CHAPTER 3
JUSTICE DELIVERY SYSTEM IN INDIA: IT’S INSTITUTIONAL HISTORY

'Every saint has a past, every sinner a future'. 'A man is a product of his circumstances in which he is or has been living'. Similarly, an institution in its current form, is not the result of an abrupt happening in vacuum but it is the result of various past occurrences and the outcome of natural as well as human forces working together gradually. Thus in order to understand the evolution of any institution, its past need to be analysed so as to appreciate the periphery of its characteristics, functions, problems as well as its solution.

'Nothing happens in isolation'. Everything is preceded and proceeded by various events happening in the past and future respectively. Similarly in order to understand the institution of Justice Delivery System, the stages through which it passed through, is required to be gone through.

India is an old civilization and during its long history, different means have been adopted to deliver justice to meet the prevailing needs. The Legal History of India can conveniently be studied under six important periods - Hindu period, Muslim period, Mughal Period, British period, English period and post-independence period. The Hindu period extended for nearly 1500 years before and after the beginning of the Christian era. However, the Muslim period started with the entry of the Arabs in the eighth century in the Malabar coast. The Mughal period began with the victory of Babar in 1526 over the last Lodi Sultan of Delhi. The British period started after the Britishers came in 1601 as merchants in India. The British period
lasted till the East India Company was abolished in 1858. The English period lasted India gained independence in 1947. The modern period began with the withdrawal of the British when on 15th August, 1947, India was declared independent.¹

### 3.1 The Hindu Period

During the Hindu period in ancient India, Hindu society, institutions and beliefs gradually developed and a definite shape was given to them. Many important beliefs and doctrines of today are deep rooted in the ancient Hindu ideology.

In ancient period, the delivery of justice was basically in the hands of the King, who assumed his position as a representative of God. It was the sacred duty of the king to punish the wrongdoers; if he neglected this work, he would go to hell.

In determining the social order, there were two important concepts, namely the caste system and the joint family system.²

(vi) The caste system emerged in ancient India as unique and one of the most rigid social systems ever developed in any part of the world. A caste was a social group consisting solely of persons born in it.³ The whole society was divided into four main castes namely the Brahmins were considered to be the most superior caste. The Kshatriyas were the nobles and warriors. The Vaisyas were merchants and traders. The Sudras were the workers and ranked lowest. In later centuries, the caste exclusiveness became absolute and reached at its zenith in caste panchayats. Each caste panchayat was regarded

---

as a supreme authority for the particular caste in each village.

(vii) The joint family system was regarded as a unit of Hindu social system. An ancient family included parents, children, grandchildren, uncles and their descendants and their collaterals on the male side. This social group had common dwelling and enjoyed their estate in common. At the head of the family was the patriarch, whose authority was absolute over the members of his family. He represented all the members of his family before the law and claimed absolute obedience from them. A number of families constituted a seic, gram or village, which became an administrative unit also. The concept of family led to private property, which in turn led to disputes and struggles, which necessitated law and a controlling authority. Two systems of family law, namely- *Mitakshara* and *Dayabhaga*, became the basis of civil law. They dealt with property rights in a Hindu joint family and mostly amongst land-owning families.

The political system and institutions were varied and complex in ancient India. India was divided into various independent states-some monarchies and the rest tribal republics. Monarchy in various forms was prevailing in ancient Hindu period. Dharma was the most important concept of the Hindu political thought. In the context of the *Dharmashastras*, the word “dharma” came to mean the privileges, duties and obligations of a man, his standard of conduct as a member of the Aryan community, as a member of one of the castes, as a person in a particular stage of life. The *Dharma Sastras* impressed upon the

---


- 49 -
Kings to look upon the people as God and serve them with love and reverence.

Saptanga (seven limbs) was also an important concept of the State. These were sovereign (Swamin), minister (Amatya), territory with people (Rastra), army (Danda) and friends or allies (Mitra). The King was the supreme authority of his state. His functions involved the protection not only of his kingdom against external aggression but also of life, property and traditional custom against internal foes. He protected the purity of class, caste and the family system as well as maintained social order. In tribal kingdoms, which contained tribal units and villages, and the King, was assisted by a Court of the elders of the tribe and by the village headman.

The form of Hindu religion, which prevailed in India previous to the spread of Buddhism, is generally known as the Vedic religion, while the form of Hindu religion, which succeeded Buddhism, is generally known as Puranic religion. The Hindu religion and philosophy laid down four great aims of human life: Dharma (religion and social law), Artha (wealth or economic well-being), Karma (doing work) and Moksha (salvation of the soul). The correct balance of the first three was to lead to the fourth. These concepts played a very important role in Indian thought. Amongst all the formal systems of Hindu philosophy the best known are Nyaya, Vashesika, Samkhya, Yoga and Vedanta.

Ancient India was divided into various independent States and in each state the King was the supreme authority. The King, with the assistance of his chief priest (Purohita) and military commander (Senani) carried on the administration of his kingdom. Each state was

---

5 P.V. Kane, History of Dharamshastra, Volume III. 17-55 (Bhandaskar Oriental Research Institute, Poona).
6 A.L. Basham, The Wonder that was India, 102-106 (Wesleyan Mission Pr., Mysore, 1929).
divided into provinces and these into divisions and districts, which differed in terminology as well as in area. For each province or district separate governors, according to their status were appointed with different designations. Most often they were related to the King and in certain places their appointment was hereditary. District officers were entrusted with the judicial and administrative functions.  

At the meeting place of districts (Janapada-Sandhishu), cities also existed. The city was administered by a separate governor (Nagaraka, Purapala). According to Kautilya, each town was under the jurisdiction of a Perfect (Nagaraka). In Kautilya’s Arthasastra, the realm was divided into four administrative units called (a) Sthaniya, (b) Dronmukha, (c) Kharvatik and (d) Sangrahana. Sthaniya was a fortress established in the centre of eight hundred villages; a Dronmukha in the centre of 400 villages; a Kharvatika in the midst of 200 villages and a Sangrahana in the centre of ten villages. At the end of the fourth century B.C. Patliputra was a very flourishing town under the Maurya Emperor Chandragupta. Megasthenese, an ambassador of Seleucus Nicator, who resided there for sometime, has given a detailed account of the administration of Patliputra. He states that it was under the care of a council of thirty officials who formed six committees of five members each. Each committee looked after different spheres of administration. 

Apart from cities, there were a large number of villages all over India. In fact, the village was the unit of government. In the North as well as in the South, districts were classified according to the number of villages under their administrative jurisdiction. The village was based upon the bond between the family or the clan. Each village consisted of a village headman and village council or village

---

8 Epigraphic Indica, Calcutta and Delhi, Chapter XV, 130.
9 Supra note 6 at 104-105.
panchayat. They assisted the district authorities in controlling the village administration. The office of the village headman was mostly hereditary- In villages he represented the King’s administration and therefore, his appointment was also at the King’s pleasure. The pseudo-Sukra writing in the late middle ages, speaks of the village headman as the mother and father of the village, protecting it from robbers, from the King’s officers.10

Under the ancient Indian system of Government great importance was given to Rajdharma, which declared that it was the personal responsibility of the King himself. The King’s Court was the highest Court of appeal, as well as an original Court in cases of vital importance to the state. In the King’s Court, the King was advised by learned Brahmins, the Chief Justice and other judges, ministers, elders and representatives of the trading community. Next to him was the Court of Chief Justice (Pradvivaka). Apart from the Chief Justice, the Court consisted of a board of judges to assist him. All the judges were from the three upper castes preferably Brahmins. Brihaspati has stated that there were four kinds of tribunals, namely, stationary, movable courts held under the royal signet in the absence of the King, and commissions under the King’s presidency.

In villages, the local village councils or Kulani, similar to the modern panchayats, consisted of a board of five or more members to dispense justice to villagers.11 It was concerned with all matters relating to endowments, irrigation, cultivable land, punishment of crime, etc. Village councils dealt with simple civil and criminal cases. At a higher level in towns and districts the courts were presided over by the government officers under the authority of the King to administer justice. The link between the village assembly and the official administration was the headman of the village. In each village,

10 Jivananda, Sikranitisastra. Chapter II. 172.
a local headman was holding hereditary office and was required to maintain order and administer justice. He was also a member of the village council. He acted both as the leader of the village and the mediator with the government.\textsuperscript{12}

In order to deal with the disputes amongst members of various guilds or associations of traders or artisans (\textit{Sreni}), various corporations, trade-guilds were authorised to exercise jurisdiction over their members. These tribunals consisting of a president and three or five co-adjudicators were allowed to decide their civil cases regularly just like the other courts. It was possible to go in appeal from the tribunal of the guild to local Court, then to royal judges and from them finally to the King. Due to the prevailing institution of the joint family system, family courts were also established. \textit{Puga} assemblies made up of groups of families in the same village decided civil disputes amongst family members.

The criminal cases were ordinarily presented before the Central Court or the courts held under the Royal authority. The smaller judicial assembly at the village level was allowed to hear only minor criminal cases. In ancient India the decision of each higher Court superseded that of the Court below. Each lower Court showed full respect to the decision of each higher Court. As such the King’s decision was supreme.

One of the cardinal rules of the administration of justice in ancient India was that justice should not be administered by a single individual. A bench of two or more Judges was always preferred to administer justice. The King sitting in his council heard the cases and administered justice. However, the concept of lawyers representing the parties came much late.

\textsuperscript{12} \textit{Supra} note 5 at 65.
3.1.1 Institution of Lawyers

*Smritis* do not refer to the existence of any separate institution of lawyers in the ancient Hindu judicial system. According to Kane, “This does not preclude the idea that persons well-versed in the law of the *Smritis* and the procedure of the courts were appointed to represent a party and place his case before the Court. The procedure prescribed by *Narada-Smriti, Smriti of Brihaspati and Smriti of Katyayana* reach a very high level of technicalities and skilled help must often have been required in litigation”. Therefore it becomes clear that the organisation of the Lawyers as it exists today was not in existence in the ancient Hindu period. Judicial Procedures came with the origin of courts and these got a definite shape with the institution of lawyers.

3.1.2 Judicial procedure

The judicial procedure was very elaborate. According to Brihaspati a suit or trial (*Vyavahara*) consisted of four parts: (a) the plaint (*poorvaksha*); (b) the reply (*uttar*); (c) the trial and investigation of dispute by the Court (*kriyaa*) and (d) the verdict or decision (*nirnaya*). The filing of plaint before the Court meant that the plaintiff submitted himself to the jurisdiction of the Court. The Court was then entitled to issue an order to the defendant to submit his reply on the basis of allegations made in the plaint. If the defendant admitted the allegations leveled against him in the plaint, the business of the Court was to decide the case. Where the defendant contested the case before the Court, the was to provide full opportunity to both the parties to prove their cases by producing evidence. Ordinarily, evidence was based on any or all the three sources, namely, documents, witnesses and the possession of incriminating objects. Thereafter, the final decision was given by the Court.

---

The provisions made gave the description of the highest Court to be located at the capital city, of lower courts under royal authority, and of people’s courts recognized as having power to decide cases. The qualifications of Judges and other officers of the Court were prescribed. The appointment of experts as assessors to assist the Court, on technical questions, whenever necessary, was provided for. The laws of procedure and of evidence were laid down. A code of conduct for judges and others concerned in the administration of justice and provisions for punishment of officers committing offences in the course of the administration of justice, had also been provided. A fairly well developed system of administration of justice existed at that time.

In criminal cases, the courts were enjoined to convict only according to the procedure established by law. False witnesses were very severely fined by the courts. Narada says that they were condemned to go to a horrible hell and stay there for a Kalpa.14

3.1.3 Trial by ordeal

The Trial by ordeal was a method to determine the guilt of a person. The ancient Indian society,15 which was largely dominated by religion and faith in God, considered the trial by ordeal as a valid method of proof. It was very common to swear “by my troth” or to call upon the Gods to witness the truth of a statement, as is clear from various illustrations of the ordeal given in the epics.16 Smriti writers generally limited its application to cases where any concrete evidence on either side was not available. Its greatest drawback was that sometimes a person proved his innocence by death as the ordeal was very painful and dangerous. Agnipurana points out that only in cases

---

of high treason or very serious offences the trial by ordeal was used. In other petty matters, it was sufficient to prove the truth by taking an oath. Some important types of ordeal, which were commonly adopted, were: (a) Ordeal of Balance, (b) Ordeal of Fire, (c) Ordeal by Water, (d) Ordeal of Poison, (e) Ordeal of Lot, (f) Ordeal of Rice-grains, and (g) Ordeal of Fountain-cheese.

