CHAPTER - II

JUSTICE DELIVERY SYSTEM: A
HISTORICAL PERSPECTIVE
The roots of all present-day institutions lie deeply buried in the past. So is true of the country’s law and its legal institutions. The legal system prevalent in any country at any given point of time is not created by one man or in one day. It represents the cumulative fruit of endeavours, experiences, thoughtful planning and patient labour of a large number of people across generations. Therefore, to comprehend and appreciate the present legal system adequately, it is necessary to acquire background knowledge of the course of its growth and development.\(^1\)

For the purpose of this work, the history of Justice Delivery system in India has been studied by dividing it into four important periods.

1. **The Ancient Period**: This period extends to nearly 1500 years before and after the beginning of the Christian era.
2. **The Muslim Period**: This period began with the first major Muslim invasion in the year 1100 A.D.
3. **The British Period**: It began with the consolidation of the British power in the middle of the 18\(^{th}\) century and lasted for nearly 200 years.
4. **The Post Independence Period**: It begins with the withdrawal of the British from India till the present times.\(^2\)

### 2.1 THE ANCIENT PERIOD

The history of our Judicial System dates back to the time when Manu and Brihaspati composed Dharam Shastras, Narada the Smritis, and Kautilya the Arthashastra. A study of these works reveal that a fairly well-developed and sophisticated system of administration of justice existed in the ancient times. Broadly speaking, there is considerable

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\(^2\) Discussed in detail in later chapters
In ancient times, the administration of justice was a primary function of the Rulers.

The duty to protect is cast on the king by dharma itself and therefore administration of justice is an important duty of the king. The most important obligation of the king was to protect the people, to provide security of life and property and to maintain social stability in order to enable virtue to flourish.

The Mahabharata declares:—
"The happiness of the people, the upholding of the truth and maintenance of social order - these are unchanging functions of Rajadharma. Praja Paripalana, the protection of the subjects, is the supreme duty. The purpose of protection is that the people may not lapse into anarchy or Matsyanyaya or fish analogy, where the stronger will eat the weaker as fish do in water."

The maintenance of external and internal peace and punishment of offenders upholding of social order, the creations of conditions under which people can live a free life are the other aspects, which come within the wider meaning of the term "protection".

It was believed in ancient times that the sacred duty of the king is to punish the wrongdoers; if he neglects this work, he would go to hell.

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4. V. Sreenivasa Murthy, History of India Part I, p 192
5. Ibid
6. Dusta nigrata, sista paripalana
7. Supra 4 p 192
According to Manu—

"Dharmoraksati raksitah', justice being preserved preserves, justice being violated destroys. Justice must not be violated, lest violated justice should destroy us.\(^8\)

The majesty and all pervading character of justice is thus brought out by Manu;

Justice keeps awake while all are asleep. The wise know penal justice to be dharma. The people are made happy by the proper administration of justice\(^9\)

2.1.1 COMPOSITION AND GRADATION OF COURTS:

In ancient India, the king was regarded as the fountain-head of justice. The king’s court was to be situated in a capital city and in the royal palace\(^10\). The king’s court was the court of original jurisdiction in all cases of vital importance and was also the highest court of appeal. In the process of administering justice, the king was advised and assisted

\(^8\) Ibid p 192  
\(^9\) Ibid p 193  
\(^10\) The Composition of Courts and Officers.
(i) Dharmadhikarana (Hall of Justice)  
The court hall was called Dharmadhikarana (Hall of Justice). The spacious hall in the palace used to be reserved for holding the king’s court. The place where truth (in dispute) was investigated according to Dharamsastras was called Dharamdhikarana (Hall of Justice). The court was called Dharmashana (seat of Dharma) by Manu and Narada; and Dharamsthana (Place of Dharam) by Sankalikhitha.
(ii) Responsibilities of king as the highest court:—
As far as the king’s court was concerned, any person could approach the king for justice either by way of an original petition or by a way of an appeal against the decisions of lower courts. However, if, owing to his pre-occupation the king was unable to preside over his court, the minister for justice or chief justice officiated for him. The Smriti laws and the customary laws were binding on the king.
by learned Brahmins, the Chief Justice and other judges, ministers, elders, and representatives of the trading community.\(^{11}\)

Next to the king was the Court of Chief Justice (Pradvivaka). The court, presided over by a Chief Justice, had a board of Judges to assist him\(^{12}\). All the judges were from the three upper castes preferably the Brahmins. Sometimes some of these judges constituted separate tribunals having specified territorial jurisdiction.

Brihaspati has stated that there were four kinds of tribunals namely, stationary courts, moveable courts, courts held under the royal signet in the absence of the king and commissions under the king’s presidency\(^{13}\).

Assistance by experts and learned scholars\(^{14}\): while deciding cases, the kings and the judges were assisted by experts in the field of law.

The disputes among traders, craftsmen, artisans, artists etc. involved technicalities and hence it was difficult for the courts to arrive at correct decisions. Hence the services of experts\(^{15}\) in the particular field were engaged.

The incorporation of the above provisions is very significant. Even during the ancient times, it was realized that whenever any technical question arose concerning craftsmen, artisans, traders etc., the opinion of the persons who had intimate knowledge of those problems was of great assistance and could be taken by the courts for the purpose of giving decisions and that the Judges or the king, even though well versed in law, were not able to appreciate fully such cases in the absence of relevant expert assistance.\(^{16}\) The utility of associating experts in

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\(^{11}\) P.V. Kane: History of Dharmasastra Volume III p 242
\(^{12}\) Maynes: Hindu law and usage p 10
\(^{13}\) Brihaspati: Chapter 1, p 1-3
\(^{14}\) Amicus Curiae of present times in the form of advice
\(^{15}\) M. Ramajois: Legal and Constitutional History of India, Vol. I at p 502
decision-making regarding disputes in such specialised fields was recognized and incorporated into the modern system.

The Evidence Act\textsuperscript{17} makes the evidence of experts a relevant material for arriving at a decision.\textsuperscript{18}

Asahaya explains this rule: "Where all the assessors of the court pass an unjust sentence out of ignorance of law or from interested motives, there a Brahmana versed in the sacred laws and acquainted with legal proceedings who happens to be present, shall point out the flaw to them, and restrain the judges from their sinful course. He shall speak though he has not been appointed to deliver judgment. The law is called the voice of the deity."\textsuperscript{19}

\textbf{2.1.2 APPPOINTMENT OF JUDGES, JUDICIAL STANDARD & THEIR QUALIFICATIONS:}

The standard laid down for Judges and Magistrates were very high. They were required to take the oath of impartiality before deciding disputes between citizens.

Integrity was the first qualification. Referring to integrity of a Judge, Brihaspati states:-

A judge should decide cases without consideration of personal gain or prejudice or any kind of bias\textsuperscript{20} and his decision should be in accordance with the procedure prescribed by the texts. A Judge who performs his

\textsuperscript{17} Sections 45 to 47 of Evidence Act, 1872

\textsuperscript{18} Another instance of experts to decide a special category of cases is the constitution of Special Tribunals like Railway Tribunal, Income Tax Tribunal - consisting of persons having technical qualifications and experience as well as members from the Judiciary.

\textsuperscript{19} M. Ramajois: Legal and Constitutional History of India; Vol. 1 at p 505 (1990) whether authorized or not, the person acquainted with law shall give his opinion. The word of a person who acts in accordance with the dictates of law is divine. This is a very important rule which enabled the King or the Judges to engage the help of persons well versed in law, and is comparable to the appointment of amicus curiae by the courts, prevalent under the present system.

\textsuperscript{20} Now a days the term used is without fear or favour
judicial duties in this manner achieves the same spiritual merit as a person performing a yajna. Dishonesty, for a Judge, was regarded as the most reprehensible crime.

Caste considerations played a very important role in the appointment of the Chief Judge and other Judges in Ancient times. Almost all books on law dealing with Ancient Judicial System mention that preferably a Brahmin be appointed a Chief Judge. The next to come, in order of preference, were the Kshatriyas and Vaisyas. But in no case was a Sudra be appointed a Judge. Regarding the qualifications of the Judges, it is stated that the persons who are ignorant of customs of the country, non-believers in the caste system and God, despisers of sacred books, insane, irate or distressed persons will not be appointed as Judges. The law books insisted on appointment of persons who were highly qualified and learned in law for the post of Judge. Women were not allowed to hold an office of Judge.

Qualifications of Chief Justice.

The meaning of the designation Pradvivaka is given by Katyayan:

Kat. 69

The meaning of the designation Pradvivaka (Chief Justice) is that in a dispute between two parties, one who puts questions (Prat), and distinguishes right from wrong (Vivaka) is called Pradvivaka.

21 Justice S.S. Dhawan: Indian Jurisprudence (1963) vol. 8, Journal of the National Academy of Administration, p 22
22 P.V. Kane: History of Dharmasastra vol III p 272
23 Brihaspati: vol 1 p 33
24 Angutara Nikaya : VIII p 801
25 M. Ramajois: Legal and Constitutional History of India; Vol. 1 at p 493
26 M. Ramajois: Legal and Constitutional History of India: Vol. 1 at 493 (1990)
A person who is well versed in the eighteen titles of law and their eight thousand sub-divisions, and who is proficient in logic (Tarka), interpretation (Mimansa) and other relevant subjects, who is master of the Vedas and Smritis, who has the capacity to extract the truth from the judicial proceedings by application of law, should be appointed as the Chief Justice.

Appointment of Other judges and their qualifications.

Narada Proclaimed:
"Let the King appoint, as members of the Court of Justice, honourable men of integrity (Sabhyas) who are able to bear the burden of the administration of justice and who are well versed in the sacred laws, rules of prudence, who are noble and impartial towards friends or foes. 28"

In Rajadharma, the king is advised to appoint suitable judges, indicating therein the qualities of a person to be a judge.

A person who is (i) well versed in Vyavahara (laws regulating judicial proceedings) and Dharma (law on all topics), (ii) a Bahushruta (profound scholar), (iii) a Pramanajna (well versed in the law of evidence), (iv) Nyayasastravalam-binah (law abiding), and (v) has fully studied the Vedas and Tarka (logic) should be appointed to carry on the administration of justice. 29

27 Narada vide Dharmakusa at p 43
28 M. Ramajois: Legal and Constitutional History of India; Vol. 1 at p 494-495
29 Ibid p 494
In addition to the above mentioned qualifications, Katyayana adds a few more criteria to indicate the suitability of a person to be appointed as a judge: -

i) For deciding disputes, the king should appoint as a judge one who is not cruel, who is sweet tempered, kind, clever and energetic but not greedy.

ii) One who has studied only a single branch of learning would not know how to decide all cases. Therefore the king should appoint as a judge one who knows many Shastras.

iii) Where a Brahmana endowed with the enumerated qualities is not available, a Kshatriya or a Vaisya with like qualifications should be appointed, but the king should carefully avoid appointing a Sudra.\footnote{ibid 495}

Thus one can conclude that the educational qualifications and personal traits prescribed for a person to be appointed as a judge, shows the importance attached to that position and how one was expected to conduct oneself as a judge. However, the rule disqualifying the Sudras from being appointed Judges is discriminatory.

Dispensation of justice - the highest Dharma of Judges

Dispensation of justice without fear and favour was the highest Dharma of the Judges. According to Manu –

(i) In a case where Dharma (justice) has been injured or made to suffer at the hands of Adharma (injustice) and still the Judges fail to remove the injustice, such Judges are sure to suffer for their act (or omission), which is Adharma.

(ii) Where Dharma (justice) is sought to be destroyed by Adharma (injustice), and truth is sought to be destroyed by untruth and the judges

\footnote{ibid 495}
failed to prevent the same but remain mere spectators, they are sure to be destroyed.  

**Judges must be impartial, independent and fearless.**

According to Katayana:–

i) The members of a court should not connive with the King when he begins to act unjustly. If they do so, they, along with the King, fall head down into Hell.

ii) Judges who agree with the king when he proceeds in an unjust manner become parties to the sin flowing from such unjust decision. They may, therefore, mollify the king by speaking at first what is agreeable to him and then by persuasion gradually bring him round to the right path.

iii) When the king directs a Judge to give an unjust decision in a case, the Judge should beseech the king against the order, which will lead to injustice, and dissuade him from wrongdoing.

iv) A judge should give his decision only in accordance with law and justice. If the king disregards that decision, the judge incurs no sin.

**Decision regarding quantum of penalty- Independent of trial.**

The final authority to decide the quantum of punishment on the persons found guilty by the Judges, was the king. While fixing the punishment, the king used to take into consideration the charges proved and any other circumstances relevant to the case.

According to Manu:

(i) “The king, having fully considered and having due regard to (a) the motive, (b) the place of occurrence (c) the ability of the offender to suffer

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31 Manu Smriti, Vol. VIII p 12-14
32 M. Ramajois: Legal and Constitutional History of India; Vol. 1 at p 496
the penalty, and (d) the nature of the crime, should impose the penalty which the accused deserves.

(ii) Let him (king) punish (offenders) first by gentle admonition, afterwards by harsh rebuke, thirdly by fine, and thereafter by corporal punishment.

(iii) If a king imposes a penalty on those who are innocent or imposes harsh or unjust punishment even on those found guilty, he brings on himself great infamy, and after death sinks to hell.\textsuperscript{33}

In ancient times, certain persons were exempted from punishment. Firstly, Men above the age of 80, women, children below 16 and the diseased were awarded half of the punishment usually prescribed for that offence. A child below five was considered incapable of committing an offence or even a sin and hence he was not to be punished for his (wrongful) acts\textsuperscript{34}.

Gautama Dharma Shastra\textsuperscript{35}, Kautilaya's Arthasastra\textsuperscript{36} and Manu Smiriti\textsuperscript{37} prescribe that, as a general rule, a Brahmin offender was not to be sentenced to death or corporal punishment for any offence deserving death sentence but in such cases, the convicted could be awarded alternative punishments. Katyayana and Kautilya were against exempting Brahmins. There are many instances available which show that in cases of offences committed by Brahamins, the death sentence was substituted with some other milder punishment.

