CHAPTER VIII
JUDICIARY
In the Vedic period, the Grama was the basis of life and the concept of justice emanated from the desire of villagers to punish the wrong-doers.

In the Rgvedic period, Dharma was the word for law and justice (which are allied terms), but it replaced the word Rta which was originally used for law and justice. The idea of justice was widely prevalent and firmly entrenched, but there were no judicial institutions.

"Firm seated are the eternal law's foundations; in its fair form are many splendid beauties. By holy law long lashes food they bring us by holy law have cow come to our worship."¹

Vamadeva gives this description of Rta, the fundamental Vedic conception of law. The sage emphasis that the law must not be composed of truth only but of certainty also. Radhabinod Pal² says: "The Vedic Rṣi does not recognise the flexibility of law. Indeed at such an age it could hardly be observed that law cannot stand still. The social interest in general security

¹Rv. IV. 23, 9.
led men to seek some fixed basis for an absolute ordering of human action whereby firm and stable social order might be assured. Demand for continual of new adjustments to the pressure of other social interests as well as to new modes of agendering security consequent upon the changes in the circumstances of social life was not yet felt."

In their conception of Ṛta the early Aryans gave the earliest possible recognition of the ethical principle in law.

The word more commonly used for law in the Rgveda is 'Dhaman' which later changed to Dharma. It is derived from 'dhri' meaning 'to uphold', 'to sustain' or 'to nourish'. The term Dharma has no precise synonym in the English language. Dharma, the sacred precept which has four feet of truth - Satya, Vyavanāra, Caritra and Rājjasana - is the eternal truth holding power over the world (Satyasthito Dharmaḥ). It stands for law; it is equated with truth and it means duty also.

The term Dharma in Pāṇini has two meanings - first, an act of religious merit and, second, custom or usage. The Āpastamba Dharma sūtra defines Dharma as

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1Rv. I. 187, 1; X. 92, 2.
2Aṣṭa. IV. 4, 92.
law while stating "We shall now propound Dharma or laws based on custom."\(^1\) Katyayana states that a charna has a two-fold implication (1) Amnaya or sacred tradition compiled as a religious canon and (2) Dharma, customary law compiled from actual life.\(^2\)

Yajñavalkya uses this term for law and states that it is constituted of Śruti, Sruti, usage of the good, one's own inclination and a desire based on good motives.\(^3\) A translation of the verse is given by Gharpure\(^4\) as follows — "Śruti (what is heard), Sruti (what is remembered), usage of the good, one's own inclination, and a desire based on (lit. born of) good motives — this is considered as the sources of Dharma."

Modern scholars give their own interpretation of the term Dharma. In the infant stage of Indological studies, Heinrich Zimmer interpreted Dharma as the fixed order of heaven and earth.\(^5\) Later, Prof. M. Winternitz

\(^{1}\text{Ap. Dh. S. I. 1, 1.}\)
\(^{2}\text{Agrawala - India as known to Pāṇini. p. 418.}\)
\(^{3}\text{Yaj. I. 7. — श्रुति स्मरण: सदानां: सक्स्तो व प्रक्षमाल्यम: । समासात्सर्वकागाधि अनुमुलिते स्तुकम ॥}\)
\(^{4}\text{Gharpure - Hindu Law. p. 17.}\)
\(^{5}\text{Zimmer - Altindischen Leben. p. 180.}\)
went to the extent of saying that Dharmaśāstras and Arthasastras were mere poetical works and that Dharma and Artha were subjects to be taught to a prince.¹

Authors of the Vedic Index² contend that "Dharma Dharman are regular words, the latter in the Rgveda and both later, for law or custom. But there is very little evidence in early literature as to the administration of justice or to the code of law followed. On the other hand the Dharmasūtras contain full particulars." But in his History of Sanskrit Literature Prof. Macconell interprets Dharma as religion and morality.³ Prof. Keith writes that Dharma śāstras deal with duty and morality as a basis of law.⁴ Prof. F. Kielhorn leaves the term untranslated and writes; "I find no English word by which I can fully express all the meanings of Sanskrit Dharma."⁵

Prof. Rangaswami Aiyangar suggests different meanings of the term in different contexts - virtue or precepts and canonical law. He further suggests that Dharma is of various kinds, constantly growing and never

² Macdonell & Keith - Vedic Index I. p. 390.
⁵ E.I. IX. p. 113.
He differentiates between the various kinds of Dharma, e.g., Saddharma or ordinary equity and morality; Asadhārma Dharma, Varṣārama Dharma, Guṇa Dharma, Naimittika Dharma and a further cross-section in his analysis of Dharma - Ācāra Dharma, Vyavahāra Dharma and Prāyaśchita Dharma.¹

Prof. H.N. Sinha has concluded that "Dharma may bear the interpretation of custom and usage, both sacred and secular in society."² In the same work, in a later context, he defines Dharma as the public law.³ Basham opines that Dharma is akin to the English word "form" and says that it is "untranslatable". In Asokan inscriptions and some other Buddhist sources it seems to have the broad general meaning of "righteousness", but in legal literature it may perhaps be defined as the divinely ordained norm of good conduct, varying according to class and caste.⁴

U.C. Sarkar states that "we can distinguish at least five sense in which the term is used in popular parlance⁵. In the first place, 'religion' which, according

³Ibid. p. 326.
⁴Basham - The Wonder That Was India. p. 114.
to him, is the category of theology; second, 'virtue' which he defines as the category of ethics; third, 'law' which is explained by him as a category of jurisprudence; the fourth and fifth meanings are 'justice' and 'duty'.