3.1.4 Trial by Jury

In the ancient judicial system of India, the trial by jury existed but not in the same form as we understand the term now. In the Court scene of the Mrichhhkatika, which according to Jayaswal is a product of the third century, the jury is mentioned. Sukraniti, Brihaspati and Narada defined the functions of the jury. This shows that the members of the community assisted in the administration of justice.17

3.1.5 Crime and Punishment

In ancient Hindu period, the punishment was considered to be a sort of expiation, which removed impurities from the man of sinful promptings and reformed his character. The punishments served four main purposes, namely, to meet the urge of the person who suffered, for revenge or retaliation, as deterrent and preventive measures, and for reformation or redemption of the evil-doer.18

Manu, Yajnavalkya and Brihaspati state that there were four methods of punishment, namely, by gentle admonition, by severe reproof, by fine and by corporal punishment; and declare that these punishments may be inflicted separately or together according to the nature of offence.

---

17 V.R. Dikhtar, Hindu Administrative Institutions, 246-247 (University of Madras, 1929).
18 Supra note 1 at 10.
The *Dandaviveka* quotes a verse in which the considerations that should weigh in awarding punishment are brought together, namely, the offender's caste, the value of the thing, the extent or measure, use or usefulness of the thing with regard to which an offence is committed, the person against whom an offence is committed (such as an idol or temple or King or Brahmin), age, ability (to pay), qualities, time, place, the nature of the offence (whether it was repeated or was a first offence). The severity of punishment depended on caste also.

Certain classes of persons were exempted from punishment under the ancient criminal law in India. Angiras quoted by the *Mitakshara* states that an old man over eighty, a boy below sixteen, women and persons suffering from diseases are to be given half *Prayaschitta* and *Sankha*; a child less than five commits no crime nor sin by any act and is not to suffer any punishment nor to undergo any *Prayaschitta*. Certain *Smriti* writers prescribe that as a general rule a Brahmin offender was not to be sentenced to death or corporal punishment for any offence deserving a death sentence, but in such cases other punishments were substituted. *Katyayana* and *Kautilya* were against exempting Brahmins.

Under the ancient criminal law, criminals were required to pay a fine as well as to undergo corporal punishment for their offences. In certain cases, the Court was empowered to grant compensation to the aggrieved party in addition to the punishment given to the offender.

Gautama and Manu prescribe the details of penalty to be paid by Sudras, Vaishyas, Kshatriyas. Brahmins and upper class persons. On a large scale, serious thefts were punished with death. In certain cases, the whole village was held responsible for theft or lost property. The

---

19 *Naradasmriti*, Volume IV, 85. Even now in the IPC, Section 82 exonerates the child below 7 years of age from any punishment.
20 *Gautama, Dharmasutra*, Volume XII, 43.
villagers were held liable to make restitution of lost property if they were unable to prove that the lost property was taken away from their village. The King or his local representatives was held liable to pay for the missing property or theft, as they were responsible for the police and maintaining law and order.

In adultery and rape, the punishment was awarded on the basis of the caste considerations of the offender and of the woman. In abuse or contempt cases, every care was taken to see that each higher caste get due respect from persons of the lower caste. Gautama, Manu, Yajnavalkya prescribe that a Kshatriya or a Vaisya abusing or defaming a Brahmin was to be punished respectively with a fine of 100 *panas* and 150 *panas*. A sudra 'was punished by a corporal punishment (cutting off the tongue). While a Brahmin defaming a Kshatriya or Vaisya was to be fined 5025 or 12 *panas* respectively.

For committing murder, early Sutras prescribe that the murderer should pay fine according to the caste of the person murdered. Mostly the penalties were based upon caste-considerations as mentioned by Budhayana. The *Arthasastra* prescribes death penalty for the murder, even if it occurred in a quarrel or duel. Capital punishment was given in varied forms, namely, roasting alive, drowning, trampling by elephants, devouring by dogs, cutting into pieces, impalement, etc. Mutilation, torture and imprisonment were common penalties for many other crimes. The King’s power and jurisdiction gradually increased and extended throughout his kingdom. The inequalities and discriminations in dealing with the criminals belonging to different castes and classes faded away in the later periods of Indian history. In this medieval period, the Court system and the administration of justice became more clear and prominent as an institution.

---

21 Supra note 5 at 391-410.
3.2 The Muslim Period

The Muslim period marks the beginning of a new era in the legal history of India. The Arabs were the first Muslims who came to India in the eighth century and settled down in the Malabar Coast and in Sind but never penetrated further. They conquered the Persians, Afghans and Turks and converted them to Islam; and it was the Afghans and Turks who were let loose on India. Though the Prophet prohibited unprovoked attacks, the Ghaznis and Ghoris who were animated by the lust for gold and pretended zeal for Islam had an easy victory over the Hindus who were enfeebled by their comforts, luxuries and internal disturbances. Just as the Roman Empire collapsed before the German barbarians - the Huns and Goths - so too the Hindu Kingdoms fell before the Asian barbarians - the Afghans and Turks. The Rulers like Akbar the great and the Saints like Kabir strove hard for such unity, but unfortunately for Indians, the Britishers arrived on the scene.

The civil administration of the Sultanate was headed by the Sultan and his Chief Minister (Wazir). The Sultanate was divided into administrative divisions from the province to the village level. The Sultanate was divided into Provinces (Subhās). The Province (Subah) was further divided into (Parganahs). A group of villages constituted a Parganah.

3.2.1 Constitution of Courts

In Medieval India, the Sultan, being head of the State, was the supreme authority to administer justice in his kingdom. The administration of justice was one of the important functions of the Sultan, which was actually done in his name in three capacities. *Diwan-e-qaza* (arbiter); *Diwan-e-Muzalim* (head of bureaucracy) and *Diwan-e-Siyasat* (commander-in-chief of forces). The courts were

---

required to seek his prior approval before awarding the capital punishment.

The judicial system under the Sultan was organised on the basis of administrative divisions of the kingdom. A systematic classification and gradation of the courts existed at the seat of the Capital, in Provinces, Districts, Parganahs and villages. The powers and jurisdiction of each Court was clearly defined.

3.2.1.1 Central Capital

Six courts established at the capital of the Sultanate were: The King's Court, Dman-e-Muzalim, Diwan-e-Risalat, Sadr-e-Jehan's Court, Chief Justice's Court and Diwan-e-Siyas.

The King's Court, presided over by Sultan, exercised both original and appellate jurisdiction on all kinds of cases. It was the highest Court of Appeal in the realm. The Sultan was assisted by two reputed Muftis highly qualified in law.

The Court of Dwan-e-Muzalim was the highest Court of Criminal Appeal and the Court of Diwan-e-Risalat was the highest Court of Civil Appeal. The Chief Justice (Qazi-ul-Quzat) was the highest judicial officer next to the Sultan. From 1206 to 1248 in the absence of the Sultan, the Chief Justice presided over these Courts. In 1248, a superior post of Sadre Jahan was created and he became de facto head of the judiciary. The officers of the Sadre Jahan and Chief Justice remained separate for a long time. The Court of Diwan-e-Siyasat was constituted to deal with the case of rebels and those charged with high treason. Its main purpose was to deal with criminal

---

prosecutions. It was established by Muhammad Tughlaq and continued up to 1351.24

The Chief Justice's Court was established in 1206. It was presided over by the Chief Justice (Qazi-ul-Quzat). It dealt with all kinds of cases. The Chief Justice and Puisine Judges were men of ability and were highly respected. Many Chief Justices were famous for their impartiality and independent character during the Sultanate period. Four officers, namely Mufti, Padit, Mohtasib and Dadbak, were attached to the Court of Chief Justice.

3.2.1.2 Provinces

In each Province (Subah) at the Provincial Headquarters, there were five courts, namely, Adalat Nazim Subah, Adalat Qazi-e-Subah, Governor's Bench (Nazim-e-Subah's Bench), Diwan-e-Subah and Sadre Subah.

Adalat Nazim Subah was the Governor's (Subehdar) Court. In the Provinces, the Sultan was represented by him and like the Sultan he exercised original and appellate jurisdiction. In the original cases he usually sat as a single Judge. From his judgement an appeal lay to the Central Appellate Court at Delhi. While exercising his appellate jurisdiction, the Governor sat with the Qazi-e-Subah constituting a Bench to hear appeals. From the decision of this Bench, a final second appeal was allowed to be filed before the Central Court at Delhi.

Adalat Qazi-e-Subah was presided over by the Chief Provincial Qazi. He was empowered to try civil and criminal cases of any description and to hear appeals from the Courts of District Qazis. Appeals from this Court were allowed to be made to the Adalat Nazim-e-Subah. Qazi-e-Subah was also expected to supervise the

---

24 M.B. Ahmad, The Administration of Justice in Medieval India, 104-125 (Aligarh Historical Research Institute, 1941).
administration of justice in his Subah and also to see that Qazis in districts were properly carrying out their functions. He was selected by the Chief Justice or by Sadre Jahan and was appointed by the Sultan. Four officers, namely, Mufti, Pandit, Mohtasib and Dadbak were attached to this Court also.

The Court of Diwan-e-Subah was the final authority in the Province in all cases concerning land revenue. The Sadre-e-Subah was the Chief Ecclesiastical Officer in the Province. He represented Sadre Jahan, in Subah in matters relating to grant of stipend, lands, etc.

3.2.1.3 Districts

In each District (Sarkar), at the District Headquarter, six courts were established, namely, Qazi, Dadbaks or Mir Adils, Faujdars, Sadre Amils, Kotwals. The Court of the District Qazi was empowered to hear all original civil and criminal cases. Appeals were also filed before this Court from the judgements of the Parganah Qazis, Kotwals and Village Panchayats. The Court was presided over by the District Qazi who was appointed on the recommendation of the Qazi-e-Subah or directly by Sadre Jahan. The same four officers, namely Mufti, Pandit, The Mohtasib and the Dadbak, were attached to the Court of District Qazi.

The Court of the Fauzdar tried petty criminal cases concerning security and the suspected criminals. The Appeals were filed to the Court of Nazim-e-Subah. The Court of Sadr dealt with cases concerning grant of land and registration of land. The Appeals were allowed to be filed before the Sadr-e-Subah. The Court of Amils dealt with the Land Revenue Cases. From the judgement of this Court an appeal was allowed to the Court of Diwan-Subah. Kotwals were authorised to decide petty criminal cases and police cases.

---

25 M. Elphinstone, History of India, 421 (Atlantic, New Delhi, 1988).
3.2.1.4 Parganah

At each Parganah Headquarters, two courts were established namely, Qazi-e-Parganah having all the powers of a District Qazi in all civil and criminal cases except hearing appeals. Canon Law Cases were also filed before the Kotwal, the Principle Executive Officer in Towns.

3.2.1.5 Villages

A Parganah was divided into a group of villages. For each group of villages, there was a Village Assembly or Panchayat, a body of five leading men to look after the executive and judicial affairs. The Sarpanch or Chairman was appointed by the Nizam or the Faujdar. The Panchayats decided civil and criminal cases of a purely local character. Though the decrees given by the Panchayats were based on local customs and were not strictly according to the law of the Kingdom. Still there was no interference in the working of the Panchayats. As a general rule, the decision of the Panchayat was binding upon the parties and no appeal was allowed from its decision.

In 1540, Sher Shah laid the foundations of Sur Dynasty in India after defeating the Mughal Emperor Humayun, the son of Babar. During the reign of the Sur Dynasty from 1540 to 1555, when Sher Shah and later on Islam Shah ruled over India, the Mughal Empire remained in abeyance. Sultan Sher Shah was famous not only for his heroic deeds in the battlefield but also for his administrative and judicial abilities. It was said by Sultan Sher Shah “Stability of government depended on justice and that it could be his greatest care not to violate it either by oppressing the weak or permitting the strong to infringe the laws with impunity”. Inspite of the fact that Sher shah ruled only for five years, he introduced various remarkable reforms in the administrative and judicial system of his kingdom. His important
judicial reforms were many. Sher Shah introduced the system of having in the Parganahs, separate courts of first instance for civil and criminal cases. At each Parganah town he stationed a civil judge, called Munsif, a title which survives to this day to hear civil disputes and to watch conduct of the Amils and the Moqoddams (officers connected with revenue collections). The Shiqahdars who had until now powers corresponding to those of Kotwals were given magisterial powers within the Parganahs. They continued to be in charge of the local police. Moqoddams or heads of the village councils were recognised and were ordered to prevent theft and robberies. In case of robberies, they were made to pay for the loss sustained by the victim. Police regulations were now drawn up for the first time in India.

