the present Legislative Council; and from that date to this, although great modifications were introduced in 1853 and 1861, the laws affecting the whole of British India had been passed in this Council. But besides these laws, passed for the whole of British India generally, from 1834 to 1870, a large number were passed by the Legislative Council between 1834 and 1861 for the Presidencies of Bengal, Madras and Bombay, which during that period had no legislative bodies of their own; and therefore we got, besides the three bodies of law already referred to, four sets of Acts,—those relating to the whole of British India, those relating to Bengal, those relating to Madras, and those relating to Bombay, passed by the Governor General of India in Council in his legislative capacity. In 1861 was passed the Indian Councils' Act, under the authority of which legislatures were established for Bengal, Madras and Bombay. The Governor General in Council, sitting as a legislative body, continued, and had since continued, to legislate for the whole of British India; but, with some exceptions, the Governor General's Council had not legislated specially for Bengal, Madras or Bombay. On the other hand, it had legislated for the North-Western Provinces, and for the Non-Regulation Provinces, which included the Panjáb, Oudh, the Central Provinces and British Burma. In the interval between 1834 and 1861, the Regulations made for these Non-Regulation Provinces were made by the Governor General in Council acting in his executive capacity. These executive orders did not appear in any statute-book. The 25th section of the Indian Councils' Act recited doubts as to the validity of these orders, but confirmed those which were then in existence. This provision had been interpreted as prohibiting the Government from making them for the future. Since 1861, the three subordinate legislatures had legislated for their own Provinces, and the general result was this, that we had, as written law, first, the English Acts of Parliament relating to India; secondly, three sets of Regulations from 1792 to 1834; thirdly, the legislative Acts of the Governor General in Council, which might be divided into the Acts relating to British India, the Acts relating to Bengal, the Acts relating to Madras, and the Acts relating to Bombay; then the Acts relating to the Non-Regulation Provinces, namely, the North-Western Provinces, the Panjáb, Oudh, the Central Provinces, and British Burma, passed since 1861. There were, besides these, the Acts of the local legislatures of Bengal, Madras and Bombay, passed since 1861 and in force in those provinces. And in addition to all these, we had the executive orders for the five Non-Regulation Provinces, passed at various periods before 1861. The net result of the whole was that, including

the English Statutes, there were no less than twenty-one different classes of laws prevailing in different parts of British India, and these twenty-one classes of laws were made by eight different authorities.

The following statement exhibited the whole matter in a compendious form :—

There were in force in—

I.—British India—Acts of Parliament	...	...	...	...	1
	Acts of Legislative Council of Governor General since 1834				2
II.—Bengal—Bengal Regulations, 1702—1834	...	...	...	...	3
	Acts of Legislative Council, 1834—1861				4
	Acts of Bengal Legislative Council, 1861—1870				5
III.—Madras—Madras Regulations, 1802—1834	...	...	...	...	6
	Acts of Legislative Council, 1834—1861				7
	Acts of Madras Legislature, 1861—1870				8
IV.—Bombay—Bombay Regulations, 1827—1834	...	...	...	...	9
	Acts of Legislative Council, 1834—1861				10
	Acts of Bombay Legislature, 1861—1870				11
V.—N. W. Provinces—Executive Orders to 1861	...	...	...	...	12
	Acts of Legislative Council, 1861—1870				13
VI.—Panjáb—Executive Orders to 1861	...	...	...	...	14
	Acts of Legislative Council, 1861—1870				15
VII.—Oudh—Executive Orders to 1861	...	...	...	...	16
	Acts of Legislative Council, 1861—1870				17
VIII.—Central Provinces—Executive Orders to 1861	...	...	...	...	18
	Acts of Legislative Council, 1861—1870				19
IX.—Burma—Executive Orders to 1861	...	...	...	...	20
	Acts of Legislative Council, 1861—1870				21

These twenty-one classes of laws were made by the following authorities :—

I—Parliament, II—The Governor General in Council (for Bengal), III—The Governor of Madras in Council, IV—The Governor of Bombay in Council, V—The Legislative Council of Governor General, VI—The Legislative Council of Bengal, VII—The Legislative Council of Madras, VIII—The Legislative Council of Bombay, IX—The Governor General in Council in his executive capacity.

That, certainly, if we regarded the whole result, was an extremely complicated state of things ; but if we bore in mind the extent of the territory legislated for, the number of the provinces and the differences of every kind between their various populations, it was not a great but a small extent of written law. He might add that, if anybody thought that the amount of written law in India was too great, he might console himself with the reflection that we hardly possessed any substantive law at all, as distinguished from laws relating to procedure, applying to the whole of British India, with the exception of the Penal Code. The Indian Succession Act related only to Europeans.

We had no general law relating to contracts, no law relating to torts, very little law relating to evidence, and no general law relating to insolvency. Those who thought that enough had already been done, should recollect that those immense heads of law were quite untouched by the legislature, and matters relating to them, where the English law did not prevail, were decided according to the dictates "of justice, equity and good conscience," which meant, in practice, according to the notions which the Judges formed from a few English text-books.

That was the state of things, and that being so, he thought that, on the one hand, the Government ought to be acquitted of having done too much, and, on the other hand, that it ought to be remembered that the course of events had produced a singular and exceedingly intricate state of things, which we ought to reduce as soon as possible to comparative consistency and simplicity. A great deal had already been done, though, for want of judicious arrangement, the fact was not apparent. There never was any authentic collection of the whole written law of British India. Some parts of the written law of India, and in particular the executive orders in force in the Non-Regulation Provinces, had never been collected at all. From time to time, collections had been made of large parts of it under the authority of Government, but there was no book which professed to be a complete compilation of the law, like the English statute-book. Enough had, however, been done to give a good notion of the extent to which the process of repeal and consolidation had been carried.