Dharma does not mean 'positive law'; in the modern sense of the term it has a much wider connotation. Its comprehensive nature groups diverse subjects or aspects like law, custom, morality, usage, virtue, religion, duty, piety, justice and righteous conduct. In fact, the term covers all aspects of life and, in its wider sense, comprised rules and principles of conduct relating to all sections of society of the Aryans.

Dr. Kane has stated that the Sanskrit Dharma defies all attempts to give it an exact meaning in English or any other language. Rhys Davids holds the same view while remarking that "Dharma is not simply law, but that which underlies and concludes the law - a word often most difficult to translate."

The earlier law books gave little attention and importance to the other sources of law except Dharma. But the importance of these sources was duly recognized

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1 Sarkar - Epochs in Hindu Legal History. p. 19.
3 Rhys Davids - Buddhist India. p. 45.
by the ancient Indian law-givers, who have described three feet of law—Sruti, Smṛti and Śiṣṭācāra.

Authors of Dharma Sūtras regard law as based on the holy scriptures, customs, conventions and ideal conduct of cultured people. Bādhayana considered the Veda tradition and ideal conduct as the sources of Dharma. According to Gautama too, the Veda, tradition and ideal conduct of cultured people constitute the basis of law.

According to Kautilya, the four feet of law are: Dharma, Vyavahāra, Caritra and Rājaśāsana. It is to be noted that the fourth limb of law, i.e., Rājaśāsana, was Kautilya's innovation. He further lays down that every following limb is to be preferred to the preceding one. When Kautilya contends that Rājaśāsana has over-riding power on the other three, he is adding something undemocratic to the judicial system of ancient India which was based on elements like Dharma, Vyavahāra and Caritra. Since Kautilya was a staunch monarchist, it seems probable that he wanted to extend the monarch’s authority over the legal system also.

Nārada also prescribes Dharma, Vyavahāra, Caritra and Rājaśāsana as the four heads of law. The Agnipurāṇa

1Arth. IV. I.

also states that the law has four feet - Dharma, Vyavahāra, Caritra and Rājaśāsana and calls them complementary (purvasādhaka), while according to Nārada and Kauṭilya, Rājaśāsana enjoys overriding power over the other three bases of law. The evidence in the Agnipurāṇa may denote a general lessening of the royal authority in the sphere of the judiciary.

Vyavahāra means judicial procedure when a case is fought in a court by citing documents, possession and other types of proof (ordeal, etc.). Harita, as quoted in the Smṛticandrikā, defines Vyavahāra as that whereby the recovery of one's own wealth and evasion of duties peculiar to another caste or class are effected in the course of law. The term in Smṛtis and commentaries is used in the sense of civil law, positive law and legal procedure. Nārada went to the extent of placing Vyavahāra above Dharma - "Vyavahāra hi Balavāna Dharmastenavahiyate."

Caritra, mentioned in law-books, was both written and unwritten and was to be gathered from ancient scriptures as well as from oral traditions preserved in territorial units and social groups. The unwritten law

1Agni. 253. 3-4.
2Cited from Sarkar - Epochs in Hindu Legal History, pp. 21-22.
3Ibid., p. 23.
is usage or local customs. Establishing the superiority of local custom, Vasistha and Gautama lay down that the immemorial usages of every province, handed down from generation to generation, can never be over-ruled by the sacred law.  

Bhaspati defines custom as "whatever is practised by a man, proper or improper, in accordance with local usage is termed Caritra". Almost the same idea is depicted in the Parāśara Mādhava - whatever is practised by one, whether in accordance with law or not, is termed Caritra (as it is consonant with the usual custom of the country). Further, the text records that the usage which has prevailed in a country, having been handed down by a line of generations in all classes, is termed Sadacāra (usage of good).

The Mahābhārata attaches great importance to custom and states that Dharma (law) arises from, and resides in, custom. Similar is the idea of Manu, who declares: "Custom is the highest dharma dictated by Śruti as well as smṛti. The sages having seen the way of Dharma through custom have accepted it as the root

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1 Vas. XVI. 4; Gaut., XI. 23.
of highest tapas.\textsuperscript{1} But the epic also states that "custom alone cannot be Dharma,"\textsuperscript{2} for "nowhere is found that custom which does good to all" or "which is not disregarded\textsuperscript{3} somehow or other."

Kautilya styles the third part of law as Samstha, meaning usage and custom of the people. He advises the king to dispense justice in accordance with the custom of the castes if he wishes to attain heaven, otherwise he will fall into hell.\textsuperscript{4} He has also assigned to the king the power to abrogate such customs of newly conquered territories as are harmful to his own interest and are contrary to righteousness.\textsuperscript{5}

The secular body of law in ancient India, founded partly on custom and partly on the authority of various texts, was recognised as one of the chief sources of law. So much importance was given to the customs of the land that the king was advised to regard the customs of newly-conquered countries as authoritative in its judicial machinery.

