26th March, 1921

THE

LEGISLATIVE ASSEMBLY DEBATES

(Official Report)

FIRST SESSION

OF THE

LEGISLATIVE ASSEMBLY, 1921

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LEGISLATIVE ASSEMBLY.

Saturday, 26th March, 1921.

The Assembly met in the Assembly Chamber at Eleven of the Clock. The Honourable the President was in the Chair.

MESSAGE FROM HIS EXCELLENCY THE VICEROY.

The Honourable the President : I have received a Message from His Excellency the Governor General :

'In pursuance of sub-section (3) of section 63 of the Government of India Act, I, Frederick John Napier, Baron Chelmsford, hereby require the attendance of Members of the Legislative Assembly in the Chamber at the Imperial Secretariat at 9 O'clock in the morning on Tuesday, the 29th March, 1921.

(Sd.) CHELMSFORD,
Governor General.'

STATEMENT LAID ON THE TABLE.

The Honourable Mr. W. M. Hailey : Sir, I beg to lay on the table a statement showing the details of the revised estimate under the head 47—Miscellaneous of the cost of the visit of His Royal Highness the Duke of Connaught.

Statement showing the details of the revised estimate under the head 47—Miscellaneous of the cost of the visit of His Royal Highness the Duke of Connaught.

1.	Cost of officers and establishments in attendance on His Royal Highness and of His Royal Highness's tour apart from actual cost of transportation		4,15,640
2.	Transportation charges		4,00,723
3.	Cost of accommodating and entertaining His Royal Highness in Delhi		5,82,431
4.	Cost of ceremonies, etc., in Delhi :		
	Camps	7,35,500	
	Communication	2,66,000	
	Water supply	2,00,000	
	Electric lighting	4,40,000	
	Decorations	1,57,000	
	Public functions	5,43,000	
	Sanitation and Conservancy	1,40,000	
	Tools and Plant	1,90,000	
	Establishment	3,00,000	
	Miscellaneous	1,48,500	
			31,20,000
			45,18,794
	Deduct—Anticipated savings (under item 4)		3,65,794
	Net total		41,53,000

NOTE.—The above is a gross estimate. Recoveries to the extent of R14,58,000 are expected to be made ultimately, reducing the net cost to approximately R27,00,000. Most of these recoveries will be made under the first five items under 4 above.

RESOLUTION *RE* CODIFICATION OF HINDU LAW.

Mr. K. G. Bagde: Sir, I have the honour to move the following Resolution which stands in my name, and which runs thus:

'This Assembly recommends to the Governor General in Council that he may be pleased to appoint a committee to consider the question of the codification of Hindu Law and, if possible, to prepare a draft Code for submission to the Indian Legislature.'

This Resolution consists of two parts. By the first part, I request the Government to refer the question of codification of Hindu Law to a committee. Those of my Honourable friends here, who are familiar with law, can easily realise the importance of codification in the development of law. But to bring this importance to the notice of other Honourable Members, I think it is necessary that I should say a few words. All civilized countries have recognised and adopted codification as a means of developing and reforming law. In almost all such countries the desire for codifying law seems to synchronise with the awakening of national feeling. To take a concrete case, we find that up to the year 1868, there was no legislation of a strictly modern character in Japan. It was only after this time that steps were taken to promulgate a national law. The period of some years before and after the year 1868 is very important from an international point of view in History of that country. In that period political dangers of immense magnitude threatened the national liberties of Japan. But Japan faced this danger most tactfully, and finally it emerged so successful as to rank one of the leading nations of the world. The era of Feudalism in Japan closed in the year 1868 and Imperial supremacy was re-established. Since this re-establishment of Imperial supremacy, attempts were made in every direction for national progress. The whole country was struggling and clamouring for national unity. National unity could not be secured without unity of law, and for unity of law codification was necessary. It was this realization of the importance of codification as a potent means for fostering national unity that made Japan to adopt it, and hence we find that the years from 1868 to 1899 form an era of extensive legislative activities in that country. I selected the case of Japan, particularly because it is an easterly nation quite dissimilar in its history, national temperament, and habits from other nations under the direct influence of the Christian civilization. In cases of other nations, we find similar periods of codification following close upon national awakening. Germany began its national legislation about the year 1848. Italy promulgated its Civil Code in 1837, Portugal in 1867 and Spain in 1887. Like legislative eras can be marked out in the history of other countries.

I give the above details only to bring to the notice of this Honourable House the importance of codification in general from a national point of view. I do not mean to say that the question of codification which I am going to discuss before this House is alike in its nature, extent or subject-matter to the cases mentioned above.

Having thus shown the universal adoption of codification, I shall proceed to mention some of its advantages. In the infancy of mankind, we find no sort of legislature; as one eminent jurist has rightly remarked:

'Law has scarcely reached the footing of custom—it is rather a habit—it is in the air.'

It is with the growth of society that relations of men grow more and more complicated and then comes into existence the system of law to regulate

some of these relations. Now it is necessary that the law governing any particular people must be definite and capable of being known by the persons whose rights and duties it determines. These principles were recognised from the earliest times, and we have Code of Hammurabi as old as more than 4,000 years. Looked at from these two points of view, namely, definiteness and cognisability, as Bentham calls it, we find case law very unsatisfactory. Case law deals with particular cases, and hence it does not provide for different kinds of facts. Thus we find that case law lacks security for completeness.

Another defect of this branch of law is that it does not prevent co-ordinate and conflicting decisions standing side by side for an indefinite time and thus provides very imperfect security for consistency. It still has another defect. It is intelligible and accessible only to experts. Now, though these defects cannot be removed completely, yet codification is the only remedy by which these faults are minimized to a great extent. Codes bring the law on a particular subject within a definite compass, and make it accessible to almost everybody. It gives general principles by reference to which particular questions may be decided.

One more great advance has been made in modern times. Law has always lagged behind society. In former times it was very difficult to introduce changes by which law can be brought up to date. But now we see that all civilised countries are possessed of legislatures representing all the important classes of the people. Through this machinery legal reforms can be introduced from time to time to meet the needs of society. Thus it saves law from being too rigid and inconvenient, and hence we see that various statutes are amended or revised after a few years to provide such new rules of law as might be required by new interests and new circumstances in the progress of society. Any enactment hardly lasts for more than 10 or 12 years on modern statute books, when it is either improved or corrected at those points at which experience has shown that it required improvement or correction.

So far I have dealt with the importance and advantages of codification in general. Taking into consideration the very unsatisfactory condition of Hindu Law at present, I think it necessary to resort to codification for removing its defects. The greatest defect of this law is its uncertainty. There are numerous commentators on the old Shastric texts. The most important of these are (1) Vidnaneshwara and (2) Jeemutwahan. But there are numerous others some of whom are regarded as chief authority in some part of the country and not in others. Thus we have nearly six different schools of Hindu Law.

When we think about the shortcomings of this law, we find the following defects. The first is, that on various important points there is a difference of opinion among the judges not only of the different High Courts but also among the judges of the same High Court. As I do not wish to take up much time of this House by going into particular details, I only shall mention such defects.

The next defect can be best expressed in the words of Sir W. C. Petheram:

'It is strange,

He says:

'that even now, when the best informed among the Hindus have written books in English to tell us what their customs are, English judges appear to think that these men do not know what their customs are, or know what their own language means.'

[Mr. K. G. Bagde.]

In this connection it is very interesting to read the case law with regard to the right of succession to the property of a woman governed by the Mayukha school who dies without leaving any issue.

In certain cases, the highest court has pronounced decisions which are not in strict accordance with the texts. The case of the validity of the adoption of the only son is to the point.

Another case of confusion arises from the different interpretations of the same authoritative texts of Hindu Law.

In certain places, it is found that the standard treatises on Hindu Law define a principle, and give only a limited number of examples. This defect is conspicuous in respect of Law of Succession. This defect can be removed only by pushing such principle to its logical conclusions.

All these defects have rendered the condition of Hindu Law very unsatisfactory. There is uncertainty regarding many points. Perhaps we shall have to wait for centuries to see these points going before the Final Court and decided by it. Thus we cannot depend upon case law. The only course left open for us is to remove these defects and pitfalls of law by having recourse to codification.

There are certain objections that may be urged against my proposal. It may be alleged that the task is very difficult. I do say, it is not easy. But at the same time it is not impossible. The province of the present Hindu Law is much more restricted than it was in ancient times. Law with regard to crimes, property, contracts and many other branches has been included in various statutes. Hindu Law at present treats of rules regarding Inheritance, Marriage, Adoption, Guardianship, Joint Family, Wills, Gifts, Debts, Alienations and Maintenance, etc. Some of these sub-heads are also affected by Acts like Hindu Wills Act, the Probate and Administration Act, the Married Women's Property Act, and others. Thus it will be seen that its sphere has been restricted a good deal.

There were certain attempts made to prepare digests of the rules of Hindu Law. But they did not succeed. I do not wish to treat these attempts in detail. Such attempts were dictated by administrative exigencies. However difficult the task might have appeared in former times, we are confident that it is capable of achievement. We have the good fortune to have among us an eminent legal scholar who has already done good work in this direction. I refer to my Honourable friend, Dr. Gour. Those who have seen his Hindu Code might easily be convinced of the practicability of the task.

I have already made it clear that by codification alone the existing shortcomings can be removed. There is another aspect of the case why we should urge for codification. Whatever might have been the causes before, now at least we must not be content with the slow reform effected by decisions of judges who are mostly non-Indians and sitting at a distance of thousands of miles from us.

While making these remarks I do not forget that our thanks are due to all those British judges and writers on Hindu Law who have taken great pains to study and expound it. We have to admit that one of our best books in Hindu Law is from the pen of an English Jurist.

The proposal I have made is a very modest one. I only propose a committee. I have not defined its composition with a view to leave the

matter entirely to the discretion of the Government. There are, however, some communities which are not strictly Hindu, but which are governed by Hindu Law, such as the Jains, the Sikhs and others.

I hope that due arrangements will be made to allow such communities to put their representatives on this committee.

My proposal is modest from another point of view. The question of reforming certain rules of Hindu Law has been agitated through the press. A few days ago, I saw a letter, published in a newspaper under the name of my Honourable friend, Mr. Seshagiri Ayyar. Though this be so, I do not wish to go further than asking for codification as I think it will remove many shortcomings in our law. There has been partial codification of many branches of law in British India. This process of codification began about the year 1834 and it still continues. Though some portions of the law have been modernised by this process, the personal law of the Hindus and Mahomedans is allowed to remain untouched. This non-interference in matters of religious and personal laws was dictated by policy. It was realised from very early times of British rule in India that any legislative interference in the religions and customs of the people would involve grave political consequences. In what is known as the plan of Warren Hastings of the year 1772, it was ordained that :

'In all suits regarding inheritance, marriage, caste, and other religious usages or institutions the laws of the Koran with respect to Mahomedans and those of the Shaster with respect to Gentoos, shall be invariably adhered to.'

I was confounded with regard to the meaning of the word 'Gentoo', and among authors also I found that there was a similar confusion with regard to its origin and meaning. Some say that the word 'Gentoo' was derived from the Sanskrit word 'jantoo' which means an animal in general. Others say, that it was derived from the Portuguese word 'gentis' meaning a gentile or heathen. Whatever that may be, the Portuguese called us Hindus as Gentoos in pursuance of the practice of other people, I mean the conquerors of India, who always spoke about the Indians in not very respectable terms.