When a Shiqahdar or a Munsif was appointed, his duties were specifically enumerated. The judicial officers below the Chief Provincial Qazi were transferred after every two or three years. The practice continued in British India. The duties of governors and their deputies regarding the preservation of law and order were emphasised. The Chief Qazi of the Province or the Qazi-ul-Quzat was in some cases authorised to report directly to the Emperor on the conduct of the Governor, especially if the latter made any attempt to override the law.

3.3 The Mughal Period

In India, the Mughal period begins with the victory of Babar in 1526 over the last Lodi Sultan of Delhi. His son, Humayun, though lost his kingdom to Sher Shah in 1540, regained it after defeating the descendents of Sher Shah in July 1555.

---

26 Supra note 24 at 129.
27 Henry Elliot and Dowson, History of India, Volume IV, 414 (Idarah-i-Abayai, Delhi, 1981).
29 Stewart, History of Bengal, 143 (Bangabasi, 1903).
The Mughal Empire (Sultanate-e-Mughaliah) was administered on the basis of the same political divisions as existed during the reign of Sher Shah. For the purposes of civil administration, the whole empire was divided into the Imperial Capital, Provinces (Subahs), districts (Sakars), Parganas and villages. Just like the Sultans of Delhi, the Mughal Emperors were also absolute monarchs and the Supreme authority in which the entire executive, legislative, judicial and military power resided.

3.3.1 Constitution of Courts

During the Mughal period, the Emperor was considered the “fountain of justice”. The Emperor created a separate department of Justice (Makukma-e-Adalat) to regulate and to see that justice was administered properly. On the basis of the administrative divisions, at the official headquarters in each Province, District, Parganah and Village, separate courts were established to decide civil, criminal and revenue cases. At Delhi, the Imperial Capital of India, the highest courts of the Empire empowered with original and appellate jurisdictions were established. A systematic gradation of courts, with well-defined powers of the presiding Judges, existed all over the Empire.

3.3.1.1 The Imperial Capital

At Delhi, which was the capital (Dural Sultanate) of the Mughal Emperors in India, three important courts were established. The Emperor’s Court, presided over by the Emperor, was the highest Court of the empire, having jurisdiction to hear original civil and criminal cases. As a Court of the first instance generally the Emperor was assisted by a Darogha-e-Adalai, a Mufti and a Mir Adi. In criminal cases, the Mohtasib-e-Mumalik or the Chief Mohtasib, like the Attorney-General of India today, also assisted the Emperor. In order to

30 Supra note 24 at 143-166.

- 65 -
hear appeals, the Emperor presided over a Bench consisting of the Chief Justice (Qazi-ul-Wazat) and Qazis of the Chief Justice's Court. The Bench decided questions both of fact and law. Where the Emperor considered it necessary to obtain authoritative interpretation of law on a particular point, the same was referred to the Bench of the Chief Justice's Court for opinion. The public was allowed to make representations and appeals to the Emperor's Court in order to obtain his impartial judgment.

The Chief Court of the Empire was the second important Court at Delhi, the seat of the Capital, it was presided over by the Chief Justice (Qazi-ul-Quzat). The Court had the power to try original, civil and criminal cases, to hear appeals from the Provincial Courts. The Chief Justice was assisted by one or two Qazis of great eminence, who were attached to his Court as Puisne judges: Four officers attached to the Court were - Darogha-e-Adalat, Mufti, Mohtasib, Mir Adi. The Mufti attached to the Chief Justice's Court was known as Mufti-e-Azam. The Chief Justice was appointed by the Emperor. He was considered the next important person, after the Emperor, holding the highest office in the judiciary. Sometimes a Chief Provincial Qazi was promoted to the post of the Chief Justice.

The Chief Revenue Court was the third important Court established at Delhi. It was the highest Court of Appeal to decide revenue cases. The Court was presided over by the Diwan-e-Ala. There were two lower courts at Delhi to decide local cases. The Court of Qazi of Delhi, who enjoyed the status of Chief Qazi of a Province, decided local civil and criminal cases. An appeal was allowed to the Court of Chief Justice. The Court of Qazi-e-Askar was specially constituted to decide cases of the military area in the Capital. The Court moved from place to place with the troops. In each Court, the four officers attached were Darogha-e-Adalat, a Mufti, a Mohtasib, Mir Adi.
3.3.1.2 **Provinces**

In each Province (Subah), there were three Courts namely, the Governor’s own Court and the Bench, the Chief Appellate Court, the Chief Revenue Court. The Governor’s own Court (Adalat-e-Nazim-e-Subah) had original jurisdiction in all cases arising in the provincial capital. It was presided over by the Governor (Nazim-e-Subah). The Provincial Chief Appellate Court was presided over by the Qazi-e-Subah. The Court had original civil and criminal jurisdiction. The Provincial Chief Revenue Court was presided over by Diwan-e-Subah. The Court was granted original and appellate jurisdiction in revenue cases.

3.3.1.3 **Districts (Sarkars)**

In each District (Sarkar), there were four courts, namely, the Chief Civil and Criminal Court of the District, Faujdari Adalat, Kotwali and Amalguzari Kachehri. The Chief Civil and Criminal Court of the District was presided over by the Qazi-e-Sarkar. The Court had original and appellate jurisdiction in all civil and criminal cases and in religious matters. Qazi-e-Sarkar was the Principal Judicial Officer in a District. He was officially known as “Shariyat Panah.” Six officers attached to his Court were - Darogha-e-Adalat, Mir Adi, Mufti, Pandit or Shastri, Mohtasib and Vakil-e-Sharayat. The Appeals from this Court lay to Qazi-e-Subah.\(^{31}\) Faujdari Adalat dealt with criminal cases concerning riots and State Security. It was presided by the Faujdar. The Appeals lay to the Governor’s Court. Kotwal Court decided cases similar to those under the modern Police Acts and had the appellate jurisdiction. It was presided by Kotwal-e-Sahar. Appeals lay to the District Qazi.\(^{32}\)

\(^{31}\) Supra note 27 at 172-173.

The Amalguzari Kachehri decided all revenue cases. Amalguzar presided over this Court. An appeal was allowed to the Provincial Diwan.

3.3.1.4 Parganah

In each Parganah, there were three courts namely, Adalat-e-Parganah, Kotwali and Kachehri.

Adalat-e-Parganah was presided over by Qazi-e-Parganah. The Court had jurisdiction over all civil and criminal cases arising within its original jurisdiction. It included all those villages, which were under the Parganah Court’s jurisdiction. Four officers attached to Adalat-e-Parganah were- Mufti, Mohtasib-e-Parganah, Darogha-e-Adatal and Vakil-e-Shara.

The Court of Kotwali was presided by Kotwal-e-Parganah to decide such cases as are found in the modern Police Act. The Appeals were made to the Court of District Qazi. Amin was the presiding officer in Kachehri, which decided revenue cases. The appeal lay to the District Amalguzar.

3.3.1.5 Village

The village was the smallest administrative unit. From ancient times the village council (Panchayats) were authorised to administer justice in all petty civil and criminal matters. Generally the Panchayat meetings were held in public places, presided by five panchs elected by the villagers who were expected to give a patient hearing to both the parties and deliver their judgement in the Panchayat meeting. Sarpanch or Village Headman was generally President of the Panchayat. No appeal was allowed from the decision.

---

of a Panchayat. Village Panchayats were mostly governed by their customary law.

3.3.2 Institution of Lawyers

The litigants were represented before the Courts by professional legal experts. They were popularly known as Vakils. Thus, the legal profession flourished during the Medieval Muslim Period. Though there was no institution of the lawyers like the "Bar Association" as it exists today, still the lawyers played a prominent role in the administration of justice. Two Muslim Indian Codes, namely, Fiqh-e-Firoz Shahi and Fanva-e-Alamgiri, clearly state the duties of a Vakil.

Ibn Batuta, who was working as a judge during the reign of Aurangzeb, mentions about Vakils in his book *Travels*. The Government advocates were for the first time appointed in the reign of Shah Jahan to defend civil suits against the state. During Aurangzeb's reign, whole-time lawyers were appointed in every district, who were known as Vakil-e-Sharia or Vakil-e-Shara. They were appointed either by the Chief Qazi of the Province or sometimes by the Chief Justice (Qazi-ul-Quzat).

A systematic judicial procedure was followed by the Courts during the Mughal period. The status of the Court was determined by the political divisions of the Kingdom. In civil cases, the plaintiff or his duly authorized agent was required to file a plaint for his claim before a Court of law having appropriate jurisdiction in the matter. The defendant, as stated in the plaint, was called upon by the Court to accept or deny the claim. Where the claim was denied by the defendant, the Court framed the issues and the plaintiff was required to produce evidence supporting his claim. The defendant was also required to file a plaint for his claim before a Court of law having appropriate jurisdiction in the matter.

The status of the Court was determined by the political divisions of the Kingdom. In civil cases, the plaintiff or his duly authorized agent was required to file a plaint for his claim before a Court of law having appropriate jurisdiction in the matter. The defendant, as stated in the plaint, was called upon by the Court to accept or deny the claim. Where the claim was denied by the defendant, the Court framed the issues and the plaintiff was required to produce evidence supporting his claim. The defendant was also required to file a plaint for his claim before a Court of law having appropriate jurisdiction in the matter.
given an opportunity to prove his case with the assistance of his witnesses. Witnesses were cross-examined. After weighing all the evidence, the presiding authority delivered judgement in open Court.

In criminal cases, a complaint was presented before the Court either personally or through representative. To every criminal Court was attached a public prosecutor known as Mohtasib. He instituted prosecutions against the accused before the Court. The Court was empowered to call the accused at once and to begin hearing of the case. Sometimes the Court insisted on hearing the complainant’s evidence before calling the accused person.

Evidence was classified by the Hanafi law into three categories: (a) Tawatur i.e. full corroboration; (b) Ehad i.e. testimony of a single individual; (c) Iqrar i.e. admission including confession. The Court always preferred Tawatur to other kinds of evidence. All those who believed in God were competent witnesses. Oaths were administered to all witnesses. Women were also competent witnesses but at least two women witnesses were required to prove a fact for which the evidence of one man was sufficient. The testimony of one woman was recognised only in those cases where woman alone were expected to have special knowledge. The principles of Estoppel and Res-judicata were also recognised by the Muslim Law.

3.3.3 Trial by Ordeal

The Muslim law prohibited the use of trial by Ordeal to determine the guilt of a person. It was not favoured either by the Sultans or by the Mughal Rulers in India. In the non-Muslim States, which were under the protection of the Sultans and Mughals, however, the old system of trial by ordeal somehow continued. The Muslim

\[\text{Badaoni, Munlakhab-al-Tawarikh, Indian Volume I, 187.}\]
Rulers neither adopted it nor interfered in the non-Muslim States to stop it.

Sultan Jalal-ud-Din Khilji (1290-1296) made the earliest attempt during the Muslim period to adopt the system of trial by ordeal in the case of Sidi Maula when the Court declined to convict him for sedition. The Sadr-e-Jahan and other Judges refused to allow Sultan Jalal-ud-Din to test the truthfulness of Sidi Maula by ordeal of Fire. The Emperor Akbar also tried to encourage the system of trial by ordeal, most probably in order to please the Rajputs. The Muslim law experts strongly opposed this move to introduce the trial by ordeal and therefore Akbar gave up the idea. In his records, Hamilton, who came to India during the reign of Aurangzeb, has mentioned a trial in South India where the accused person was required to put his hand in a pan of boiling oil.

3.3.4 Appointment of Judges and Judicial Standard

During the Mughal period, the Chief Justice (Qazi-ul-Quzat) and other judges of higher rank were appointed by the Emperor. Sometimes, the Chief Justice and other judges were directly appointed from amongst the eminent lawyers. A Chief Provincial Qazi having high judicial reputation was also promoted to the office of Chief Justice. Similarly, Provincial and District Qazis were also appointed from lawyers. The selection of a Qazi as a rule was made from amongst the lawyers practicing in the courts. Lawyers were also appointed as Chief Mohtasib of the Province. The corrupt judicial officers were punished and dismissed. Every possible effort was made to keep up the high standard of the judiciary.

