Tuesday, August 2, 1870

ABSTRACT OF THE PROCEEDINGS

COUNCIL OF THE GOVERNOR GENERAL OF INDIA

LAWS AND REGULATIONS.

VOL 9

Jan to Dec

1870

PL

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 Simla on Tuesday, the 2nd August 1870.

PRESENT:

His Excellency the VICEROY and GOVERNOR GENERAL of India, K.P., G.C.S.I., *Presiding.*
The Hon'ble JOHN STRACHEY.
The Hon'ble SIR RICHARD TEMPLE, K.C.S.I.
The Hon'ble J. FITZJAMES STEPHEN, Q.C.
The Hon'ble B. H. ELLIS.
Major-General the Hon'ble H. W. NORMAN, C.B.
The Hon'ble F. R. COCKERELL.

EUROPEAN BRITISH SUBJECTS BILL.

The Hon'ble MR. STEPHEN introduced the Bill to confirm certain laws affecting European British subjects, and moved that it be referred to a Select Committee with instructions to report in a fortnight. He had fully explained at their last meeting the object of the Bill. A telegram had since been received from the Government of Bombay, in which objections were taken to the measure in its present form. These objections appeared to him ill-founded, but their validity would be considered by the Committee.

The Motion was put and agreed to.

PENAL CODE AMENDMENT BILL.

The Hon'ble MR. STEPHEN moved for leave to introduce a Bill to amend the Indian Penal Code. He said that as the Penal Code had been in force since the beginning of 1862, a sufficient interval had passed since its enactment to enable those who had watched, or were interested in it, to form an opinion of its merits, and to discover its defects. He had himself been led by circumstances to study the whole subject of criminal law with particular attention, and he was glad to be

able publicly to express his opinion that the Indian Penal Code was a far better and more philosophical system of criminal law than any other with which he was acquainted, and in particular than any of the systems which were in force in England, France, or America. At the same time it appeared to him to be defective in some particulars. He thought that some of its defects were of considerable practical importance, and required an immediate remedy; others, though serious, were of a sort which might be remedied at leisure. He had given considerable attention to the subject, and should be prepared, he hoped, at no very distant time to make certain suggestions as to the propriety of re-casting the Chapters relating to Homicide, Theft, and the infliction of bodily harm; those suggestions, however, would be made rather from the juridical point of view than with the object of meeting any immediate and pressing want. There were, however, other defects in the Code, which he thought it desirable to remedy at once, as he believed that they were actually producing, in some instances, serious miscarriages of justice, and as they certainly might at any moment result in very serious mischief. He would shortly go through the sections of the proposed Bill, and explain the intention of each of them.

Section three of the Code provided that any person liable by *any law passed by the Governor General in Council* to be tried for an offence committed beyond the limits of British India, should be dealt with as if the act had been committed within British India. As cases might arise in which persons might be tried in India for an offence committed out of India (at sea for instance) not against any law passed by the Governor General in Council, but against other laws the breach of which the Courts in India have power to punish, it was thought best to extend the section to those cases.

Section thirty-four of the Code provided that when a criminal act was done by several persons, each was liable as if he alone had done the act. It was proposed to modify this section so as to make it apply in terms to acts done "in furtherance of the common intention of all." It appeared from a judgment of Sir Barnes Peacock that this was the true meaning of the section, and it was thought better to express it.

The definition of the word "offence," which frequently occurred in the Penal Code, was enlarged by Act IV of 1867. It was proposed to embody the enlarged definition in the interpretation clause of the Penal Code.

Section fifty-six of the Code provided that Europeans and Americans should be sentenced to penal servitude, instead of transportation according to

It would be sufficient to prove as against any person the existence of such a conspiracy anywhere within or without British India, and his participation in it by any act which could show his knowledge and approval of the designs of the conspirators. MR. STEPHEN thought that no argument was required to prove that a conspiracy to bring about such a series of events as those of 1857 was as great a crime as could well be committed. The conspirators in such cases were usually more dangerous and more criminal than the instruments who carried out, in practice, their wicked designs.

The next section was one which, by some unaccountable mistake, had been omitted from the Penal Code as ultimately passed. It stood as section 113 in the draft Code published in 1837, and Sir Barnes Peacock was quite unable to account for its omission when the Code was enacted. It punished "attempts to excite feelings of disaffection to the Government," but it distinguished between disaffection and disapprobation, and explained that "such a disapprobation of the measures of the Government as was compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, was not disaffection," so that "the making of comments on the measures of the Government with the intention of exciting only this species of disapprobation was not an offence within this section."