Thus, the king was required to be highly circumspect and judicious in the matter of imposing penalties. Firstly, he must satisfy himself, beyond any reasonable doubt, about the guilt of the accused. Secondly, whenever the king found the accused guilty in deciding the quantum, he was required to take into consideration the following factors:

\textsuperscript{33} Manu Smriti, Vol VIII p 126-129
\textsuperscript{34} Narada Smiriti Vol IV p 85
\textsuperscript{35} Gautam Dharamasastra Vol. XII p 43
\textsuperscript{36} Kautilayas Arthasastra Vol. IV p 8
\textsuperscript{37} Manu Smiritis Vol. VIII p 125, 380, 381
The offender’s caste, the value of the things, the extent or measure, the use or the usefulness of the thing w.r.t which an offence is committed. The person against whom the offence is committed (Such as idol or temple or king, state, Brahmin), the age, the physical condition and health of the accused, his capacity to bear the penalty as also any aggravating or mitigating circumstances such as provocation etc, if any, as also his past record. The king was required to be kind to the first-time offender and also to those who committed the offence for the second or third time, but was required to impose corporal punishment thereafter, and this guideline appears to be in respect of non-heinous offences or minor offences.

Remarkably, most of the above mentioned provisions are prevalent even in the present times. These provisions indicate that in cases the trial of which the king himself presided, as far as the decision on the question of guilt was concerned, though he (king) was required to be guided by the Judges, but so far as the quantum of penalty is concerned he was paramount. Further in all those cases where the king himself did not preside over the trial, the chief justice was required to fix the guilt and deliver his judgment, nonetheless, the penalty was again decided by the king.

### 2.1.3 The Other Courts

The court presided over by the king was the highest court. Besides, the Smritis have recognized some other courts also i.e. courts appointed by the king, and the people’s courts. The hierarchy of such courts was:-

i) Nripa (King himself)
ii) Adhikrita (Court appointed by the king)
iii) Gana (Assembly)
iv) Shreni (Corporation)
v) Kula (Gathering or family councils)\(^{38}\)

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\(^{38}\) M. Ramajojis: Legal and Constitutional History of India; Vol. 1 at p 490, V. Sree Nivasa Murthy History of India Part I p 195, Mayne : Hindu Law and usage p 10 S. Varadacharviar : The Hindu Judicial System p-90
(i) Nripa:
Nripa was a court presided over by the king himself.

(ii) Adhikrita:
These courts were appointed by the king to administer justice and they were authorized to hear criminal cases.

(iii) The People's Court
There were three types of courts which were known as people's courts, namely:-
  a) Kula
  b) Shreni &
  c) Puga or Gana

Kula: In villages, local councils or Kula (similar to modern panchayats) consisted of a board of five or more members to dispense justice to villagers. All matters relating to endowments, irrigation, cultivatable land, punishment for crime etc were decided by Kula. The village councils dealt with all types of civil cases. However, so far as criminal cases were concerned, they had the power to decide cases involving minor offences only. At a higher level in towns and districts, the courts were presided over by officers under the authority of the king to administer justice. The link between village assembly and the official administration was the headman of the village who held hereditary office and was required to maintain law and order and administer justice. He was also the member of the village council. He acted both as a leader of the village, and mediator with the state.

In the Sanchi Stupa inscription of Chandra Gupta–II, we come across the term Panchmandali which resembles the modern Panchayats. The village Court or the Gram Panchayat was the judicial machinery of the lowest rung39.

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39 V Sreenivasa Murthy; History of India Part 1 p 194
Shreni: They were constituted in order to deal with disputes among members of various guilds or association of traders or artisans. The Shrenis were authorised to exercise effective jurisdiction over their members. These tribunals consisted of a president and 3 to 5 co-adjudicators. They were allowed to decide the civil cases regularly just like the other courts.

Puga: Due to the prevailing institution of the joint family, family courts called Puga, were also established. These assemblies were made up of groups of families in the same village which decided civil disputes amongst family members.

Guilds: Trade guilds and corporations resolved the disputes amongst the members of various guilds or associations of traders and artisans, known as shrenis. Appeals from decision of guilds lay to local courts, then to royal judges and from there, finally to the king. These guilds had their own rules and regulations called Srenidharmas which were binding on their members.40

Kula, Shreni and Gana Could decide all disputes except those falling under the Title Sahasa i.e. act accompanied by Violence.41

Fines and corporal punishment could only be inflicted by the King. The people's court consisted of panchayatdars. They had the authority to decide all civil and criminal cases except those involving trial for an offence committed with violence (Sahasa). They had no authority to execute sentences of fines and corporal Punishments. The matter had to go before the king, who alone could execute sentence if it met with his approval.42

After considering the historical evidence and the indications available therefrom, the Law Commission in its 14th report has observed:–

40 Ibid p 198
41 S. Varadachariar: The Hindu Judicial System, p 90
42 M. Ramajois: Legal and Constitutional History of India; Vol. 1 at p 491
“Though ancient writers have outlined a hierarchy of courts as having existed in
the remote past, the exact structure that obtained cannot be ascertained with any
definiteness; but later works of writers like Narada, Brihaspati and others seem to
suggest that regular courts must have existed on a considerable scale, if the
evolution of a complex system of procedural rules and of evidence can be any
guide. Popular tribunals, particularly the village courts, survived for a long time
and existed even at the time of commencement of the British rule in India. Their
continuance was favoured by their antiquity and the absence of any other
effective tribunal within easy reach; the structure of the village society in those
days; the nature of the principal functions which these tribunals discharged which
were conciliatory and the non-interference by local rulers with the working of
these tribunals.”

Right of appeal to king in all cases

A party not satisfied with the decision of any lower court could appeal to
the king’s court. The king reconsidered the decision if he felt that the
case had been wrongly adjudicated. There was no further appeal and
the king’s decision in the case was final.

In ancient India, as in present times, the decision of each higher court
superseded the decision of a court below it. Each lower court showed
full respect to the decision of its respective higher court. As such, the
king’s decision was supreme and binding on all the concerned parties.

The above provision recognized the prerogative of the sovereign i.e. the
king to function as the highest court of his kingdom. A party could
approach the king for a review of the decision given by any tribunal. This
sovereign power is comparable to the power conferred on the Supreme
Court under Article 136 of the Constitution of India.

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43 Law Commissions 14th report Vol. I, p 27
44 M. Ramajois; Legal and Constitutional History of India; vol 1 at p 492
2.1.4 JUDICIAL PROCEDURE

A suit commenced ordinarily with the filing of a plaint (Purva Paksha) before a competent authority. The plaint was required to be brief, unambiguous and free from confusion. In case of disputes relating to property, elaborate rules were laid down for requirements about giving detailed and full description of the property. A written statement known as Uttara Paksha was required to be filed by the defendant and the rules provided that they must be clear and must offer a reply to all the points raised in the plaint. The defendant's reply could fall into any of these types: Mithya i.e. denial, Samprati Patti or Satya i.e. confession or admission, Karana Pratya Vasakanddana a special plea of demurer and Purvanirnaya (reference to a previous verdict). Normally, the parties were required to produce their witnesses. The presence of the witnesses who were far away or did not stir out was secured by the orders of the judge. Different modes of proof for substantiating allegations were prescribed. On the conclusion of trial, judgment known as Nirnaya was pronounced and the successful party became entitled to Jayapatra or a document of success. The execution of decrees could entail imprisonment, sale, fine and demand for additional security of property.

A clause in Yajnavalkya required that a law suit between husband and wife, teacher and pupil, master and servant should not be entertained. According to Manu, preference must be given on the basis of the Varna of the plaintiff. Katyana, on the other hand, recommended that priority should be given to a plaint where injury was greater or the cause was so important which required immediate attention.

The doctrine of Res-Judicata known as Prag Nyaya and doctrine of Precedent were also well known.

Under the Criminal Law, an elaborate classification of offences was given. Apart from offences like rape, dacoity and the like, there were other offences like not running to the rescue of another person in

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45 Justice H.R. Khanna: Judiciary in India and Judicial Process p 3-5
distress. Cattle lifting was the commonest of all, punishment was prescribed for causing damage to the trees in city parks, or those providing shades, or those bearing flowers and fruits, and to the ones in holy places. It was an offence for a Judge to give a wrong decision out of corrupt motives.

### 2.1.5 MODE OF PROOF

The modes of proof were

(i) Human and (ii) Divine

Human evidence was of three types (a) Documents (Lekhya) (b) Possession (Bhukti) (c) Witnesses (Saksi).

Divine proof consisted of ordeals. Ordeals were resorted to only when the ordinary method of proof was not feasible. In criminal cases, sometimes circumstantial evidence was sufficient to punish the criminal or to acquit him. The accused could produce any witness before the court to prove his innocence. The Atharva Veda and the Upanishad talk of its existence. A detailed account of the existence of trial by ordeal as it existed in ancient India is given in the Agni Purana. It was pointed out that only in cases of high treason or very serious offences; this method of trial by ordeal was resorted to. In other cases, it was sufficient to prove the truth by taking an oath. Some of the important types of ordeal prevalent in those times were:

- Ordeal of balance, ordeal of fire, ordeal by water, ordeal of poison, ordeal of lot, ordeal of rice.

Perjury by a witness attracted severe penalty. Narada says that they were condemned to go to horrible hell. There were six types of punishment, namely - fine, reprimand, torture, imprisonment, death and banishment, some instances of grant of monetary compensation to the victim are also found.47

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46 Ibid
47 V Sreenivasa Murthy; History of India Part 1 p 203
2.1.6 INSTITUTION OF LAWYERS.

There is no unanimity among the historians as to the existence of institution of lawyers in the Ancient times. The Smritis do not refer to the existence of any separate institution of lawyers.

According to Kane

“This does not preclude the idea that persons well versed in the law of 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, Brihaspati and Katyayana reaches a very high level of technicalities and skilled help must often have been required in litigation”

The legal texts of the times permitted the defendant to send his representatives wherever his personal attendance could be dispensed with. A firm piece of evidence as to the existence of pleaders occurs in Asahaya’s commentary on the Narada Smriti wherein a lawyer pleads with a party for professional fee. The practice of appointing a pleader was in vogue in the days of Sukra. If the party to the dispute was unable to attend court because of his pre-occupation elsewhere or because of his ignorance of law, he could appoint his agent known as Niyogin in the law courts to defend his case. These agents were not to collude with the other party. Their fees ranged between 6% to 7½% depending upon the value of the property. The larger the corpus of the property, the smaller was the percentage of the fee. With the passage of time, law and legal procedures became more and more complex and technical and by the year 500 A.D, the parties were compelled to turn to learned scholars well versed in the smritis to represent their cases.

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48 P.V. Kane; History of Dharamsastra Vol. III ch XI, p 288 & 289: A.L. Basham, The Wonder that was India, p 117
49 Manu Smriti Ch. VIII, Verse 169 A.S. Altekar: State and Government in Ancient India, p 258
50 V Sreenivasa Murthy; History of India Part 1 p 206 & 207
After considering Kane’s observation and other historical material, one can safely conclude that institution of lawyers as it exists today did not exist in the Ancient period.

• Administration of Justice in Mauryan Times:
  - During the Mauryan times, the king was the fountain-head of justice and decided all important matters. There were special courts in the cities and villages presided over by Mahamatras and Rajukas. Kautilya mentions two types of courts
  - Dharmastheya
  - Kanta Kasodhana

The Dharmastheya courts were civil courts, which decided cases pertaining to contracts, gifts, sale, marriage, inheritance, boundary disputes etc. These courts were composed of six judges and were larger courts than the criminal courts. Manu classifies law under 18 titles without making demarcation between civil and criminal disputes. These were: 1) deposits and pledge, 2) non-payment of debts, 3) sale without ownership, 4) concern among partners, 5) resumption of gifts, 6) non-payment of wages, 7) non-performance of agreements, 8) restriction of sale and purchase, 9) dispute between the owner (of cattle) and his servants, 10) defamation, 11) theft, 12) robbery and violence, 13) adultery, 14) duties of a man and wife, 15) partition of inheritance and 16) gambling and betting. These topics, though are not exhaustive yet they cover (a) the law of property, (b) law of persons and (c) law of obligations. These topics are based on the requirement of the society as reflected in the aims and aspirations of the people. They also include cases involving criminal liability.

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51 V.D. Mahajan’s History of Ancient India, p-338
52 Kautilyas Arthashastra contains important information of Mauryan times. Book III and Book IV of Arthashastra are very important as they contain details about Administration of Justice during Mauryan times: The former styled ‘The Dharmasthia’ or the law of courts deal with Vyavahara or positive law and the regulations concerning artisans, merchants, physician & others. The later titled “The Removal of Thorns” deals with the Prevention, trial and Punishment of offences.
53 Manu Smriti Vol. VIII p 4-7
The criminal law courts known as Kanta Kasodhana according to Kautilya, took cognizance of the following cases:

1) Protection of artisans, merchants etc., 2) Suppression of the undesirables, 3) detecting criminals by means of spies, 4) arresting the suspicious or real culprits, 5) post-mortem examinations, 6) discipline in various state departments, 7) punishment for mutilation, 8) capital punishment, 9) ravishment of immature girls, 10) examination by word and action thereon, and 11) miscellaneous offences.

Kantakasodhana was in the nature of the ‘doctrine of police power’. Hence, “the king in order to regulate the liberties of its people and to ensure the peaceful enjoyment of their rights was obliged under the doctrine of Kantakasodhana to remove all such impediments (thorns) which were injurious to the peaceful enjoyment of rights of the people and to root out all such anti-social order. In fact the conception of the administration of criminal justice went hand in hand with the police jurisdiction and the one completed the other and was completed by the other. There are detailed instructions in the Arthasastra for investigating cases of homicide and suicide. These go to show the high level that culture and civilization had attained during the epoch of the Mauryans. The term civil law and the criminal law appear for the first time during Mauryans times and were unknown to the old system.54

The opinion of the persons well versed in law was taken. The words of a person who acts in accordance with the dictates of law were considered divine and this enabled the King/Judge to engage the help of a person well versed in law. It is comparable to the appointment of amicus curiae by the courts prevalent under the present system. In all important cities and headquarters, there was established at least one court and one police head office. The village elders in panchayats settled petty cases. In civil cases, the Hindu code of law, as laid down in the Shastras, was followed. The evidence of respectable persons was relied upon.

54 V Sreenivasa Murthy; History of India Part 1, p 196 & 197; Maynes; Hindu Law and Usage p 11;
UB Singh: Administrative system in India Vedic age to 1947, p 47-48
Punishment used to be very severe, even for small offences like evasion of government taxes, giving false evidence, causing injury to artisans, ordinary theft etc., the body was mutilated.\textsuperscript{55}

- **Judicial Administration During Gupta Period**
  The theory of divinity of kings was popular during the Gupta period. The Gupta kings enjoyed a large number of powers including Political, Administrative, Military and Judicial Powers.\textsuperscript{56}

  The Gupta kings were not autocrats as they shared their powers with ministers and other high officers. To help them in administration, they had councils, consisting of princes, high officials and feudatories. Kalidas, the great Sanskrit playwright, refers to three kinds of ministers who were in charge of foreign policy, finance and justice. These, along with the Yuvaraja, possibly constituted the council of ministers.