38 Zia-ud-Din Barni, Tarikh-e-Fifoz Shabi, 211 (Sang Emil Pub., 2009).
40 Captain Hamilton, A New Account of East Indies, Volume I, 315 (Hitch. London.).
41 Fatwa-e-Alamgiri, (Calcutta), Volume III, 387 (Calcutta College Pr.).
3.3.5 Crimes and Punishments

During the Muslim period, Islamic law or Shara was followed by all the Sultans and Mughal Emperors. The Shara is based on the principles enunciated by the Quran. Under the Muslim criminal law which was mostly based on their religion, any violation of public rights was an offence against the State. Islam provides that the State belongs to God; therefore it was the primary duty of any Muslim ruler to punish the criminals and maintain law and order. Offences against individuals were also punishable as they infringed private rights.

3.3.5.1 Hadd

Hadd provided a fixed punishment as laid down in Shariat, the Islamic law, for crimes like theft, robbery, whoredom, apostacy, defamation (Itteham-e-Zina) and drunkenness (Shurb). It was equally applicable to Muslims and non-Muslims. The State was under a duty to prosecute all those persons who were guilty under “Hadd”. No compensation was granted under it.

3.3.5.2 Tazir

Tazir was another form of punishment, which meant prohibition, and it was applicable to all the crimes, which were not classified under “Hadd”. It included crimes like counterfeiting coins, gambling, causing injury, minor theft, etc. Under “Tazir”, the courts exercised their discretion in awarding suitable punishment to the criminals. The Courts were free to invent new methods of punishing the criminals e.g. cutting off the tongue, impalement, etc.43

3.3.5.3 Qisas

Qisas or blood-five was imposed in cases relating to homicide. It was a sort of Blood money paid by the man who killed another man.

---

43 Supra note 24 at p.225.
if the murderer was convicted but not sentenced to death for his offence. The Court exercised its discretion to compound the homicide cases. The State was authorised to punish the criminals for grave offences although the injured party might “waive his private claim to compensation or redress”.44

The Muslim law considered “Treason” (Ghadr) as a crime against God and Religion and therefore, against the State - Persons held responsible for treason by the Court were mostly punished with death. No consideration was shown for their rank, religion and caste. Only the ruler was empowered to consider a mercy petition. Contempt of the Court was considered a serious offence and was severely punished in the Muslim Period.

The judicial system of the Mughals, of course, suffered from some defects, e.g. there was no regular hierarchy of courts and there the jurisdiction and powers were not definite. There was no separation of judiciary from the executive and officers like Sipah-Salar, Diwan, Shiqdar and Amil performed Judicial functions. The Qazis were often corrupt and the punishments were severe. But in spite of all these defects, the people often did get justice because of the personal interest evinced by the emperor. The system, however, was very simple and cheap.

While the great Mughal was ruling in Delhi, there appeared on the Indian scene a phenomenon almost unparalleled in the history of the world. After a brief episode of Portuguese domination, a handful of adventures from the distant island of England in the Atlantic, forming the English East India Company, came to India as a trading body which possessed some sovereign body, “the trade of which was auxiliary to its sovereignty”. Some of those who were sent out from England to guide the destiny of India were actuated by the loftiest of

44 Dr. M.U.S. Jung, Administration of Justice of Muslim Law, 102 (Delhi, 1926).
motives, while others were definitely hostile to Indian interests but disinterested as they were in the petty squabbles between individuals, they could evolve an efficient system of administration of justice in which fair play predominated and which we have inherited. But English Justice, as we shall see, was always pragmatic even in their own country and necessarily so in India. Some of the rules evolved to protect the ruler were certainly not conducive to a proper administration of justice. The British period, however, constituted a major and fundamental breakthrough from our past practices and traditions.

3.4 The British Period

The English people came to India in 1601 as a “body of trading merchants”. On 31st December, 1600, Queen Elizabeth I granted a Charter to the Company which incorporated the East India Company to trade into and from the East Indies, in the countries and parts of Asia and Africa for a period of fifteen years subject to a power of determination on two years’ notice if trade was found unprofitable. Thus the Company became a juristic person with the exclusive privilege of trade with the East Indies. The same Charter further granted legislative power to the Company to make bye-laws, ordinances, etc. for the good government of the Company and its servants and to punish offences against them by fine or imprisonment according to laws, statutes and customs of the realm.

3.4.1 Enactment of various Charters

3.4.1.1 Charter of 1600

The provisions of the Charter of 1600 were only in connection with the trade and were not intended for acquisition of dominion in India. The legislative authority was given to the Company in order to...
enable it to regulate its own business and maintain discipline amongst its servants.

3.4.1.2 Charter of 1609

On 31st May, 1609, James I granted a fresh Charter to the Company which continued its privileges in perpetuity, subject to the proviso that they could be withdrawn after three years notice. The Company was also authorised to continue the enjoyment of all its privileges, powers and rights which were earlier granted to it by Queen Elizabeth under the Charter of 1600.45

In order to enable the Company to punish its servants on long voyages, the Company secured the first Royale Commission in 1601. Later, on 14th December, 1615, the King authorised the Company to issue such Commissions to its Captains subject to one condition that in case of capital offences, e.g. wilful murder and mutiny, a jury of twelve servants of the Company will give the verdict. The Company was given this power in order to maintain discipline on the board during the voyages. Some additional powers were given to the Company for enforcing martial law by the Charter of 1623.

With a view to strengthening their power and to secure advantages, the Directors of the Company tried to contact the Mughal Emperor and succeeded in gaining the Emperor’s favour and Company entered into a treaty with the Mughal Emperor. The Mughal Emperor of Surat granted the right of self-government to the English by issuing a Firman and this proved to be a turning in the legal history of India as the English Company secured various privileges from the Mughal Emperor. It provided: (1) That the disputes amongst the Company’s servants will be regulated by their own tribunals. (2) That the English people will enjoy their own religion and laws in the administration of

the Company. (3) That the local natives authorities will settle such disputed cases in which Englishmen and Hindus or Muslims were the parties (4) That the Mughal Governor or Qazi of the relevant place will protect the English people from all sorts of oppression and injury.

The Englishmen at the Surat factory were living under two different systems of law. In some cases they were under the provisions of Indian law while in certain other cases they were governed by English law. As the presiding judicial authorities were laymen, they mostly applied their ideas of justice instead of the settled rules of the English law. The English people exploited the native judiciary to their own advantage due to the prevailing corrupt practices in local courts.

3.4.1.3 Charter of 1661

The Charter of 1661 re-organised the Company on a joint-stock principle. The Company was authorised to appoint Governors and other officers for proper administration. The Company's power to govern its employees and to punish their disobedience and mis-demeanour was enhanced. The Charter further authorised the Company to empower the Governor and Council of each one of its factories or trading centres at Madras, Bombay and Calcutta to administer, with respect to the persons employed under them, both civil and criminal justice according to the English law. Where there was no Governor, the Chief Rector of a trading centre and his counsel was authorised to send a man for trial to a place where there was a Governor. The Powers under the 1661 Charter was extended to all those who lived in the Company's settlements and all punishments including death penalty could be awarded. The purpose of the Charter was to develop into a government for the locality and give a judicial system to the Company's territorial possessions. The Charter drew no distinction between the executive and the judiciary and justice was required to be administered according to English law.
3.4.1.4 Charter of 1668

This Charter authorised the Company to make laws, orders, ordinances and constitutions for the good governance of the island of Bombay. It was specifically provided that such laws and regulations should not be repugnant or contrary to, but be as near as possible to the laws of England. The Charter also empowered the Company to establish Courts of judicatures similar to those established in England for the proper administration of justice.

3.4.1.5 Charter of 1683

The Charter of 1683, granted by Charles II, was the next step. It authorised the Company to raise military forces. The Charter provided that a Court of judicature should be established at such places, as the Company might consider suitable, consisting of one person learned in civil laws and two merchants - all to be appointed by the Company and to decide according to equity, good conscience, laws and customs of merchants by such dates as the Crown from time to time directs. Thus, under this Charter the East India Company was authorised to establish Admiralty Courts at places of its own choice.

3.4.1.6 Charter of 1686

James II further renewed and added to the various powers and privileges earlier granted to the East India Company. The Charter authorised the Company to appoint admirals and other sea-officers in any of their ships, with power for these naval officers to raise naval forces and exercise martial law over them in times of war, to coin money in their Forts and to establish Admiralty Courts. In 1687, the Company was authorised to establish a municipality and a Mayor’s Court at Madras.

---

3.4.1.7 Charter of 1698

On 13th April, 1698, William III granted a charter to the Company whereby certain changes were made in the existing rules to improve the administration of the Company. The Charter created a Court of Directors and authority and control over the affairs of the United Company was entrusted to the Court of Proprietors. The Constitution of the Company continued till the passing of famous Regulation Act in 1773, which completely overhauled the Constitution of the Company.

After 1707, English Company was in possession of three factories and settlements at Bombay, Madras and Calcutta. English factories and settlements were governed by a President or Governor and Council at the three places. Members of the Council were generally taken from senior merchants of the Company. The Governor who was executive head with his Council was also looking after the administration of justice in his settlement. At the three settlements of Bombay, Madras and Calcutta the Company had to deal with different local political powers.

By the end of the seventeenth century, the East India Company was firmly established in India at Surat, Madras, Bombay and Calcutta, though it still declared its mission purely as a trading Company. These activities of the Company in fact paved the way for the adoption of a new policy by the British Parliament in the beginning of the eighteenth century regarding its aims and relations with India. The gradual passing of various Charters for regulating the Company’s acquisition of territory and administration of justice in India, from time to time, may be said to be the gradual but inevitable steps on the road that led eventually to the setting up of the British Empire in India.
Surat was a famous international port in those days and Muslims in thousands sailed every year from Surat to Arabia for Haj (pilgrimage) purposes. The place from where the ships sailed was called Makkai Darwajah (gate used for going to Maceca for Haj). The firman of the Mughal Emperor granted these traders a veritable Empire within an Empire with an instruction that the Kazis should provide speedy justice to Englishmen, protect them from all injuries or oppressions whatsoever and “aid and treat them as friends with courtesy and honour”. With this favour conferred on them, the British routed their competitors the Portuguese in the waters of Surat. In those days in India the law was personal and religious in character and the English did not like to be governed by that law and the local courts. There was no concept of territorial law.47 There was no uniform or common lex loci to regulate inheritance, succession and other subjects. Practically in all civil cases, the justice was administered according to the personal laws of the Hindus or the Muslims. The criminal law was, however, entirely Muslim. Wherever the Englishmen settled in India they sought to administer justice to themselves according to the English law and this proved to be a very important single factor, which exerted a profound effect on the growth and development of the Indian legal system. Justice was administered in a very summary manner and none seemed to care for even the elementary processes of law.

The Court of Governor and Council was designated as the High Court of Judicature. It was clearly stated that the Court will meet twice a week and will be authorised to decide all civil and criminal cases with the help of a jury of 12 men. Another important step of the Governor was to recognise the old Choultry Court. According to his scheme the Indian Officers of the Court were replaced by the English Officers of the Company’s service. Justices were directed to sit in the

47 Jain, Indian Legal History, 1972. 11-12 (N.M. Tripathi, New Delhi, 1976).
Court for two days in each week. The Court was empowered to try civil cases up to 50 Pagodas, and petty criminal cases. The High Court of Judicature consisting of the Governor and Council were authorised to hear appeals from the Choultry Court. A judicial system based on hierarchy of Courts with well-defined jurisdiction, came into existence in Madras.48

After the Charter of 1683, the Company established Courts of Admiralty in India. Its main purpose was to try all traders committing various crimes on high seas by hearing all cases concerning maritime and mercantile transactions. The Court was also authorised to deal with all cases of forfeiture of ships, piracy, trespass, injuries and wrongs and was guided by the laws and customs of merchants as well as the rules of equity and good conscience.

After 1704, it appears that the Company paid more attention to the Mayor’s Court and Court of Admiralty ceased to have its regular sittings, which ultimately resulted in its gradual disappearance from the judicial scene. Its Jurisdiction, including hearing of appeals from the Mayor’s Court was transferred to the Governor and Council, which gradually replaced the Admiralty Court at Madras.