Now, this line of least resistance adopted by our Government has still been continued, and the social fabric of Indian communities is left undisturbed as much as possible. The proposal that I make does not in any way go against this policy of Government. I do not propose any change or innovation of any sort. I only wish to have the existing Hindu Law to be codified as it is, so that many defects arising from its present unsatisfactory condition might be removed. I know that the task is of great dimensions. It will require some years before it is accomplished. But we must make a beginning. The earlier we make it, the better for the communities concerned. The principle should be accepted by Government, and with that view the present Resolution is introduced. There is not the least reason for Government to hesitate to accept the principle of the Resolution, as it goes in no way against their policy in the past. The new era of political reforms has given us legislature representing the various classes of the people in the land, and hence this august House, I think, is pre-eminently fitted to undertake the question. I, therefore, request the Honourable Members of this House to support the Resolution.

Mr. T. V. Seshagiri Ayyar: Sir, I rise at once, as reference was made by the Honourable Mover to me and to a letter which I have written

[Mr. T. V. Seshagiri Ayyar.]

to the papers, mostly to the legal journals, regarding the necessity for legislation respecting matters of Hindu Law. Sir, the learned Mover has referred to the task as being a very difficult one. I think he would be justified in saying that it is almost an Herculean task. It is a very difficult task, and, as I propose in the few remarks that I shall make, to indicate the lines which the Government might pursue without any difficulty, I think I am justified in making my remarks at this early stage.

Sir, the question of Hindu Law, like other questions connected with Hindus, presents a phase of arrested development. In the old days, there were Smritis which from time to time were changed by writers who made the law of the Hindus quite abreast of the times they lived in. Then came a time when there were commentaries upon these Smritis. These commentators, although they professed to give the intention of the Smriti writers, as a matter of fact, introduced into their commentaries their views regarding the customs which were prevalent in their days, and thus they contributed to the development of Hindu Law. Later on, came a period when decisions of courts tried, to some extent, to help to improve Hindu Law. But I must say that the attempts made by courts to assist in its development rather proved a hindrance than a help to the development of Hindu Law. Now, Sir, for a long period there has been this stagnation in regard to Hindu Law. No attempt has been made for a considerable period to tackle with the problems of Hindu Law. I must point out, it is neither complimentary to our intelligence nor to the ancient civilisation which we profess to have inherited that we should for such a long time have left the Law in the unsatisfactory state in which we find it. Now that we are told that we are representing the people in this Assembly, I think the time has come when we should make some endeavour to codify or legislate in regard to Hindu Law matters.

Sir, I have pointed out to the Assembly, not as a lawyer, but as a layman, the necessity for codifying Hindu Law. I began by saying that there are a large number of Smritis which are supposed to lay down the Hindu Law for us. The difficulty for the lawyer, the difficulty for the judge, and for the litigant is, which of these Smritis should have greater weight than the others? Then comes the question which of the commentaries should be given more prominence than the others. All these are difficulties which have been confronting the judges and lawyers for a considerable period. Only the other day, I think it was the day before yesterday, I was reading in a legal journal which was sent to me from Madras, a very peculiar position which confronted two of the learned Judges of the Madras High Court. The question was whether a disciple of a Sudra sanyasi can inherit the property of that sanyasi. The learned Judges had to consider whether the text of Mitakshara which deals with the inheritance of the property of gurus is obsolete or not, and the learned Judges came to the conclusion that it is not obsolete. Now there are a large number of such questions. Judges have very often to consider as to whether a particular text of Hindu Law which is to be found in the Smritis of Manu or Narada, is obsolete or still in force, and then, Sir, there is the question whether a particular text is mandatory or only directory, and then we have another difficulty as to whether a particular enumeration in a text is illustrative or exhaustive. I have had to administer justice and was always confronted with such difficulties, and I think if I can say that of a person who is a Hindu and who has read some of the ancient Smritis texts, finds these

difficulties, you can imagine, Sir, what the difficulties of European judges would be in regard to such matters. Therefore, it is time, and very high time that we made some attempt to codify Hindu law so that persons who have to administer it, persons who have to argue it and persons who suffer under this intolerable state of the law may know something definite as regards that law.

Sir, my Honourable friend has pointed out that legislation has been attempted in various civilised countries and he was good enough to point to the example of Japan in this matter. Sir, it is very easy, so far as Japan is concerned, to codify. It is a homogenous country; there are no differences as we find in this country, and, therefore, there is not the same difficulty which confronts the legislature in a country like Japan as you find here. But here, Sir, we have endless varieties of Hindu law. The Hindu law which is observed in Madras is not the Hindu law which is observed in Bombay and, if we take Bengal, we find two schools, one the Dayabhaga and the other the Mitakshara which is administered by the same Judges in Bengal. Consequently, you will find great difficulty in codifying. The example of Japan will not be of much assistance to us.

Sir, my object in rising at once after the Mover of this Resolution is, that I may be in a position to indicate to the Honourable the Law Member the mode or the direction in which the assistance of Government may be given for this purpose. Sir, there are three courses open in order to set right the present unsatisfactory state of the Hindu law. The first is to appoint a large Commission composed of persons who are acquainted with Hindu law. That, I believe, Sir, would be no doubt a satisfactory one, but, unfortunately, it would mean considerable expense and Mr. Hailey, who has taken the trouble to come here on this occasion and has been listening somewhat intently to what I have been saying, may not be able to find the funds for this purpose this year, or the next year or the year after. It will undoubtedly take a long time to get a Commission to go round the country to collect opinions and to submit to the Government the conclusions they have come to. Moreover, it will take an enormous length of time to do it, and further, Sir, it is not possible for a Commission appointed by this Assembly to deal satisfactorily with the various systems of law in the various Presidencies. If Commissions are to be issued, those Commissions must be issued by the various Local Governments. A Commission from Bengal, a Commission from Bombay and a Commission from Madras. We have to consider the various states of the Hindu law in those Presidencies, and probably this Assembly may be in a position afterwards to appoint a small Committee to examine the opinions thus gathered. Therefore Sir, I think the idea of having a Commission to go round the country at this present stage is not a practical one so far as I can see.

A second course is to allow private persons to introduce Bills to codify the Hindu law. Sir, if I make a few personal remarks about myself, I hope you will pardon me for doing so; I may say, that I came to this Assembly mainly with a view to give my assistance in the matter of codifying Hindu law, although it is for that purpose I came here. Sir, you have found none the less that the war horse is not dead in me and that wherever there are other questions coming up, I tried to catch your eye and to interpose in the discussions as often as anybody else. But, Sir, the main purpose which led me from Madras to Delhi is to see that Hindu law is codified, and, if I am not satisfied that any such attempt can be made in this Assembly, I might

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not consider myself justified in intruding my presence any longer on you. The main object of my life, after a fairly full public career, in coming over to Delhi is to see that this unfortunate state of Hindu law is rectified, and if I am unfortunately led to think that that cannot be done, then, Sir, I may perhaps say good-bye to this Assembly altogether. Now, Sir, I hope the Assembly will pardon me for having said so much about myself. Sir, there are difficulties in the way of private legislation. One difficulty is this: I asked you very early in this session whether Bills took precedence over Resolutions, and you, Sir, with your impartiality and with your desire to hear a large number of people on Resolutions were good enough to tell me that under the existing law Bills would have no precedence over Resolutions and that we would have to ballot for Bills as well as for Resolutions I may say, Sir, that I am neither favoured by the gods nor favoured by the ballot. On three occasions I tried my hand. On the first occasion I was seventh on the list: on the second occasion I was eleventh on the list; and on the third occasion I was seventeenth on the list. That shows that I am not very much favoured by the ballot box. Under those circumstances the only course is to ask the Government to allow me to bring in my Bills if I wanted to legislate upon Hindu law, and I am not quite sure that I will have, as I said, the favour of the gods in regard to this matter; there will be other people who will claim the same indulgence. Therefore, Sir, the difficulty of private legislation is very great.

A third course, and an intermediate course, is this and this is the course which I recommend to the consideration of the Honourable the Law Member. I suggest that at the end of each session a small Committee may be appointed for the purpose of considering what are the most urgent matters which require codification, to take up those subjects which offer the least possible resistance, the Committee will advise the Government on the particular matters which should be taken up for legislation at the next session. It will have this advantage A Bill will be drafted; it will at once be published in the Gazette of India and opinion will be elicited from the High Courts and from various bodies immediately, whereas that cannot be done in the case of a private Bill. If it goes out with the imprint of Government approval it will soon get the opinions of the various persons interested and it will be passed into law as early as possible. Therefore, Sir, I would suggest to the Honourable the Law Member that he should at the end of each session appoint a small Committee — it need not be the same Committee each time to advise him as to the particular matters which, without in the least provoking public opinion or in the least prejudicing orthodox opinion, can be taken up for legislation.

Sir, I do not think there is anything more to be said on this question. As I said, the state of the Hindu law is not very complimentary to the education which we have received and to the civilisation with which we have come in contact. It is absolutely necessary, in order that this matter should be set right, that some steps should be taken, and, in my opinion the last of the courses which I have recommended to the consideration of the Honourable the Law Member seems to be the most feasible one and one which, if followed, would to a certain extent set right the abuses which we find in connection with Hindu law.

Dr H. S. Gour: Sir, after the very flattering reference to my Hindu Code it is supererogatory on my part to say, that I heartily support the Resolution. The three questions which arise in this connection, are:

First, should we have any code at all? And the second question is, is it possible to codify Hindu law? And the third question is, what should be the nature of this Code? Now, Sir, it is too late in the day to question or dispute the value of a code. Its advantages are world-wide and well-known. A code makes the law certain; it makes it simple and it makes it uniform. The only disadvantage which is sometimes spoken of as attaching to a code is its rigidity; but that rigidity should no longer stand in the way of a code when we have the Legislative Assembly with its argus eyes ever watching the course of legislation in this country. The question, therefore, about the utility of a code need not detain us.

The next question and the question upon which my Honourable friend, Mr. Seshagiri Ayyar has discoursed this morning is the question about the possibility of a code. Now, Sir, I cannot for a moment doubt that we can codify the whole body of Hindu law. As to how far that Code will meet the requirements of the various schools, communities and localities is a question which has to be put to the test of time. I am quite aware of the difficulties which have been raised in times past to the codification of Hindu law. Various efforts have been made during the last century for the purpose of codifying Hindu law; and I also feel that these efforts have not been as successful as they might have been. But the mere fact that effort after effort has been made for the purpose of codifying Hindu law is the best argument that you can have in favour of codification. The Honourable Mr. Seshagiri Ayyar has pointed out, that in the various castes and communities, and in the various localities of this country there are various local laws. But if he will examine the underlying principles of these castes, communities and localities, he will find that there is a substratum of uniform, unvarying, clearly enunciated principle, and it is upon that principle that Hindu society hangs together; and that, I submit, constitutes the frame work of a Hindu code. I feel, Sir, that the difficulties of codification loom large to those people who have not really tackled with the problem. I myself for the last 25 years was a victim to that fear, that Hindu law, sacrosanct as it is, with its innumerable divergences, its innumerable conflicts in texts, its conflicting interpretations, and the judicial dicta which added to the confusion, was far too diffuse for codification. But when I took up the work I found the work extremely interesting and I have attempted to codify the whole of Hindu law in 290 sections; and the fact that it is now used as a good working code by the legal public in this country is, at any rate, some justification for making a venture of the kind proposed by the Honourable Mover. I am aware of its imperfections, and it is because I am aware of its imperfections that I rise to support this Resolution.