  Judicial officers were called Mahadandanayaka and Mahakshapatalika etc. The Mahadandanayaka combined the duties of the Judge and the Military General. Mahakshapatalika was a keeper of records.

  Kalidas refers to Dharamasthana i.e. courts attended by the king in his capital. He also refers to Dharamdhikaras, who were required to be well versed in the scriptures of Dharma and had to maintain order in town.\textsuperscript{57}

### 2.2 THE MUSLIM PERIOD:
This Period also known as the Medieval period marks the beginning of a new era in Indian legal history. The judicial system of India during this period may be studied under two separate heads.

- The Sultanate of Delhi
- The Mughal period.

\textsuperscript{55} V.D. Mahajan; History of Ancient India, p 338
\textsuperscript{56} Ibid at p 527
\textsuperscript{57} V.D. Mahajan; History of Ancient India, p 527
2.2.1 JUDICIAL SYSTEM DURING THE SULTANATE PERIOD

Administration of justice was the primary function of the Sultan. The chronicles provide a wealth of information on the king's responsibility for upholding and maintaining the Shariah\(^{58}\). The Muslim canon law was applied to the Muslim population only while the non-Muslims were exempted from it. Thus two types of laws were recognized viz. Tashrii and Ghair Tashrii law\(^{59}\). In matters like inheritance, sale or transfer of property or Hindu marriage etc., presumably the customary laws of the Hindus were followed. The policy of the Delhi sultanate was minimal interference with the social affairs of the Zimmis.\(^{60}\) However, in cases of crimes, which constituted offence in every law, the same law was applicable to both the Muslims and the non-Muslims\(^{61}\).

During the Sultanate period, the Hindu chiefs were allowed to retain their principalities where the established legal system was not touched. In villages, the ancient system of local government was not disturbed and the village panchayats were left to carry on their traditional functions so long as they did not clash with the jurisdiction of the Qazis. The village headman i.e. muqaddam acted as both committing and trial magistrate while dealing with criminal cases\(^{62}\).

During medieval times, the Sultan was the supreme authority for administering justice in his kingdom. He had the original as well as appellate jurisdiction\(^{63}\). Justice was administered by him in three capacities\(^{64}\):

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58 The Shariah is the basic, divine Personal Law in Muslim countries. A.B.M Habibullah – The Foundation of Muslim Rule in India 3rd Edition p 226
59 Baillie; Digest of Muhammedan law, p 174
60 Non-Muslim
61 Husain: Administration of Justice in Muslim India p 15
62 A.B.M. Habibullah, the Foundation of Muslim Rule in India Chapter XIII 3rd Edition, p 226.
63 Ibid
64 U.B. Singh: Administrative system in India (Vedic Age to 1947 ) (1998) p 90
Diwan-e-Qaza (Arbitrator)
Diwan-e-Mazalim (Head of bureaucracy)
Diwan-e-Siyasat (Commander-in-chief of forces) (to deal with the cases of rebel & high treason.)
The courts were required to seek his (Sultan's) prior approval before awarding the capital punishment.\textsuperscript{65}

A. Classification and Gradation of Courts

A systematic classification and gradation of courts existed in the capital, the Provinces, the Districts, the Parganas, and the villages\textsuperscript{66}. They can be studied under following headings:

Central Capital

There existed six types of courts in the Capital.
(i) The King’s court: This was the highest court of appeal in the realm presided over by the king. It exercised both the original and the appellate jurisdiction. In cases arising out of violation or application of the religious side of the Shariah, he was assisted by the Mufti and Sadrus- Sudur while dealing with the cases of secular nature he sat with the qazi-ul-quzat (chief justice). He also held the summary trial in cases involving criminal offences.

Unlike other branches of the government, the Judiciary from the very beginning appears to have been a centralized department. The Sultan himself appointed Qazis to different provinces and localities, on the recommendation of Qazi-ul-Quzat. The appointment and dismissal of Amir-i-dad (later on known as dadbaks) was also under the control of the Sultan.
(ii) Diwan-i-Muzalim: This was the highest court of criminal appeal
(iii) Diwan-e-Risalat: The highest court of civil appeal
(iv) Sadre-Jahan’s court

\textsuperscript{65} Ibid
\textsuperscript{66} M.B. Ahmad: The Administration of Justice in Medieval India

39
Chief Justice's court (Qazi-ul-Quzat): The Chief Justice 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. Qazi-ul-Quzat lived in Delhi. Four officers namely Mufti, Pandit, Mohtasib and Dad Bak were attached to the court of Chief Justice.

Diwan-e-Siyasat: It was created to deal with the cases of rebels and those charged with high treason.

The chief justice (Qazi-ul-Quzat) was the highest judicial officer next to the Sultan. He used to live in the capital and decided cases with Amir-i-dad. (Probably he used to be the Chief City Magistrate for his designation suggested his association with detection and redressal of crimes). In 1248, Sultan Nazir-ud-Din, being dissatisfied with the then Chief Justice, created a superior post of Sadr-e-Jahan and appointed Qazi Minhaj Siraj to this post. Since then the Sadr-e-Jahan became the de facto head of the judiciary. The Court of Ecclesiastical Cases, which was under the Chief Justice upto 1248 A.D. was also transferred to the Sadre-Jahan and later on became popular as sadre Jahan's Court. The Sadre-Jahan grew more powerful and occasionally presided over the king's court. The offices of Sadr-e-Jahan and Chief Justice remained separate. Muhammad Tughlaq established a court known as the Diwan-e-Siyasat which continued till 1351. It was constituted to deal with the cases of rebels and those charged with high treason. Its main purpose was to deal with criminal prosecution.

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67 Ziauddin Barni: Tarikh-e-firozshahi p 441
68 Mufti was a lawyer of eminence attached to the court to expound law. Law as expounded by mufti was accepted as authoritative by the judge.
69 A Brahman lawyer. Known as Pandit. (His status was same as Mufti) was appointed to explain personal laws of Hindus in civil cases.
70 He was in-charge of Prosecution on original and Appellate Side.
71 An Administrative Officer of the Court.
72 It was Ala-ud-Din Khilji who amalgamated the two courts, but Firoz Tughlaq again separated them later.

A.B.M. Habibullah: The foundation of Muslim Rule in India: (3rd edition), p-227
The Provinces

In each of the Provinces, five courts were established -

i) Adalat Nazim Subah (Governor's or Subehdar's courts); he exercised the original and the appellate jurisdiction. While exercising his original jurisdiction, he used to sit alone in judgment but while hearing appeals, the Governor sat with Qazi-i-Subah.

ii) Adalat Qazi-e-Subah (presided over by chief provincial Qazi); he had the jurisdiction to try civil and criminal cases of all descriptions and was empowered to hear appeals from the courts of district Qazis. He was to supervise the administration of justice and to see that the Qazis in their districts carried out their duties properly. He was appointed by the Sultan on the recommendation of the Chief Justice. Mufti, Pandit, Mohtasib and Dabaks were the four officers attached to this court.

iii) Governor's bench (Nazim-e-Subah's Bench)

iv) The court of Diwan-e-Subah: He was the final authority in the provinces to hear cases relating to land revenue.

v) The Sadre-e-Subah i.e. Court of Chief Ecclesiastical Officer. He represented Sadr-e-Jahan in Subah in matters relating to grant of stipend, lands etc.

Districts

In each District (at District Headquarter) six courts were established:

(i) Court of Qazi: This court, as the name suggests, was presided over by the District Qazis who had an original jurisdiction to hear all civil and criminal cases. Under the appellate jurisdiction, he used to hear appeals from the judgment of the Parganah Qazi, Kotwals and Village Panchayat. Four officers namely Mufti, Pandit, the Mohtasib and the Dadbak were also attached to the court of district Qazi.

(ii) Dadbaks or Amir-i-dad: He used to be the chief city magistrate. He used to detect and redress the crimes taking place in his jurisdiction.

(iii) Faujdars: Used to deal with petty criminal cases concerning security and suspected criminals.
(iv) Court of Sadr: The court mainly dealt with the cases concerning grant of land and registration of land.
(v) Court of Amils: Dealt with land revenue cases. Appeals from the decisions of this court lay with the court of Diwan-e-subah.
(vi) Kotwals: The police work was the responsibility of Kotwal who maintained law and order and even helped in military defence. Another officer called rais-i-bazar, who also performed some police work and used to supervise the market, checked dishonest dealings, hoarding and profiteering.

The Parganah
In each Parganah two courts were established:
- Qazi-e-Parganah (Dealt with all civil and criminal cases except hearing appeals).
- Kotwal (Petty criminal cases were filed before the kotwal). He was the principal executive officer in town.

Villages
A parganah was divided into a group of villages, and for each group, there was a village assembly or panchayat. The village panchayats were left to carry on their traditional functions so long as they did not clash with the jurisdiction of the Qazis. The village headmen i.e. muqaddam acted both as committing and trial magistrate while dealing with crimes. The Faujdar appointed the chairman of panchayat or the Sarpanch. The panchayats used to give their decisions on the basis of prevalent customs and their decision was binding on the parties and no appeal was allowed against their decisions.

B. Separate Judicial Organization for the Army
During the Sultanate period, there existed separate judicial organization for the army. ‘Qazi-i-laskar’, an officer in military camps used to administer martial law. This office became very important in Barani’s times and only able and honest men, well versed in Shariah were

Ibid p 228

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appointed to it in the Khalji period. The amir-i-dad was also a member of the military court and this was perhaps a normal practice.\textsuperscript{74}

C. Appointment of Judges and Judicial Standards
During Medieval times, the Sultans appointed Judges on the basis of their high standards of learning in law. Ibn Batuta\textsuperscript{75} has stated that Qazis were teachers of law who had the ability to give correct judgment. Whenever unpopular and corrupt persons were appointed Qazis, public resentment was often expressed. Incompetent and corrupt Qazis were ridiculed, condemned and dismissed from their offices.

D. Remuneration of Judicial Officers
Remuneration was paid to the judicial officers for the services rendered to the state. However, the payment, in case of higher officers was not made in cash but by way of revenue assignments. There is evidence to prove the fact that Qazi-ul-Quzat was paid in this manner and the revenue of some specified Iqtas was permanently attached to the office of Amir-i-Dad. In the Tughlaq period, the Judges also appeared as a salaried staff, but this may be due to the Khalji centralization and effect of substitution of the assignment system by cash payment as was done in other departments\textsuperscript{76}.

\textbullet Judicial Reforms of Sher Shah Suri
M.B. Ahmad in his work\textsuperscript{77} has summarized the judicial reforms introduced by Sher Shah Suri. Sher Shah Suri introduced the system of having in the parganahs, separate court of first instance for civil and criminal cases.

(i) At each parganah, he stationed a civil judge called Munsif (a title which survives to this day, to hear civil disputes) to watch the conduct of Amils and the Muqaddams (officers connected with revenue collections). The shiqadhars, who had until now powers

\textsuperscript{74} Ibid p 229, Barni Tarikh-e-firozshahi p 47
\textsuperscript{75} Elliot: Ibn Batatua Travels p 56-71
\textsuperscript{76} V. Sreenivasa Murthy Part-ll, p 229: History of India
\textsuperscript{77} The Administration of Justice in Medieval India p129
corresponding to those of kotwals, were given magisterial powers within the parganahs. They continued to be incharge of the local police.

(ii) Muqaddams or head of the village councils were recognized 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 drawn up for the first time in India.78

(iii) When a Shiqadhar or a Munsif was appointed, his duties were specifically enumerated.

(iv) The judicial officers below the chief provincial Qazi were transferred after every two or three years. This practice continued in British India also.

(v) The duties of Governors and their deputies regarding preservation of law and order were emphasized.79

(vi) The Chief Qazi of the province or the Qazi-ul-Quzat was, in some cases, authorized to report directly to the emperor on the conduct of the Governor especially if the latter made any attempt to override the law80.

2.2.2 THE MUGHAL PERIOD

In India, the Mughal period begins with the victory of Babar in 1526 over the last Lodhi Sultans of Delhi. His son, Hamayun, though lost his kingdom to Sher Shah Suri in 1540, regained it after defeating the descendents of Sher Shah Suri in July 1555. The Mughal Empire continued from 1555 to 1750 through many ups and downs.

Judicial Administration

The Judicial System of the Mughals was modelled on that of the Caliphate of Baghdad and of Egypt with such modifications as tailored to the age and conditions prevailing in India.81

78 Henry Elliot & Dowson: History of India, Vol. IV p 414
79 Ibid p 420
80 M.B. Ahmad: The Administration of Justice in Medieval India: p 129
81 R.C. Majumdar J.N. Chaudhuri: The History and culture of the Indian people, the Mughal Empire (1994) p 545
A. Composition of Courts

The Emperor was considered the fountain of justice. There was a separate department of justice (Mahekma-e-Adalat) to regulate and ensure that justice was properly administered. The highest court of the empire was established in Delhi (the imperial capital), which had both original and appellate jurisdictions. Separate courts were established to decide Civil, Criminal, and Revenue Cases.

The Mughal emperors regarded speedy administration of justice as one of their important duties and their officers did not enjoy any special protection in this respect. Akbar said, “If I were guilty of an unjust act, I would rise in judgment against myself. What shall I say then of my sons, my kindred and others.” The Mughal emperors of India prided themselves on their love for equity and regarded administration of justice as an important duty, which a sovereign could not afford to neglect. The love for justice of the emperors like Jahagir, Shah Jahan and Aurangzeb is well known. Though access to the emperor, wading through all kinds of official obstruction was not very easy, at least two Mughal emperors Akbar and Jahangir, granted to their subjects the right of direct petitioning. The latter allowed a Chain of Justice (with bells) to be hung outside his palace to enable the petitioners to bring their grievances to the notice of the emperor. The Qazi-ul-Qazat or the Chief Qazi was the principle judicial officer in the realm. He appointed Qazis in each provincial capital, who made investigations into, and tried civil as well as criminal cases of both the Hindus, and the Muslims; the Muftis expounded the Muslim law, and the Mir Adils drew up and pronounced judgments. The Qazis were expected to be just, honest, impartial and to hold trials in the presence of the parties; and in court; and they were not supposed to accept presents from the people whom they served, nor to attend entertainments given by anybody.