In 1854, there was published a collection of the Bengal Regulations and Acts, then in force, by Mr. Clarke of the Madras Civil Service, under the authority of the Government. That collection filled three quarto volumes, and contained the whole of the Bengal Regulations and the Acts of the Governor General in Council from 1834 to 1853. Of those three volumes of Acts, then in operation, MR. STEPHEN believed that not half a volume was now in force.

By Acts X of 1861, XVII of 1862 and VIII of 1868 nearly the whole of the Bengal Regulations had been repealed, except those which related to particular subjects, such as Revenue, the Management of Wards and Pensions.

The same was the case, to an even greater extent, with the Madras Regulations, a vast mass of which had been swept away by Madras Act II of 1869. The same process had been going on with respect to the Acts of the Legislative Council. Every one who had occasion to administer the law of this country was acquainted with the collection of Acts published by Mr. Theobald. That collection consisted of five volumes, with a small additional part. He (MR. STEPHEN) had before him the first of these volumes, which contained the Acts from 1834 to 1848. He had been looking through the volume, in which the repealed Acts were struck out, and, of the Acts passed between 1834 and 1848, there were very few of any general interest or importance in force.

The whole of the Acts now in force, passed during the first forty years of English legislation in India, would go into a very small compass indeed; and it must be remembered that the process had been carried out only recently, because the volume which he held in his hand was published in 1860, and omitted the Acts which had then been repealed. All those Acts had therefore been repealed since, and a very large proportion of them within the last two years. He was not in a position to say to what extent the process had been carried out, but if all the repealed matter and repealing Acts were left out of these five volumes, they would be reduced to a very much smaller compass; and he might further add that, if the contents of that residuum were divided according to the local application of the Acts, it would be found that that comparatively small remainder of unrepealed law contained parts of nine different statute-books. It contained, on the one hand, the whole statute-law (except English Acts of Parliament) which was in force in British India generally; it contained all the laws passed since 1861 which applied to the five Non-Regulation Provinces, and it contained the laws—a very considerable number—which applied to Bengal, Madras and Bombay respectively. If, therefore, you were able to repeal the laws that were really useless, and to divide those which were of use into nine different classes, one for British India generally, one for Bengal, one for Madras, one for Bombay, one for each of the five Non-Regulation Provinces, you would see that the real written law of India was reducible to a very small compass indeed. He would add that many parts of it were arranged in as scientific a manner, and drafted in language as clear and terse, as any body of law in the world.

The present Bill was intended as a step towards the reduction of this intricate state of things to order. The Council would naturally ask, how that task was to be performed, and what part the Legislative Council would be asked to take in it? The answer to that was short and simple. Four things were necessary;—first, to repeal all useless matter; secondly, to consolidate the different Acts relating to the same subject; thirdly, to re-arrange the Acts, if possible, according to their subject-matter, certainly according to their local application; and, fourthly, to ascertain from the Non-Regulation Provinces what Acts and Orders were there in force, and to publish them in an authentic form. You would then have a complete body of written law divided according to subject and place. A considerable part of that operation would be matter of mere executive detail. As he had already said, there was no one authorised statute-book to which every one must refer; but although there was no book of that kind published under the authority of Government, books such as those prepared by Mr. Clarke and Mr. Theobald had repeatedly been published, and were indispensable to the administration of justice. It was a matter for the discretion of those

who published such books how they should be arranged. The authority of the legislature would be required to repeal and consolidate, and to put on a satisfactory footing the executive orders having the force of law in the different Non-Regulation Provinces. Many considerations, one of which was the state of the finances, must influence to a considerable extent the time in which any scheme of the kind could be carried out. He held out no hopes of any rapid execution of it, but he (MR. STEPHEN) thought that we should look to the ultimate attainment of such a result, and that we should do something towards it, first by repeal, secondly by consolidation, and thirdly by obtaining an account of the different executive orders in force in the Non-Regulation Provinces. These orders had never, so far as he knew, been collected, and there was considerable difficulty in ascertaining what they were. Government had, however, in May last, taken steps to have them collected and published; and in the Panjáb, Oudh, the North-Western Provinces, and, he believed, the Central Provinces, considerable progress had been made in the work. Many of these executive orders related to matters of the highest importance; as an instance he might refer to the Civil Code in the Panjáb: it was in point of law a mere executive order, but in point of fact it was an attempt, and by no means an unsuccessful one, to solve a problem with which the Government of India had not yet ventured to grapple. When we once had all these orders collected together, it would be possible to define the extent of their operation, and to do away with a great deal of uncertainty as to the extent to which other Regulations applied to those provinces.

That was the general scheme of which this Bill formed a part, and he hoped to be in a position, at no distant date, to lay before the Council a list of the enactments which it was necessary to repeal, as a first step towards the completion of a task which would be brought to a termination as rapidly as the state of business and other considerations would permit.

The Motion was put and agreed to.

The Council adjourned to Friday, the 4th March 1870.

WHITLEY STOKES,

Secy. to the Council of the Govr. Genl.

for making Laws and Regulations.

CALCUTTA,
The 25th February 1870. }