Now, Sir, two questions arise in connection with the codification of Hindu law. Shall it be a mandatory code or shall it be merely a declaratory code? If it is to be a mandatory code, then I quite agree with the Honourable Mr. Seshagiri Ayyar that a commission will have to go to all parts of India for the purpose of ascertaining what is the existing law and what is the law which they want. Because in that case the legislature will legislate not only upon what is the law but it will legislate upon what ought to be the law. But the difficulties which this course presents do not arise if the legislature were merely to enact a declaratory code, a code of what is at present the prevailing law. That, I submit, need not present any difficulties; and a very small committee costing a figure, which will certainly not alarm the Honourable the Finance Member, should suffice to place such a code on the statute book. But if a more ambitious scheme is launched and this Assembly was to decide that we should

[Dr. H. S. Gour.]

have a complete, perfect and up-to-date code of not only what is the law but what ought to be the law, then I certainly think that the difficulties are greater and the cost of legislation will proportionately increase. These are the two alternatives which I present to the Honourable the Law Member. I am for once in favour of a simple declaratory code which should enunciate the leading principles of Hindu law as they are administered by the courts to-day.

Now, Sir, if such a code, a declaratory code, is enacted, it will be the ground-work for the future legislator and in better times we might be able to appoint a more ambitious committee for the purpose of overhauling the whole of Hindu law and bringing it up to date. That we have sufficient materials for such a declaratory code, as I commend to the attention of this House, I have no doubt; and I therefore submit, that neither the question of time nor the question of expense should delay the movement in favour of a declaratory code. Now, Sir, it has been said, and said with a great deal of truth, that the progress of Hindu society is arrested for want of a code. And the Honourable Mover has pointed out that the Judges, both Indian and European, have the greatest difficulty in administering the Hindu law. As a matter of fact, there is no question of Hindu law upon which the very best Sanskritists and the most profound lawyers do not feel some doubt. Such is the uncertainty of Hindu law, an uncertainty born of the following facts: first of all, the whole of Hindu law is embedded in an unknown tongue; in the second place, we are not in a position to obtain an authentic version, a true version of the text to which that law relates; in the third place, we have a number of conflicting commentaries placing different interpretations upon the same word and the same aphorism; and lastly, these aphorisms were written at a time and for a society which has long since ceased to exist. From the days of Manu, some two thousand years before Christ, when the first code of Hindu law was promulgated, the later commentators have rested content by fastening meanings upon the original texts to suit the altered conditions of the society in which they lived, and the result has been that the true meaning of the original texts has in course of time been wrested from its normal meaning and sense; and the interpretation of Hindu law at the present day is a highly technical art known only to the few, and I doubt even if it is known to a very few. But Hindu law, as it was originally enacted, was intended to meet the requirements of a simple pastoral life. Society has grown and become more complicated, and with the growth of society and the growth of the numerous problems which the modern conditions of society bring, Hindu law finds itself totally and wholly inadequate to deal with the conflicting claims and the conflicting rights of persons and people.

The result has been that English Judges and Indian Judges have to eke out this bald statement of law with what is known as justice equity and good conscience, and these judicial dicta which have been added to the written texts and now constitute the *juris corpus* in this country form a considerable portion of the law as it is administered at the present day. In other words, while the law is defective, Judges have to administer law according to the dictates of justice, equity and good conscience, and they have unconsciously sometimes, and consciously at other times, to supplement that law by what they conceive and consider to be the right law and in doing so they assume a jurisdiction of necessity which rightly belongs to the truly appointed and accredited Indian Legislature. I submit that this state of Hindu law is far from satisfactory. It can never be consistent, it can never be uniform and it can never be exhaustive.

Individual cases are decided and these cases are overruled or distinguished as soon as subsequent cases arise, and it is found that the enunciation of principle in a particular case requires qualification or modification. I submit, therefore, this indirect method of judicial legislation which is going on and must go on in the absence of a Hindu code must be put a stop to by this Assembly deciding here and now that Hindu law shall be codified in one of the two ways I suggest in which codification is possible. I submit, Sir, that as there are no practical difficulties for the immediate enactment of a declaratory code, the Honourable the Law Member should accept this Resolution, and I have no doubt that he will find that a very small committee of the nature suggested by the Honourable Mr. Seshagiri Ayyar would suffice for that purpose.

Rai Bahadur Pandit J. L. Bhargava: Sir, though in the Punjab custom is the primary rule of decision in matters relating to succession, special property of females, betrothal, marriage, adoption, guardianship and certain other matters laid down in section 5 of the Punjab Laws Act, yet no custom is to be presumed to exist, but it is to be established like any other question of fact except in cases in which there have been judicial pronouncements of the highest courts in certain matters relating to agricultural tribes. As regards non-agricultural tribes resident in towns, the initial presumption is, that they are governed by Hindu law. In the case of agricultural classes also, if no custom is found to exist, a Hindu can always fall back upon his personal law. Therefore, the Punjab is as much interested in the codification of Hindu law as any other province. In the Punjab, Mitakshara or the Benares School is generally followed, and in order to find a correct principle governing a particular case, resort is always had to the judicial pronouncements made by the various High Courts, and they are sometimes very conflicting. In order to secure uniformity and to remove this uncertainty, it is highly desirable that there should be a code complete in itself so far as it can go, so that it may guide the litigant public, the counsel and the Judges who have to deal with Hindu law. With these few words, I support the Resolution which is now before the Assembly.

Babu J. N. Mukherjea: Sir, if in course of what I may have to say on this very important subject, it seems to this House that there is a jarring note upon a possible unanimity of the House, I shall ask the indulgence of the House to bear with me on a point of such vital importance. Sir, there cannot be any doubt that if on a point like this codification was possible, every one would feel eager for a result like that. But in considering the point, we must not treat the question as one of first impression, but as one which has a long history attached to it. I mean to say, that the Hindu law to-day as it is interpreted by the British courts is a growth, and to say that there has been in the present instance an arrested development will not be correctly representing the exact situation. Now my submission is, that you cannot in a matter like this, write on a clean slate, as it were. There are religious and social susceptibilities to be considered, and we must note that the administrative experience which the British Government has gained has led it to follow the present course. Let us see, what will be the immediate effect of codification in the present instance, apart from the question of the difficulties that we shall have to face in connection with it. Now, what are the sources of Hindu Law? We find that they are based upon the sacred writings of the Hindus; and the commentaries upon them, though they purport to differ on certain

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points, all agree in assuming that there is a common basis for their line of interpretation, though they might differently interpret the same text. Sir, if a body which does not exactly represent the Hindu community were to legislate upon the subject and to pass a Code and called that a declaratory Act laying down what the Hindu law is, what would be the effect of that on the situation? Will that Act nullify all the fundamental or basic principles which are to be found in the religious books of the Hindus as forming the ground-work of their laws? Will this House take upon itself to say, 'hereby Manu is repealed, hereby Yajnavalkya is repealed, hereby this House repeals Mitakshara'? Will such a course be proper or feasible? Such being the case, I hope this House will not make up its mind to go in for a big undertaking like the one proposed and create a regular hornet's nest about it.

12 NOON. It cannot take such a course. The statutes of Parliament have laid down that the Hindus shall have their own law so far as these questions are concerned and that the Muhammadans shall have their own personal laws. What would be the feeling of my Muhammadan brethren if we said 'your laws were written many many years ago, let us codify the laws laid down in the Koran or in the Hadeesh'?

Mr. Amjad Ali: The Koran is not the same.

Babu J. N. Mukherjea: But suppose people said that? Would you tolerate it for one moment?

Mr. Amjad Ali: We do not suppose it for one moment.

Babu J. N. Mukherjea: Well, a large body of people among the Hindu population are imbued with a feeling like that evinced by my Honourable friend. If we cannot repeal certain sections of the Vedas and Smritis, what will be the value then of the Code? Now, various books on Hindu law have been written, such as Sir Ernest Trevelyan's book, and my Honourable friend, Dr. Gour's book, where precepts in the form of principles have been laid down. They are deductions of principles from decided cases, and in many of the principles enunciated, the words used by the Judicial Committee or by the High Court of India have been put down. If you wanted to find the law on a point where conflicting opinions existed, you would find in such books an exhaustive statement of the law on such points. Such a statement in a book and a statement of the law in a Code have this difference between them that a Code is presumed to be exhaustive on the point with which it deals, and therefore the words used in a Code furnish a starting point for the decision of questions arising in connection with future litigation, or for the interpretation of the law in any particular case that may come up for consideration. Therefore, in codifying Hindu law *en bloc* we have to give the go-by to all that has been said in the religious books of the Hindus or what is to be found in the Smritis, and we shall have in such event to confine ourselves entirely to the Code itself. That is the difficulty. The Code will debar the courts from looking into the past, from explaining the present by reference to the past, and will compel us to follow the words of the Code as the starting point and the final word on the subject. I deprecate, what was described by my learned friend, Dr. Gour, as the rigidity of a Code. That is the fear.

I need not tell this House that the English common law is a matter of free choice with the English people. In the earlier stages of the growth of

English law, it might have been said 'What is the use of having common laws? Let us have codified laws right through. We shall then know precisely what the law has to say on any particular point.' No doubt, statutes have been passed from time to time in England, but the common law has had its existence side by side with the statutes. Besides that, the effect of a rigorous interpretation of the law has been done away with, to some extent at any rate, by the application of the principles of equity. Now that we know what the practical difficulties to be met in a matter of this kind are, the first question that presents itself for consideration, as has been pointed out by my learned friend, Mr. Seshagiri Ayyar, is, on what lines should we proceed with a view to the solution of our difficulties? No doubt, his suggestion that we might, for the present, confine ourselves to the consideration of small detached points and see first of all whether we can codify the Hindu law on these points—seems to me to be the most feasible course to adopt. At the very outset, we have to face the great practical difficulty of an attempt to make a comprehensive code dealing with all the points of Hindu law at one and the same time. Such an undertaking will extend over a long series of years. Whether the Honourable the Finance Member will find the money to carry on this extensive work (it may last well over many generations to come) is another question. That is a difficulty which has been noticed by all the eminent speakers who have spoken on the subject. We all feel this difficulty about it. Conflicts of decisions there will be in any event. But in spite of these difficulties of the present condition of things, people have submitted that in the present condition of things, it is the only feasible way that the questions that present themselves to us can be solved. It is more satisfactory than the process suggested by the Resolution, at least, on many points. What I would submit to this House is, that we should not be tempted to imitate other nations, for instance Japan, as it has been pointed out by my friend, Mr. Seshagiri Ayyar. That it is out of the question, because there is homogeneity there, whereas here what have we got? First of all, it will take years to find out how many classes of Hindus there are and to what laws they subjected themselves. I am not sure on what points the law will be settled in the midst of such diversity. How many years will necessarily elapse before we find something like a satisfactory solution of such a question? Then again, a code means that we shall have a law in one place of a uniform character governing a large class of people or the whole of the population of a country. For instance, all our statutes, the Evidence Act, the Penal Code, or the Criminal Procedure Code are indiscriminately applied to all. There is no question of religious principles in any of these codes. Whereas in the case of Hindus, we find that there are different sects and tribes and it will be an impossibility, at any rate it appears so to me, to form one Code which will meet all the needs of all the different classes of Hindus; because *ex hypothesi* the courts in British India have applied and mean to apply different laws to those different classes at least so far as details of Hindu law are concerned. Therefore one benefit of codification is lost. We find the same diversity, we have the same difficulty right through even if there be a code. Now, Sir, if decided cases and the principles which are deducible from decided cases have so far succeeded in laying down the fundamental principles, the investigators who have gone before us have not worked in vain; in the century and a half that have elapsed, many many points have been cleared up, the foundations of many others have been laid. We know, as a matter of fact, the courts have changed the law in certain respects, and Hindu

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society has submitted to these changes. For instance, as regards the widow's rights, we know that the courts deviated from the text laid down by the Smritis, and certain modern principles have been introduced by our courts. For example, the principle has been introduced, that property once vested cannot be devested and things like that. Although we find such a principle more or less in an elementary form in the Smritis, yet I take the above to be a modern principle introduced in recent times so far as this particular point is concerned. Principles like these have been introduced. It was never intended that a widow should go on enjoying her husband's property when she did not live a chaste life. According to the proper meaning of the text in Katyayana, it should be held that she should enjoy her husband's property so long as she continues to live a chaste life.