\textsuperscript{1} Manu. I. 101, 110.
\textsuperscript{2} Mah. Mokṣāchārīma Parva. 262.
\textsuperscript{3} Ibid., 260.
\textsuperscript{4} Arth. III. 7.
\textsuperscript{5} Arth. XIII. 4.
Gharoure defines custom as established practice at variance with the general law. He says that in effect it is the evolution of rules the existence and general acceptance of which are proved by their customary observance. According to him, customs are of four kinds:—(1) private, family customs; (2) general customs of the district; (3) Jātyācāra; customs of the estate and trade customs; and (4) public customs, which are applicable to every member of the State.¹

The Śaṅkaraśastra refer to customs very often but hold a divergent opinion regarding the relative superiority of law and custom. The Mimāṃsā school holds the view that customs are based on the lost Śruti text; hence the customs opposed to written law must be discarded while the later Śaṅkaraśastra appear to have been in favour of unqualified acceptance of customs even when they are in conflict with the written law. Jolly says that custom is frequently mentioned in the Śaṅkaraśastra in various contexts. Thus the usage prevalent in holy land and the decision of an assembly of virtuous men, especially of learned Brāhmaṇas, are regarded as authoritative in every case.² U.C. Sarker observes that customs undoubtedly


² Jolly - History of Hindu Law. p. 35.
played a very important part as one of the material sources of ancient Hindu law.¹

Bṛhaspati says that the time-honoured institutions of each country, caste and family should be preserved intact; otherwise, the people would rise in rebellion; the subjects would become disaffected towards their ruler, and the army and the treasure would be destroyed.²

Conception of Law in Ancient India

In ancient India, law and justice were allied terms and the idea of justice arose out of the bare needs of society.

In the Vedic period, law, having been given a predominant place in the life of the people, brought together social and ethical ideas. It covered all fields of human activity and indicated the regulative principles of the nature of society. The institutions dispensing justice in the Vedic period were the king and the Sabha. But no separate and elaborate machinery existed for the dispersion of justice. Macdonell and Keith remark: "There is no trace of organised criminal justice vested either in the king or in the people. There still seems to have prevailed the system of wergild, which indicates

¹Sarkar - Epochs in Hindu Legal History, p. 38.
²Bṛhas. VIII. 28-31.
that criminal justice remained in the hands of those who were wronged."¹ In the Sūtras, on the other hand, the king's place is recognised as an infringed by crimes, a penalty being paid to him or, according to Brāhmaṇical text-books, to the Brāhmaṇas. It may, therefore, be reasonably conjectured that the royal jurisdiction steadily increased. The references in Brāhmaṇa literature to the king as giving punishment (Danda), present a clear view of the institutions which were coming into vogue and of the king being considered as the fountain-head of justice.

In the Smṛti literature, we notice further progress in the concept of both law and the courts of justice. According to the code of Manu, the object of law is to maintain peace and order in the community.² The king is advised by Manu to appoint a learned Brāhmaṇa for inspection of affairs when he himself does not inspect.³ Manu has listed 18 kinds of law.⁴ Here we have for the

²Manu. VIII. 1.
³Ibid. 9.
⁴Ibid., 4-7.

1) Bhūdāna.
2) Nikṣepa.
3) Asvāmivikraya.
4) Sambhiya - Samutthāna.
5) Dattasyānapakrama.
first time a clear demarcation between civil and criminal laws.

Pāṇini, the great grammarian, calls the judge 'Dharmapati', a plaintiff as 'Parivāci' or 'Parivādaka', a witness as Śākti and an arbitrator as 'Stheya'.\(^1\) The concept of law does not seem to have made much progress since the days of Manu.

A new chapter was opened in the history of ancient Indian law with Kautilya\(^2\) in regard to both its concept and the legal procedure. Kautilya practically shattered the ancient concept of law by assigning a supreme position to Rājaśāsana and subordinating to it the other three elements viz. Dharma, vyavahāra and Caritra. Krishnarao remarks\(^3\) "Kautilya's conception of law was in keeping

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\begin{align*}
v:\text{Vetanādāna}. \\
vii): \text{Samvidyātikārā}. \\
viii): \text{Kṛyāvikrīyānuśaya}. \\
ix): \text{Śvāmipālaivivāda}. \\
x): \text{Śmāsviṣṭa}. \\
xii): \text{Ūkāruṣuṣya}. \\
xiii): \text{Dāndapāruṣuṣya}. \\
xiv): \text{Śteya}. \\
xv): \text{Ṣāhasa}. \\
xvi): \text{Strisāṅgrahana}. \\
xvii): \text{Stripudharma}. \\
xviii): \text{Vibhōga}. \\
xviii\text{i): } \text{Dyūtasampāhavaya}. \\
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\(^1\)Pāṇini. I. 3, 23; III. 2, 142; and 146; IV. 1, 84; V.2.91. Agrawala, V.S. - India as known to Pāṇini. pp.416-17.

\(^2\)Arth. IV. I.

\(^3\)Krishnarao, M.V. - Studies in Kautilya. p. 173.
with his conception of politics freed from the trammels of irrationalism." In books 3rd and 4th of his text Kautilya mainly deals with the judiciary. He planned a well organised judicial system. He divides the law courts into two broad divisions - Dharmasthiya and Kantakaśodhana. The former dealt with Vyavahāra and civil litigation while the latter tried such cases as arose out of such violation of the State laws, as endangered the safety of the state.

Law originated out of the human necessity and an urge for a peaceful life according to the Purānic conception. The Purānas give a realistic touch to law. According to Agnipurāṇa law distinguishes between right and wrong.

In the Gupta period separate machinery was set up for the administration of justice. Though king was the highest court of appeal but the department of judicial administration was under the jurisdiction of Mahādandanāyaka, who had many subordinates to carry on the administration of justice called Prādaivīka.¹

The above discussion shows that law (Dharma) based upon Vyavahāra, Caritra and Rājaśāsana was deemed sacred in origin by the ancient Hindus. Its enforcement

¹Inscriptions of the Gupta Emperors and dramas of Kālidāsa.
was due to the dread of hell and of social disapproval. The legal system of ancient India was not a result of the arbitrary will of the monarch or of a bill passed by any parliament; it had its root in social customs, practices and conduct of good people. It changed and progressed gradually.