M.B. Ahmad: The Administration of Justice in Medieval India: p 143-156
The Qazis department became a by-word for official malfeasance in the Mughal times. There were no primary courts below those of Qazis. The villagers and the inhabitants of smaller towns settled their differences locally by appeal to panchayats, through the arbitration by an impartial umpire or by resort to force. The Sadr-us-Sudar exercised supervision over the lands granted by the Emperor or Princes to pious men, scholars, and monks; and tried cases relating to them. Below them was a local Sadr in every province. Above the urban and provincial courts was the emperor himself who, as the Khalifa of the age, was also the fountainhead of justice and the final court of appeal. Sometimes he acted as a court of first instance too. Fines could be imposed and the court could inflict severe punishments like amputation, mutilation and whipping without any reference to the emperor, but his consent was necessary in awarding the capital punishment. There was no regular jail system but the prisoners were confined in forts.84

(I) The Imperial Capital Delhi:
The capital of the Mughal emperors in India, had three important courts: -
- The Emperor’s court, presided over by the Emperor, was the highest court in the empire. The emperor administered Justice in person.85 The Emperor, while dispensing justice in this court, was assisted by a Darogha-e-Adalat, a Mufti, and Mir Adi.
- In criminal cases, the Mohtasib-e-Mumalik or chief Mohtasib (like today’s Attorney General) also assisted the emperor. In order to hear appeals, the emperor presided over a bench consisting of Chief Justice (Qazi-ul-Quzat) and Qazi’s of Chief Justice’s court. The bench decided questions both of fact and law. When authoritative interpretation of law on a particular point was required, the King could refer the same to the Chief Justice’s Bench.

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84 Dr. Gokulesh Sharma (Add Civil Judge): Judicial and Administration System during Mughal Empire: AIR 1997 Journal p 59-60.
85 Dr. Gokulesh Sharma: Judicial & Administrative System during Mughal Empire AIR 1997 Journal p 59, U.B. Singh: Administrative system in India p 120
Next to the Emperor’s Court was the Court of Chief Justice (Qazi-ul-Quzat) who held the office of chief sadr too. The emperor appointed the Chief Justice and the court had the power to try original, civil and criminal cases to hear appeals from the provincial courts. It was also required to supervise the working of Provincial Qazis and Qazis posted at the headquarters of districts and parganas. In administering justice, the Chief Justice was assisted by one or two Qazis of great eminence who were attached to his court as puisne Judges. The Qazis decided religious cases mostly dealing with Personal law of Muslims such as marriage, divorce, inheritance and the like. Besides these cases he was also the head of ecclesiastical and charity department. The four officers attached to the court were Darogha-e-Adalat, Mufti, Mohtasib, and Mir Adil. The Mufti attached to Chief Justice’s court was known as Mufti-e-Azam.

The third important court was the Chief Revenue Court. It was the highest court of appeal to decide revenue cases and was presided over by Diwan-e- Ala.

Besides these courts, there were two more courts at Delhi to decide local cases:—

- The court of Qazi of Delhi to decide local, civil, and criminal cases;
- The courts of Qazi-e-Laskar, which was specially constituted to decide cases from the military area in the capital.

(II) The Provinces:

In each province, there were three courts:—

- The Governor’s own court, presided over by the Governor.
- The Provincial Chief Appellate court, presided over by Qazi-e-Subah.
- The Provincial Chief Revenue court, presided over by Diwan-e-Subah.

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86 R.C. Majumdar & J.N. Chaudhuri: The History and culture of the Indian people, the Mughal Empire (1994) p 545
87 Ibid, p 548-549
(III) Districts (Sarkars):

In each District, there were four courts namely:-

- the chief civil and criminal court of the district; presided over by Qazi-e-Sarkar (Shariyat Panah). The court had the original and appellate jurisdictions in all civil, criminal, and in religious matters.88

- Fauzdar Adalat: It dealt with criminal cases concerning riots and state security. This court was presided over by the Fauzdar. Appeals against its decisions lay to the Governor's court.

- Kotwali Court: Presided over by Kotwal-e-Shehar that decided cases similar to those under the modern police act and had appellate jurisdiction. Appeals lay to District Qazi.

- The A-malguzari Kachehri decided all revenue cases. A-malguzar presided over this court.89

(IV) Parganah

In each Parganah, there were three courts:

- Adalat-e-Parganah: Presided over by Qazi-e-Parganah. The court had jurisdiction over all civil and criminal cases arising within its local jurisdiction.

- Court of Kotwali: Presided over by Kotwali-e-Parganah.

- Kachehri: Presided over by Amins. These courts were used to decide revenue cases.

(V) Villages

In villages, panchayats performed judicial functions. The panchas were authorized to dispense justice for the local area in panchayat meetings. The villagers elected panchas. The village headman was generally the President of panchayat. The decisions of the panchayats were almost invariably unanimous and punishment inflicted were fines, public degradation or reprimand or ex-communication. No sentence of imprisonment was awarded because there was no proper authority to

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88 Henry Elliot and Dowson: History of India, Vol. Ill, p 172-173
89 Alexander Dow: History of Hindustan Vol. Ill, p 752
execute these sentences and also because there were no jails in the villages.  

B. Institution of Lawyers:
Professional legal experts represented litigants before the courts. They were popularly known as Vakils. The legal profession flourished during the Mughal period. Two Muslim Indian codes namely Fatwa-i-Firoz Shahi and Fatwa-i-Alamgiri clearly state the duties of vakil. Ibn Batuta who was working as a judge during the reign of Mohammad Tughlaq mentions Vakils in his book.  

State advocates were for the first time appointed during the reign of Shahjahan to defend civil suits against the state. During Aurangzeb’s reign, whole-time lawyers were appointed in each district who were known as Vakil-e-Sarkar or Vakil-e-Shara. They were appointed either by the Chief Qazi of the province or sometimes by the Chief Justice (Qazi-ul-Quzat). Sometimes they were appointed to assist the poor litigants by giving them free legal advice. The Vakils had a right of audience in the court and it was expected that the Vakils would maintain a high standard of legal learning and behaviour. 

C. Law
Nothing like modern legislation or a written code of laws existed in the Mughal period. The only notable exceptions to this norm were Jahagir’s twelve ordinances and Fatawa-i-Alamgiri, a digest of Muslim laws prepared under Aurangzeb’s supervision. The Judges chiefly followed the Quranic injunctions or precepts, the fatwas or previous interpretations of the holy law by eminent jurists and the qanunvas or ordinances of the emperors. They did not ordinarily disregard customary laws and sometimes followed principles of equity. Above all, the

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90 R.C. Majumdar & J.N. Chaudhuri: The History and culture of the Indian people, the Mughal Empire (1994) p 549
91 Ibn Batuta, Travels p 194
emperor’s interpretation prevailed provided it did not run counter to the sacred laws.92

D. Trial by Ordeal
The Muslim law prohibited the use of trial by ordeal to determine the guilt of a person. It was favoured neither by the Sultans nor 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 rulers neither adopted it nor asked the non-Muslim states to stop it.93

Criminal Law and Punishments
During the Muslim period, all the Sultans and Mughal Emperors followed the Islamic law or Shara. The Shara is based on the principles enunciated by the holy Quran.

“Islamic Jurisprudence recognizes three kinds of crimes: offences against the state, offences against private individuals and offences against god. These offences were punishable with death. Offences against the state and Private individual were compoundable according to the law of Islam94 the punishments, as recognized by the Muslim law were – Hadd, Tazir, and Qisas,95

92 Dr. Gokulesh Sharma: Judicial & Administrative System during Mughal Empire AIR 1997 Journal p 59
93 Sultan Jalal-ud-Din Khilji made the earliest attempt 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 the ordeal of fire. Emperor Akbar tried to encourage the system of trial by ordeal and it was most probably to please the Rajputs. The Muslim law expert strongly opposed his move to introduce the trial by ordeal and therefore Akbar gave up the idea.
94 Zia ud-din Barni: Tarikh-e- Ferozshahi p 211
95 UB Singh: Administrative system in India (Vedic Age to 1947), p 121
96 MB Ahmad: The Administration of Justice in Medieval India, p 225
a) Hadd provided a fixed /unalterable punishment as laid down in the Shara, the Islamic law for crimes like theft, highway robbery, whoredom (zine), fornication, apostasy, false accusation of adultery, defamation (Itieham-e-zina) and drunkenness. Hadd was a deterrent punishment and always took definite forms like stoning, scourging, amputation of limbs for certain well defined offences. However, scourging and stoning could not be combined. It was equally applicable to Muslims and non-Muslims and the state was under a bounden duty to prosecute all those who were guilty under the Hadd. No relaxation was granted to anyone under this provision.

b) Tazir is a reformative punishment. It was another form of punishment which meant prohibition, which was applicable to all the crimes not classified under the Hadd and for which no expiation is prescribed. It included crimes like counterfeiting coins, gambling, causing injury, minor theft etc. Under the Tazir, the court exercised its 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, impairment. "It may include imprisonment, exile, corporal punishment, a reprimand, fine or other humiliating proceedings. But the delinquent must be mentally sane for the imposition of this punishment. The kind and amount of punishment was in the hands of the Judge"\textsuperscript{96}.

c) Qisas was retaliation. It applied in cases of killing and wounding which did not prove fatal. This was called blood for blood. In case the next of kin demanded a legal punishment, it had to be awarded by the Judge. However, if the next of the kin accepted the blood money called Diya offered by the murderer and pardoned him unconditionally, the offence could be compounded and no further cognizance of it could be taken by any one. However, the Muslim Law considered Treason (Ghadr) as a crime against God and religion and therefore against the state. Persons held responsible for treason by courts were mostly punished with death. No consideration was shown for their rank, religion and caste. Only the

\textsuperscript{96} Dr. B.S. Jain: The Administration of Justice in 17th Century India 1\textsuperscript{st} Edition p. 62; J.N. Sarkar, The Mughal Administration 4\textsuperscript{th} Edition p 104
rulers were empowered to consider a mercy petition. The contempt of court was considered a serious offence and was severely punished during the Muslim period.97

JUDICIAL SYSTEM IN MODERN INDIA

A. The British Judicial System in the Factory Towns

The British came to India initially as traders under the banner of The East India Company98 Queen Elizabeth granted a charter in 1600 to the company for the purpose of carrying out trade in India and East Indies. It empowered the company to make laws, ordinances etc. for the good governance of the company and its servants and to punish its servants for breaches of its laws and rules, by fines, imprisonment and amercements but it could not enact laws which prescribed capital punishments. However, fines etc. to be imposed had to be reasonable and not contrary or repugnant to the laws, statute or customs of England, which meant the company was not allowed to make any fundamental deviation from the English legal principles99.

The charter of 1600 AD was renewed in 1609 AD by James-I. Subsequently the charters of the years 1615, 1623 and 1635 were granted to the company. Not many changes were brought about by these charters except that the 1623 charter provided that besides fine and imprisonment, death sentence could also be imposed by the company in cases of mutiny, murder or other felony after a jury trial.100

The powers granted by these charters were restricted in scope and were limited to meet the requirement of maintaining discipline over the company men. With the proliferation of new factories and manifold increase in their activities, the company felt the need to maintain discipline among all the British residents within their jurisdiction and to

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97 ibid
98 The Governor and Company of Merchants of London Trading into East Indies.
99 M.P. Jain: Outline of Indian legal history; S.S. Shelwant’s Legal and Constitutional History of India 2003 p 2 H.V. Sreenivasa Murthy’s History of India Part II, p 123
100 S.S. Shelwant’s Legal and Constitutional History of India 2003 p 2-3
punish offenders according to the laws of England. The company made a representation to the council of states in England to grant it the requisite powers and privileges to settle disputes amongst the English residents. Accordingly, Charles II issued a new charter to the company in 1661; authorising the Governor and Council of each Factory with “the power to judge all persons whether belonging to the Company or living under them and in all causes, whether civil or criminal according to the laws of England and to execute judgment accordingly”.101

The charter of 1661 conferred on the Governor and the council extensive judicial powers. It could try and punish all those persons living in the settlement of the company including the Indians and award even the death sentence. Moreover the charter made the first systematic attempt to apply the English law in India. What is more the charter also vested in the executive the judicial power as well.

The charter of 1683 made provisions for the establishment of a court consisting of one person learned in civil law and two assistants to be appointed by the company. The courts were empowered to settle disputes relating to mercantile and maritime cases.102 Administration of justice during this period was in a rudimentary stage. “Those who were charged with administering justice were deficient in legal training and more interested in business than judicial administration; and they decided cases according to their sense of justice and fair play rather than according to law”103. Moreover, the local courts suffered from many evils. Corruption and bribery were rampant and there are a number of instances wherein the Judges set free criminals after accepting bribes. In the absence of any written laws or codes, there was great scope for discretion and hence corruption and favouritism104

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101 M.P. Jain: Outlines of Indian Legal History at p 6
102 H.V. Sreenivasa Murthy: History of India Part II p 124
103 M.P. Jain: Outlines of Indian Legal History at p 7
104 H.V. Sreenivasa Murthy: History of India Part II p 127.
B. Administration of Justice in Presidency towns

The company established its first factory in Surat on a permanent basis on a grant obtained from Jahangir by Thomas Aldworth. The Mughal Emperor issued a firman permitting the British settlers to live according to their own laws, administered by their own officers. The Mughal authorities after granting permission to the East India Co. to establish their factory at Surat, further granted it permission to set up other factories at Agra, Ahmedabad, Broach and Masulipatnam. What was really more material than the early expansion of mercantile activity was the actual acquisition of land by the company in three widely separated, but strategically crucial spots - Madras, Bombay and Calcutta which ultimately rose to the rank of presidency towns.¹⁰⁵

1. Madras Presidency:

The judicial administration in the Madras presidency from 1639 AD to 1726 AD can be studied in 3 phases.

First phase: 1639-1665:

During this phase, the judicial system was in a rudimentary stage. The Agent and Chief Officer Of the council looked after the administration of the company. Inside the fort lived the Englishmen and hence it was known as the ‘White Town’ and Madraspatnam where local people lived had come to be known as the ‘Black Town’. The agent and the council enjoyed both the executive and judicial powers of the white town and also administered the black town. They were empowered to decide all civil, criminal and other matters. However, this machinery being deficient in legal training, found it difficult to decide serious offences like murder.¹⁰⁶

The English did not disturb the indigenous system prevailing in the Black Town. The Choultry Court presided over by the village headman known

¹⁰⁵ Madras became a presidency town in 1665, while Bombay was raised to this status in 1687. Calcutta became a presidency last of all in December 1699.
¹⁰⁶ M.P. Jain: outlines of Indian legal History at p 11
as Adigar decided petty civil and criminal matters. Nothing is known as to how the cases of serious nature were decided.  