But the modern interpretation is, that if the property of the husband has once vested in her, it cannot be devested. That is one point. There are many other points in respect of which the case law seems to have deviated from the original texts. It seems to me, Sir, that it will be more satisfactory if we can devise means by which differences on small points of Hindu law, taken in a detached form, can be set at rest by an authority respected by the community or possessing statutory powers. Of course, these points are settled in individual cases, and when they are settled they are very often coloured by the facts of the particular cases. Therefore, I submit, that if general propositions of law which arise and which give us trouble from time to time can be decided, by means other than a general codification which we can devise, or by some means by which an authority can be constituted, so that it can authoritatively state its opinion on a particular point of conflict in Hindu law, such a course seems to be a more practicable way of dealing with the subject than the proposal for codification which has been admitted by my learned friends, who have considerable experience in these matters, to be a very very difficult task.

Mr. N. M. Samarth: Sir, I am sorry that I do not agree with my Honourable friend, Mr. Seshagiri Ayyar, in his view that this Assembly or the Government should attempt the huge task of codifying the Hindu law for the whole of India. I find he says he did not say that. But I understood him to say that he had come here for the sole purpose of seeing that Hindu law was codified, and I hope that even if his object is not fulfilled, he will still continue to be a Member of this Assembly. As regards codifying the whole of Hindu law, my difficulty is this. Any person who is acquainted with Hindu law and who is concerned in the administration of it as a Judge or as a practising lawyer, knows that the fundamental principle of Hindu law is that custom is paramount over the letter of the law, or as expressed in Sanskrit *Sástrat ru thi baliyasi* 'custom overrides the Shastras'. That is the fundamental principle in administering Hindu law. Consequently you find different schools of Hindu law in different parts of the country in accordance with the traditions and customs of the various communities who have lived in those parts. I come from Bombay. The Bombay school of Hindu law, I claim, is more progressive than others, especially with regard to the rights of women, and I do not expect any uniform Hindu Code doing justice to the Bombay view. I would not like, at any rate, a Hindu Code being framed in such a way as to level us down to the method of treatment of Hindu women which finds favour with the other schools. I would, therefore, oppose any codification of Hindu law on that basis. My Honourable friend, Dr. Gour, has

attempted something like what he calls a code of Hindu law. Every mother thinks her little goose a swan. To my mind, if he will forgive my saying so, his so-called code is a mere boiled down digest and nothing else. That is not, I venture to think, the idea of a code. But coming to practical matters, it seems to me that there is one way by which this idea of codifying Hindu law for the different provinces may fructify. It should be left to each province, to each local legislature for instance, to consider whether it is desirable for that province to codify the Hindu law which prevails in those parts. It should be left, for instance, to the Bombay Legislature to decide the question for themselves, and if they come to the conclusion that it is desirable to do so, they will be in a better position to codify the Hindu law as suited to the Bombay Presidency than a body of men who may not be so conversant with that law or who may try to think that the Bombay law gives more rights to women than it is desirable for women to have. With these few words, I must say, that I am not in favour of the motion as it stands.

Sir P. S. Sivaswamy Aiyer: The Resolution which has been moved has for its object not to introduce a change with regard to any particular part of the Hindu law, but to subject the whole of the system of Hindu law to an examination and scrutiny at the hands of a committee. It is a motion really to throw the whole of the Hindu law into the melting pot. The issue now is not between legislation and no legislation. Lawyers who have been nourished upon the principles of the English law and English jurisprudence may perhaps be expected to share in the hostility which English lawyers generally entertain towards attempts at codification. But that is not my attitude. I am all in favour of legislation on those points of Hindu law upon which the need has been felt for legislation, whether it be on account of the conflicting decisions of the courts, or whether it be because the general sentiments of the community have outgrown the doctrines of Hindu law on any particular subject. If there is a strong and a practically universal consensus of opinion as regards the need for a change with regard to any particular point, the Legislature may well interfere in such a case. If the courts have given conflicting decisions and it is impossible for the layman or even for the lawyer to come to any definite conclusion as to what the law is, it is desirable for the legislature to intervene. But in the absence of these conditions I do not think it would be wise to appoint a general commission for the purpose of examining the whole of the Hindu law and suggesting amendments and alterations. I am not aware of many instances of the whole of the personal law of the people of a country having been thrown into the melting pot in this manner and subjected to the scrutiny of a commission. We have been told that a progressive nation like Japan has introduced codes. I am sorry to confess, that I have little acquaintance with the codes of Japan. I do not know whether Japan has codified the law of status, or the personal law of her people, but I hope we shall not be considered unprogressive if we fail to follow the example of Japan, even if Japan has codified the whole of her personal law. Now, if it is necessary to introduce changes with regard to any matter of Hindu law, there are various ways of introducing it. The most hopeful method, and, in my opinion, the most proper method of introducing such changes is to deal with specific points and bring forward legislation relating to those points, preferably in the provincial Councils. It must be remembered that India is a large continent with several provinces and sometimes several systems of law in the same province like the Dayabhaga and Mitakshara in

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Bengal. Now, under those circumstances, it would be a task of immense difficulty for a Central Legislature like this to attempt to legislate for the whole of India in a matter like this. It would be neither desirable nor possible to standardise the whole of Hindu law and reduce it to a code. It is not like the laws relating to contracts or transfer of properties or crimes or evidence or anything of that sort. It relates to matters affecting the rights of succession, inheritance, marriage, adoption, joint family, and so on, which are all intimately bound up with the social structure, with the religious sentiments and with the usages of the people. The best machinery for dealing with matters of this kind is the provincial legislature. Hitherto, no doubt, the Central Legislature has been very chary of interfering in matters of personal law, mainly, no doubt for the reason that they have regarded it as likely to be attended with political danger if they attempted to interfere with laws connected with the religious usages and social structure of the people. I hope that, hereafter, the attitude of the Central Government will not be hostile at all and that, on the other hand, they will be disposed to allow the provincial legislatures to go ahead wherever they feel the necessity for a change. This is the line of policy which we in Madras have followed. Some years ago, the late Sir Bhashyam Ayangar introduced a Hindu Gains of Learning Bill which was successfully carried through the Madras Legislature but was, unfortunately, vetoed by the Governor of Madras in deference to an unreasonable protest from certain sections of the community Subsequently, my friend, the Honourable Mr. Seshagiri Ayyar, carried through the Council a Bill relating to transfers and bequests by Hindus. It is legislation on these lines that is most promising of results. Now, suppose, on the other hand, you appoint a large commission to codify the whole of Hindu law. They will have to travel over the whole of India, take evidence as regards the views and the wishes of the people and the necessity or otherwise for any particular changes. What a lengthy process it will be and how very expensive? To give you one illustration of the delay and the futility of legislation on some of these matters, I may refer to the Malabar Marriage Act in which my friend, Sir Sankaran Nair, took a great deal of interest. It took any amount of time to record the evidence of the community concerned, there was no end of discussion, it gave rise to acute differences of opinion on the part of the community, and, eventually, it was passed. And do you know how many marriages have been registered under that Malabar Marriage Act during the last 25 years or so? Not more than 28, and I believe that even some members of Sir Sankaran Nair's family have not registered their marriages. The fact is, they have now discovered that the relations now subsisting do amount to marriage and that they do not want any Marriage Act at all. Now, that is an illustration of the extremely expensive and futile character of attempts to legislate in social matters. Now, there is another danger in appointing a commission of this sort. You offer a great temptation to hasty social reformers.—I am not opposed to reforms on points on which the community is agreed—to advocate each his own pet hobby and to push it forward and pull down the whole system. I do not believe it would be at all desirable to appoint such a large commission with such a large scope and to ask them to range over the whole field of Hindu law and reduce the existing law to the form of a code. I think it would be attended with very considerable danger of creating discontent in the community. The safest method, therefore, is to proceed by way of piece-meal legislation on points

upon which the community in each province may be generally agreed, and if we have a large number of Statutes of this kind dealing with specific topics, the time may come when you may find it expedient to consolidate all these enactments and pass them in the shape of a code. The work which Dr. Gour has told us he has attempted will, I have no doubt, be extremely useful in an attempt of this kind. but I do not think the time has come yet for recasting the whole of Hindu law ; the time has not come yet for a new Manu to re-edit the whole of Hindu law.

Much has been said about the rigidity given to particular doctrines of Hindu law by the action of the Courts. On the other hand, members of the legal profession will also realise that there have been cases where the action of the courts has tended to liberalise the system of Hindu law and to make changes in accordance with the changes in public opinion or in accordance with the requirements of equity. Take, for instance, the law relating to alienations. The Hindu law of alienations has been gradually moulded into conformity with the requirements of equity and it has been allowed to make an encroachment upon the rights of members of the joint family.

There are other cases which will occur to the minds of Honourable Members where the law has retained a fluid character owing to the action of the courts. Take again the law of wills, which is entirely a growth of modern times and is due to the effect of judicial decisions. It is not necessary for me to go into any details of this sort on the present occasion. My Honourable friend, Dr. Gour, said that the code might be a declaratory code. I suppose what he meant to say was that the code might declare the law as it is, instead of seeking to make any changes ; that will not satisfy the wishes of those who do wish to introduce changes. But even if you merely make a declaration of the existing law it will involve a stupendous amount of labour and it is not really worth while. Then again let me add one more consideration before I sit down. I am not one of those who think that the system of Hindu law is perfect. There are many respects in which it has given rise to inconvenience ; but where is there any system of personal law which will satisfy the opinions and sentiments of all the people living under that system or of all the people who living under other systems wish to model the personal law of the people on lines which they consider most conformable to abstract justice and equity ? Only the other day we had notice of a Resolution from a Muhammadan Member of this Assembly that the Hindu law should be so altered as to let in daughters to inheritance along with sons. Now, that would be fundamentally altering the character of the present principles of the Hindu law of inheritance. Whether it is a thing which is desirable in itself or not, is another question ; it is for the Hindu community to decide. Now if you were to subject the English law of property to scrutiny of that sort you will find many a doctrine which might perhaps be declared by an outsider to be anomalous or inconvenient or inexpedient in the public interests. I think it would be a great mistake to subject the whole of the personal law of any community to a scrutiny like this, and I think the only safe course for us to pursue is to proceed by way of piece-meal legislation in the manner which has been pointed out by some of the gentlemen who have already preceded me.