Nothing could be further from the wish of the Government of India than to check, in the least degree, any criticism of their measures, however severe and hostile, nay, however disingenuous, unfair, and ill-informed it might be. So long as a writer or speaker neither directly nor indirectly suggested or intended to produce the use of force, he did not fall within this section. This, however, must be coupled with a warning. The question on trials under this section would always be as to the true intention of a speaker or writer, and this intention would have to be inferred from the circumstances of the case. The most bitter and unfair criticisms published by a newspaper in the common course of its business, might be perfectly compatible with the absence of any intention to advise resistance to lawful authority. Language, temperate in itself and justifiable as far as the express meaning of its terms went, might, if addressed to an excited mob, be the clearest proof of an intent to produce forcible resistance to authority. Whilst genuine criticism had nothing to fear from the proposed section, persons seditiously disposed must not suppose that they could evade its provisions by confining themselves to what, under other circumstances and in other persons, might be genuine criticism.

the provisions of Act XXIV of 1865. This Act provided that, instead of a term of transportation not exceeding ten years, penal servitude for a term not exceeding six years should be inflicted, and instead of a term of transportation not exceeding fifteen years, penal servitude not exceeding ten. Now the Courts could award transportation for a term exceeding ten years, but short of life under five sections only. Hence in most cases European and American offenders could not be sentenced to penal servitude for any term intermediate between six years and life. This defect it was proposed to remove by a very simple proviso.

The two next sections were of great importance. For the first of these MR. STEPHEN was personally responsible. The second had been omitted by pure accident when the Code was passed. Each related to the punishment of political offences. Section one hundred and twenty-one of the Code punished with death or transportation for life and forfeiture of property—waging of war against the Queen, attempts to wage war, and abetment of waging of war. Now one form of abetment was conspiracy coupled with any act or illegal omission done in pursuance of that conspiracy. The effect of this was, that the Code apparently did not punish at all a mere conspiracy to wage war, nor did it punish any treasonable practice or conspiracy short of an attempt to wage war. Moreover, there was a good deal of obscurity about the phrase "wage war against the Queen." By the 25th Edward III, by which the law of treason in England was defined, waging war was one form of treason, and many cases, especially in the early part of the eighteenth century, had been decided as to the meaning of those words. Whether or not these cases would be held to apply to section 121 of the Penal Code, if the necessity for putting a judicial construction upon it should unhappily arise, was a question which MR. STEPHEN did not wish to discuss; but as he thought the English Judges had somewhat strained the law in their desire to find out means of inflicting appropriate punishment upon a most serious crime, he thought it would be a pity if the cases in question came under discussion in Indian Courts.

He proposed to remove these defects by a section adapted from the Treason-Felony Act passed in England in 1848. This section would punish, with the severest secondary punishment, conspiracies to deprive Her Majesty of the sovereignty of British India, or of any part thereof, and the waging, or abetment of the waging, or conspiracy to wage, civil war. The term "civil war" was defined to imply permanent and organized hostile operations carried on, for whatever purpose, by one section of the community against another. No act or omission would be necessary to make such conspiracies criminal.

Passing over a few alterations of minor importance, MR. STEPHEN came to section eleven of the proposed Bill. It proposed to add the material part of the Lottery Act V of 1844 to the Chapter on Public Nuisances, and to repeal the Act itself. He did not know how this Act came to have been omitted from the Code.

The three hundred and seventh section of the Penal Code punished attempts to murder with transportation for life. Two prisoners under sentence of transportation for life,—one at the Andaman Islands, the other in Sindh,—had lately made desperate attempts to commit murder. In one case a most deserving gaol guard had been maimed for life, and had all but died in consequence of the brutal violence inflicted on him. In such cases no punishment at all could be inflicted on the criminal, as it mattered nothing to him how often he was sentenced to be transported for life. MR. STEPHEN proposed to punish such offenders with death.

The last addition which he proposed to make in the present Bill was to the Law of Homicide. The Penal Code strangely omitted to punish what, in England, would be called manslaughter by negligence. If a man killed another by any act which he knew to be likely to cause death, he committed culpable homicide; but if he caused death rashly or by negligence, he committed no offence at all. This was the more remarkable, as punishments were provided for causing hurt, or grievous hurt, by rash and negligent acts, and as in the draft prepared by Lord Macaulay there was a section which punished the offence now in question. By what accident it had been omitted, MR. STEPHEN did not know. He proposed now to insert such a section. One reason for doing so was, that the Judges had adopted a plan for evading the law which, though ingenious, and, perhaps, necessary, was, he thought, objectionable. They convicted prisoners who had caused death by a rash or negligent act of causing 'grievous hurt' by a rash or negligent act. MR. STEPHEN had heard a Judge direct a Jury that to cause death was "to cause grievous hurt and more." This, he thought, was perfectly good sense; but as the Code defined "grievous hurt" to mean eight specified injuries, he thought it very questionable law. To convict a man who by rashness caused another to be drowned, of having 'deprived him of the sight of one of his eyes,' or of having "caused him to be unable for twenty days to follow his ordinary pursuits," was, to say the least, grotesque. MR. STEPHEN proposed to remedy the omission by providing expressly for the case of causing death by any rash or negligent act.