The Company issued a Charter in December 1687, which authorised it to create a Corporation of Madras and establish a Mayor’s Court. The Mayor’s Court was a part of the Corporation of Madras. It was empowered to carry out judicial functions. In 1688, the Company created a Corporation of Madras consisting of a Mayor, twelve Aldermen and sixty or more Burgesses. Out of 12 Aldermen, 3 were required to be Englishmen compulsorily. The quorum fixed for sitting of the Court was a Mayor and two Aldermen.

The creation of the Mayor’s Court at Madras left only petty cases to be decided by the Choultry Court. This Court decided only

48 Supra note 1 at 40.
petty criminal cases and civil cases amounting to two Pagodas. Two Aldermen constituted the quorum of the Choultry Court and this Court continued to work in Madras till 1726.

With the dawn of the eighteenth century, there were four different courts working in Madras - First, the Mayor's Court as the Court of Record; secondly, the Court of Admiralty with the Judge-Advocate as President to try pirates; thirdly, the Old Choultry Court whose presiding officer was called the Chief Justice of the Choultry; and finally, the Court of the President or Governor-in-Council, which heard appeals from the decisions of the Admiralty Court as well as from the Mayor's Court. These courts continued up to 1726 when the Charter of George I introduced a uniform set of Courts in all the three Presidency Towns.

Describing the State of justice in those days it has been said that the quality of administration of justice was crude. No principles of substantive or procedural law governed the judicial proceedings. Judgement-debtors and the criminals were sent to prison for indefinite periods. Englishmen guilty of serious offences were being sent to England. The Governor could pardon death sentence Pirates and interlopers were awarded death penalty. Robbery was punishable with death. For stealing, the punishment was slavery. Conditions of imprisonment were horrible. The modes of punishment were generally inhuman and barbarous and were being used against those who were caught to deter others.

Aungier introduced certain reforms in the old setup of the judicial machinery at Bombay. He improved the judicial system gradually. According to the reforms of 1670, the Island of Bombay was divided into two divisions - one division consisted of Bombay.

---

Mazagaon and Girgaon; the other comprised of Mahim, Parel, Siom and Worli. A separate Court of judicature was established for each division at Bombay and Mahim. Each Court consisted of 5 judges. The customs officer of each division, an Englishman was empowered to preside over the respective Court. The Courts were authorised to hear, try and determine cases of small thefts and all civil actions up to 200 Xeraphins\textsuperscript{51} in value. An appeal from the Court of each division was allowed to the Court of Deputy-Governor and Council. Apart from the appellate jurisdiction, the Court also had original jurisdiction in important felonies, which were to be tried with the help of jury and the laws of the Company.

Aungier, the Governor, was himself not satisfied with the working of the Courts - So he prepared a new plan in 1672 for the administration of justice in Bombay. A new central Court known as the Court of Judicature was established. The Court of judicature was empowered to exercise its jurisdiction over all civil, criminal and testamentary cases. Appeal was allowed to the Deputy Governor and Council. Aungier was primarily concerned with the speedy and impartial administration of Justice. Justices of Peace were appointed to administer criminal justice. For this purpose, Bombay was divided into four divisions, namely, Bombay, Mahim, Mazagaon and Sion. The scheme of 1672 also created a Court of Conscience to decide petty civil cases. The decision of the Court was final and no further appeal was allowed. No Court-fee was charged from poor persons and, as such the Court became famous as, “Poor-man’s Court”.

The period from 1690 to 1718 is a dark period in Bombay's Legal History as the machinery to administer justice was the almost paralysed in Bombay. A new period in the Judicial History of Bombay began with the revival and inauguration of a Court of Judicature on

\textsuperscript{51} Xeraphins was a Portugueses coin, which were equal to nearly Rs. 10.
25th March, 1718. This Court consisted of 10 judges in all, with wide powers for exercising jurisdiction over all civil and criminal cases according to law; equity and good conscience. It was also guided by the rules and ordinances issued by the Company from time to time.

As regards the working of the Court, earlier studies of Fawcett\textsuperscript{52} and Malabari\textsuperscript{53} state that Court met only once a week but yet it was famous for its impartiality, speedy justice and also for the cheapness of its process. Most of the civil litigation was concerned with the recovery of debts. In criminal cases, whipping in a public place was the most common punishment given by the Court. Banishment from the Island imprisonment for a period at the Court’s discretion were other common ways of punishing the criminals. For perjury and malicious complaints there were summary trials. Under the Charter of 1726 the Mayor’s Court was established at Bombay in 1728 which replaced the Old Court of 1718.\textsuperscript{54}

3.4.2 Administration of Justice In Calcutta

The English Company’s settlement at Calcutta was quite different from that of Madras and Bombay. In 1698, Prince Azim-Ush-Shan, Subedar of Bengal and grandson of the Emperor Aurangzeb, granted Zamindari rights of three villages-Calcutta, Sutanti and Govindpur to the English Company.\textsuperscript{55} In criminal cases, the Company decided to adopt the existing Mughal pattern. As such a Faujdarce Court, presided by an English Collecter, was established to decide criminal cases of the natives of three villages, Sutanti, Govindpur and Calcutta. The Collecter was empowered to decide the criminal cases summarily. The criminals were punished by whipping, imposing of

\textsuperscript{52} Fawcett, \textit{The First Century of British Justice in India}. (Clarendon Pr.).
\textsuperscript{54} \textit{Supra} note 50 at 111-112.
fines, imprisonment, banishment or work on roads. Capital punishment was not inflicted unless the sentence was confirmed by the Governor or President and Council of Calcutta. Apart from its jurisdiction on Indians, the Court also took cognizance of petty crimes committed by English people.

To deal with civil litigation, the Collector presided over a civil Court or the Court of Cutchery. Ordinarily, the Collector referred the civil cases to arbitrators. The Collector decided cases in a summary way on the basis of the prevailing customs and usages of the country. In the absence of such native customs, the case was decided according to natural justice and equity. In rare cases only appeals were allowed to the Governor and Council. The Collector in the capacity of a Zamindar was also responsible for the collection of land revenue from the three villages. Appeals were made to the Governor and Council.56

In the judicial system of Calcutta, the office of Collector became a very important office. It was dealing with civil, criminal and revenue matters. It was also authorised to decide petty civil and criminal cases concerning Europeans in India. The Governor and Council were also empowered to decide serious criminal cases and important civil cases. All judicial and executive powers were exercised by the Collector and the Governor and Council. It created conflict and confusion resulting in dissatisfaction. Unscrupulous and ignorant people came to occupy the offices of Kazi and extortion and corruption was rampant. Justice could be purchased in those times. General confusion prevailed in the field of law and its enforcement. The Company officers due to acquisition of Zamindari had the chance of filing this power vacuum and they did so by asserting themselves and snatching more powers from the feeble and corrupt administrators. Charters of 1668 and 1726 made it possible for the Company to

56 Holwell. Indian Tracts, 120 (T. Becket & P.A. deHondt, 1764).
introduce for the first time English laws side by side the personal laws of Hindus and Muslims and the subsequent Charters accelerated this process.

3.4.3 Courts In Bengal

To tackle the problems and to remove corruption from the administration of Justice, Warren Hastings was transferred from Madras to the Governorship of Bengal in 1772. Firstly, he tried to remove all the evils which were the greatest obstacles in the proper collection of the revenue of Bengal, Bihar and Orissa. He replaced the office of Naib-Diwans by British Agency for collection of revenue, farms were let for a fixed term, revenue supervisors were designated as collectors and appointed a Committee of Circuit to find out defects in the administration of justice and to prepare a proper plan on which the whole civil and criminal justice was to be based.\(^5\)

With the Battle of Plassey in 1757, the real authority of the Nawabs of Bengal passed to the English Company.\(^5\) At the historic battle of Buxar in 1764 it was not merely the Nawab of Bengal, as at Plassey, but the Emperor of India who was defeated. The Court of Proprietors of the Company in England sent Clive to India to deal with the situation and consequences. “Dual Government” was introduced by Clive. But this system, according to the testimony of Kaye, “made confusion more confounded and corruption more corrupt”. The Courts were the instruments of power, rather than of justice, useless as means of protection, but apt instruments for oppression. The working of Clive’s policy of dyarchy in Bengal created anarchy. None was taking responsibility for the conduct of the government and deteriorating condition of the natives. The Directors of the Company suspected and blamed Indian officers for the evils. In 1771, Company changed its


policy and the Directors declared at both Calcutta and Murshidabad by a proclamation issued on May 11, 1772, their resolution “to stand forth as ‘Diwan’ and by agency of the Company’s servants to take upon themselves the entire care and management of revenue”. The charge of the revenue and civil justice was taken over by the controlling Councils of Revenue and they advised their subordinate agents and officers to deal with them directly on all matters relating to the Diwani.

The main object of the Company was to bring under the direct control of the Company’s servants the revenue collections and civil justice in order to save both the ryots and the government from hardships caused due to the existence of the intermediaries. The Nawab’s authority over criminal justice was recognised by the Company.

The committee of Circuit, under Warren Hastings as its chairman, prepared the first judicial plan on August 15, 1772. It was the first step to regulate the machinery of administration of justice and the plan being a landmark in the judicial history became famous as “Warren Hastings Plan of 1772”. Under this plan the whole of Bengal, Bihar and Orissa were divided into districts. The “District” was selected as the unit for the collection of Revenue and for the administration of civil and criminal justice. In each district an English Officer, called Collector of District was appointed to control the collection of revenue. As regards the administration of civil Justice in each district, a Moffusil Diwani Adalat was established. The District Collector presided over it. This Adalat was empowered to decide all civil cases dealing with real and personal property, inheritance, caste, marriage, debts, disputed accounts, contracts, partnership and demands

---

of rent. Its decision was final in all suits up to the valuation of five hundred rupees.

At the seat of the Government i.e. Calcutta, one *Sadar Diwani Adalat*, a Court of superior jurisdiction, was also established. It was the Chief Court of appeal and was empowered to hear appeals from all district *Moffusil Diwani Adalats* in such cases where the valuation of the suit was more than five hundred rupees. Besides these courts, the Head Farmers of Parganas were authorised to decide petty disputes relating to property up to the value of ten rupees. In the sphere of criminal justice, the plan provided for the establishment of a *Moffusil Faujdari Adalat* in each district for the trial of all crimes and misdemeanour under the Collector of the District. One Court like the *Moffusil Faujdari Adalat* was established at Calcutta to decide local criminal cases and was placed under the charge of a Member of the Council who served in rotation. In each district, a Qazi and a Mufti with the help of two Maulvies, who were to hold trials for all criminal cases. The Collector was authorised to supervise the working of the Court.

A *Sadar Nizamat Adalat* was established at Calcutta to hear appeals from the *Moffusil Faujdari Adalats* of the districts and to control their working. It was presided over by a Darogha or Chief Officer appointed by the Nawab. A Chief Qazi, a Chief Mufti and three Maulvies were to assist the Darogha in performing his duties – The Court revised important proceedings of the *Moffusil Faujdari Adalats*. The *Moffusil Faujdari Adalats* had no power to pass capital sentence without the approval of the *Sadar Nizamat Adalat*. In passing severe sentences for grave offences, the Nawab’s signature was a prior condition as the Nawab was considered to be the head of the *Nizamat Adalat*.

---

Article 27 of the Plan (1772) of Warren Hastings directed the Diwani Adalats to decide all cases according to the laws of the Koran with regard to the Mohammedans and the laws of the shastra with respect to Hindus. It was one of the most important provisions of the plan, as it safeguarded the personal laws of Hindus and Mohammedans placing both these laws on equal footing. This was, in Macaulay’s words, a “far-sighted policy”. Rankin’s recognizes it as an act of enlightened policy.61

Warren Hastings invited to Calcutta seven of the most learned pundits in the country and commissioned them to prepare a digest for the guidance and convenience of the Civil courts. In his view it was the sacred right of Indians to retain their own system of law and justice. It is therefore, clear that by safeguarding the personal laws of the natives of India, Warren Hastings showed his far-sightedness and the legal historians considered it, “one of the wisest steps ever taken by Warren Hastings”.