The Honourable Dr. T. B. Sapru: Sir, only the day before yesterday I had the honour of making a speech on this precise question in another place ; but I was not opposed there to my legal friends, and necessarily some points of

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view which have been elicited to-day in the debate were not brought out the day before yesterday. You have here to-day warm advocates of codification, cautious advocates like my friend, Sir P. S. Sivaswamy Aiyer, and uncompromising opponents like my friend, Mr. Samarth.

Now, so far as the two great Madras lawyers are concerned, it seems to me that in spite of the seeming difference of opinion between them, in the result they are agreed, as I hope to be able to show presently. So far as my Honourable friend, Dr. Gour, is concerned, one can naturally sympathise with his ambition to be another Justinian in this country. But there are just a few considerations which I will beg the House to bear in mind in approaching a question of this momentous character. In the very first place, let me point out the essential difference between ancient codes and modern codes; and it is important to bear in mind that difference when you have to deal with a code affecting an ancient community like that of the Hindus. In almost all the ancient codes you find that the sanction behind the written law was that of religion. In most modern codes you find that the sanction is either secular or it is an admixture of a secular and religious character. Therefore, when you undertake a task of this stupendous character, you have to put one or two questions clearly to your mind. Is it only that you intend to codify the law after a careful investigation, the law which you have inherited from past ages? Or is it also that you want to modify the law as you have inherited it from past ages and to make such modifications as modern requirements may demand? If it is only a question of codifying the inherited law, you have first of all to discover what that law is and to remove all such controversies and differences of opinion as you have at the present day and as have also been inherited through a long series of years. If, on the other hand, you want also to codify the law so as to meet modern requirements, you have to take care that in your zeal for the modification of the law you may not bring into existence forces of opposition which may altogether defeat the object that you have in view. These considerations, if I may be permitted to say so, are not peculiar to the present conditions of India. Whenever and wherever in modern times attempts have been made at codification, you find lawyers as well as scholars divided into two groups. I need hardly remind a learned Assembly of lawyers of the great battle which was waged in the latter part of the 18th century and the earlier part of the 19th century between two schools of German jurists; Savigny on the one side detested—perhaps quite as strongly as my friend, Mr. Samarth detests—all attempt at codification. Thibaut on the other side was a warm advocate, such as my friend, Dr. Gour, is of codification. Anyhow the real point is, that even in regard to the German Code, which has been described by Professor Maitland as the most perfect code invented by the human mind during the last two hundred years, the German nation proceeded with the utmost possible caution. As my Honourable friend, Mr. Bagde, himself pointed out, the first attempt began about the year 1846, and you will find that the first commission which was appointed there to codify the law was in the year 1887 or 1889. It laid down what is known as the first project; this first project was again followed by what is known as the 'second project,' and this again in its turn was followed by the 'third project.'

So time after time there was revision by one committee or commission and again by another committee or commission, and it was not until the year

1896 that the German Code was put in its final shape, and even after that it took four years to obtain the imperial sanction. This is the caution and circumspection with which they proceeded there.

Similarly, I could give, if necessary, the history of other continental codes. In recent years the most remarkable instance is that of the Swiss Code which again was brought into existence after arduous labours extending over a long number of years. Therefore, while as a lawyer, and as a Hindu lawyer, any one in my position should consider it his pride and privilege to assist his own countrymen to have a system of personal laws in a codified form, I would beg the House not to allow its enthusiasm to over-run the necessary caution in this matter.

It it somewhat remarkable that while in the early days of Sir William Jones it was found impossible to get a pundit in Benares to help in the translation of the Code of Manu, we have got so many pundits of Hindu law to-day anxious to help the Government in the codification of the law. Perhaps the Assembly will allow me to read an interesting passage to illustrate the change which has come over the spirit in modern times. A learned writer, referring to the difficulty which Sir William Jones felt in translating the Code of Manu says:

'At Benares, the Chief Native Magistrate was unsuccessful in his attempts to procure a persian translation of the work, the pundits being unanimous in their refusal to render assistance. The pundit, with whom Sir William read Sanskrit, reluctantly consented to lend his aid, but only on certain days, when planetary influences were favourable. As preparations for the publication of an English version advanced, the pundit became alarmed at the prospect of Sir William's success, and apprehending serious consequences to himself, he earnestly requested that his name might in no way appear in connection with the attempt to make known to foreigners the sacred Institutes of the revered Hindu legislator. Eventually a wealthy Hindu at Gaya caused a version to be made, which assisted Sir William in his design and enabled him, at an enormous expense of time and labour, to give the result of his endeavours to the European world in an English version. The translation appeared in the year 1792.'

You have now pundits learned in law both in this House and in the other House anxious to assist the Government. Now take it from me, that so far as Government is concerned, they are not unwilling to avail themselves of their proffered help and assistance, but at the same time I would beg the House to remember what all that offer of help implies in time, in men and in money.

Again, there are just one or two considerations which I should like to place before the House in connection with this question of codification. My Honourable friend, Mr. Bagde, the Mover of this Resolution, referred to a remark which one comes across in every text book dealing with the question of codification, namely, that in any country where there is a growing national consciousness there is also a desire for a national code, because the two are supposed to help each other. But let me point out, that it is no use relying upon that bare dictum of learned text writers. When they refer to the demand for a national code, they mean quite a different thing by that expression. There are vital distinctions between codes such as have sprung up in Germany, Switzerland and other countries and a code such as you want here, dealing with questions purely affecting the Hindu community which is one of the several communities in India. Therefore, let us not rely too much upon that dictum.

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Again, my Honourable friend, Dr. Gour, seems to think that once law has been codified, all the troubles are over. The best answer that I can give is by referring to Dr. Gour himself. Take for instance the Transfer of Property Act consisting of 138 sections, and yet the learning, patience and knowledge of Dr. Gour has given us three stupendous volumes extending over many pages. Take again his book, the Hindu Code, into which he says, he has condensed the whole of the recorded wisdom of ancient sages in 290 sections. But look at the book itself. It extends over 1200 pages. Therefore, let us not build our hopes too much upon mere codification. At the same time, it is a great mistake to suppose that when law has been codified, there can be no room for doubt or difficulty. In this connection, perhaps the House will allow me to refer to two very suggestive passages, one from Bentham and one from a French writer. Now, Bentham, who was perhaps the most enthusiastic supporter of codification, says:

'The object of a code is, that every one may consult the law of which he stands in need, in the least possible time; and a code should be complete and self-sufficing, should not be developed, supplemented or modified except by Legislative enactment.'

Now there is a criticism on this made by one of the most distinguished predecessors of mine which it is also necessary to read out to the Assembly. This is what Sir Courtenay Ilbert says:

'The views of Bentham were characteristic of the age in which he wrote; it was an age of great ideals. It underrated the difficulties of carrying them into execution. It overrated the powers of Government. It broke violently with the past. It was deficient in the sense of the importance of history and historical knowledge. It aimed at finality and made insufficient allowance for the operation of natural growth and change. It ignored or under-estimated differences caused by race, climate, religion, physical, social and economical conditions.'

I need hardly point out the application that these remarks have to the question before you.

Then, again, when certain questions arose with regard to the Code of Napoleon in France, and when one of the Commissioners who were appointed to codify the French law was approached and asked as to whether the codification of the law in France would put an end to all legal troubles, he gave this warning, and let me read that also:

'We have guarded against the dangerous ambition of wishing to regulate and foresee everything. The wants of society are so varied that it is impossible for the legislator to provide for every case or every emergency. We know that never or scarcely ever in any case, can a text of law be enacted so fair and precise that good sense and equity will alone suffice to decide it. A new question springs up. Then how is it to be decided? To this question it is replied, that the office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences and not to descend to the details of all questions which may arise upon each particular topic.'

I consider it necessary that these facts should be brought out before this House which consists not only of lawyers but also of laymen. I will only refer to one more aspect of the question, and then finish. English lawyers, as my Honourable friend, Mr. Eardley Norton, will bear me out, have been very cautious in regard to this matter. It is the glory of English law that it has reached its present stage not by codification, but by the exposition of Judges and eminent writers of law. It is true, that there has been a school of thought in England which has pressed for the condification of law. It is also true, that during the last thirty or forty years certain branches of common

law have been codified. Now there is growing in England a school of thought, which is more urgently pressing for codification of law, and I will just read to this House a passage from one of the greatest exponents of that school of thought which, I venture to think, will be accepted alike by my Honourable friends, Mr. Seshagiri Ayyar and Sir Sivaswamy Aiyer.

Two years ago, Dr. Goudy, Regius Professor at Oxford, delivered an address on this very question and dealing with this question he said :

'The task though difficult is perfectly feasible.'

He then added :

'There are three alternative methods apparently by which condification may be effected. First, the whole law in all its departments may be codified by one operation, *uno flatu*, civil, criminal, ecclesiastical and so on. Second, each of the great departments of law, civil, criminal. fiscal, may be codified separately and independently of each other. Thirdly, the codification should be effected piece-meal as it is said, that is to say, by taking small portions of the law '

Now Dr. Goudy supported the second method for England. May I venture to support his third method—the method of piece-meal legislation for India ?

And if you bear that in mind, you will find that both Sir Sivaswamy Aiyer and Mr. Seshagiri Ayyar are in substance agreed. Now, as both Sir Sivaswamy Aiyer and Mr. Seshagiri Ayyar have pointed out, there are certain branches of the Hindu law which are in an extremely unsatisfactory condition. Take for instance the question of adoption or take again the question of impartible Rajes or take again some branches of the law relating to *Stridhan* or take again some questions relating to widows' estates, and lastly, the tremendous amount of confusion that exists with regard to the liability of a son to pay his father's debts. Now, these are branches of law which may be taken up by enthusiastic scholars like Dr. Gour and experienced judges like Mr. Seshagiri Ayyar, and they may introduce Bills in regard to them. The services of my Department and my personal services will be at their disposal. But the Honourable Mover has asked me to give a reply which I trust he does not expect to be either directly affirmative or negative. His whole object, I understand, is that this question should receive the attention of this House and of the Government. Now, what I propose to do on behalf of the Government in a matter like this is, that we shall address the Local Governments and the various High Courts, various learned bodies, Bar libraries and legal associations, and ask them to advise us as to whether in their opinion in the first place the time has arrived when a serious and organised effort should be made to codify the whole of the Hindu law or any portion of it and, if so, on what lines we should proceed. We shall further ask them as to whether in the event of their being of opinion that we should make an attempt like that, what should be the composition of any Committee or Commission that we may appoint. Until we have reached that stage, I think it will be recognised that it is impossible for me or for any Member of the Government to give a more decisive reply.