The motion was put and agreed to.

OUDH TALUQDARS RELIEF BILL.

The Hon'ble MR. STRACHEY asked leave to postpone the presentation of the Report of the Select Committee to which the Bill for the relief of certain taluqdárs in Oudh had been referred.

Leave was granted.

BENGAL REGULATIONS REPEAL BILL.

The Hon'ble MR. COCKERELL introduced the Bill for repealing certain enactments of the Bengal Code, and moved that it be referred to a Select Committee with instructions to report in six weeks. He said that this Bill purported to remove from the Statute-book all the Regulations, or parts of Regulations, of the Bengal Code, which (1) through lapse of time or change of circumstances, had become inoperative, or (2) though not expressly repealed, had been virtually superseded by other provisions of the existing law, or which (3) operated merely to rescind other enactments.

Within one or other of these classes were comprehended all the enactments specified in the Schedules.

He would not at the present time go into the details of these Regulations, which it was proposed to repeal either wholly or in part, further than to notice that some of them at least would appear to have been purposely left out of former repealing Acts, and to state the considerations upon which their repeal was now recommended.

As instances of such omissions, he might cite Regulations VI and IX of 1793 which came within the first, and certain provisions of Regulation IV of 1793 and other cognate enactments which belonged to the second, of the classes above referred to.

Regulations VI and IX of 1793 related to the constitution and function of the late Sadr Díwání and Nizámat Adálat. Although these Courts had been replaced by the High Court, the Regulations which treated of the constitution and functions of the former had clearly no application to the latter whose position and duties were regulated by English statute and letters patent.

In this view, the corresponding Regulations of the Madras Code had been repealed by the local legislature, which, it might here be remarked, could those

enactments have been held to apply to the High Court, would have had no power to affect them by its legislation.

The other Regulations above-mentioned provided special penalties for the resistance by a landholder of the process of the Zila Court. Now, the resistance of a Court's process was an offence under the Indian Penal Code, and by the second section of that Code every act done contrary to the provisions thereof was punishable thereunder *and not otherwise.*

It was difficult to understand why, when in accordance with the rule laid down in that section, the other penal provisions of the then existing law were repealed, these enactments were left. It was certain that the extreme penalties which they contained had long since fallen into disuse; in some of the decisions of the High Court, the doubt had been raised as to whether the provisions of those Regulations in regard to the contempt of Court by resistance of its process, could be held to be still in force though they had not been expressly repealed, and it had been shown that at all events their operation was confined to cases of resistance of the process of the Court of the District Judge. When it was considered that these Courts formed a not inconsiderable minority of the Courts in which the litigation of the territories affected by these Regulations was carried on, the above-mentioned consideration afforded in itself a sufficient argument for abrogating these special penalties; for it was obviously inexpedient to maintain different measures of punishment for the same offence, the application of which was regulated solely by the status of the Court against whose lawful authority such offence had been committed.

He need only add that if the Bill was committed, it was desirable that it should be sent, in the first instance, to the Local Governments of Bengal and the North-Western Provinces.

The Schedules had been carefully prepared with the aid of such local experience as he had been able to bring to bear on their subject, and it was hoped that they would be found to contain every enactment that it was possible to dispense with. A measure of this kind, however, needed in an especial manner the review and criticisms of local experts ere the Committee could be in a position to deal satisfactorily with its details.

We needed to be certified that a wholesome zeal for cutting away the "dry wood" and so compacting the statutory plantation did not result in the destruction of anything that was of practical use at the present time.

The Motion was put and agreed to.

The following Select Committees were named:—

On the Bill to confirm certain laws affecting European British subjects—the Hon'ble Messrs. Ellis, Cockerell, and the Mover.

On the Bill for repealing certain enactments of the Bengal Code—the Hon'ble Mr. Stephen and the Mover.

The Council then adjourned to the 16th August 1870.

SIMLA,
The 2nd August 1870.

WHITLEY STOKES,
Secy. to the Council of the Govr. Genl. for making Laws and Regulations.