**Second Phase: 1665-1686**

During this phase, certain changes took place in judicial administration. With the rise of Madras to the status of presidency in the year 1665, the governor and council began to work as court though they had no legal training.

In March 1678 the Governor and the council resolved that they would sit two days in a week to decide cases in all civil and criminal matters according to the laws of England with the help of a Jury (of 12 men). This court called the High Court of Judicature was formally inaugurated on the 27th March 1678. This court also heard appeals against the decision of the Choultry court.

The reorganization of the judicial machinery touched the country court as well. It now came to be composed of the company servants and it would sit two days in a week. It tried petty cases involving a sum of up to 50 pagodas. With the consent of the parties concerned, cases involving higher sums could be tried. The Governor and the council decided cases which did not come under the purview of the Choultry court.

**Third Phase: 1686-1726**

a) During this phase, two kinds of courts were established i.e. The Admiralty Court and the Mayor’s court and Choultry courts were reorganized. The Admiralty Court was established under the Charter of 1683, for deciding mercantile and maritime cases of trespass, injuries and wrongs done or committed on high seas, or within the charter limits the cases of forfeiture and seizure of ships/goods which came for trade within the company’s monopoly area. It was to consist of 3 members one

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107 Ibid p 12
108 H.V. Sreenivasa Murthy: History of India Part II p 127-128
109 M.P. Jain: Outlines of Indian Legal History at p 13-15

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of whom was a person learned in civil law and two merchants appointed by the company. The court was to decide the cases based on the principles of equity, justice and good conscience and the customs of the merchants. It could determine its own procedure subject to the directions of the crown.\footnote{Ibid p 15}

b) Mayor's Court:- In 1687, under the charter issued by the company, a municipal corporation was established at Madras and the Mayor and the Aldermen were constituted in a court for administering civil and criminal justice. Mayor's Court was a part of Municipal Corporation and the mayor was to be an Englishman only.

The Mayor and the Aldermen appointed a lawyer-member as the Recorder of the court to assist them in judging the cases of 'considerable value and intricacy'. The court decided both civil and criminal cases. The criminal cases were tried with the help of the jury. It had the jurisdiction to try civil cases up to three pagodas and inflict such punishments as fine, amercement, imprisonment and corporal punishment. In criminal cases where the sentence was for loss of life or limb, the aggrieved could appeal to the Admiralty Court. When the admiralty court ceased to sit regularly, the Governor and the council heard appeals in civil and criminal matters. Punishments were severe and often barbarous in nature.\footnote{H.V. Sreenivasa Murthy: History of India part II p 129}

There is a recorded instance of an Indian hanged for robbery and his head stuck up in a prominent place.\footnote{A Hindu accused of stealing some clothes from a washerman was sent to St. Helena as a slave. In one case of perjury, the Mayor's Court passed the sentence of loss of ears, standing in pillory and whipping out of Company's bounds. In one case, an Indian convicted of murder was sentenced to be hanged and his body in chains was displayed at a prominent place. M.P. Jain : Outlines of Indian Legal History p 21.} We find major native malefactors being hanged, and English men whipped or burnt in the hand. Benefit of
doubt was not given to the accused. But the ‘benefit of clergy’, after conviction for theft or manslaughter, was claimed by Englishmen.

2. **Bombay Presidency:**
The growth of judicial system in Bombay is characterized by three stages from 1668 to 1683, 1684 to 1693 and 1718 to 1726. There are many similarities in the growth of justice systems of Madras and Bombay. Again the administration of justice in Bombay suffered from the same weaknesses and uncertainties as it did in Madras.

(i) **First Stage: 1668-1683**
The first judicial system was established in Bombay in 1670. Bombay was divided into two divisions and a court consisting of five judges was established in each of them. It was presided over by the customs officer. They were to have powers to hear, try and determine cases of small theft and civil cases where subject matter did not exceed 200 xeraphins (about Rs 150). The Deputy Governor and Council who worked as a superior court heard appeals from the divisional courts. It had both original and appellate jurisdictions and heard serious cases with the help of the jury.

The governmental proclamation issued in August, 1672 replaced the existing Portuguese laws by the English law and created three types of courts: Court of Judicature, Court of Conscience and Court of Appeals.

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113 A technical Principle of the English Ecclesiastical law, known as benefit of clergy was available to English men as a defence and was commonly invoked in cases of Manslaughter; In such a case, the accused was branded on the hand and discharged.

114 H.V. Sreenivasa Murthy: History of India Part II p 131

115 S.S. Shilwant: Legal & Constitutional History of India, p 22

116 Portuguses were the first European nation to acquire Bombay in 1534 by cession from king of Gujrat. It was in the year 1661 that island of Bombay was transferred to the English King Charles II, by the Portuguese king, as dowry, when the former married the sister of the latter. So till the proclamation was issued portuguese laws were Pravelent.
(ii) Second Stage: 1684-1690

As per the charter of 1683, the Admiralty Court was established in Bombay in 1684 with Dr. John as the Judge-Advocate to try all cases, civil, criminal, admiralty and maritime matters. But soon it became the object of jealousy of the Council, which failed to tolerate any person or institution as superior to itself in any matter whatsoever.¹¹⁷

The island of Bombay was attacked and captured by Siddi, an Admiral of the Mughal Emperor in 1690. He held sway over the island till 1712. This marked the end of the second stage of uncertainty or halted development of the judicial system in Bombay.

(iii) Third Stage: 1718-1726

During this stage, Bombay went through with more judicial plans. On 25th March, 1718, "a court of Judicature" was established with a Chief Justice and nine other judges of whom four were Indians. The four Indian judges of the court represented the major communities Hindus, Muslims, Portuguese-Christians and Parsis. The jurisdiction of the court extended to all cases, civil, criminal and testamentary. The court administered justice on the principles of equity, justice, and good conscience and the rules and ordinances of the company made from time to time. Although the judges were guided by the English law, they were required to take cognizance of the caste customs. It also worked as registration office and possessed jurisdiction over 'matters of probate and administration of estate'. The court-fee was moderate and three English judges (Indian judges did not count) constituted the quorum. The Governor and Council heard appeals from this court.¹¹⁸

3. Calcutta Presidency 1690-1726

As zamindar, the company at Calcutta not only collected revenue but also dispensed justice in all matters - civil, criminal and revenue, pertaining to the Indian inhabitants of the settlement. The English

¹¹⁷ Raj Kumari Agrawala, Indian legal system, p 107
¹¹⁸ S.S. Shilwant: Legal and Constitutional History of India p 28
collector who collected the revenue also decided civil and criminal disputes arising within his jurisdiction. As for Englishmen, the collector dealt with only petty civil cases and the rest went before the Governor and Council as per the Charter of 1661. Since there was no definite law to be followed, the collector, in addition to his discretion, took cognizance of the customs and usages of the parties to the dispute. He could award the death sentence, but it could be executed only with the approval of the Governor and the Council. Appeals from this court lay to the Governor and the council.

Such was the way in which justice was administered in Calcutta prior to 1726. It was extremely rudimentary and at best it may be described 'less as judicial system and more as an administration of convenience.'

C. Introduction of authoritative and uniform Judicial Pattern 1726-1773

Prior to 1726, the system of judicial administration in 3 presidency towns was found wanting in uniformity and remained disoriented, informal and unsatisfactory. Another limitation to the existing judicial system was the absence of courts with testamentary and intestate jurisdiction with the powers to grant probates and letters of administration in cases where the executors of the deceased or his legal representatives died intestate though not to be found in the settlement in India, and recognized no authority by the courts in England. This led to the company getting into endless litigation in England, which it sorely wanted to avoid. To overcome these serious shortcomings, the company petitioned the crown with a request to grant it "such powers as may conduce not only to the punishing of vice, administration of justice and better governing the factories and settlements abroad" and to establish courts "with civil and testamentary jurisdiction to take cognizance of such cases (where the executors of the deceased and his legal representatives, if he died intestate), but also to establish them

119 H.V. Sreenivasa Murthy: History of India Part II, p-134
120 Ibid
under authority that would be recognized by the English courts." The result was the issuance of the charter by King George-I on 24th September, 1726, hailed as the ‘first judicial charter.’

**The Charter of 1726: Establishment of the Mayor’s Courts**

The charter of 1726 brought about significant changes in system of judicial administration in the three presidency towns of Calcutta, Bombay and Madras. Prior to this charter, there existed different types of Legal systems in the three Presidencies. King George-I of England granted the charter of 1726 to the company, which turned over a new leaf in the evolution of judicial institutions. The courts were put on an entirely new pedestal and for the first time in the history of the company, Crown’s Courts were established in the presidencies on a uniform and definite basis. Moreover, the charter introduced for the first time the system of appeals from the courts in India (i.e. Governor-in-Council) to the Privy Council in England. Because of its great contribution in the field of law and justice, the charter came to be known as ‘Judicial Charter.’

The charter provided for the establishment of Mayor’s court in all the three Presidencies. The court comprised of The Mayor and nine Aldermen and had the authority to hear all the Civil Cases arising within the town and all sub-ordinate factories, which fell within its jurisdiction. The first appeal from the decision of Mayor’s Court lay with the Governor-in-Council and further appeals in all those cases involving 1000 pagodas to the King-in-Council. In Mayor’s Court, the English law - both the common law and the statute law was followed. The court also had the testamentary jurisdiction.

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121 M.P. Singh, Outlines of Indian Legal and constitutional History, VIIth Edn. (1984), p 1617
122 HV Sreenivasa a History of India—II, p 136, SS Shilwant Legal & Constitutional History of India, p 36-40
123 M.P. Jain: Outlines of Indian Legal History at p 35
The charter vested criminal jurisdiction in the Governor-in-Council (Governor and five members). The councils were empowered to try and punish each and every offence except high treason (treachery against the state).

Legislative Power
The charter also empowered the Governor-in-Council of each presidency to make bye-laws, rules and ordinances for the good governance and regulation of the corporation and the inhabitants.

Merits of the Charters
The chief merit of the charter lies in its establishment of regular, definite, uniform and authentic judicial system in all the three presidencies of Madras, Bombay and Calcutta. For the first time, the courts in India began to draw their authority from the crown instead of from the company, which implied formalization of judicial authority. The charter also extended, for the first time the jurisdiction of the king-in-council to India. In initiating a system of appeals from India to the Privy Council in England, it laid a very important milestone in the history of Indian Courts. The Privy Council remained the last court of appeal for India for more than two hundred years.\(^{124}\)

Demerits of the Charter
The Mayor’s Courts which the charter established did not prove successful because they administered only the English law and were presided over by the Judges who lacked legal qualifications and training. The enforcement of English law caused great hardships and dissatisfaction to the natives because their personal laws and customs were summarily ignored. It caused resentment among the natives against the court.\(^{125}\)

\(^{124}\) H.V. Sreenivasa Murthy: History of India Part II p 136
\(^{125}\) Ibid p 136
The judicial system envisaged by the Charter failed to function smoothly due to strained relations between the court and the Governor in Coun.

Madras came under the occupation of the French in September 1 and remained with them till August 1749. During this period, the Mad Corporation had ceased to function. The company availed of opportunity to request the King to issue a new Charter with a view removing the shortcomings of the Charter of 1726. Thereupon George II issued a fresh Charter on 8th January, 1753 which was applicable to all the three Presidency towns.126

**The Charter of 1753**

The charter of 1753 continued the existing system with the following modifications: First of all the charter restricted the jurisdiction of Mayor Court vis-a-vis the Indians i.e. the court had no jurisdiction to entertain suits between the natives unless both the parties agreed to submit themselves to the court’s jurisdiction. Moreover, the Mayor’s Court heard cases against the Mayor and the company.127

The court could entertain suits of the value of five pagodas. The Charter aimed at introducing impartial and effective justice. For this purpose, the Mayor’s Court was authorized to entertain action against the Mayor. Also, the Charter forbade a person from sitting as a judge to hear a matter if he had any interest in it. The court was empowered to hear suits against the Company and the suitors were required to deposit money with the Government. Further, a new court called the ‘Court Requests’ was created at each Presidency town. This court was empowered to decide cheaply, summarily and quickly small cases up to the value of five pagodas128 or nearly 15 rupees. “The idea underlying the creation of the court was to help the poor litigants with small claims, who could

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126 H.V. Sreenivasa Murthy: History of India part II, p 138
127 H.V. Sreenivasa Murthy: History of India Part II, p 134, SS Shilwanth Legal Constitutional History of India, 2003, p 46-50, M.P. Jain: Outlines of Indian Legal Hi at p 46
128 H.V. Sreenivasa Murthy: History of India Part II p 138
defray the expenses of litigation at the Mayor's Court.\textsuperscript{129} The court was to sit once a week and the Judges to the court called Commissioners were initially appointed by the Governor and Council from amongst the servants of the company. Later on, half of them were to retire annually and their places were to be filled by ballot by the remaining Commissioners. The number of Commissioners was to be between 8 and 24 and three of these Commissioners were to sit in the court by rotation on every court day. It possessed the jurisdiction to hear matters relating to the native people.

The judicial scheme of 1753 was not conducive to the development of a sound administration of justice. It was too much executive-ridden. True, it ended serious conflicts between the executive and the Judiciary but this was done at the expense of the independence of the Judiciary. There was no Indian representative in the court; the court never functioned impartially and this was particularly true in cases involving the servants of the Company and the natives. The Judges who handed civil and criminal justice, like before, lacked the knowledge of law. In other words the Charter of 1753, instead of furthering the advancement of the judicial system, completed the stranglehold of the Executive over the Judiciary.\textsuperscript{130}

Courts for the Natives

The Presidency Governments realized the need for providing some judicial forum for the natives. In Madras a Sheriff's Court was created to try cases ‘without appeal to the Mayor's Court, unless the judgment involved a sum greater than five pagodas’. When the Court of Directors of the Company disapproved the new scheme, the Choultry Court began to work in 1775 and continued till it was finally abolished in 1800. Meanwhile, in 1796 a court under a servant of the Company was improvised to decide civil dispute between the natives over the value of

\textsuperscript{129} M.P. Jain: Outlines of Indian Legal History at p 45
\textsuperscript{130} HV Sreenivasa History of India—II, p 139
five pagodas. The court sat twice a week. In 1793, it yielded place to the Recorder’s Court.

Calcutta was comparatively free from the peculiar problems that prevailed in Madras. The ban on Mayor’s Court trying cases of the natives did not put them to difficulty as the jurisdiction of the Indians was placed under the Zamindar’s or Collector’s Court presided over by a single judge. After 1753, the Zamindar’s Court took cognizance of cases over the value of five pagodas while below that value was tried by the Court of Requests.