When we have collected the opinions of the High Courts and of the Local Governments and learned societies, you may take it from me that I shall give the matter my best consideration re-surveying the whole situation and then allow my further steps to be guided by the opinions so expressed and so obtained. I hope this reply will be considered to be satisfactory by my friend, Mr. Bagde, and by his supporters there. And if he considers it to be satisfactory, I sincerely hope and trust, he will not press his Resolution to a vote.

Dr. Nand Lal: Sir, the year 528 A.D. is held in great reverence in the view of the jurists of the world. Why so? Because the illustrious Emperor of Rome contemplated a codification of the laws then, and the result of the contemplation at that time was that we have now got a Code which is called the Twelve Tables, and for which the whole world is indebted to that illustrious Emperor Justinian. To my mind, this year willbe considered a year of great importance and eminence when a Resolution like that is moved before this House by the representatives of the whole of India.

With a view to examine the situation and see whether the codification of the Hindu Law is necessary or not, let us try to examine certain conditions. When we try to find out what is Hindu Law, practically then naturally the answer is given to us from some quarters that some portion of the Hindu Law has become obsolete. Now, may I very respectfully ask the advocates for the opposition which is the real and definite body of your Hindu Law? It is extremely difficult to say precisely and concisely that a certain kind of Hindu Law is a law which can govern the whole of India. In Calcutta, I mean to say, in Bengal, the majority of the people are governed by Daya Bhaga; and the majority of people in Bombay are governed by their separate system of *Dharm Shastra*, and again the majority of people in Madras are governed by another school of Hindu jurisprudence. Mitakshara governs the United Provinces and the greater portion of the Punjab. It is extremely difficult to say which is the particular type of Hindu Law which will govern the whole of India. And what is our present idea? Unity. I say, the codification, in itself, has got unifying elements. You cry for nationalism on one side and when certain elements which can form nationality are put forward before you, you deny them. Codification is one of the unifying elements. It is the most forcible thing which you need really to feel united. If the Hindu Law is codified, there will be a universal law for all the Hindus. The Hindu in the Punjab will bow to it, the Hindu in Madras will respect it, the Hindu in Bengal will obey it. There will be greater unity as a result.

It has got judicial benefit also. And what is that? The present condition is deplorable. I may very respectfully say, the conflict in judicial decisions is appalling. That conflict will be removed at once, in any case it will be removed to a very large extent.

Socially, as I have already submitted, it has got more benefit. And politically also, it has got marvellous utility, in that all Hindus living whether in the Punjab or Bengal or Madras or any other part of India will think themselves one, because they are governed by one rule of law. So, politically, judicially, and socially, it is necessary that the present rule of law, which is said to be Hindu Law, should be codified.

The advocates for the opposition have set forth certain arguments to the effect that a certain part of the people in Madras will not like this idea. Well, some years back, some members of the same community in Madras did not like to cross the ocean. They thought it a sin to cross the sea. But in these days, we find that a number of gentlemen from Madras are going to England and they come back qualified as members of the Bar. The same superstition took hold of the minds of some people in the United Provinces. All these superstitions have been removed by civilisation. There is enlightenment in these days, and we should not think of the old days. When we lay claim to civilisation we should try to avail ourselves of those things which really maintain that civilisation, and codification of law, I may say, is one

of them. It has been said here in this House by a number of gentlemen, that this is a very difficult task. With due deference to their line of thought, I may say, it is not difficult at all. Where there is a will, there is a way. If you want to do it, do it seriously, and you will find it finished. It is not an extremely difficult thing at all. If a few lawyers put their heads together and think about it, the whole thing, which seems to be a colossal and difficult task, will become quite easy. I am in full support of this Resolution, and I thank the Honourable Mover for moving it.

Mr. K. G. Bagde: In view of the assurance given by the Honourable the Law Member, I think I need not press the Resolution before this House. I am glad, that in the person of the Honourable the Law Member we have got an ardent supporter of the cause of the progress of Hindu Law. With these few remarks, I beg that this House will allow me to withdraw the Resolution.

The Resolution was, by leave of the Assembly, withdrawn.

THE INDIAN ELECTRICITY (AMENDMENT) BILL.

MESSAGES FROM THE COUNCIL OF STATE.

The Honourable the President: I have received a message from the Secretary of the Council of State to the following effect:

'I am directed to inform you that the message from the Legislative Assembly to the Council of State, desiring its concurrence in a Resolution to the effect that the Bill further to amend the Indian Electricity Act, 1910, be referred to a Joint Committee of he Council of State and of the Legislative Assembly, and that the Joint Committee do consist of 12 Members, was considered by the Council of State at its meeting to-day, and that the Resolution was concurred in by the Council of State. The following Members of that body were nominated to serve on the Joint Committee, namely:

The Honourable Sir Alexander Murray,
The Honourable Mr. Froom,
The Honourable Sir Maneckji Dadabhoy,
The Honourable Sardar Jogendra Singh,
The Honourable Mr. Moncrieff Smith, and
The Honourable Mr. Chatterjee.

H. MONCRIEFF SMITH,

Secretary of the Council of State.'

The Honourable Sir Thomas Holland: Sir, I beg to move:

'That the following six Members of the Legislative Assembly be nominated to serve on the Joint Committee to consider and report on the Bill further to amend the Indian Electricity Act, 1910, *viz.*:

Rao Bahadur T. Rangachariar,
Mr. P. P. Ginwala,
Mr. J. N. Mukherjea,
Mr. S. Sinha,
Mr. Rahimtoola Currimbhoy, and
The Mover.'

The motion was adopted.

RESOLUTION *RE* ULTIMATE COURT OF APPEAL IN INDIA.

Dr. H. S. Gour: Sir, the Resolution which I have the honour to move reads as follows:

'This Assembly recommends to the Governor General in Council to be so pleased as to take early steps to establish a Court of Ultimate Appeal in India for the trial of Civil Appeals now determined by the Privy Council in England and as the court of final appeal against convictions for serious offences occasioning the failure of justice.'

Sir, this Resolution for the establishment of a Supreme Court in this country is in consonance with the policy that the British Colonies have followed as soon as they became federated nations. I venture to think that, had it not been for the hurry with which the Indian Reforms Act was passed in both the Houses of Parliament, this question of the establishment of a supreme court in this country would have engaged the attention of those illustrious reformers who have given us the Government of India Act, 1919. The Resolution which I wish to move is to add one more necessary chapter to the Government of India Act, 1919, and in doing so, I follow the example of the great Colonies of England, such as, Canada, Australia, and South Africa.

Now, Sir, you will ask me what immediate necessity there is for the establishment of such a court in this country. My answer would be, remember the history of the Judicial Committee of the Privy Council. As we know, the Judicial Committee of the Privy Council is not a tribunal or a court, but merely an advisory body constituted and intended to advise the King in his capacity as the highest tribunal for his Dominions. Early in the fifteenth century, as England came to expand into a large colonial power, territories were ceded or acquired by conquest, and it became necessary for the Government to administer justice to these scattered dominions with the result that the Judicial Committee was requisitioned by His Majesty to advise him on the administration of civil justice. The growth of jurisdiction of the Privy Council can be traced to this fact. Later on, small and short statutes were passed from time to time, till in 1833 a much more comprehensive statute was passed which regulated and defined the jurisdiction of that body. But from its very inception up to the present day the Judicial Committee has remained a court of necessity, a court which merely exists because there is no lawfully constituted court to replace it, a court which advises the King on the administration of justice because the Colonies have now courts lawfully instituted of their own for that purpose. In England, we have now the established courts. In 1867, when the confederation of the Dominions of Canada took place, it was provided by the North America Act of that year that a supreme court shall be constituted for the Dominions of Canada as the court of ultimate appeal from the provincial courts. In pursuance of that Act passed in 1867 a Supreme Court was constituted in 1875 and the Act armed and clothed the Supreme Court of Canada with jurisdiction to hear appeals which had hitherto been heard by their Lordships of the Privy Council. The Privy Council continued to wield its jurisdiction up to the year 1900 in the case of Australia, and by the constitution of the Commonwealth of Australia a court of final appeal was constituted for the whole of Australia. The Australian Act follows the Canadian Act and its essential particulars are as follows. Both in Canada as well as in Australia this court of final appeal is the supreme authority in all civil cases, but the provincial or federal

courts have the option of either appealing to the Supreme Courts which sits in the Colonies or of appealing direct to their Lordships of the Privy Council. But, in practice, both in Canada as well as in Australia the tendency is to appeal to the local court and, when there has been an appeal to the local court, the further appeal to the Privy Council is limited, according to the Acts of the two Colonies, to cases in which leave is given by these courts to appeal, and in the much rarer cases in which special leave is obtained from their Lordships of the Privy Council. It has been laid down, as regards cases from Canada as well as from Australia, that except in very special cases or cases involving a question of constitutional law, or a question of law of great and general importance, special leave to appeal to the Privy Council would not be granted. The result, therefore, has been, that so far as Canada and Australia are concerned, though both these Colonies have the option of either going direct to the Privy Council or appealing to the Supreme Court, as a matter of practice and convenience, the appeals to the Privy Council are few and far between.

Such is the history of the establishment of the Supreme Courts in Canada and Australia.

Turning now to South Africa, on the conclusion of the Boer War the British Parliament enacted what is known as the Union of South Africa Act, 1909, and you will find that sections 103 to 106 of that Act deal with the question with which I am concerned here. While in the case of Canada and Australia a litigant from the High Court or as it is called the Supreme Court in Australia has the right of either appealing directly to the Privy Council or to the locally constituted Supreme Court, in the case of South Africa he has got no right of appeal to the Privy Council at all and all appeals from the provincial High Courts must be laid before the Supreme Court of South Africa. The King s prerogative in all the three cases of Canada, Australia and South Africa remains unimpaired, but in practice this prerogative is confined to very special cases. We have, therefore, now before us the example of three of the most important Colonies of England, and in all these Colonies the Supreme Court is constituted as a part and parcel of the Reform Acts which federated the union of these Colonies.