King's Court

In ancient India, justice was administered in the name of the king. He was deemed to be the fountainhead of justice. He was the highest tribunal, with both original and appellate jurisdiction. When any case was decided by the king with the help of councillors, there was no appeal and when any case was tried by a lower court, the king's court was the highest appellate court.

To mete out punishment to the criminals appears to be one of the chief duties of a good king. The law knew no higher authority than the king. The essence of Aryan law from the earliest Vedic times was that he should place himself under the guidance of sages. He was to ascertain the law from learned men and from the customs. He was expected to exercise great care in dispensing justice. According to Manu, the king who punishes those who do not deserve punishment and does not punish those who deserve it commits a great mistake.
and goes to hell. Vasistha\textsuperscript{1} prescribes one day’s fast for the king and three days’ fast for the Purohita as penance whenever the king punishes an innocent person.

According to the \textit{Mahābhārata}\textsuperscript{2} and the \textit{Rāmāyana},\textsuperscript{3} if a king remains busy in pleasure seeking and does not meet litigants who approach him for justice, he would suffer like King Nṛga. King Nṛga is said to have been cursed by two Brāhmaṇas who had a dispute about the ownership of a cow and could not see the king for many days. Megasthenes states that the king remains in the court the whole day. Kautilya\textsuperscript{4} advises the king not to make petitioners wait at the door while he is in the court; when a king makes himself inaccessible, the people around him create confusion and he thus engenders disaffection among his subjects and makes himself a victim to his foes.

The king’s authority to administer justice was strictly restricted as strong injunctions are given in ancient Hindu law books as to where he should find the law.

\textsuperscript{1}Vaś. XIX. 40, 43.
\textsuperscript{2}Mbh. quoted in Dandaviveka. p. 13.
\textsuperscript{3}Rām. Uttrakāṇḍa. 53. 18, 19, 25.
\textsuperscript{4}Arth. I. 19.
Gautama lays down that the king should derive knowledge about the law from the scriptures, the customs and usages of the country and the customs and law prevailing among different castes and classes.¹

"The king could not change the law in his own favour except to the extent that an administrator could introduce changes in law. This absence of legislative power in administration takes away the important influence that had the tendency to make the ruler degenerate into an arbitrator.² K.V. Rangaswami Aiyangar also observes that "Medhatithi roundly declared that a king cannot make a law, over-riding Dharma" and also that "the evidence of history does not disclose any exercise of the alleged royal power of independent legislation". About the king he says: "He cannot make a new law. The royal edict is merely declaratory and not innovative."³

It is thus clear that though the king was the highest authority as far as the administration of justice was concerned, he was not to act arbitrarily. He was supposed to know the right law for each caste and seek

¹Gaut. Dh. S. XI. 19-21, 22, 25.

²Introduction by Dr. S.K. Aiyangar to "Hindu Administrative Institutions" by V.R.R. Dikshitar, pp. 32-33.

³Aiyangar - Some Aspects of Ancient Hindu Polity, pp. 23 and 133.
the advice of the learned brāhmaṇas who constituted his judicial council, and was bound to show deference to the time-honoured customs of the land and the four sources of law. Even in the Rgvedic period, when the outlines of the judicial set-up are not clear, he was required to discharge his judicial functions with the help of the Purohita.

In the later Vedic period, the king himself presided over the court and dispensed justice with the help of his assessors. The Śūtras also show that the king could not act arbitrarily but he was to administer justice according to the Vedas, the Dharmasāstra and the Purāṇas. Complex cases were referred to the Parisad. When even the Parisad failed to arrive at a satisfactory solution, the king referred the case to a learned Brāhmaṇa. ¹

The Sūtras insist that the king should not dispense justice alone but must seek the help and guidance of others who are well read. Manu ² and Yājñavalkya ³ suggest that the king, without wearing gaudy dress and ornaments, should enter the hall of justice accompanied by learned Brāhmaṇas and an efficient minister, free from hot temper.

¹Gaut. Dh. S. XXVIII. 50.
²Manu. VIII. 1-2.
³Yāj. II. 1.
and greed, and should decide the cases of the litigants according to the Dharmas'astras. Katyayana\(^1\) holds the same opinion and says that the king who performs his judicial functions in the presence of a judge, the ministers, learned Brāhmaṇas, the Purohitas and the Sabhyas attains heaven.

Kane\(^2\) writes: "This sentiment that it is not safe for a single man, however clever he may be, to undertake, to decide a dispute, was so much respected that Kālidāsa gives expression to it in Mālviṅgīmītram (Act I), when he pens the sentence *Sarvajñāsyāpyekākino nirṇyābhuyapagmo doṣāya*. In Rāghuvaṁśa (17.39) he again states that the king (Atithi) always looked into the complaints of people himself with the help of judges.* Kane adds: "Pitāmaha states that a person, even if he knows the rules (of Dharma) should not give a decision single-handed; justice was to be dispensed only in the court and not secretly."

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\(^1\) Quoted in Viśramitrodya. p. 278.