There are also instances of quarter sessions trying cases involving only natives, though they were to entertain appeals made by non-Indians, and punish as per the English Law.

The situation in Bombay was different. Since the Company claimed full sovereignty over the island, it did not deem it necessary to set up separate courts for trying disputes of the natives. Unlike in the Presidency towns of Madras and Calcutta, the Mayor’s Court continued to entertain suits of Indians.

The judicial system even after the grant of the Charter of 1753 remained unsatisfactory. The Mayor’s Court ‘had degenerated into an engine of oppression rather than acting as a court of justice’. The House of Commons appointed in 1772 a Committee of Secrecy to review the working of the judiciary. The Report of the Committee, which was quite critical, led to the replacement of the existing system by the establishment of the Supreme Court at Calcutta in 1774\textsuperscript{131}.

D. The Adalat System: 1772-1781

The company had its control over the territory of the presidency towns of Calcutta, Bombay and Madras. However, with the passage of time, the company extended its sway over the territories surrounding the

\textsuperscript{131} SS Shilwant: Legal & Constitutional History of India (2003), p 48-49
presidency towns also. These territories came to be known as "Mofussils".

The company was successful in securing the Diwani of Bengal, Bihar and Orissa in 1765 from Emperor Shah Alam. The Adalat System was for the first time introduced in the territories of Bengal, Bihar and Orissa in the year 1772. After the initial experiment in these areas, the Adalat system was introduced in Bombay and Madras also.

Under Mughals, the government was conducted by the two high dignitaries – The Nawab (Nazim) and The Diwan. The nawab headed the military, supervised the criminal justice system and was also maintained law and order. The Diwan headed the Diwani, which comprised the system of collecting revenue and deciding civil and revenue cases. The division of administrative power between the Nawab and Diwan was to create a system of checks and balances. Nizam had military power without finance and Diwan had control over finance minus the military power.

The aim of the company was to make the Nawab completely harmless for the future. Therefore, the English successfully entered into an agreement with the Nawab whereby he was completely divested of the power to maintain army and in lieu of this, he agreed to accept an annual allowance of 53 lakh rupees for his personal maintenance and for his criminal judicatories. The Nawab also agreed to entrust the actual administration of whatever functions were left with him to the deputy Nawab. Thus a system of dual government was established in Bengal.

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132 The territory referred to as Mofussils was in contra distinction to the presidency towns in that it was completely under the jurisdiction of the company with no relation to the crown.
133 It now became the responsibility of the company to provide for judicial organization in the Mofussils and judicial administration thus provided came to be known as Adalat System.
Judicial system under Mughals

There was Qazi’s Court to administer common justice throughout the Bengal. Besides Qazi’s court, there were number of other central courts also viz the court of Nawab or Nazim. Headed by the Nawab, it was the highest court for criminal cases. The Court of Diwan was the highest court dealing with revenue and civil cases. It also had the appellate jurisdiction against the decisions given by the Qazis.135

The Daroga-i-Adalat-al-Alia
To begin with, the Daroga was merely a deputy of the Nawab but with the passage of time, he came to exercise all those functions hitherto performed by the Nawab.(Criminal Cases)

Daroga-i-Adalat Diwani
He was a deputy of the Diwan but with the passage of time, the Diwan ceased to exercise his jurisdiction in person and the Deputy Diwan started exercising his powers. He decided cases relating to revenue and property.

E. Judicial Reforms 1772-1835

The period witnessed the first serious attempt at the establishment of an effective and sound judicial system to protect the interests of all the sections of Society. The Supreme Court at Calcutta was established after the passage of the Regulating Act, 1773. With a view to familiarizing themselves with the customs, manners and laws of the governed, the Code of Sanskrit was translated into English called the ‘Code of Gentoo laws’. In 1791, Sir William Jones and Colebrooke brought out the Digest of Hindu Law.136
I. **Reforms of Warren Hastings**\(^{137}\) - Under the plan of 1772, the following courts were established:

(I) Mofussil Diwani Adalat
In each of the district a mofussil diwani adalat was established with a European collector as Judge thus combining the Judicial and Revenue functions in one and the same officer.
The Adalat could hear and decide Civil Cases pertaining to personal property, inheritance, caste, marriage, debts, disputed accounts, contracts, partnerships and demands of rent. All such suits were decided by the application of Hindustan for Hindus and Muslim Laws for Muslims. Its decisions in cases involving upto Rs. 500 were final but the cases above Rs. 500 were appealable to the Sadar Diwani Adalat.

(II) Small Cause Adalat
Small cause Adalats were established to hear and decide finally the disputes upto Rs. 10. The cases were to be decided by the head farmers of the paraganas i.e. village.

(III) Mofussil Fauzdar Adalat
These Adalats were established in the districts to try all kinds of criminal cases. Muslim law officers, Qazis, Muftis and Maulvis constituted these courts.

The collector exercised General supervision over the Adalat. The adalat could not finally determine cases involving the death sentence and forfeiture of property of the accused. These cases were submitted to Sadar Nizamat Adalat for final orders.

(IV) Sadar Adalats

a. Sadar Diwani Adalats
   Were established in Calcutta over the mofussil Adalats. Sadar Diwani Adalat comprised the Governor and members of the council. Decisions in cases involving more than Rs. 500 from mofussil Diwans Adalats were appealable to Sadar Adalats within 2 months from the date of decree given by the Mofussil Adalats.

b. Sadar Nizamat Adalat
   Comprised an Indian Judge appointed by the Nawab, who was known as the Daroga-i-Adalat. The Daroga was assisted by the Chief Qazi, Chief Mufti and three Maulvis. The proceedings of the mofussil Nizamat Adalat could be revised by sadar Nizamat Adalat. The sentence of death passed by the mofussil Nizamat Adalat also required the approval of Sadar Nizamat Adalat. In the case of death sentence, the death warrants was prepared by the Adalats and was signed by the Nawab.

   All adalats were to maintain proper registers and records. All cases were heard in an open court. The cases in which the cause of action was older than 12 years were not to be actionable. Mutilation as a punishment was not followed. Dacoits on conviction were executed in villages, also they were fined and then their families made slaves to the state. Arbitration as a mode of dispute resolution also existed.

(V) The Plans of 1774 and 1780

Warren Hastings then introduced certain other Judicial plans i.e. Judicial Plan of 1774 and 1780. The basic feature of the plan of 1780 was the separation of revenue and judicial functions. It was for the first time under this plan that the government levied court fee on the suitors. 138

(VI) The Supreme Court at Calcutta

The Regulating Act of 1773 provided for the establishment of the Supreme Court of Judicature at Calcutta in place of Mayor’s Court. The

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138 Cambridge History of India Vol. V, p 418
Act empowered the crown to establish the Supreme Court by Royal Charter.

George-III, the King of England gave effect to this provision 1 of the Regulating Act and issued the Royal Charter on 26th March, 1774 establishing the Supreme Court of Judicature at Fort Williams in Bengal.\(^{139}\)

The Supreme Court was the Court of Equity as well as the Court of record, had the Ecclesiastical jurisdiction and was further constituted into the Court of Admiralty.\(^{140}\) The charter conferred on the Supreme Court the power to superintend and control the Courts below i.e. Court of Requests, Court of Justice and Peace and the Court of Quarter Session. The Court could also issue various prerogative writs like Mandamus, Certorari, Prohibition, and Habeus corpus.\(^{141}\)

The Supreme Court had the power and jurisdiction to hear, try and determine all civil causes, actions and suits arising against:

a) The Mayor and the Aldermen of Calcutta;

b) Any of his Majesty's subjects residing within Bengal, Bihar and Orissa;

c) Any person who was already or indirectly in the service of the company or any of his majesty's subjects;

d) Any inhabitant of Bengal, Bihar and Orissa if he entered into a contract/agreement in writing in which the other party to such a contract was his majesty's subject and the cause of action exceeded Rs. 500/-.

The Court had both the original jurisdiction and the appellate jurisdiction against the decision of the company's court.

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\(^{139}\) The charter appointed Sir Elijah Impey as the chief justice and Robert Chambers, Stephen Ceasar Le Maistre and John Hyde as three puisne Judges of the Supreme Court.

\(^{140}\) B.L. Grover & S Grover: A New look at Modern India History, p 366-67

\(^{141}\) M.P. Jain: Outlines of Indian Legal History at p 78
The Supreme Court had the criminal jurisdiction too. It was to be the
“Court of Oyer and Terminus and Goal Delivery” in and for the town of
Calcutta and factories subordinate thereto. In this capacity, the Court
was also authorized to hear, determine and judge all crimes committed
in the provinces of Bengal, Bihar, and Orissa by:
- Any of his majesty’s subjects
- Any persons employed by or being directly or indirectly in the service
  of the company or any of his majesty’s subjects.

However, the Court did not have the criminal jurisdiction over the
Governor General or members of his council except in cases of treason
and felony. The charter also provided for appeal against the decision of
the Supreme Court, which lay to the king-in-council.

The Supreme Court also had the power to reprieve or suspend the
execution of any capital sentence. The Supreme Court was a great
improvement over its predecessor i.e. Mayor’s Court. For the first time, it
was provided that the Court was to consist of professional lawyers and
judges. With the passage of the Regulating Act, there came into
existence two distinct and independent judicial systems in Bengal i.e.,
the crown’s court (the Supreme Court) and the company adalat system.

As to the relationship between these two Courts, the Regulating Act was
silent. Again the Regulating Act had not laid down the nature of law to be
followed by the Supreme Court. As the Supreme Court was created in
place of the Mayor’s Court, the law administered in the Mayor’s Court
i.e. English law was to be applied in the Supreme Court also.

The Supreme Court also administered the English criminal law, which at
that time was known as ‘hanging law’. A large number of offences under
it were punishable with death. The Indians did not known anything about

\footnote{A court or oyer and Terminus could try all Criminal cases, felonies & misdemeanors while goal
delivery could try only those persons who had been arrested and lodged in prison. Both these
terms combined meant a plenary criminal Jurisdiction.}
this law. So they did not like it as it was completely foreign to their conceptions, traditions and manners.\textsuperscript{143}

After the success of the Supreme Court at Calcutta, the Supreme Courts were also established in the presidency towns of Madras and Bombay.\textsuperscript{144} Along with the Supreme Court, the presidency town system and the Moffussil system continued to exist.

Laws administered in the Supreme Courts

The Supreme Courts of Calcutta, Madras and Bombay were empowered to exercise Civil, Criminal, Equity, Ecclesiastical and Admiralty jurisdictions. The laws, which were applied and administered by the Supreme Court may be classified under the following eight headings:

(i) The Common law, as it prevailed in England in 1726 and which was not subsequently altered by Statutes specially extending to India or by Acts of Governor-General-in-Council.

(ii) The Statute law which prevailed in England in 1726 and which was not altered by the Legislative Council of India.

(iii) The Statute law expressly extending to India which had been enacted since 1726; not repealed as yet and Statutes extended to India by Acts of Governor-General-in-Council.

(iv) The civil law as applied in the Ecclesiastical and Admiralty courts in England.

(v) Regulations made by Governor-General-in-Council and Governors-in-Council and registered in Supreme Courts prior to the Charter of 1833.


\textsuperscript{143} S.S. Shilwant: Legal and Constitutional History of India p 93

\textsuperscript{144} The parliament passed an Act in 1800, which provided for the establishment of the Supreme Court at Madras, which was done in 1801. It was to be the court of record and consisted of a Chief Justice and two puisne Judges, being English Barrister of at least 5 years' standing. The Court had the same jurisdiction and powers and was subject to the same restrictions as the Supreme Court at Calcutta. The Supreme Court of Judicature at Bombay was established on 8\textsuperscript{th} May 1824 under the charter issued by the King in 1823. It consisted of Chief Justice Sir E. West and two other puisne judges i.e. Sir Charles chambers and Sir Ralph Rice.
(vii) The Hindu law and usages in actions regarding inheritance and succession to lands, rents, goods and all matters of contracts and dealing between party and party in which a Hindu was a defendant.

(viii) The Mohammedan law and usages in actions regarding inheritance and succession to lands, rents, goods, and all matters of contracts and dealing between party and party in which a Mohammedan was a defendant.\textsuperscript{145}

II. Reforms of Lord Cornwallis

In the legal history of India, reign of Lord Cornwallis marks a highly creative period. He introduced a judicial system based on the principle of equity and justice, set up a gradation of civil courts, reformed criminal law, proclaimed the sovereignty of law and brought out the new code of regulations called the Cornwallis Code of Civil Procedure, thus completing the work begun by Warren Hastings.\textsuperscript{146}

Cornwallis came to India in 1786 with definite instructions from the Directors, who had enjoined economy and simplification, to reunite the functions of a revenue collector, civil judge and magistrate in one and the same person. In deference to the instructions, Cornwallis brought about corresponding changes in the existing system in 1787. Accordingly, the European collectors were empowered to deal with revenue disputes and were also made judges of the Diwani Adalats enjoying full magisterial powers. However, he was enjoined not to mix revenue matters with other civil suits. He tried revenue disputes in the maal adalat (revenue court). The appeals against the decisions first lay with the Board of Revenue at Calcutta and then with the Governor-General and the council.\textsuperscript{147}

\textsuperscript{145} S.S. Shilwant: Legal and Constitutional History of India p 123-124
\textsuperscript{146} M.P. Jain: Outlines of Indian Legal History at p 127-148 HV Sree niwasan History of India – II, p 148-152
\textsuperscript{147} SS Shilwant: Legal and Constitutional History of India, p 125-147 B.L. Grover and S. Grover: A new look at Modern Indian History from 1707 to Modern times (2004) p 83-84

Ibid
As magistrate, the collector dealt with minor offences, and inflicted corporal punishment not exceeding fifteen rattans, or imprisonment not exceeding fifteen days. The collector was also empowered to arrest British subjects, if sufficient grounds were adduced, and commit them to the Supreme Court. No distinctions were made between the non-British subjects and the natives.