Impey was appointed as Chief Justice Sadar Diwani Adalat. He devoted his time and energy to introduce reforms in Diwani Adalats. One of the most remarkable contributions of Sir Elijah Impey was the preparation of the first Civil Code for the administration of civil justice in India. In the legal history of India the first civil code was adopted in 1781.62

The Regulating Act, 1773 was introduced by Lord North on May 18, 1773 in the House of Commons as Regulating Bill. This Act permitted the Company to retain its Indian possessions, but its management was brought under the definite, if only partial, control of Crown and Parliament. This Act made certain important alterations in

61 G.C. Rankin, Background to Indian Law, 2-5 (University Press, 1946).
the structure of the Company's Government in India. A Governor-General and four Councillors were appointed by the Presidency of Fort William in Bengal. The Governor of Bengal was designated as the Governor-General of Bengal.

Section 13 of the Regulating Act empowered the Crown to establish a Supreme Court of Judicature at Fort William in Calcutta. This provision was specially made to remove the defective state of the judiciary, as it existed under the Charter of 1753. The Supreme Court was to consist of a Chief Justice and three Puisne Judges being barristers of not less than five years standing to be appointed by His Majesty. It was further provided that the Supreme Court would have full power and authority to exercise all civil, criminal, admiralty jurisdiction. In criminal cases, it would act as a Court of Oyer and Terminer and Goal Delivery for the town of Calcutta and the factories subordinate thereto.

The Supreme Court was authorised to form and establish such rules of practice for the subordinate courts as were necessary for the administration of justice and due execution of all the powers. It was recognised as a Court of Record. It had jurisdiction over all British subjects in Bengal, Bihar and Orissa and had power to decide all complaints regarding crime, misdemeanors or oppressions. It had jurisdiction over servants of the company too. But the Supreme Court was incompetent to exercise its criminal jurisdiction over the Governor-General and any of his Councillors. The Court had no power to arrest or imprison them in any action. Immunity of the Governor-General and his Councillors was granted in order to safeguard them from unnecessary harassment and also to maintain their prestige as they were the heads of the executive. The appeals from the judgements

---

of the Supreme Court went to King-in-Council and also to state the conditions and circumstances under which such an appeal was to be allowed.66

For the subsequent appointment of a Judge, the Charter stated the qualifications as of at least five years standing as a Barrister of England and Ireland. The judges were to hold office at the pleasure of the King. Each judge of the Supreme Court was to be a Justice of the Peace and was to have authority and jurisdiction as the Judges of the King’s Bench in England had under the Common Law. The Court was authorised to establish rules of practice and process. It had the power to appoint the necessary subordinate staff and regulate the Court fees with the consent of the Governor-General.

The Charter granted civil jurisdiction to the Supreme Court. Where the cause of action exceeded Rs. 500, the Supreme Court was authorised to hear in the first instance. It could also hear the matter by way of appeal from the decision of a Moffusil Court, a Company’s Court. Where the valuation of a suit exceeded 1000 Pagodas an appeal could lie to the King-in-Council within six months from the decision of the Supreme Court.

While exercising its criminal jurisdiction, the Supreme Court was to be a Court of Oyer and Terminer and Goal Delivery in and for the Town of Calcutta, the factories subordinate thereto. All offences of which the Supreme Court had cognizance were to be tried by a jury of British subjects resident in Calcutta.

The Supreme Court was empowered to superintend the Court of Collector, Quarter Sessions, and the Court of Requests and was empowered to issue these Court’s the writs of Certiorari, mandamus, error or procedendo. The Court was also granted full civil and

criminal jurisdiction over all the British subjects in Bengal, Bihar and Orissa and over all the persons employed directly or indirectly in the service of the company. The powers of a Court of Equity and those of a Court of Admiralty for Bengal, Bihar and Orissa and "there adjacent territories and islands under the jurisdiction of the Company were also given to it. The judges of the Supreme Court were authorised to admit attorneys and advocates and they nominated three persons for the office of Sheriff when selection was made by the Governor-General and Council. The Supreme Court was vested with four distinct jurisdictions, namely, civil, criminal and ecclesiastical and admiralty. Thus the Supreme Court at Calcutta was granted the widest jurisdiction and many important powers. Keeping in view the jurisdiction of the Court, the population of the three provinces (Calcutta, Bombay and Madras) may be classified into four distinct categories, namely, British subjects, the servants of the Company, the inhabitants of Calcutta and the Indians residing in the three provinces.

At Madras and Bombay, the conditions were not similar to those of Calcutta, and therefore, for a long time it was not considered suitable to establish Supreme Courts in these provinces.

In 1800, the British Parliament passed an Act empowering the Crown to establish a Supreme Court at Madras in place of Recorder's Court. The Crown, by Letters Patent issued on 26th December, 1800, abolished the Recorder's Court and established the Supreme Court at Madras, which came into being on 4th September, 1801. The powers of the Recorder's Court were transferred to the Supreme Court and it was also directed to exercise similar jurisdiction and to be subject to the same restrictions as the Supreme Court continued its functioning at

---

67 Ibid.
Madras till the High Court of judicature was established in its place by the Indian High Courts Act, 1861.

The Recorder’s Court continued to function in Bombay up to 1823 when by an Act of the British Parliament, the Crown was authorised to abolish the Recorder’s and in its place to establish a Supreme Court at Bombay. The Crown’s Charter establishing the Supreme Court was issued on 8th December, 1823, and the Supreme Court was formally inaugurated on 8th May, 1824. The jurisdiction of the Supreme Court was limited to the town and Island of Bombay. It had no appellate jurisdiction over the Company Courts in the Moffusil. Regarding maritime crimes, the Charter restricted powers of the Supreme Court at Bombay to such persons as would be subject to its ordinary jurisdiction. This was in conflict with the provisions of the Charter Act of 1813, which authorised the Supreme Courts at Calcutta and Madras to take cognizance of all such crimes committed by any such person, if the ordinary jurisdiction was limited to British subjects.

The Supreme Court functioned at Bombay up to 1826 when the High Court of Judicature was established at Bombay under the Indian High Courts Act, 1861. Gradually the purity and the prestige of the judicial administration went on increasing in Bombay.

The Supreme Courts of Calcutta, Madras and Bombay were empowered to exercise civil, criminal, equity, ecclesiastical and Admiralty Jurisdictions.

During the period 1834 to 1861 i.e. before the High Courts were established two sets of Courts were administering justice in India.

---


70 T.B. Sapru, Encyclopaedia of The General Acts and Codes of India, Volume 9, 2-3 (Butterworth, 1942).
The King’s Courts and the Company’s formed the dual system of Courts having their separate jurisdictions.

Apart from the King’s Courts, in each Province the Company also established a hierarchy of civil and criminal Courts. These courts were known as Company Courts. They exercised their jurisdiction outside the Presidency towns and the Sadar Diwani Adalat and Sadar Nizamat Adalat were the highest Company’s Courts in each Province.

They were given appellate Jurisdiction in civil and criminal cases respectively and had no original jurisdiction. They were also empowered to supervise the working of the subordinate courts of the Company. The appeals from Sadar Diwani Adalats lay to the Privy Council. The Company’s courts were established in order to meet the requirements of Indians who were residing beyond the Presidency towns. In many respects the Company’s courts differed from the King’s courts.

3.4.4 The hierarchy of courts

The hierarchy of Company’s Courts in each Province i.e. Calcutta, Bombay and Madras was as follows:

3.4.4.1 Courts in Calcutta

Before the enactment of the High Courts Act, 1861, there were six types of civil and eleven types of criminal courts of the Company to administer justice in the Province of Calcutta. In order of hierarchy the civil courts were: Sadar Diwani Adalat, City Courts, Zila Courts, Courts of Principal Sadar Ameens, Court of Sadar Ameens and Courts of Munsiffs. Eleven types of criminal courts in order of hierarchy were: Sadar Nizamat Adalat, Courts of Sessions Judges, Joint Magistrates, City Magistrates, Zila Magistrates, Deputy Magistrates, Principal Sadar Ameens, Law officers of City Courts and Law Officers of Zila Courts.
3.4.4.2 Courts in Bombay

There were six types of civil and five types of criminal courts of the Company in Bombay before the establishment of the High Court. In order of hierarchy the civil courts were: Sadar Diwani Adalat, Zila Courts, Courts of Assistant Judges, Courts of Principal Sadar Ameens (Native Judges), Courts of Sadar Ameens (Native Commissioners) and Courts of Munsiffs. The five sets of Criminal courts were: Sadar Nizamat Adalat, Courts of Judicial Commissioners of Circuit, Courts of Sessions Judges, Courts of Joint Judges in certain Zilas and Courts of Assistant Sessions Judges. Apart from these, the offences of petty nature were decided by the Heads of Villages and District Police Officers.

3.4.4.3 Courts in Madras

The Company’s judicial machinery in Madras consisted of eight sets of civil courts before the High Court of Madras was established. In order of hierarchy the civil courts were: Sadar Diwani Adalat, Zila Courts, Courts of Assistant Judges, Courts of Subordinate Judges, Courts of Principal Sadar Ameens, Courts of Sadar Ameens, Courts of District Munsiffs and Courts of Village Munsiffs. Nine sets of criminal courts, in order of hierarchy consisted of: Sadar Nizamat (Faujdari) Adalat, Courts of Sessions Judges, Subordinate Judges, Magistrates, Joint Magistrates, Assistant Magistrates, Principal Sadar Ameens, Sadar Ameens and District Munsiffs. Apart from these, the petty offences were also tried by the Heads of villages and the District Police Officers.

The King’s Courts and the Company’s Courts applied different laws. The Supreme Courts mostly applied English law, both civil and criminal, with certain exceptions relating to Hindus and Mohammedans. In the case of Hindus and Mohammedans, whenever they were parties to a suit, the law of the defendant was always
applied. The English law of procedure governed the procedure of the Supreme Courts. They also applied such rules and regulations of the Company's Government, which were registered in the Supreme Courts. In some cases, customary law was ascertained and applied. In cases for which there was no ascertainable law or custom, the Judges were required to exercise their discretion according to justice, equity and good conscience.\(^7\)

3.4.4.4 Establishment of The High Court

The Charter Act of 1833 empowered the Governor-General-in-Council with the help of the Law Member, to legislate for all provinces. It has been an important landmark in the legal history of India. The centralisation of legislative machinery introduced unification in laws and removed conflicts and confusion, which were created by the enactment of Regulation Laws by legislature of the different provinces. The Charter Act of 1833 declared that the Acts passed by the Governor-General-in-Council will be binding on all Courts of the country including the Supreme Court. It also laid special emphasis on the enactment of uniform law in certain important fields to govern all persons without any distinction of caste and religion. In order to carry out this policy the Charter Act of 1883 appointed the First and Second Law Commission. The Indian penal Code, the Civil Procedure Code and the Criminal Procedure Code were the outcome of the Commission.

3.5 The English Period - Post 1858 Era

In 1858, the East India Company was abolished and the assumption of direct responsibility of the Government of India by the Crown made the problem of uniting the two sets of Courts much easier. The Uniform Codes were passed and the next step to

\(^7\) Dr. J. Duncan M. Derret, “Justice Equity and Good Conscience in India”, Bombay Law Reporter, 129, 145.
amalgamate the Supreme Courts and Sadar Adalats was to implement uniformity in the administration of justice. The object was achieved by the Indian High Courts Act of 1861.72

The Act of 1861 empowered the Crown to establish, by Letters Patent, High Courts of Judicature at Calcutta (for the Bengal division of the Presidency of Fort William), Madras and Bombay abolishing the Supreme Courts and the Courts of Sadar Diwani Adalat and Sadar Nizamat (Faujdari) Adalat. The jurisdiction and powers of the High Courts were to be fixed by Letters Patent. The Crown was also empowered to establish a High Court in the North-Western Provinces.

Each High Court was empowered to have supervision over all courts subject to its appellate jurisdiction. The High Court was also given the power to call for returns, to transfer any suit or appeal from one Court to another to make general rules. Her Majesty could by grant of Letters enlarge their jurisdictions. On the authority of the 1881 Act Letters Patents were issued establishing High Courts at Calcutta, Bombay and Madras.

3.5.1 Establishment of four High Courts of Judicature

3.5.1.1 High Court of Judicature at Calcutta

The Letters Patent empowered the High Court to enroll and remove the High Court to enroll and remove Advocates, Vakils and Attorney’s-at-Law. It was constituted to be a Court of Record.

The jurisdiction of this Court was ordinary original civil jurisdiction and to try and determine as a Court of Extraordinary original jurisdiction, any suit falling within the jurisdiction of any Court within or without Bengal but subject to its superintendence. The original criminal jurisdiction and Admiralty, Probate and matrimonial

---

jurisdictions were also conferred on it so as to make it a High Court having all the jurisdictions possessed by the Supreme Court. Consequently on its appellate side, the High Court, therefore, replaced the then Company’s Appeal Courts at Calcutta viz. the Sadar Diwani Adalat and Sadar Nizamat Adalat.