\(^3\) Rāghu. 17. 39. - स धर्मस्थाले लघुकालिका न चययोःः

The word 'Dharmastha' used here for judges may be noted. Kautilya uses the same word in III. 1. From a detailed examination of the Rāghuvaṁśa, it appears very probable that Kālidāsa has closely studied Kautilya's Arthaśāstra. Kane - H.D.Ś. Vol. III. p. 269.
The king's responsibility for maintaining law and 
dispensing justice was not taken lightly. He was expected 
to be strictly impartial in deciding the cases, for 
impartial judgements were said to lead the king to heaven. 
He was also advised not to start a law suit by himself, 
though fines are a fruitful source of income to him. 
He is further advised to throw into the water all the 
money collected by wrongly imposed fines.¹

While establishing the judicial supremacy of the 
king, Kautilya accords priority to Rājaśāsana over the 
other sources of law. But the king was still not allowed 
to dispense justice according to his sweet will alone. 
As Ancient Indian law-givers repeatedly say that law has 
four sources, we do not propose to say that king's will 
could be ignored or overruled but from the injunctions 
of our ancient authorities, we can conclude that king's 
will alone was not considered to be the only source of 
law.

Composition of Royal Court

In the later Śāptis the king's court has been 
compared to a human body in which the king is the head, 
the chief judge is the mouth, the assessors are the arms, 
etc. More accurately, the functions of the various

¹Manu. VIII. 43; IX. 244; Yāj. II. 307.
parts (Anga) of a law court, which are 10 in number, are thus defined: 1 the Chief Judge passes the judgement, the king inflicts the punishment, the assessors of judges investigate the merits of the case, the law-book furnishes the decree, gold and fire are used when ordeals are resorted to, the water is to refresh, the accountant calculates the value of the disputed property, the scribe records the proceedings and the court servants have to summon the accused, the assessors, and witness and hold both the parties in custody if they have given no surety. 2 The number of the jurors was to be odd, 3 and not even, to facilitate decision in case of a difference of opinion. Katyayana opines that the Satibas should bring round a king gradually to the right path when the latter is about to start on the path of injustice and to pronounce the true decision. 4

As regards the qualifications of the judges, they were expected not only to be impartial but also well grounded in law and truthful exponents of what they believed to be the correct legal position. 5

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1 Jolly - Hindu Law and Custom, p. 287.
2 Brhas. I. 4-10.
3 Manu. VIII. 11.
4 Quoted in Smrticandrika. II. p. 21.
5 Yaj. II. 2. — शुलायणकपन्न न आभिन्न: सत्यवचिनः।
राज्य समालोच्यां तरिकों मित्र न ते समानः।
Prescribing the qualifications of the judges, Āpastamba says they should be endowed with good learning, belong to a good family, be senior in age, clever and careful about Dharma. Nārada requires them to be proficient in the texts on the 18 titles of law and their 800 sub-heads in logic, and masters of the Vedas and the Sūtras.

On the issue of the caste of the judges all the ancient law-givers hold the same opinion that a Śūdra should not be appointed a judge. Manu goes to the extent of saying that even if a learned Brāhmaṇa is not available, an uneducated one may be appointed a judge by virtue of his birth alone. But Kātyāyana is of the opinion that if a learned Brāhmaṇa is not available for the post of Chief Judge, a Kṣatriya or a Vaiśya who knows the Dharmaśāstras may be appointed, but the king should scrupulously avoid appointing a Śūdra.

The other name for Chief Justice apart from Prāgavivāka is Adhikarpika. Mṛchchhakatika bears testimony that Adhikarpika was assisted by a Śreṣṭhin and a kāyastha. The constitution of the law-court given

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1Āp. Dh. S. II. 29, 5. - विवादिते विवादिनियन्त्विन्नो शुद्ध

2Manu. VIII. 9; Yāj. II. 3.

3Kāt. quoted by Mit. on Yāj. II. 3.

4Mṛchchhakatika. Act. IX.
in the Mṛchchhakatikā is the same as in the Smṛtis, and, broadly, the terminology also. The judges (Aḍhikārṇika, Niyukta, Aḍhikṛta and Drāṣṭr) assemble in the justice hall which was situated in the outskirts of the royal palace. It was to be situated in the east and should be adorned with decoration pieces and jewels. The forenoon was considered to be the proper time for the judicial bench to sit. The trial by jury was limited to criminal cases. Possibly, respectable Śrēṣṭhis were given representation to satisfy public opinion. But the king was not to appoint those Sabhyas who were ignorant of the usages of the country, who were atheists and devoid of the study of the Śāstras, who were either puffed up, greedy or distressed.

From the trial of Carudatta in the Mṛchchhakatikā it is clear that the Chief Justice was to decide the guilt or innocence of the accused and punishment was in the hands of the king. The judge says: "We are the authority in deciding the guilt or otherwise; the rest is in the hands of the king." The function of the jury is defined by Brhaspati and Nārada, and also in the Sukraśītisāra.

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1Mit on Yāj. II. 2. Lokaraṃjanārtham.
2Brhas. quoted in Srāvicandrikā. II. p. 15.
3Mṛchchhakaṭikā. Act. IX. — बाल सावधान । निष्ठिय कर्म प्रमाणाय।
4Brhas. in Viramitrodaya. p. 42. Cf. Jolly — Nārada, Introduction. II. 45 — "One condemned by the judges shall be punished by the king according to law" "Justice is said
We find two types of royal courts in Kauṭilya\(^1\) (1) Dharmasthīya and (2) Kantakāsodhana. Dharmasthīya dealt with Vyavahāra litigation, while Kantakāsodhana comprised three ministers and three learned men acquainted with the sacred law (Dharmastus). They determined cases relating to violations of the law and looked to the safety of the empire. Krishnarao opines that "Kantakāsodhana was manifestly something more comprehensive than a body of penal sanction which were applied to all castes and corporations."\(^2\)

**Lower Courts**

The most pronounced feature of ancient Hindu polity was the dominating position of the law throughout history; when it became the king's right and duty to administer justice, he interpreted and enforced the law through the lower courts of the land.