Though Cornwallis brought about these changes as a loyal servant, he was certainly not happy over the combination of the judicial and the revenue functions. In order to improve the administration of justice, he consulted the Judges and officials for three years, and on 3rd December 1790, he came out with the new regulations, which were to be the basis of criminal administration for the next forty years.\(^{148}\)

The Judicial Scheme of 1790

The Preamble to the Regulation explained that the changes were necessitated by the ‘numerous robberies, murders and other enormities which have been committed daily throughout the country’. The District Faujdari Adalats were swept away and in their places four Circuit Courts, three for Bengal and one for Bihar each presided over by two judges chosen from the covenanted civil service were set up. The judges of these courts decided cases with the help of Qazis and Muftis. These courts toured every district twice a year to try persons chargesheeted by the city magistrates. The Sadr Nizamat Adalat was transferred from Murshidabad to Calcutta where the Governor-General and the Council who sat as judges continued to be assisted by the Chief Qazi and two Muftis. With this, the criminal jurisdiction of the native Deputy Nawab was finally abolished.

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The Judicial Scheme of 1793

In the last year of his tenure in 1793, the judicial reforms of Cornwallis took a final shape. The judicial plan of 1793 was based on the principle of separation of powers and accordingly the revenue and judicial functions were entrusted to separate hands. The collectors were divested of all judicial powers including the trial of revenue cases and were left only with the power of collecting the land revenue. The district civil court came to be presided over by a new class of officers called the district judge.

An ascending hierarchy of civil courts was set up. At the lowest level were the Munsiffs’ courts presided over by Indian commissioners who dealt with petty disputes involving amount up to the value of Rs. 50. Next came the Court of the Registrar presided over by the covenanted servant of the Company. He tried cases involving value upto Rs. 200. Appeals from both these courts lay to the District or city courts. Then came the Zillah or District Court under a British judge who decided civil disputes with the help of Indian assessors. Above them were the four provincial Courts of Appeals, each under three European judges with Indian assessors, at Patna, Dacca, Murshidabad, and Calcutta. These judges were also Judges of Circuit; the old Courts of Circuit were done away with. It heard cases referred to it by the Government or the Sadr Diwani Adalat and entertained cases declined by a Mofussil Diwani Adalat. It enjoyed the original jurisdiction in certain cases and dealt with appeals involving a sum upto Rs. 1000. The highest court of appeal was the Sadr Diwani Adalat consisting of the Governor-General and members of the Council in Calcutta. It heard appeals involving over Rs. 1000 and appeals against the decisions of this court lay to the King-in-Council in disputes exceeding Rs. 5000.

The British subjects in the district were made amenable to the Diwani Adalat. All those who lived away from Calcutta were refused licenses till they agreed to submit themselves to the jurisdiction of the district civil courts for the acts done by them in their official capacity. Thus Cornwallis proclaimed the principle of Sovereignty of Law in India.
The Islamic law was still administered, in terms of which, no Muslim could be awarded the capital punishment on the evidence of an infidel, but this was modified. Regulation IX of 1793 modified the law of evidence by providing that the religious persuasions of witnesses shall not be considered as a bar to the conviction or condemnation of a prisoner. This regulation enabled the non-Muslims to testify against the Muslims in criminal cases. Further changes were effected in the Islamic criminal law. Now restrictions were placed upon the right of the heir of a slain man to pardon the murderer or imprisonment was substituted for mutilation. All these regulations were embodied in the famous Cornwallis Code.

The Judges were entitled to good salaries so that they were not tempted to accept bribes. The court fee, to be paid at the time of institution of cases at the rate of 2-5 %, was abolished to enable inexpensive justice delivery. Regulation VII provided for the appointment of pleaders with some legal training by the Sadr Diwani Adalat. The court could dismiss or suspend pleaders if they were found guilty of corruption, gross misconduct or fraud.

In short, Cornwallis’ reforms in civil and criminal law were effective in checking the tyranny of the revenue collectors and preventing violence, but they encouraged the more subtle oppression by the money-lenders and the lawyers; and their insistence on formal evidence increased the difficulty of suppressing organized dacoity.

In 1793 the Recorder’s Courts were set up in Bombay and Madras in place of the Mayor’s Courts. In course of time, the Governor-General and the council, which were more burdened with executive work, found it difficult to cope with increasing appeals to the Sadr Adalat. Therefore in 1801, separate judges were appointed to these courts.

III. Reforms by Lord William Bentick

Lord William Bentick’s reign heralds another important milestone in the growth of the Indian judiciary. Bentick favoured a liberal and humanizing
policy in creating policies and implementing them. Undoubtedly he was the first Governor-General to openly and fearlessly act on the theory that the welfare of the subjects was a major, perhaps the primary duty, of the British in India. Fired as he was with the same ambition as Cornwallis to improve the administration of justice, he introduced reforms that were original and the institutions he created serve as the basis of our judicial system till date.\footnote{M.P. Jain: Outlines of Indian Legal History at p 195 HV Sreenivasa: History of India–II, p 152-154, B.L. Grover and S. Grover: A New look at Modern Indian History (2004), p 130}

(i) Reforms in Criminal Judiciary
The provincial court of appeal and circuit courts set up by Cornwallis were abolished by Bentick. This was followed by the division of presidency into 20 divisions and commissions of revenue and circuit were created for each division. The functions of the Court of Appeal were transferred to magistrates and collectors and commission of revenue and circuit were vested with the power of superintendence and control over them. The commissioner was subjected to the authority of Sadar Nizamat Adalat in respect of his judicial functions and the board of revenue in his revenue functions.

Another change was brought about by Regulation VII of 1831. The regulation gave power to the Government to invest the judges of the District Diwani Adalat with the powers of the sessions court i.e. administration of criminal justice. The session’s judges tried cases committed to them by the magistrate; while not in session they sat as district judges and disposed of the civil cases. It led to the phenomenon of the District and Session judges doing civil and criminal work side by side and solved to a great extent the problem of arrears.

(ii) Indian Participation
The policy of Europeanisation of Indian administration pursued by Cornwallis was discouraged by Lord William Bentick. The Indians began
to be appointed to higher ranks in judicial administration and were given more powers and better salaries. The Indians would inflict such punishment as imprisonment with hard labour upto one month and corporal punishment upto 30 rattans. The Indian assessor or the jury came to be associated with the trial of criminal cases, but the final decision rested with the English Judges who presided over the court.

(iii) Reforms in the Civil Judiciary
For the convenience of the public of the upper provinces (present day UP) and Delhi, by Regulation VI of 1831, a separate Sadr Diwani Adalat and a Sadr Nizamat Adalat were set up at Allahabad from 1st January, 1832 and the residents of these areas were no longer under necessity of traveling thousand miles to file their appeals at Calcutta. The constitution and the powers of these Adalats were similar to that in Calcutta.

The absurd legal convention of using Persian as the Courts' language was discontinued and the suitors were given the option to use either Persian or the vernacular tongue. However, in the higher courts, English replaced Persian as the Court language.

In brief, it may be said that Lord William Bentick outlined the main contours of the present-day judicial administration in India. In fact, by establishing a superior type of Indian civil judge authorized to try cases involving property up to any amount, and with salaries rising to £720 a year, Bentinck removed the weakness of the Cornwallis Regulations which permitted a very cautious and limited use of Indian judges for civil cases.

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150 The charter appointed Sir Elijah Impey as the chief justice and Roberts Chambers, Stephen Caesar Le Maistre and John Hyde as three puisne Judges of the Supreme Court.

151 Thompson & Garatt, The rise and fulfillment of British Rule in India (1958) p 322
F. Judicial Reforms: 1835-1858: A Survey

In spite of these reforms, certain anomalies persisted in the Indian judicial system. Among the major ones, mention may be made of the lack of uniformity in the judicial set up. In Bengal, justice was administered in accordance with the Bengal code which was in operation from 1793 to 1834. In the Madras Presidency, the court proceedings were conducted in terms of the Madras Regulations which remained in force from 1802 to 1834, while in the Bombay Presidency, the revised Bombay code of 1827 guided the operation of law. Secondly, Indians were not given a greater share in judicial administration, they were excluded from higher posts and had to content themselves with serving as subordinate judicial functionaries. The tiers of courts and the complex procedure followed by the courts rendered justice delivery costly and protracted, resulting in evils like forgery and perjury.

These were the major deficiencies in the prevalent judicial system and attempts were made to set the system in order by initiating the following changes.

With a view to bringing about uniformity in the judicial set up of the Presidencies and the non-regulation provinces, the Law Commission was appointed in 1834 with T.B. Macaulay as President. The Macaulay Commission began drafting the Criminal Code first and submitted it to the Government of India on 14th October, 1837. After necessary revisions and examination by the Second Law Commission (set up in 1853), the penal code was passed in 1860.

To supplement the Indian Penal Code, the second Law Commission formulated the draft Criminal Procedure Code. This was passed by the legislative council as Act 25 of 1861 and put into operation on 1st January, 1862. It was first made applicable to regulation provinces and then to the whole of British India with the exception of presidency towns.

152 R.C. Srivastava: Development of Judicial System in India from 1833-1858, p 3
153 HV Sreenivasa: History of India—II, p 154-155
The Macaulay Commission also prepared the draft Code of Civil Procedure. As R.C. Srivastava rightly observes: “The codification of law was an epoch-making event in the history of the Indian judicial system. About three decades of sustained labor and planned work by some of the best British legal minds which constituted the Law Commission and the Indian Legislative Councils, crystallized in the formation of the Indian Penal Code and The Codes of Criminal and Civil Procedure...... even today the mode of administering justice, in all its essential features, continues to be the same as envisaged by the progenitors and framers of these codes a hundred years ago”.  

These codes brought about uniformity in the judicial set-up of the country.

During the period from 1833 to 1853, Indians were given greater share in the administration of justice. Perjury and delay were sought to be redressed by setting up Small Causes Courts in the Presidency towns for expeditious disposal of petty cases and Sadr Adalats were made more efficient and effective instruments of justice. The prerogative enjoyed hitherto by the Europeans was done away with by Regulation XI of 1836 which stipulated that no person by reason of place of birth or by reason of descent was to be excepted in any proceeding in the court of Sadr Diwani Adalat or the Zillah and the City judges, of the Principal Sadr Ameens, and of the Sadr Ameens in the Bengal Presidency; the Court of Sadr Adalat, the Provincial Courts, the Courts of Zillah judges of Assistant judges, of the Registrars and of the Native judges in the territories subjects to the Madras Presidency; and the Courts of Sadr Adalat, of the Principal Sadr Ameens and of the Junior Native Commissioners in the territories subject to the Presidency of Bombay.

G. Changes in the Indian Judicial set-up under the Crown

During this period, drafts of different Codes were prepared. The Third Law Commission set up in 1861 prepared drafts of the Indian Succession Act, Law of Contract, Law of Negotiable Instruments, Law of Specific Performance, Law of Evidence, Law of the Transfer of Property

154 R.C. Srivastava: Development of Judicial System in India from 1833 to 1858, p 171-172
155 Ibid p 17
and the revised Criminal Procedure Code. Before the Commission resigned in 1870 it could not see all the drafts prepared by it enacted. Only the Companies Act, 1866, the General Clauses Act, 1868, The Indian Succession Act, 1865, and the Divorce Act, 1869 were passed. Subsequently, the Indian Contract Act, 1872 and the Indian Evidence Act, 1872 were passed.

The Fourth Law Commission formed on 11th February, 1879 addressed itself to the task of codification and the revision of existing Codes. In 1881 the Negotiable Instrument Act and in 1882 the Transfer of Property Act, the Easement Act, the Trusts Act and subsequently the revised Civil Procedure Code and Criminal Procedure Code were passed.

Establishment of High Court

Prior to 1861 there existed two parallel judicial systems in the presidency towns of Calcutta, Bombay and Madras i.e. one being the Crown's Court, consisting of the Supreme Court and other being the Company's Court i.e. Sadar Diwani Adalat and Sadar Nizamat Adalats. It was in 1861 that these two sets of courts were merged and replaced with three High Courts in three provinces under the Indian High Courts Act, 1861.

The Indian High Courts Act of 1861\textsuperscript{156}

This Act of 1861 empowered the crown to establish by letters patent, High Court of Judicature at Calcutta (for the Bengal Division of the presidency town of Fort William), Madras and Bombay\textsuperscript{157} and to abolish the Supreme Courts and Courts of Sadar Diwani Adalat and Sadar Nizamat Adalat. The Act also empowered the crown to establish a High Court for North Western Provinces. The Jurisdiction and Powers of the High Courts were to be fixed by letters patent.

\textsuperscript{156} HV Sreenivasa: History of India –II, p 156

\textsuperscript{157} Section I of the Indian High Courts Act, 1861
High Court of Judicature at Calcutta

The Indian High Court Act, 1861 did not by itself create & establish the High Courts in India. It was a permissive Legislation and authorized the crown to establish the High Court. In Pursuance of Act of 1861, charter creating a High court at Calcutta was issued on May 14th, 1862. Section 9 of the High Courts Act, 1861 defined the Jurisdiction and powers of the High Court. It was to exercised such civil, Criminal, Admiralty and vice Admiralty and testamentary Jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it was established, as Her Majesty might grant and direct by Her Letters Patent.

High Court of Judicature at Bombay

On 26th June 1862, by means of letters patent, the Queen established the High Court of Judicature at Bombay. This letters patent was similar to the one issued for establishing the High Court at Calcutta.

The establishment of the Bombay High Court was a significant landmark in the history of judicial system in Bombay. It led to the introduction of a uniform system of law and procedure throughout the presidency of Bombay and thereby contributed to the growth of the judicial system and the Rule of law in Bombay.

High Court of Judicature at Madras

On 26th June 1862, the Queen, by issuing the charter established the High Court of Judicature at Madras. It stipulated that the jurisdiction and powers of Madras High Court were to be similar to those of the Calcutta and Bombay High Courts.

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The Charters for the High Courts of Bombay an Madras were issued on June 26th, 1862. The letters patent were found defective in certain respect. On 28th December, 1865 fresh letters patent were issued. All the charters (the letters patent being identical) here discussion of only Calcutta High Court is made.
Under the power given by the Indian High Courts Act, 1861, the crown issued letters patent on 17th March 1866 establishing a High Court of Judicature at Agra for North-Western provinces. The High Court was not invested with any ordinary original civil jurisdiction in insolvency matters as given to the presidency High Courts nor admiralty nor vice admiralty jurisdiction. This was so because the three High Courts in presidency towns inherited the jurisdiction of both the Supreme Court and Sadar Adalats while the High Court at Agra inherited the jurisdiction of the Sadar Adalats only. However, in the year 1875, the High Court was shifted from Agra to Allahabad and came to be known as the High Court of Judicature at Allahabad.159

The letters patent (1866) also conferred the appellate jurisdiction besides the jurisdiction with regard to persons and estates of infants and lunatics and relief of infant insolvent debtors at Calcutta. In addition to this original criminal Jurisdiction and Admiralty, Probate and Matrimonial Jurisdictions were also conferred on it so as to make it a High Court having all jurisdiction possessed by the Supreme Court. Consequently on its appellate side, the High Court, therefore, replaced the then company's Appeal Court at Calcutta viz. Sadar Diwani Adalat.