An appeal in any matter, not being of criminal jurisdiction, from the decision of the High Court was allowed to the Privy Council, provided that the sum or matter in issue was of the value of not less than Rs. 10,000. The High Court was also empowered to certify that the case was a fit one for appeal to the Privy Council.

3.5.1.2 High Court of Judicature at Bombay

By Letters Patent on 26th June, 1862, the Queen established the High Court of Judicature at Bombay. It abolished the existing Supreme Court, Sadar Diwani Adalat and Sadar Nizamat Adalat. The Bombay High Court was, therefore, given all those powers which were given to the Calcutta High Court. The independence and legalism is the most valuable legacy left to us by the English Lawyers and judges of the Bombay High Court.

3.5.1.3 High Court of Judicature at Madras

By Letters Patent issued on 26th June, 1862, the Queen established the High Court of Judicature at Madras and on its establishment the Chartered Supreme Court and the Sadar Diwani Adalat and Sadar Nizamat Adalat were abolished at Madras. Their Jurisdiction and powers were transferred to the High Court at Madras. The Letters Patent stated the jurisdiction and powers of the Madras

---

High Court to be similar to the jurisdiction and powers of the Calcutta and Bombay High Courts.

3.5.1.4 High Court of Judicature at Allahabad

Under the power given by the Indian High Courts Act, 1861, the Crown issued Letters Patent on 17th March, 1866 established a High Court of Judicature at Agra for the North-Western Provinces. The Sadar Diwani Adalat and Sadar Nizamat Adalat, were both abolished after the establishment of the High Court at Allahabad. The Allahabad High Court, as is well known, was not given any ordinary original civil jurisdiction, jurisdiction in insolvency matters as given to the Presidency High Courts, nor admiralty and vice-admiralty jurisdiction. In 1875, the High Court was shifted from Agra to Allahabad and was known as the High Court of Judicature at Allahabad. Since then a Bench of the Allahabad High Court is working at Lucknow. The Indian High Courts Act, 1911, empowered to establish High Courts in any territory within the Indian Dominions. Under the Act of 1911, a High Court could be established for any territory whether or not included within the limits of another High Court. It was considered that the power to establish new High Courts under the Act of 1861 was exhausted after the Allahabad High Court was established and, therefore, the Act of 1911 was passed. The Act of 1911 raised the maximum number of Judges in each High Court from sixteen to twenty, which included the Chief Justice also.

The Government of India Act, 1915 was passed by the British Parliament in order to consolidate and re-enact the existing statutes concerning the Government of India; and the High Courts. The provisions of the High Courts Acts of 1861 and 1911 were re-enacted. The Act of 1915 provided for the Constitution, jurisdiction and powers

---

of the High Courts. Each High Court was to consist of a Chief Justice and as many other judges as were appointed by His Majesty. It stated qualifications for the appointment of a Judge of The High Court. The High Courts were given original appellate, including admiralty jurisdiction in respect of offences committed on the high seas. They were declared Courts of Record and were given power to make rules for regulating the Courts practice. They had powers of supervision over all subordinate courts under their respective jurisdictions. The Act of 1915 also empowered His Majesty to establish new High Courts in any territory. Later, the High Court was established at Patna under this Act. It was given the same status as that of Allahabad High Court and therefore was given the same privileges and powers.

3.5.2 The Act of 1935

The Act of 1935 provided that every High Court would be a Court of Record consisting of a Chief Justice and other Judges as appointed by His Majesty from time to time. The provision of the Act of 1911, fixing the maximum number of Judges as twenty, was dropped and the Act of 1935 empowered the King-in-Council to fix number of Judges from time to time for each High Court. As regards the minimum qualifications of a person to be appointed a Judge, the Act provided that Barristers and advocates of ten years standing were qualified for High Court Judgeship. It was also laid down that a member of the Indian Civil Service of ten years standing was also qualified to be appointed a Judge of any High Court in India. If he remained as High Court Judge for three years, he was declared eligible for holding the office of Chief Justice of High Court. A provision was also made for an appeal to the Federal Court from any Judgement, decree or final order of a High Court.
3.5.3 The Privy Council

The King-in-Council or later called the Privy Council or the Judicial Committee of the Privy Council became the Court of last resort against the decision of courts in British possession overseas.

The Norman Conquest in 1066 played a very important role in shaping the English law and the Constitution of Courts of Justice in England. It introduced a powerful Central Government in England controlling executive, legislative and judicial departments. The Normans ruled over England through Curia Regis, which was a sort of Supreme Feudal Council of Normans to control the administration of England. Out of the Curia, gradually two distinct bodies namely, the Magnum Concilium, the larger Council and the Curia Regis, the smaller Council emerged. The smaller Council consisted of some high officials of the State, members of the Royal Household and certain important clerks chosen by the Crown.

The Curia Regis in its judicial manifestation became a distinct body from the Curia Regis as a general Administrative Council and eventually evolved into two great Common Law Courts, the Court of King's Bench and the Court of Common Pleas. The separation of these three Courts, entrusted with different functions became distinct in the reign of Edward I. In course of time, the Privy Council originated from the smaller Council of the King.

In the sixteenth century, during the Tudors, the Council had the exclusive power to adjudicate upon appeals from colonies. An order in Council was issued to regulate appeals from the Channel Islands. The sovereign, as the fountain of justice had the inherent prerogative right and duty to ensure the due administration of Justice over all British

---

*George W. Keeton, The Norman Conquest and the Common Law, 81-113, 201-222 (Ernest Benn Ltd., 1966).*  
subjects. The Privy Council delegated its authority to this Committee to hear appeals, which came before it from the colonies of the Crown.

In the eighteenth century with the growth of the British Empire, the work of the committee of the Privy Council greatly increased. But it was realised that the Councillors, who presided over it, were mostly laymen and it sat on average of about nine days a year. This was severally criticised by lord Brougham in his famous speech of Law Reforms in the House of Commons in 1828.78

The Judicial Committee of the Privy Council whose constitution has been modified by the Acts of 1844, 1908, 1929 and other Acts is now composed of Lord Chancellor, the existing and former Lords President of the Council (who do not attend), Privy Councillors who hold or have held high judicial office (including retired English and Scottish Judges), the Lords of Appeal in ordinary, and such judges or former judges of the superior courts of the Dominions and Colonies as the Crown may appoint. Ordinarily the quorum of the Judicial Committee is of three members but in important cases generally five members preside over the committee to hear appeals.79

There is only one Judgement of the Privy Council and there is no dissenting judgement as in the case of appeals heard by the High Courts. Such a judgment of the Privy Council may be the unanimous judgement of the members of the Board hearing the Appeal or the majority. It is the duty of every Privy Councillor not to disclose the advice he has given to his Majesty. On the advice tendered, a draft order in Council is prepared, and at a meeting of the Privy Council itself, usually in Buckingham Palace, it receives His Majesty’s approval. All the immense jurisdiction over the rights of property and

---

person, over rights political and legal and over all questions growing out so vast an area is exercised by the Privy Council. The jurisdiction is based on the royal prerogative of the sovereign. The King was considered to be the fountain of justice and it was his inherent right to do justice.

The Privy Council’s report\(^{80}\) was in the form of an advice and only one opinion was pronounced and it was not bound by precedents. There are three rules of practice which guided the Privy Council’s Appellate jurisdiction. Succinctly they may be presented as under:

1. His Majesty’s prerogative extends to criminal as well as to civil cases;

2. Interference in criminal cases would not be done, unless the forms of legal process are disregarded or there is violation of the principles of natural justice; or

3. Unless there is miscarriage of Justice or violation of some legal principle or procedure”.\(^{81}\)

### 3.5.4 Appeals from India To The Privy Council

For the first time in the legal history of India George I by the Charter of 1726 provided for appeals to the Privy Council from India. From the decisions of the Mayor’s Courts first appeal lie to the Governor-General-in-Council in the respective provinces. The second appeal from order of the Governor-General-in-Council in the respective provinces. The second appeal from order of the Governor-General-in-Council would now lie to the Privy Council in England.

In 1818, it was found that during the last sixty years only fifty appeals were filed to the Privy Council. It was considered that the

---

\(^{80}\) Phanindra Chandra v. King, AIR 1940 PC 117.

\(^{81}\) J.P. Eddy, India and the Privy Council: The Last Appeal, 66 LQR 206.
appeals were not filed due to the fixed limit on the valuation of the suit. In order to encourage appeals to the Privy Council, it was decided in 1818 to remove the condition regarding the valuation of the suit in appeal. The appeals in all cases were, therefore, allowed to the Privy Council from the decisions of the Sadar Diwani Adalats of Bombay and Madras. Its reaction was very favourable and the later records of the Privy Council showed a great increase in the number of appeals. No doubt it was also realised in such appeals that there was a lot of inconvenience to the parties as well as invoking huge expenditures.

The Charters establishing the High Courts provided for the circumstances under which an appeal will lie from the High Courts to the Privy Council. The Charter recognised the right of parties to file an appeal to the Privy Council in all matters, except criminal cases from the final judgment of the High Courts. An Appeal was also allowed from any other judgment of the case to be a fit case for appeal to the Privy Council. The Civil Procedure Code also provided for appeals from the High Courts to the Privy Council under Sections 109 to 112. An appeal was also allowed where the High Court certified that the case involved an important question of law and that it was a fit case for appeal. Early Charters of the High Courts granted a right of appeal to the Privy Council from any judgment, order or sentence of a High Court made in the exercise of original criminal jurisdiction, if the High Court declared that it was a fit case for appeal.

The Government of India Act, 1935 introduced a federal Constitution in India in which the powers were distributed between the Center and the Constituent units. It also provided for the establishment of a Federal Court. The Federal Court of India was inaugurated on 1st October, 1937.
3.5.5 The Federal Court of India

Before the Federal Court of India was established under the Government of India Act, 1935, the British Parliament was seriously considering to tackle the problem of creating a central Court of final appeal in India. It was partly due to the growing trend of the Indian Public opinion in favour of stopping appeals to the Privy Council from Indian High Courts and also partly due to the emerging federal-structure of the British Empire in India.

As early as 1921, Sir Hari Singh Gour was the first person in the legal history of India, who realised the necessity of establishing an all-India Court of final appeal in India in place of the Privy Council. So he introduced a resolution on 26th March, 1921, in the Central Legislative Assembly.

The Government of India Act, 1935 changed the structure of the Indian Government from “Unitary” to that of the “Federal” in nature. It established the foundation for a Federal framework in India. A Federal Constitution involves a distribution of powers between the Centre and the Constituent Units. Section 200 of the Act provided for the establishment of a Federal Court in India.

The jurisdiction of the Court was very limited and appeals were allowed to the Privy Council. The Federal Court was a Court of Record. It sat at Delhi and at such other places as the Chief Justice of India may declare, with the approval of the Governor-General of India, from time to time. The Federal Court was to consist of a Chief Justice and not more than six puisne judges, who were to be appointed by the King and he could increase the number also.

---

The Federal Court was given three kinds of jurisdictions, namely (1) Original (2) Appellate and (3) Advisory. The jurisdiction of the Federal Court of India was enlarged and it continued its existence up to the establishment of the Supreme Court of India on 26th January, 1950 under the Constitution of India. The Court was not authorised to enforce its own decisions directly but with the aid of civil and judicial authorities throughout the Federation. It was not to pronounce any judgment in its original jurisdiction\textsuperscript{84} other than a declaratory judgment.

The Federal Court exercised appellate jurisdiction in constitutional cases under the Act of 1935, its appellate jurisdiction was extended to civil and criminal cases from 1948. The Federal Court was empowered to hear appeals from the High Court in Acceding States on questions relating to constitutional matters. The Federal Court was given exclusive original jurisdiction to decide cases between the Centre and the Constituent units. An appeal was allowed to the Federal Court from any judgement, decree or final order of a High Court, if the High Court certified that the case involved a substantial question of law as to the interpretation of the Constitution. The Federal Court had jurisdiction to grant special leave to appeal, and for such an appeal a certificate of the High Court was essential.

In Constitutional matters, the Federal Court shared the scene with the Privy Council in deciding cases. After 1937 it was only in civil cases exceeding Rs 10000 that the appeals were allowed to the Privy Council.