**Village Courts**

Dispensation of justice was one of the main functions of the local bodies. It was carried on in accordance with local laws and customs, through the agency of the village headman. These local laws and customs were
to depend upon the jury"; II. 6; Śukra. IV. 5, 26-27.

\(^1\)Arth. II. 4.

revered even by the king while administering justice.
Kauṭilya, though a staunch advocate of centralised monarchy,
left many cases to be decided by the village elders as
they arise out of boundary disputes and matters relating
to temples, the Brāhmaṇas, ascetics, women, minors, old
and invalid persons. The following were the popular
courts referred to in ancient Indian literature, through
many expressions in different times.

Sabhā as law Court

The 'Sabhā', frequently referred to in the R̄gveda,
denotes both 'the people in meeting' and the 'hall' which
was the venue of their meeting. We do not find any traces
of organised institutions dispensing justice during the
early Vedic period. Though no detailed information about
the working of the Sabhā is furnished in the later Vedic
period, the Maitrāyaṇī Samhitā mentions the Sabhā in the
sense of the court-house of the village judge — the
Grāmyāvādin — who is referred to in all the Samhitās of
Yajurveda. The term Sabhāsād, which occurs in the
Athravaveda and later Vedic literature, meant assessors

1Arth. III. 9.— शासननियम साधनग्रापतृंगदृ: भूष: 1
2Ibid. III. 20.
4Av. III. 29, 1 (of Yama); VII. 12, 2; XIX. 55, 6,
Kāth. Samh. VIII. 7; Mait. Samh. I. 6, 11; Taitt. Br. I. 2,
1, 26; Ait. Br. VIII. 21, 14.
or legal experts who decided cases in the assembly. The frequent use of Sabhācara in Vedic literature signifies the Sabhā as a law-court. The importance of the Sabhā as a judicial unit came to be recognised in the period of the Dharmaśāstras.

Kula, Śrenī, Pūya and Gaja

The Smṛti literature is full of references to the popular courts, but the Dharma Sūtras and Manusmṛti are silent on this point. "Whether they were not evolved before the Christian era or whether they were not mentioned as being unofficial, it is difficult to say, probably the latter was the case", observes Altekar.

For the first time they were mentioned in Yājñavalkyasmṛti. Yājñavalkya mentions three kinds of local courts, Pūga, Śrenī and Kula. Vijñāneśvara, a commentator of Yājñavalkya, describes them as agencies of adjudication other than the official ones. Brhaspati mentions these courts in an ascending order and prescribes an appeal from Kula to Śrenī court, from Śrenī to Pūga court.

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3. Vāj. II. 29.
The families were fairly large in ancient India. Kula court has been described by Mitākṣrā as consisting of a group of relations, near or distant. The family elders decided the quarrels arising between two (or more) members of the family. In short, it was a small informal body of family elders. Perhaps they took cognisance of quarrels arising in family units of 10, 20 or more villages. This court took notice of criminal cases and justice was dispensed in the name of the president i.e. head of the family. On failure of a Kula court to pronounce a decision, the case was taken to a Śrenī Court.

Śrenī means the corporations of persons following the same craft or work — though they may belong to different castes — such as house dealers, sellers, weavers and dealers in hides, etc. The term Śrenī used to denote a guild or corporation courts which were a prominent feature of commercial life in ancient India from 500 B.C. The earliest and quite frequent references to these guilds are to be found in the Mahābhārata and in Buddhist literature. They had a committee of their own, consisting of four or five members. Most likely, they dispensed justice whenever a quarrel arose among the members of the guild. The Sūtris and the various commentaries define them as a court constituted by traders or artisans, including men of different castes and
occupations but inhabiting the same village or town.

When a suit was not decided in a Śrenī court or when the litigants felt that justice had not been done to them, they could make an appeal to the Pūga court. This court was composed of different guilds (Śrenīs) residing in one village or town. The Pūga most probably evolved out of the Sabhā of the Vedic period, because it comprised the grāmanvīdhas, like the Sabhā.

According to Sāntiparva, the Gaṇa was the body politic of the entire community consisting of Gaṇamukhyas and Pradhānas, and it carried on the business of the community. Gaṇa courts had their own laws which were called "Samaya”.1 With the rise of monarchical kingdoms, the decisions of Gaṇa courts were made subject to the appellate jurisdiction of the monarch.

Pritiṣṭhita, Apritiṣṭhita, Mudrita and Śāsita

Apart from this category of local courts, Brhaspati mentions another category of having four kinds of courts: (1) Pratiṣṭhita (stationary), (2) Apritiṣṭhita (not stationary), (3) Mudrita (furnished with the king’s signet ring), and (4) Śāsita (directed by the king

1'Samayas' are discussed in detail in the Chapter IV.
himself).  

The Pratīṣṭhita court was situated in a village, town or city, while Apratīṣṭhita was a movable court (not situated in a particular village, town or city). It was a temporary court which met for a particular purpose and was dismissed afterwards. The court where the judges, appointed by the king, were authorised to use the royal seal was called 'Mudrita'. In the Sāsita court, the king, along with the assessors, heard the cases and gave decisions.

The Pratīṣṭhita and Apratīṣṭhita courts dealt with minor cases and inflicted Vāk-danda and Dhik-danda. If a litigant was not satisfied with the judgement given by these courts, he could take the case to the higher courts, Mudrita and Sāsita. Apart from having this jurisdiction, these courts could impose heavy fines and inflict corporal punishment.

Bṛhaspāti points out the existence of yet another category of courts. He opines that for persons roaming in the forests, a court should be held in the forest;

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1Bṛhas. I. 2-3.