The charter also provided that appeal will lie from the High Court to 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 High Court where the Court certified the case to be fit for appeal to the Privy Council.

The Indian High Courts Act, 1911

By the Indian High Courts Act, 1911, a few modifications were effected in the Indian High Courts Act, 1861. First, the ceiling on the number of judges in a High Court was raised. The Act of 1861 had fixed the maximum number of judges, excluding the Chief Justice, at fifteen. The Act of 1911 raised this limit, including the Chief Justice, to twenty.

159 HV Sreenivasa History of India –II p 167
Secondly, the power to establish High Courts was now liberalised. Under the Act of 1861, a High Court could be established only, for the territory not included within the local jurisdiction of another High Court. The Act of 1911 dropped this restriction. It authorized the Crown to establish additional High Courts. A High Court could be established in any territory within His Majesty's dominions in India whether or not included within the limits of the local jurisdiction of another High Court. When a High Court was established in any territory included within the local jurisdiction of another High Court, His Majesty could by letters patent alter its jurisdiction and make such incidental, consequential and supplemental provisions as might appear to be necessary by reason of the alteration of those limits. Thus, the power to establish additional High Courts conferred by the Act of 1911 differed from that conferred by the Act of 1861. Also, it was thought that the power accorded in 1861 to create High Courts had been exhausted by the creation of the Allahabad High Court and that fresh conferment of such power was necessary. Thirdly, the Act of 1911 made provision for appointment by Governor-General-in-Council of additional judges to a High Court for a maximum period of two years. Lastly, the Act prescribed that the salaries of the judges or temporary judges were to be paid out of the revenues of India.

The Government of India Act, 1915-1919

On July 29, 1915, the British Parliament passed the Government of India (Consolidating) Act, 1915, with a view to consolidate and re-enact existing statutes relating to the Government of India. The Act re-enacted all the provisions made by the Indian High Courts Acts of 1861 and 1911 in relation to the High Courts. The Act of 1915, however, made one significant change with respect to the ordinary original civil jurisdiction of the High Courts of Calcutta, Madras and Bombay, viz., it laid down that these courts "may not exercise any original jurisdiction in any matter concerning revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force. The result of the provision was that while the three High Courts could adjudicate upon a matter concerning revenue on their appellate side, they could not do so on their original side this was an unreasonable anachronism without any justification. Except for the
historical reason, there was no other reason to differentiate between the original and appellate sides of a High Court for purposes of revenue cases. The conflict of jurisdiction between the Company's courts and the Supreme Court had become a thing of the past and, therefore, there was no longer any justification to keep an antiquated provision on the statute

A few provisions of the Regulating Act, 1773, and the Act of Settlement, 1781, were re-enacted by the Act of 1915. The Governor-General, Governor, Lieutenant-Governor, Chief Commissioner, members of the Executive Council of the Governor-General or the Governor or Lieutenant-Governor, and a Minister were to be exempt from the original jurisdiction of the High Courts for anything counselled, ordered or done by any of them in his public capacity. None of these officials was to be liable to be arrested or imprisoned in any suit or proceeding in any High Court on its original side, or was to be subject to the original criminal jurisdiction of a High Court in respect of any offence not being treason or felony. The exemption from liability to arrest and imprisonment was also to extend to the Chief Justices and other Judges of the High Courts. It was further provided that a written order of the Governor-General-in-Council for any act was to be a full justification for the act, in any civil or criminal proceeding in any High Court on its original side, except so far as the order extended to any European British subject. However, the Governor-General, or a member of his Executive Council, or any person acting under his orders was not to be exempted from any proceeding in respect of any such act before a competent court in England.

The Government of India Act, 1935

Under the Government of India Act, 1935 some important provisions relating to the High Courts were made. This Act empowered His Majesty to issue letters patent constituting a High Court for any part of India and the Nagpur High Court was established under the provisions of this Act.

The Act 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 maximum number of Judges in the Court
was to be fixed by King-in-Council from time to time for each High Court. It also stated the qualifications for the Judges. It was laid down that only Barristers and Advocates of ten years' standing were qualified for the High Court Judgeship. Moreover a member of Indian Civil Service of 10 years standing was also qualified to be appointed as a Judge and if he remained High Court Judge for 3 years, he could be appointed even a Chief Justice of a High Court.

The jurisdiction of the existing High Court
The law administered in it and the powers of Judges continued to be same under Govt. of India Act 1935 as before. Provisions were also made for an appeal to the federal court from any judgment, decree of the High Court so far as administrative control over the High Courts was concerned, they were under the control of the provincial government. The 1935 Act also ensured the independence of the judiciary from any executive interference or political pressure (a provision we now have after independence) by providing that salaries, allowances and pensions of the judges of the High Courts was to be fixed by His Majesty on their appointment.

The Federal Court of India
The Government of India Act, 1935 replaced the unitary system with a federal system. The provinces were given somewhat autonomous character and they began to be treated on a federal basis. This necessitated the creation of a federal court, an independent court, to decide future disputes between the units. In pursuance of this, a federal court was set up at Delhi in 1937

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160 Section 220 (1) of GOI Act, 1935
161 Section 220(3) of GOI Act, 1935
162 Section 223 of GOI Act, 1935
163 Section 209 of GOI Act, 1935
164 Section 221 of GOI Act, 1935
165 inaugurated on 1st Oct., 1937
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. An increase over six needed the approval of the federal legislature. The judges were appointed by warrant under the royal sign manual. The judges were to hold office till they attained 65 years of age.

A judge could be removed from his office on the grounds of misbehaviour or infirmity of mind or body by the king on the recommendation of the judicial committee of the Privy Council.

The jurisdiction of federal court was mainly of 3 kinds:–
1. Original Jurisdiction
2. Appellate Jurisdiction
3. Advisory Jurisdiction

The federal court was given exclusive original jurisdiction to decide cases between the centre and its constituent units and between the units inter-se. In relation to the Indian States, however, it was specifically provided that the jurisdiction of the Federal Court would not extend to an Indian State unless the dispute concerned the interpretation of the Constitution Act itself or of an Order in Council made under it or the extent of legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of the State; or it arose under an agreement, made after the establishment of the Federation, with the approval of the Crown Representative, between a State and the Federation or a Province, if the agreement expressly provided that the jurisdiction of the Federal Court would extend to such a dispute.

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166 Section 200(1) of GOI Act, 1935
167 Section 200(2) of GOI Act, 1935
168 Section 200(2)(b) of GOI Act, 1935
169 Section 204 of GOI Act, 1935
170 Section 205 & 207 of GOI Act, 1935
171 Section 213 of GOI Act, 1935
It also exercised appellate jurisdiction over the decisions of the High Courts but it was a very limited one. An appeal was allowed to the federal court from any judgment, 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 Government of India Act 1935. Or an Order in Council made under it. Similarly, an appeal lay from a High Court in a federal State in cases involving the interpretation of the Act or of any Order in Council made under it or the extent of the legislative and executive authority vested in the Federation by virtue of the Instrument of Accession of the State. But appeals from federal States were to be by way of special case stated for the opinion of the Federal Court. The Federal Court was authorized to require a case to be so stated and to return any case so stated in order that further facts might also be stated; but the procedure for this was for the Federal Court to cause letters of request to be sent to the Ruler of the State.

In addition to the powers of the Federal Court to adjudicate on constitutional issues, this Act of 1935 empowered the Federal Legislature to confer appellate jurisdiction, in respect of only British India, on the Federal Court in two classes of cases:

1. Where the amount or value of the subject matter of the dispute was fifty thousand rupees or such smaller sum not being less than fifteen thousand rupees or such other sum not less than 15 thousands as may be specified by the Act or Judgement, decree, final order from which appeal lies.172

2. The federal court had the jurisdiction to grant special leave to appeal and for this purpose, a certificate of the High Court was essential.173

Section 206 of The Government of India Act, 1935 empowered the federal legislature to pass an Act enlarging the appellate jurisdiction of the federal Court in civil cases to its full extent.

172 Section 206 (1) (a) or GOI Act, 1935
173 Section 206 (1) (b) or GOI Act, 1935
The Government of India, Act 1935, also conferred an advisory jurisdiction on the federal court. Its advisory jurisdiction was limited only to those cases which were referred to it by the Governor-General for its advice on any legal question of public importance. Such a piece of advice was tendered in an open court in the presence of lawyers of all the parties concerned.

It was the highest and the foremost of all the Indian courts. As the final interpreter of the Constitution of India, the federal court made decisive contribution in the development of the Indian constitution.

There is thus historical continuity between the Federal Court and the Supreme Court of India. The Federal Court never touched the domain and authority of the High Court.

**Privy Council**

Another notable development in the evolution of the judiciary during the British times was the emergence of the Privy Council as an ultimate court of appeal. The Privy Council was also known as king-in-council or as it later came to be known the Judicial Committee of the Privy Council. It acted as the highest court of appeal from the courts in India for about two centuries from 1726 to October 1949. The Privy Council made a great contribution towards establishing a high standard of justice in the country and creation and ascertainment of law and, therefore, it occupies a unique niche in Indian legal history.

**Appellate Jurisdiction of Privy Council**

In the heyday of the British empire, the Privy Council or rather its judicial committee, heard appeals from the courts of some 150 countries in all types of cases, civil and criminal, and applied not merely English law but

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174 Section 213 GOI Act, 1935

175 On 26th January, 1950, the federal court yielded place to the Supreme Court, all its judges became judges of the Supreme Court and all cases pending stood transferred to the Supreme Court.

176 M.P. Jain: Outlines of Indian Legal History at p 318
also other diverse systems of law. Initially the judicial functions of the Privy Council were insignificant. But as England acquired more and more colonies from the 17th century onwards, the judicial functions of the Privy Council assumed significance. As regards India, it acted as the highest court of appeal for over two centuries.177

Indian Appeals:
The history of Indian appeals to Privy Council may be traced as below:

Appeals from Mayor’s Court
In 1726, the Royal Charter, establishing the Mayor’s courts at presidency towns gave the right of appeal to the Privy Council. Appeals from Supreme Courts at Bombay, Madras and Calcutta also lay to the Privy Council.

High Courts: Appeals to the Privy Council
With the creation of three High Courts in 1861, a major change occurred in the scheme of judicial institutions in India as the erstwhile Sadar Adalats and Supreme Court came to an end. The Charter Act of 1861 provided that an appeal could be made to the Privy Council in any case, not being of criminal jurisdiction, from any final judgment, decree or order of the High Court, if either the value of the subject matter was not less than Rs. 10,000 or the High Court declared that the case was fit for appeal to the King-in-Council. An appeal could be made to the Privy Council even from the interlocutory order of a High Court. (not being a criminal nature)
In criminal cases, an appeal could lie to be Privy Council from any judgment or sentence of the High Court made in the exercise of its original jurisdiction or in any case where the point of law had been reserved for the opinion of the High Court by another court of original jurisdiction if the High Court declared that the case was fit for appeal and under such conditions as the High court might establish or require

177 M.P. Jain: Outlines of Indian Legal History at p 317
subject to the rules and the orders made in this behalf by the crown on the advice of the Privy Council.

Appeal from Federal Courts
An appeal against the decision of the federal court also lay with the Privy Council. The Privy Council also possessed the right to grant special leave to appeal in cases where regular appeal did not lie or the subordinate court refused permission for appeal.

Regarding the unique role played by the Privy council K.M. Munshi a veteran lawyer and statesman observed:

"The British Parliament and the Privy Council are the two great institutions which the Anglo-Saxon race has given to mankind. The Privy Council, during the last few centuries has not only laid down law, but has also coordinated the concept of rights and obligations throughout all the dominions and colonies in the British Commonwealth. So far as India is concerned, the role of the Privy Council has been one of the most important. It has been a great unifying force and for us Indians it became the instrument and embodiment of the rule of law, a concept on which alone we have based the democratic institutions set up in our constitution."\(^{179}\)

Alladi Krishna swami Ayyer, an eminent lawyer observed: Whatever might be said about executive government under the resume which has to come to an end with Indian Independence Act there can be no doubt..... The record of the judicial committee of privy council has been a splendid one.... The Verdict of History would be in favour of judicial committee and there can be no more illustrious example for our federal court and Supreme Court to follow than judicial committee of the Privy Council.

\(^{178}\) Section 208 of GOI Act, 1935
\(^{179}\) M.P. Jain: Outlines of Indian Legal History at p 341
Abolition of Privy Council’s Jurisdiction

In 1949 the Constituent Assembly decided to grant full autonomy to the Indian judiciary. In anticipation of India attaining the status of a full republic in 1950, the last link with the Privy Council was severed in 1949 and the jurisdiction of the Federal Court and the Privy Council was inherited by the Supreme Court of India. 180

H. Free India and the Development of Judicial Institutions

The constitution of India came into force on 26th January 1950. The composition, powers and functions of all the three organs of the Government are laid down in the constitution. The Supreme Court is established at the Apex of Judicial institution in India. It is vested with original, Appellate and Advisory Jurisdiction in constitutional, Civil, Criminal and other matters. 181

High Courts 182 Next is hierarchy of the courts are the High Courts. (There are 21 High courts in country) High Courts are vested with original and Appellate Jurisdiction in constitutional, civil and criminal matters. High courts have the power of superintendance an control over all the courts and Tribunal with in its territorial Jurisdiction.

Suboridinate Courts :
The constitution of India also provides for sub-ordinate courts. They function at district level under the over all super- intendance and control of High courts of the State. These courts includes the Court of District and Sessions Judge Court of Judicial Magistrate 1st class.
Court of Judicial Magistrate IInd class.
For Metropolitan areas they are known as Metropolitan courts. 183

Panchayats :
Part IV of the constitution embodies the Directive Principle of State Policy. Article-40 lays down that state shall take steps to organize village panchayats and endow them such powers and authority as may be necessary to enable

180 Article 308 of Draft Constitution; Article 374 of the Constitution of India
181 Chapter IV and part V of the constitution contains provisions relating to union Judiciary
182 Chapter V and Part VI of constitution contains provisions regarding the High Courts
183 Chapter VI under part VI of the Constitution of India
them to function as a unit of self government. The Panchayats had been
discharging judicial functions since ancient times including during British rule.
They deal with petty civil an criminal matters through informal and simple
procedure with an endeavour to make conciliation or compromise between the
parties under disputes.