So far as India is concerned, using the expression Colony in its large sense, India is England's largest and most important Colony. As a Colony it is bigger in area, more numerous in population, than either of the colonies of Canada, Australia or South Africa, and I submit, there is no reason whatever why we should not have a Supreme Court of our own in this country. We have in India, as Honourable Members are aware, six chartered High Courts, some Chief Courts and a few Judicial Commissioners' Courts. These are, for all purposes, courts of final appeal in this country. Now appeals from these courts at present go to the Privy Council, subject to the limitations provided in sections 109 and 110 of the Code of Civil Procedure. I do not wish to take the House through the details of those sections because they were discussed only the other day, namely, that all important cases of the value of Rs. 10,000 or more and involving either a substantial question of law or those in which the judgments of the courts are not concurrent, are appealable to their Lordships of the Privy Council. Now, one of the provisions of the Code of Civil Procedure is, that if the value of the claim is directly or indirectly Rs. 10,000 or upwards, the case is appealable to the Privy Council and it happens that in a majority of cases the real value of the claim in a High

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Court is perhaps below Rs. 10,000. Now, to calculate the cost of an appeal to the Privy Council, Rs. 4,000 are required by the High Court as a deposit by way of security for payment to the respondent in case of his ill-success, about Rs. 2,000 are required for the printing of the papers and we will put down about Rs. 4,000 at least for Counsel in England and about Rs. 2,000 as the costs of the Solicitor there. Consequently, the minimum expenditure of an appeal to the Privy Council approximates about Rs. 12,000 and that in a case where the value may be much below Rs. 12,000. Consequently, I submit, that the expense of an appeal to the Privy Council is prohibitive. But, if that were all, I would not complain. The delay attendant upon an appeal to the Privy Council is also a matter which cannot be lost sight of. I admit that in recent years an attempt has been made to quicken the disposal of cases and their Lordships of the Privy Council have shortened the period of limitation with that object in view. But with all that we cannot forget that the court is situated some 8,000 miles distant from India, and we cannot also forget that it is a court in which we cannot be directly represented; we are only represented in their Lordships' court through the Solicitor who works for us in London. The delay, therefore, of 2 or 3 years and in many cases of 4 to 5 years, if not more, is inevitable. Now, if it was a question of expense and delay, I should have made out a very strong case for the establishment of a local Supreme Court of appeal. But you will remember, some five years back, Lord Haldane, when he was Lord Chancellor of England, contributed an article to a legal journal which was widely circulated and discussed in this country, in which he suggested the establishment of a Privy Council in this country; and more latterly, the present Lord Chancellor, Lord Birkenhead, in his articles to *The Times*, a summary of which is available to us here, has recommended the strengthening of that court by appointing some Indian jurists and lawyers and also by raising the salary of their Lordships of the Privy Council and by making certain other reforms. I mention these facts for the purpose of showing, that so far as the present constitution of the Privy Council is concerned, two eminent legal authorities, two Lord Chancellors, have in succession confessed that it requires improvement.

Now, what should be the method of improvement? Their Lordships of the Privy Council in case after case have pointed out, that in cases dealing with Hindu and Muhammadan Law and with law which is not founded on English Law, they have always welcomed the assistance of persons specially versed in those laws; and I submit, that if we have a court in this country, a Supreme Court following the lines of the Supreme Court of Canada, Australia or South Africa, we shall have got over the three objections which at present prevail, to a direct appeal to the Privy Council, namely, firstly expense, secondly delay, and thirdly the unsatisfactory method of disposals. The question as to whether litigants in this country should be put up on election, as they are in Canada and Australia, of choosing their forum of either an appeal to the locally established Supreme Court or to the Privy Council is a question upon which I express no opinion. That is a matter which must be left for further discussion. All that I am concerned with at present is, that the Government should be pleased to accept this Resolution and commit itself to the establishment of a Supreme Court in this country. It is, I submit, essentially necessary to complete the conception of an Empire. We have now a Parliament of our own, and it is necessary that we should have a Supreme Court also. It is

necessary for the reason that our laws materially differ from the English Laws; and if the Colonies of Canada, Australia and South Africa, where the English Law is the *lex loci*, found it necessary to establish Supreme Courts of their own, how much more necessary it is that we in this country, who suffer from the multiplicity of laws of which you, Sir, have heard just now from the speeches of my Honourable and learned friends, Mr. Seshagiri Ayar and Sir Sivaswamy Aiyer, how much more necessary, I submit, it is, that in the midst of this multiplicity and conflict of laws we should have a Supreme Court established in this country which should be empowered to adjudicate upon the rights of parties in the same manner and to the same extent as the Supreme Courts adjudicate upon the rights of parties in the three Colonies I have named.

I have been hitherto speaking of the civil jurisdiction of the Supreme Courts of these Colonies. Now, let me take the Honourable Members through another very important branch of law, that is, criminal law. Now, the Privy Council have in several considered judgments disclaimed their authority to adjudicate in criminal cases as the court of correction. In a very recent case, their Lordships wrote in unmistakeable terms that the Privy Council is not a court of criminal appeal, and in saying so, Lord Haldane who delivered the judgment of their Lordships made the following observation: (That was in the case of Dal Singh, 44, Cal. 876)

'It is well established that the unwritten principles of the constitution of the Empire restrain the Judicial Committee from being used in general as a court of review in criminal cases. But while the sovereign in Council does not interfere merely on the question whether the court below has come to a proper conclusion as to the guilt or innocence, such interference ought to take place where there has been a disregard or violation of the principle in such a fashion that it amounts to a denial of justice.'

In other words, the Privy Council disclaimed their authority to interfere on behalf of litigants from this country unless it is shown that there has been a failure, a gross failure, of justice, and that failure of justice must be directly attributable to the misapplication of principle or procedure. Now, this is a very narrow gate indeed, and judging from the cases that have gone up to the Privy Council, I venture to think, that the cases are perhaps not more than about a dozen; and of these the successful cases are only four or five, certainly not more than half a dozen. Now, so far as regards the criminal jurisdiction, the Privy Council disclaimed all authority except in the cases laid down in the leading cases of *Dillet* and *Dal Singh* from which I have quoted. Under the colonial law, the Supreme Courts are courts of revision; and they revise all judgments of the federal courts, and in that way rectify the errors of those courts. If a Supreme Court is established here, I submit, it should be armed with similar jurisdiction to review and revise all criminal cases, and in that respect it would possess the same power as the final courts of criminal appeal in the three large Colonies of England.

My Resolution, therefore, is this: That the court of final appeal in this country will generally follow the lines adopted as regards its foundation, the Supreme Courts in Canada and Australia; and if Honourable Members so desire, it may follow the narrower course for which there is a precedent in the South African Act of 1909. But I prefer to follow the examples of the two larger Colonies of Canada and Australia, giving the litigant the option of either appealing to the Supreme Court here or to the Judicial Committee of the Privy Council in England.

Some Honourable Members in discussing this motion with me in private asked me in a quizzing sense, 'What is this Resolution of yours? Do you want

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to destroy the Privy Council?' Now, I wish to assure Honourable Members, that that is far from my purpose. Even if I had the desire, we, in this House, have not the authority to destroy or to limit the King's prerogative, and in the three cases which I have instanced, the King's prerogative remains unimpaired, though by the Australian Act, it is expressly provided, that the Parliament may limit the King's prerogative, the King having parted with that prerogative by an Act of Parliament. Now, in the Resolution which I am moving here, I have no intention whatever of limiting or altering or qualifying in any way or degree His Majesty's prerogative which is exercised by the Privy Council. The position would then be this. If we have a Supreme Court here, subject to the provisions contained in sections 109 and 110, all cases of Rs. 10,000 or more which are ordinarily appealable to the Privy Council will be appealable either to the Supreme Court or to the Privy Council at the option of the appellant. That is all the change that I wish to make, and I think it is a necessary improvement in the judicial administration of this country.

As regards criminal cases, the jurisdiction of the Privy Council is extremely limited, so limited as to be almost negligible. We wish to clothe the Supreme Court with a real revisional jurisdiction in all criminal cases. Here again we reserve to His Majesty and the Privy Council the power to grant special leave both in civil and in criminal cases for any reason and circumstance as their Lordships may think fit and advisable. In other words, we do not wish to impair the King's prerogative exercisable through the Privy Council. All we desire is, that the Supreme Court constituted in this country should lighten the work of the Privy Council by deciding cases locally which ordinarily are decided by the Privy Council. It has been asked, that if the Supreme Court is established here, what will be its constitution and *personnel?* Now, this is a matter of detail, and I do not wish to load my Resolution with details upon which Honourable Members may differ, but I may generally remark, that so far as the constitution of the Supreme Court is concerned, the majority of the Judges would come from this country, and it would be possible to import two or three Judges from England to strengthen the Bench for the determination of Indian cases, but this is a matter which is not of the essence of my Resolution and, therefore, I would ask the Honourable the Law Member not to consider it as an integral part of it. My Resolution therefore, is, that this Honourable House should vote in favour of the establishment of a Supreme Court in this country on the lines I have indicated.

The Honourable the President: I may remind the Assembly that when this day was set down as a day for Resolutions of non-official Members, I announced that it would be a half-day ending at or about 2 O'clock. Having received no intimation of a general desire to sit beyond that hour, I propose to adjourn at 2 O'clock.

The Honourable Dr. T. B. Sapru: Sir, I beg to move the amendment which stands in my name and which runs as follows:

'That for the words 'to establish a Court of Ultimate appeal in India for the trial of civil appeals now determined by the Privy Council in England and as the court of final appeal against convictions for serious offences occasioning the failure of justice'

the following be substituted, namely:

'To collect the opinions of the Local Governments, the High Courts and other legal authorities and to ascertain public opinion generally as to the desirability of establishing a

supreme court of appeal in India for the trial of civil appeals and its relation to the Privy Council and as to whether such court of appeal should also have any jurisdiction in regard to criminal cases'.'

I do not wish to traverse the ground which has been covered by my Honourable friend, Dr. Gour, in his able speech this morning. So far as the constitution of the Privy Council is concerned, it is well known to every lawyer, and I need hardly remind my legal friends that to the extent to which the Privy Council exercises its judicial jurisdiction on behalf of His Majesty, it is impossible for the Indian Legislature to pass any legislation which may affect that prerogative. That, I hope, will be admitted by every lawyer. Then the Privy Council derives its jurisdiction (apart from the English Acts to which reference has been made by my Honourable friend, Dr. Gour, the Acts of 1833 and 1844) from certain enactments passed by the Indian Legislature. Now, if the Resolution of my Honourable friend, Dr. Gour, is accepted without my amendment, we shall at once be committing ourselves to a step of a very far-reaching character without carefully examining the whole position. It is for that reason, that I have ventured to put forward my amendment in the hope, that it will be accepted, so that we may collect opinions from the various High Courts, bar associations and other persons who are best fitted to express their opinion in a matter of this character. Now, whether ultimately the High Courts and other bodies whom we propose to consult will support the general idea underlying the Resolution of my Honourable friend, Dr. Gour, or whether they will not support it, it is impossible for me to say at the present moment. But, so far as the Government are concerned, they are prepared to address the Local Governments and High Courts on this point and to elicit opinion. When that has been done, we shall be in a position to get a correct idea of the position, and, I think, my Honourable friend, Dr. Gour, will then probably think it better to consider this question again. Meanwhile, I think, that so far as the Government are concerned, they are not prepared to commit themselves to any position stronger than that, but I venture to hope, that the position that I am taking to-day will appeal to Dr. Gour and that he will see that in a matter of this character, it is impossible for any Government to give an affirmative reply without taking the utmost possible care to obtain competent opinion in India and in England.

There is one more matter with regard to which I should like to make just a few observations, and that is, if I understood Dr. Gour correctly, that he would enlarge the scope of the court of final appeal so as to enable it to entertain appeals in criminal cases where there has been a failure of justice. Now I do not know what exactly will be the constitution which he will give to this court of appeal. But, as Dr. Gour himself has pointed out, the practice of the Privy Council in regard to criminal appeals has left no room for doubt from the time of *Dillet's* case up to now. The principle on which the Privy Council has professed to act is, that criminal appeals cannot go up before it as a matter of right, that it is disposed to interfere in criminal cases only where there has been a gross failure of justice or an abuse of some judicial process. Well, it at once raises a question of great importance, *viz.*, as to whether there should be a further right of appeal in criminal matters. But these are questions which Dr. Gour will not expect the Government to answer at once. These are certainly questions on which the Government are entitled to receive

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guidance from judicial and legal quarters and it is for that reason, that I put this amendment of mine before the House so that we may gain time and be in a better position to give an answer to this question. That is all, Sir.