प्रतिष्टितप्रतिष्टिता मुद्रीता भालिता तथा ।
कु लिथा स्म ये प्रौढः समधैश्वत्वात्तविथ।।
प्रतिष्टिता पूरे श्रामः बला नामप्रतिष्टिता ।
मुद्रीताःधवलक्ता राजशुलतः ब शालिता ॥
for warriors in the camp, and for merchants in the caravan. Again, cultivators, artisans, artists, money-lenders, dancers, persons wearing the token of a religious order, and robbers should adjust their disputes according to the rules of their own profession. The king should dispense justice to persons versed in sorcery and witchcraft with the help of persons who have knowledge of the three Vedas, and not by himself.\(^1\) This well-established belief, corroborated long afterwards by the principle of local knowledge, is also recognised in the Ṝṣiṃsmṛti in relation to the settlement of boundary disputes. He points out that if there is no witness, let four men who dwell on all the four sides make a decision about the boundary.\(^2\) Yājñavalkya also hold the same view that boundary disputes should be settled by the persons residing in the locality, aged men and cowherds, etc.\(^3\) Sukraniti maintains that in the case of a dispute, the best men of the locality alone can be the proper judges. Foresters are to be tried with the help of other foresters and so on, and villagers

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\(^1\)Brhas. I. 25-27.
\(^2\)Manu. VIII. 258.
\(^3\)Yaṣ. II. 150.
by persons who live with both the parties.¹

Almost all the Smṛtis state that the number of judges in all the courts should not be even, have the same qualities as discussed above. Whether the judges in these courts were appointed by the king or they were representatives of the people is not definite, but in most cases the presidents of all types of courts were apparently appointed by the king, flanked by the local assessors.

The assessors apart, these courts also included other officials. The accountant and the scribe ought to be of good birth and character and have knowledge of various scripts. And a strong, truthful person was to be appointed to summon the witnesses, the plaintiff and the defendant, and to look after them. The nature of this job shows that the post was reserved for the Śūdras. Vyāsa says: "A stout-Śūdra whose ancestors were employed in that office acting under the orders of the judges should be made a Sāchyapāla to obtain materials for trial."²

Respect for common law and public opinion was the principle followed by these courts in deciding

¹ Ṣukra. IV. 5-24.
cases. The king was to interfere only when there was a dispute between the chief of a court and his colleagues.

Sir Henry Maine holds the view that the existence of the local courts was due to the prevailing anarchy in the country which did not allow any regular royal court's working. As soon as law and order were maintained they disappeared. But the existence of these local courts cannot be denied till the beginning of British rule, though they disappeared after it was well established. These courts, though unofficial by nature, had the royal sanction behind them. Yajñavalkya describes them as having the sanction of the king. The reasons for the existence of these local courts and the encouragement given to them by the king may be described as follows:-

Justice was the main duty of the king and the local courts lessened his burden, as the king personally could not have heard so many cases. So the local courts removed the confusion and corruption which were likely to be created by people around the king.

They helped the cause of justice because only

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1Maine - Village Communities in East and West. p. 68.

2Yaj. II. 30.
the local men, were fully acquainted with the facts of a case and it was very difficult for a person to go and tell a lie in front of his fellow beings who knew him well. Moreover, the dread of hell was also there, which prevented people from telling lies in the court. They had respect for their local customs and were conscious of their right to get proper justice. That justice led everybody to heaven was a common belief in ancient India; i.e. proper justice alone could bring happiness to this world.

Above all, the Hindu system of administration never allowed a person to be an arbitrator and it never considered anybody above the law.

The foregoing discussion reveals that ancient Indian judiciary was democratic in both its set-up and administration.

**Theory of Punishment**

Punishment may be defined as a result of an act or omission that violates the law. The Sanskrit word which stands for punishment is Danda, which is connected with Dharma. Manu states that with a view to bringing to an end the state of anarchy, the Prajāpati created Dharma. The people were expected to follow the precepts of Dharma and lead a just and peaceful life. But the scheme did not work. The people continued to be wicked
and violent, so the Prajāpati created Danā. According to Manu, Danā governs and protects society. The epic also holds the same view that it was designed to correct human vices.

Danā was considered to be the punitive power of the State. The king wields Danā, but he could not exercise the punitive power of the State arbitrarily. He was directed to wield Danā in accordance with Dharm. Manu observes that the science of statecraft evolved out of Danā, and further states that the whole world is rectified by Danā and even gods and demi-gods are subject to its authority.

Manu has summed up the ancient Indian theory of punishment in the following words: "Punishment has been prescribed by the sages, so that righteousness may not be outraged and unrighteousness may be cured."

As far as dispensation of justice is concerned, there was no equity before the law. The class basis was the dominating feature in the administration of justice. A Brāhmaṇa and a Śūdra were not awarded the same punishment

\[1\text{Manu. VII. 18. - हथ: शासित: प्रजा: स्वा झड़ स्वामित्व रजैति।}
\[2\text{Mbh. Rajadharmānudāsana Parva. 112, 34, 35.}
\[3\text{Manu. VII. 14.}
\[4\text{Ibid., VII. 22.}
\[5\text{Ibid., VIII. 122.}
for the same kind of offence. A glimpse of this differentiation can be had in the following principles:

According to the Baudhāyana Dharma Śūtra, for slaying a Kṣatriya one should give 1,000 cows and a bull; for slaying a Vaiśya one should give 100 cows and a bull and for slaying a Śūdras one had to give only 10 cows and a bull. The Śūdras were treated so low that the above-mentioned text prescribes the same fine for killing a Śūdras as for killing a crow, a peacock, an owl, a frog and a dog, etc. The Brāhmaṇas were exempted from corporal punishment, but the Śūtras say that the Brāhmaṇas who tend cattle, practise agriculture or live as artisans should be treated as Śūdras.