The Federal Court was abolished on 26th January, 1950 with the establishment of Supreme Court of India. The Federal Court built up great traditions of independence, impartiality and integrity, which were inherited by its successor, the Supreme Court of India.

\textsuperscript{84} United Provinces \textit{v. Governor-General-in-Council}, 1939 FCR 124.
The British Parliament declared India as an Independent Dominion on the 15th August, 1947. It was considered essential to make necessary changes in the old system of appeals to the Privy Council. The Central Legislature of India passed the Federal Court in all civil cases. It abolished the old system of filing direct appeals from the High Courts to the Privy Council either with or without special leave.

The Abolition of Privy Council Jurisdiction Act, 1949 was passed by the Constituent Assembly on 24th September 1949. The jurisdiction of the Privy Council to entertain any new appeals and petitions and to dispose of any pending appeals and petitions ceased to exist from 10th October, 1949. Thus the appeals pending before the Privy Council were transferred to the Federal Court of India.

During the period 1726 to 1949 and especially from 1833 onwards, the Privy Council played a very important role in making a unique contribution to the Indian Law and the Judicial system as a whole. It was a great unifying force in the judicial administration of India. The law declared by the Privy Council in the pre-Constitution period is still binding on the High Courts except in those cases where the Supreme Court of India has declared law in its Judgments. It shows the amount of respect, which the Indian High Courts still have for the Privy Council judgments. In the fields of Hindu law and Mohammedan law, though at times defective law was laid down, the contribution of the Privy Council is remarkable. The Privy Council commanded great respect amongst lawyers, Judges and the Indian public as the highest judicial institution. Its contribution to statute law, personal law, commercial law and criminal law, was of great importance. Even in Independent India up to 1949, the Privy Council decided many important cases - The principles of integrity,

85 *Punjabai v. Shamrao*, AIR 1955 Nagpur 293.
impartiality, independence and the rule of law, which were laid down by the Privy Council are still followed by the Supreme Court of India. Thus the Privy Council served the cause of justice for more than 200 years and its contribution and model is of great value, and a source of inspiration to all those concerned with the administration of India.

3.6 The Post-Independence Period

The independence of India fundamentally made it a “welfare state”, ensuring social, political and economic justice to its teeming millions. The advent of freedom and promulgation of constitution have made drastic changes in the administration of justice necessitating new judicial approach. The “ultimate goal” of the constitutional instrumentalities is to serve the people of India upholding the letter and spirit of the constitution. The goal of the constitution of India is “to secure to all citizens – Justice, Liberty, Equality and Fraternity”. The constitutional instrumentalities are bound to uphold these constitutional values and principles of democracy. The hopes of teeming millions are focused on the Constitution to protect their life, liberty, property and all the rights, which the constitution of India and laws of land grant and guarantee.

India was partitioned at the time of Independence. Lahore High Court remained in the Pakistan territory. A High Court for Punjab was therefore, established at Simla by the Governor-General under the Indian Independence Act, 1947. During the period from 15th August, 1947 to 26th January, 1950 i.e. after independence to the date when Constitution of India came into force, seven High Courts were established at different places.

In 1966, upon reorganisation of the State of Punjab, the High Court was designated as the High Court of Punjab and Haryana. The Governor-General established a High Court at Gauhati for Assam, at Cuttack for Orissa. The High Court of Rajasthan was established at
Jodhpur by the Raj Pramukh of Rajasthan. It was given all powers and jurisdiction just like that of the Allahabad High Court. A Bench also started functions at Jaipur. For Travancore-Cochin a High Court, was established at Emakulam by an Ordinance in 1948, which was repealed by the Travancore-Cochar High Court Act, 1949. Later on, this State came to be known as Kerala. The Kerala High Courts Act, 1958 laid down the jurisdiction, powers and authority of the Kerala High Court.

Even before 1947, there existed the Jammu and Kashmir High Court. It was established by the Maharaja of the State. It was given civil, criminal, original and extraordinary jurisdiction. After the Constitution of Jammu and Kashmir came into force, the Jammu and Kashmir High Court continued to do the judicial work.

3.6.1 The High Courts After The Constitution of India

The Constitution of India contains many specific provisions regulating the independent working of the High Courts. The Constitution of India re-organised all the existing High Courts. It provided a High Court for each Province. The Parliament was empowered to establish a common High Court for two or more provinces or Union territories. The President of India appoints the Judges of the High Court after consulting the Chief Justice of India, the Governor of the Province and the Chief Justice of the High Court for which appointment is to be made. The President of India also appoints the Chief Justice of the High Courts. There has been departure from the old traditions of appointing the senior-most puisne Judge as the Chief Justice. The Chief Justice can also be a judge from another State.

---

86 Article 214 of the Constitution of India.
87 Article 217 of the Constitution of India.
Each High Court is a Court of Record.\textsuperscript{88} The High Court has both powers of administrative as well as judicial superintendence over the subordinate Courts within its jurisdictions.\textsuperscript{89}

Article 226 of the Constitution empowers the High Courts to issue to any person or authority within their respective jurisdictions, directions, orders or writs in the nature of 
\textit{habeous corpus, mandamus, prohibition, quo warranto and certiorari} or any of them for the enforcement of any of the Fundamental Rights conferred by Part III of the Constitution and for any other purpose.

The High Courts apart from their civil, criminal, appellate jurisdiction, are the interpreters and the guardians of the Constitution protecting the Fundamental Rights. The High Courts are also given other important functions under various Acts. In the changing socio-economic and political conditions of India, the High Courts are playing an important role in the administration of justice in India.

\subsection*{3.6.2 The Supreme Court of India}

With the transfer of power from the British Parliament to the people of India\textsuperscript{90} under the \textit{Indian Independence Act}, 1947, it was considered necessary to establish a separate judicial organ in India, which is supreme in authority and in jurisdiction. A new era in the legal history of India began on 26\textsuperscript{th} January, 1950, when the Constitution of India came into force. Under Article 124, it provided for establishment of a Supreme Court of India. The Supreme Court of India was inaugurated on 28\textsuperscript{th} January, 1950, in the Court House, New Delhi. While appointing a Judge other than the Chief Justice, the Chief Justice will always be consulted\textsuperscript{91} by the President of India.

\begin{itemize}
\item Article 215 of the Constitution of India.
\item Hari Vishnu Kamat \textit{v.} Ahmad Ishaque, AIR 1955 SC 233.
\item V. P. Menon, \textit{The Transfer of power in India}, (Orient Longman Limited, 1957).
\item S.C. Advocates-on-Record Association \textit{v.} Union of India, (1993) 4 SCC 441.
\end{itemize}
The Constitution of India has granted three types of jurisdiction to the Supreme Court namely Original, Appellate and Advisory. It is also given special powers, e.g. to review its Judgements, to punish the guilty for contempt of Court, to issue writs under Article 32, to judicially review the legislation, etc.

The original jurisdiction of the Supreme Court extends to any dispute between the Centre and the Constituent states or between the States inter-se. The Constitution also empowers the Supreme Court to issue writs under Article 32. Apart from appeals, under Article 136, the Supreme Court has the power to grant special leave from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India.\(^2\)

The Supreme Court has the power to transfer a criminal case or appeal from one High Court to another “whenever it is made to appear to the Supreme Court that an order under Article 142 is expedient in the ends of Justice”.

Thus the Supreme Court occupies the most vital and exalted position under our Constitution set-up, entrusted with the power to utter the final word in all matters relating to the interpretation of the Constitution and the laws and their enforcement and constitutes the symbol of national unity in the field of administration of law and justice. The judgment of Supreme Court is the law of the land.\(^3\)

### 3.6.3 The Sub-Ordinate Judiciary

The appointment of the sub-ordinate judiciary was envisaged by the Constitution Makers and it was given recognition in the Constitution of India. Articles 233 to 237 deal with the same. The

---

\(^2\) *Bhurat Bank v. Employees of Bharat Bank*, AIR 1950 SC 188.

\(^3\) Article 141 of the Constitution of India.
provisions provided for the appointment of district judges at the
district level by the Governor of the State in consultation with the
High Court exercising jurisdiction in relation to such State. The
recruitment of persons other than district judges to the judicial service
to be made by the Governor of the State in accordance with rules made
by him in that behalf after consultation with the State Public Service
Commission and with the High Court exercising jurisdiction in
relation to such State. The control over district courts and other courts
subordinate to the High Court of a State was to be vested in the High
Court.

3.7 The Emergence And Growth of Other Mechanisms

3.7.1 Panchayati Raj

The village Panchayat has been the oldest administrative units
in India. In ancient time, the villagers enjoyed perfect autonomy and
were governed by Panchayat—A body of five leading men of the
village. With the independence of India, the framers of the
Constitution firmly pledged for reviving the village Panchayats as an
effective mean to “carry democratic values down to the doors of the
villagers”. The Directive Principles of State Policy (Article 40)
provide “The state shall take steps to organise village Panchayats and
endow them with such powers and authority as may be necessary to
enable them to function as units of self-government”.

With the development and passage of time in the country, the
old concept of Panchayats as bodies doing minor judicial and
administrative work of the rural communities has undergone a great
change. Today, the Panchayats have been made as the foundations of
the implementation of rural development programmes.

The Panchayati Raj denotes a three-tier structure-Gram Sabha
with Village Panchayat as executive body at the village level,
Panchayat Samitis at the Block or Tehsil level and Zila Parishad at District level. There has been no rigid pattern followed by various states in the country. The Government of India has always stressed certain fundamental aspects of the Panchayati Raj like the setting-up of three-tier organisation from the village to the district level, with an organic link among them: a genuine transfer of power responsible to these democratic bodies and provision of adequate resource to enable them to discharge their duties efficiently; and the channelisation of all the development programmes in the local areas through the Panchayati Raj bodies at the appropriate level.

In most of the States, the legislations were passed for the implementation of Panchayati Raj Institutions. The 73rd amendment in the Constitution has further strengthened the position of Panchayati Raj Institutions by giving them a constitutional status. The New added Articles provide for the Constitution, composition, election, duration and powers and responsibilities and power to levy taxes and duties by the Panchayati Raj Institutions in the rural areas. The Eleventh Schedule contains 29 subjects on which the Panchayats shall have administrative control. The Panchayati Raj is, therefore, the mean, and community development is the end.

3.7.2 Lok Adalats And Legal Aid Programmes

Lok Adalats is a peculiar process of deciding disputes by negotiations via a benevolent middle agency. This movement has the inherent capacity latent in it to lessen the burden of arrears of cases in the Courts. The Legal Services Authorities Act, 1987 has been passed to give legal status to Lok Adalats.

73rd amendment has added a new Part X to the Constitution consisting of 16 Articles and new Schedule “Schedule Eleven”. New added Articles are Article 243, Article 243-A to Article 243-O.

Legal Services Authorities Act 1987, was enforced from 9th November 1995 in the country.
This aimed at furthering the Constitutional objective enshrined under Article 39-A the slate has to promote justice on the basis of equal opportunity and to provide free legal aid by suitable legislation or schemes so that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. In addition thereto, the Special Courts and tribunals for family matters, enforcement of labour laws and to adjudicate the service matters have also been constituted as the means to deliver justice.

In essence, we can say that there have been some changes in different periods of Indian history but the concept of justice delivery throughout the Panchayati Raj Institutions has continued to exist throughout. The family matters all through have been given a special place to be decided in a family way. The hierarchy of Courts started from the Muslim period has become more express with clear Jurisdiction and powers. Today the Constitution of India ensures the Independence of Judiciary with Supreme Court as at the Apex and High Courts at the State levels recognized as the courts of record with superintending power over the subordinate courts existing in the form of District and Sessions Courts and the subordinate Magisterial Courts.

Despite the effective and efficient emergence of the present institutional frame-work through the pages of history, the needs of time continue to change. The justice delivery system of the time faces problems of the day and needs plugging of the holes in the system. This necessitates change and that change(s) gave rise to the present set-up. The glimpses of the history of any institution enable us to analyze the past so as to shape the future. Even Mr. Justice Thommen remarked:

“The Indian legal system is the product of history. It is rooted in our soil, nurtured and nourished by our culture, languages and
traditions, fosters and sharpened by our genius and quest for social justice, reinforced by history and heritage: It is not a mere copy of the English common law, though inspired and strengthened, guided and enriched by concepts and precepts of justice, equity and good conscience which are indeed the hallmark of the common law". 96