Mr. T. V. Seshagiri Ayyar: Sir, having regard to the amendment moved by the Government, I do not intend to ask this House to allow me to move my amendment. I think the amendment which has been moved by the Honourable Dr. Sapru contains all that is necessary for the purpose of getting my ideas accepted by this House.

Sir, there is only one matter on which I would like to say a few words and it is this. The Honourable Mover almost at the end of his speech referred to the fact, that the majority of judges should be Indians and that there should be English judges also in the Supreme Court of Appeal. Sir, there is a large volume of opinion in this country, that as far as possible the present *personnel* of English judges sitting in the judicial committees should be maintained, that any weakening of that element is likely to be regarded with great disfavour in this country. Because, Sir, there is this factor in having such eminent judges as retired Lord Chancellors hearing appeals from this country, that they have no legal prejudice, there is a breadth and depth of vision which they bring to bear in deciding our cases, having regard to their large practice in England. These cannot be expected of persons who are wholly trained in this country; and I will say, Sir, this much, and I say it quite impartially, that as far as possible there should be no place for a retired judge of the High Court in the Judicial Committee. I say, that so far as popular opinion is concerned, it is against persons who have spent the best part of their lives in this country being sent up to the Privy Council; and their views have given greater room for complaints than the judgment of English judges. Now, subject to this limitation, I think that a good case for an inquiry has been made out by Dr. Gour and if Government is prepared to make the inquiry and collect opinion, I think Dr. Gour might very well withdraw his Resolution.

Mr. Eardley Norton: I wish, Sir, to say just a few words in regard to this motion. For my part, I welcome it, and I welcome it because I look upon it as a further manifestation of the assertion of that nationalism which it was the object of these reforms to foster and to encourage. There are many objects which have been removed by legislation from our control, upon which an embargo has been placed, such, for instance, as the ecclesiastical, the military and the political departments. They are at present outside our jurisdiction, though I hope that in the years to come my Honourable colleagues in this House will lay their profane hands as well upon those sacred arks. But, at present, the motion with regard to the Supreme Court deals with a subject over which we have particular jurisdiction, namely, over law and legal tribunals, and I think, that it would be idle to assert that if this country is in time to clothe itself with the full powers, privileges and responsibilities of a country entitled to Self-government, it would be idle, I say, to assert, that it shall not possess the right to have its own Supreme Court or final Court of both civil and criminal appeal established in India. That there is plenty of legal intelligence in this country, both Indian and English, of that I am satisfied. More than once the Privy Council have openly complimented the Indian Judges in this country, from the time of

the late Mr. Justice Mahmood of Allahabad down to recent days upon the possession of legal and judicial intelligence not inferior to their own. And I have no doubt whatever, that if and when this Supreme Court comes into existence, we shall find plenty of indigenous talent, English and Indian, to discharge with intellectual credit the grave and varied functions of an accomplished court of final jurisdiction. Some of us, I admit, have at times felt some little doubt as to whether, if this Court is to be manned by a purely Indian element, it could own that complete power of self-detachment and impartiality and inamenability to collateral and outside influences which almost invariably exist at Home. I am one of those, however, who believe that if these qualities do not exist here at present—(a question upon which I do not wish to enter now)—I am one of those who believe that these indispensible virtues will also be acquired in the fullness of time, that Indians in this country will find themselves hardening into the same standard of morality as exists elsewhere and be as immune from accessibility and extraneous considerations and influences as we claim ourselves to be. Of that I have little doubt. They only want time. They want a more comprehensive, a more courteous, a more friendly and trustful treatment by Englishmen to make them feel that the absence of moral backbone is not an inherent and lasting disqualification to their fitness for the highest office. If they do not possess this particular class of virtue, there is no reason to suppose that they will not acquire it at a further stage of their political education. I think they will.

With regard to the question as to what powers should be vested in the contemplated Supreme Court, I do not propose to speak. These will be discussed later on, if and when this matter returns to us at a future period. But, with regard to the question of the criminal side of the question, I have a word or two to say. I do hope, that if the Supreme Court crystallises, its Judges will be invested—I do not say with the right of appeal from the High Courts—but I do trust, that they will be invested with larger powers than at present it is apparently suggested that they should possess. There is a feeling—and I think it is a feeling which is well based—there is a feeling that it is because High Courts are in criminal matters placed in a sphere of almost complete irresponsibility, such not infrequent miscarriages of justice occur. I will only point to two cases with both of which I was myself concerned. In the case of the Queen *versus* Subramanyam, which went to the Privy Council, not as a matter of right but under the powers which the Privy Council claim of redressing gross and manifest injustice, the question in England as in India was this: whether or not, where the Criminal Procedure Code distinctly states that a man shall not be charged with more than three charges for offences of the same character, committed within the period of one year, whether, with that statement staring them in the face, High Courts have a right to try him on 43 charges. That particular client of mine was charged with 43 offences alleged to have been committed within a year while the Act said that he could only be charged with 3. The High Court divided upon the point. Oddly enough, the Civilian judges were right and the Barrister judges were wrong. But the Civilians and the Barristers immediately joined forces and said, that whatever judicial view was right or wrong, such a joinder of charges was an irregularity and not an illegality and was therefore curable under section 537, I think, of the Criminal Procedure Code. As a matter of fact and law,

[Mr. Eardley Norton.]

it was a question which went to the very root of the jurisdiction of the court, and that is what the Privy Council held. Had it not been that the appellant had friends who supplied him with the necessary means, he would have been convicted and convicted unjustly. He was acquitted in the Privy Council. A few years later, a man was charged with murder at a place called Pandi near Tanjore. I shall not deal with the evidence or facts at length. But the main evidence in that case consisted of the statement of an approver twice retracted in open court and upon the evidence of witnesses who were obviously false and much of whose testimony was inadmissible. Well, the Sessions Judge convicted the man, I do not know why. The appeal came up to the High Court during the vacation. Only two Judges were available. They heard the appeal during the vacation, and disagreed. They and the accused had to wait until the Judges came back after the vacation. Mr. Justice Sankaran Nair was appointed as the third Judge to dispose of the case, and possibly for the first time in his legal career, that learned Judge went wrong. He said, that Mr. Justice Bakewell was right in deciding that the man should be hanged. He disagreed with Mr. Justice Sadasiva Iyer who found the evidence unreliable. The man then appealed to the Privy Council. The Government of Madras opposed the admission of the appeal, and were told by the Judicial Committee that their opposition to the admission was improper. The appeal was heard on its merits. The Privy Council gave their decision in favour of the appellant, and said, that it was another instance of gross infraction of public justice. They decreed the reversal of the conviction on the ground, that on the face of the proceedings there was evidently an open and flagrant transgression of the plain injunctions of the law. If the accused had not been an extremely wealthy man, the Government of Madras would have hanged him. To cure all this, I venture to think, that as my learned and Honourable friend suggests, if we had a Supreme Court of appeal sitting here on the spot, with Council trained in the law as now, there would be no justification for the allegation that the vindication of innocence depends some times upon the length of the purse and not of the merits of a prisoner. I heartily welcome this proposed improvement in our judicial system as it stands now, and I hope that after the Honourable the Law Member shall have made his researches both here and elsewhere, there will be a sufficient consensus of opinion that the view now put forward is the right and proper one to follow.

Dr. Nand Lal: Sir, I have full sympathy with the amendment, subject to this condition that the Royal prerogative and the jurisdiction of the Privy Council remain as at present.

It seems to me, Sir, that the civil law has been, to a certain extent, the favourite child of the legislature. The criminal branch of the law has not been given that facility which the civil branch has been given, and the discussion following will endeavour to prove it to the hilt. In civil cases we find, that there is a right of first appeal under section 96 of the C. P. C. and then if there is a point of law, there is a right of second appeal under section 100 of the same Code. In criminal cases, we find, that there is only one appeal. There is no second appeal in criminal cases at all, whether there has been a miscarriage of justice, or whether there has been a flagrant error of law. There is section 439 of the Criminal Procedure Code which relates to the revisional side of the High Court; and under another section and in some cases, the revisional side of District

Magistrate's Court and Sessions Judge's Court can be invoked. But there is no provision for second appeals in the Code of Criminal Procedure. It is conclusively established, that in the absence of this provision for a second appeal, so far as the criminal administration of law is concerned, there is only one appeal, and if any injustice is done, there is no remedy for it. It has been already examined and discussed by the Honourable Mover, that the Privy Council will not be bound to review any decision given by any criminal court in India. As a matter of right, no convict can approach the Privy Council, but the Privy Council, in the exercise of their discretion, may entertain a petition, but the petitioner has not got any right or privilege in the matter of putting forward his petition. On this score, the establishment of a Supreme Court in India is a very desirable thing. The submission which has been put forward and properly couched in the language of this Resolution, is a commendable one. So far as the civil side is concerned, I quite agree with the arguments advanced by Dr. Gour, that the establishment of a Supreme Court in India will minimise expenses and save time and, moreover, on the top of it, litigants will be afforded the opportunity of giving their directions to their solicitors personally. With these few remarks, I support the amendment.

Dr. H. S. Gour: I have very great pleasure in accepting the amendment of the Honourable Law Member, and in doing so, I wish just to say two words. One is the remark of my learned friend, Mr. Percival, who says that India is the only country in the world which has not got a Supreme Court. I hope the Honourable Law Member will remember that. The second thing is, that reference to the Local Governments, the High Courts and Law Associations is at times apt to be dilatory, and I, therefore, ask the Honourable Law Member to treat this as an urgent matter. He must remember, that we are here laying the foundation stone of a great superstructure in which will be installed British justice, and we, therefore, desire that the work should be completed as early as possible. I, therefore, request the Honourable Law Member to treat this as an urgent or extra urgent motion and send it round to the Local Governments and High Courts and other dignitaries whom he wishes to consult, so that our plans may be ready and mature before the next autumn, and I hope that by the next Simla session when we meet, the Honourable Law Member will come forth with beaming smiles and say, 'Your Supreme Court is ready and you may now enter it.'

The Honourable the President: The question is:

'That the original* Resolution be amended† as suggested by the Honourable Dr. Sapru.'

The motion was adopted.

The Honourable the President: The question is:

'That the following Resolution be adopted:—

'This Assembly recommends to the Governor General in Council to be so pleased as to take early steps to collect the opinions of the Local Governments, the High Courts, and other legal authorities and to ascertain public opinion generally as to the desirability of establishing a supreme court of appeal in India for the trial of civil appeals and its relation to the Privy Council and as to whether such court of appeal should also have any jurisdiction in regard to criminal cases'.'

The motion was adopted.

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* *Vide* page 1606 of these Debates.
† *Vide* page 1611 of these Debates.

THE ENEMY MISSIONS BILL.

MESSAGE FROM THE COUNCIL OF STATE.

The Honourable the President: I have received a Message from the Secretary of the Council of State to the following effect :

'I am directed to inform you that in accordance with Rule 36 (*1*) of the Indian Legislative Rules, the amendment made by the Legislative Assembly in the Enemy Missions Bill, namely, the substitution in the fifth line of clause (3) of the Bill of the words 'have been' for the word 'be,' was taken into consideration by the Council of State at its meeting to-day and that the Council of State has agreed to the amendment.

H. MONCRIEFF SMITH,

Secretary of the Council of State.'

The Assembly then adjourned till Monday, the 28th March 1921.