Caste enters in an equally conspicuous manner into the law of defamation. For defaming a Brāhmaṇa, a Kṣatriya was fined 100 Paṇas, a Vaiśya from 150 to 200 Paṇas, while a Śūdras was to suffer corporal punishment. A Brāhmaṇa was to be fined 50, 25 and 12 Paṇas for defaming a Kṣatriya, Vaiśya and a Śūdras respectively. There was a uniform penalty of 12 Paṇas for twice-born men defaming a caste-fellow.

Imprisonment is included in the corporal punishment, and it was also prescribed in default of fine. According to Manu, in case a Śūdra or a Vaiśya or a Kṣatriya is unable to pay the fine imposed on him, he will discharge
it by physical labour, but a Brāhmaṇa shall pay it by easy instalments.

The dispensation of justice in ancient India seems more harsh to the lower castes and partial to the Brāhmaṇas, yet the Brāhmaṇas were expected to maintain a high level of social morality in their private life and were more drastically punished for laxity in that sphere.

The Pāñchviniṣa Brāhmaṇa says that the Purohita might be punished with death for treachery against his master.

Fines were imposed after taking into consideration the social position of the person, the nature of the offence, the cause (whether grave or light), the antecedents, the present circumstances, the time and the place. The ancient Indian law-givers prescribe fines and even corporal punishment for judges and Prādeśīs who are corrupt and give wrong judgements.

Manu maintains that in all matters of justice, the judge should take into consideration the various factors, such as time, place, circumstances and the psycho-physical status of the individual who commits the crime.

Though the ancient law-givers were undeniably partial to the Brāhmaṇas, they did not spare them when
they were found guilty of adultery. A Brāhmaṇa who subdues a guarded Brāhmaṇī against her will will be fined 1,000 Paṇas, but he shall be made to pay 100 Paṇas if he had relations with a willing one. Tonsure of the head is ordained for a Brāhmaṇa instead of capital punishment but (men of) other castes shall suffer punishment based on class lines. For producing a false witness Manu prescribes banishment for a Brāhmaṇa.

The Agnipurāṇa prescribes a fine of 1,000 kārṣapānas on a Brāhmaṇa for taking prohibited food, while a Śūdras was fined only one kārṣapāna for committing the same mistake. Neglect of duty, corruption and, above all, unwarranted harassment of the people by judges were severely punished.

That in extreme cases the Brāhmaṇas were awarded capital punishment also is evident from the testimony of Mṛchchhakātika. He records that Cārudatta, who was adjudged guilty of the murder of Vasantaśena (a Gaṇikā) by the judge, was to be given capital punishment.

Though we find stray references to severe punishments meted out to the Brāhmaṇas, it is certain that the administration of justice was partial to Brāhmaṇas and

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1Agni. 227. 60.
2Mṛchchhakātika. Act. IX.
caste-ridden, disregarding the democratic set-up of the judicial system as a whole.

Rule of Law and Purity of Justice

The sense of justice was quite high in ancient society from the very beginning of legal institutions. Nothing was considered above the law. Though the king was the fountain-head of justice, he could not himself create a law as there was the Brāhmaṇa agency, which always balanced and counterpoised the estate of sword and the estate of wealth. It was laid down that the king must abide by their opinion in all cases of undue interference.

The Brhadāranyaka Upaniṣad records: "Brāhmaṇa (the supreme being) created the supreme and excellent law; the law is the king of kings. Therefore there is nothing higher than the law. Even a weak man rules with the help of the law, as with the help of a king. Again, if a man declares what is true, they say he declares the law; and if he declares the law, they say he declares what is true. Both are the same."¹

Kāṭhaka Samhitā² records a long discussion over a case where a child is accidentally run over and killed

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²Kāṭh. Samā. XXVII. 4.
by a chariot which was driven by the king and his Purohita. The matter was reported to an assembly of Ikshvākus who decided that expiation was due.

One more incident about the purity of justice may be quoted from the Pāli canon. In the Vinaya Piṭaka Chullavagga is quoted the case Anāṭhapindikā versus royal prince Jeta. The case was decided by the court of Śrāvasti, capital of Outh. Anāṭhapindikā was a great devotee of Śākya Muni. He wanted to build up a monastery to dedicate it to the Sāṃgha, but was not finding a suitable site. He happened to like prince Jeta's garden which was not too far or too near the city and quite convenient to the Bhiksus. He told the prince that he wanted to buy the garden. The prince replied: "It is not 0, gentleman, for sale, unless it is laid over with crores (of money pieces)." "I take your happiness, the garden", replied Anāṭhapindikā.

"No, gentleman, the garden has not been taken". Then they asked the lords of justice whether the garden had been bought. And the lords decided thus; "Your Highness has fixed the price and the garden has been taken."

Here in this incident we find that a prince and

\[1\text{Text Ch. VI. 4.9.}\]
a citizen file a case in a court. The court does not side with the prince. The best part of the purity and validity of justice lies in the fact that the prince accepted the decision calmly.

While going through ancient Indian judicial history, we gather that the king was considered to be the guardian of law but not the creator of it.

In the light of these facts, we may maintain that Hindu law was not created by one person. It came down to us from the knowledge and conduct of the sages. The duty of the king to maintain and uphold the law was imposed upon him by the law itself.