**LEGAL HISTROY**

**PART -III**

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***Chapter-I***

**Administration of Justice in Surat, Bombay, Madras and Culcutta(1600-1726)**

**--------------------------------------------------------------------------------------**

In 1583 A.D three (3) English merchants Ralph Fitch, James Newsberry and William Heeds visited India. Britishers got information about the wealth of India from the writings of Ralph Fitch who travelled throughout India. The information about the wealth of the country inspired the Britishers to have trade relation with India.

            On 24th September 1599, some merchants of London held a meeting under the chairmanships of the city mayor. The object of the meeting was to constitute themselves into a company for starting trade relations with the east Indies. They formed a company under the name and style “The Governor and Company of merchants of London trading into the East Indies”. The said company is known as East India Company. The Company applied to the crown for permission to trade with East Indies. On 31st December 1600 Queen Elizabeth issued a Charter and there by incorporated East India Company.

**Introduction**

            History comprises of the growth evolution and development of the legal system in the country and sets forth the historical process where by a legal system has come to be what it is overtime. The legal system of a country at given time is not creation of one man or of one day but is the cumulative fruit of the endeavor experience thoughtful planning and patient labor of a large number of people through generation.

            With the coming of the British to India the legal system of India changed from what it was in the Mughal period where mainly the Islamic law was followed. The legal system currently in India bears a very close resemblance to what the British left with.

            As per the need of the changing times the changes and amendments were made but the procedure which is followed not has its root in the era of British India. Little did the traders of the English East India Company (EIC) while establishing their trade in India knows that they would end up establishing their rate for about 400 years here. But the evolution of law as it today did not came about in one go altogether. It was the presidency towns individually that were first affected by this change in hands of the governance of India after which the steps towards amalgamation of the judicial system were taken by the Charter 1726 and 1753. To improve upon this under the regulating Act 1773. Supreme Court in the presidency town and then under the Act of 1798 the recorders Court at Madras and Bombay were established. This were ultimately replaced by the establishment of High Court Act 1861 which are still running in the country it was only after Independence in 1950 that the Supreme Court was established reforms and codifications were made in the pre-post-independence era and are still continuing.

**The history of the legal system in British**

India opens with the establishment of east India company

            The company incorporated in England by the crowns Charter of 1600. The company was given executive trading right in Asia including India, Africa and America. All the members of the company constituted themselves as general court it was to elect annually the court of Directors. The Court of Directors consisted of a Governor and 24 Directors.

            The court of directors was to manage the entire business the court of director were to be elected by the general court for 1 year but any of them might be removed from his office even before the expiry of his term of office by the general Court.

**Object of the company**

            Actually the company appears that to promote British trade and commerce in Asia. The company was conferred on only those powers which were necessary to regulate its business and maintain discipline amongst its servants and they were not at all adequate for governance of any territory.

            But the company came to India and they were found the Indian Kings disunited and unaware of the Modern Politics. They realized they can dominate the territory in India the company gradually and gradually inclined to acquire territories in India. The company thereby could market for its goods. At the time of the incorporation the object of company was commercial but gradually and gradually its object became political also.

            In early days the administration of justice in the settlement East India Company was not a high order. There was no separation between the executive and the judiciary the judiciary was under the control of the executive the judges were not a law experts. The company gave lesser importance to the judicial independence fair justice and rule of law. The administration of justice and developments of courts and judicial institution during this period may discussed under the following headings –

         **1600 to 1726 is the first period.**

         **1726 to 1773 is the second period.**

         **Administration of justice and development of East India Company – presidency town.**

**Emergence of the East India Company development of authority under charters**

**East Indian Company and its development**

Charter divided into 2 group

 1 Legal System

 2 Administration System

Governor and 24 director in company for managing company for 1 yr tenure and re-elect is common between them.;

**Charter 1600**: only connection with trade and were not intended for dominion of India. Legislative power given to company to regulate its own business and maintain disciplinary action against their servants.

**Charter 1609**: 31st may 1609 James granted a fresh charter to the company which given privileges in perpetuity. The company was also authorized to continue the enjoyment of all its privileges by Queen Elizabeth under Charter 1600. They can punish their servants for grosser offences on long voyages. The company secures the first Royal Commission in 1601. 1623 charter the add on of martial law power given to company. English people came to India in the reign Emperor Jahangir and settled at Surat 1612. It’s a best place for trade and commerce in western coast of India.

**Charter 1625**: New trading body for the purpose of trading with East India Company with name “Courten Association” this continue till 1657.

**Charter 1657**: Oliver Cromwell granted a new charter amalgamated the various joint stock into one joint stock. The charter also ends the tussle between old company and Courten Associations.

**Charter 1661**: in reign of Charles II the company entered into a period of unpredicted prosperity. Now charter of company turn from trading into purely territorial power and has new line of company territories.

Now company punishes the servants and employee on the basis of disobedience and make trading centers {Madras, Bombay and Calcutta} solve both civil and criminal cases according to English law. If there is no governor than trial sends a man to a place where there was a governor.

**Trading body to a territorial power : subsequent charters**

**Charter 1668**:

 Body of territorial power

 Charles II transferred to Bombay which he got as a dowry from Portugal to East Indian Company for a rent of 10 Euro.

 Making law, order, ordinances and constitution for good government.

 Court of judicatures and proper administration of justice.

**Charter 1683:**

Company to raise military forces.

 Judicature court established 1 person and 2 merchants- all appointed by Company- decide on the basis of good, equity and consciences, laws and customs of merchant

 East India Company to established Admiralty Court.

**Charter 1686:**

James II renewed the power and privileges of company by this charter

 Company appoints admirals and sea officers.

 Their power of naval force and martial Law.

 Authorised to established a municipality and Mayor court at Madras

 Sir Jasiah Child governor of Company and chairman of court of director established polity of civil and military power and create and secure a large revenue

 English dominance in India

 Company territorial in India

**Charter 1693:**

Old company jealous to English company.

 Whings to come in power in England and new company established 1693 to break old company monopoly

 New company name “General Society”.

**Charter 1698**

William III granted a charter to the company certain advantages were made in the existing rule to improve the administration of company.

 Director created for control of company and sees the affair of the united company.

 Company work till passing of Regulating Act 1773 which completely overhauled the constitution of company.

**Administration of Justice in Surat: (1612-1687)**

The East India Company established Ist factory in Surat in 1612. British crown sent an ambassador Sir Thomas Roe to the Mughal Emperor to request to grant certain facilities to the English man in India. In 1615 the Mughal Emperor on the pleading of Sir Thomas Roe issued a Firman, the Mughal Emperor allowed the Englishman to live according to their own religion and laws and to settle dispute among themselves by their president, however the disputes between on Englishman and an Indian were to be decided by the native Judges.

**Following are the few facts of Administration of justice in Surat-**

1 Most Important Factory Initially.

 2 Important Commercial Centre.

 3 Populous Town & International Port.

 4 1612 Established Factory at Surat.

 5 The Governor and Company of merchant of London training into East.(15 year).

 6 1615 mughal farmaan and special power to them.

7 Governor and council (less knowledge of law)

 8 Qazi Court made by Muslim Ruler to solve cases

9 Defects in Surat

 10 No knowledge of law

11 Fight between them only

1. Corruption
2. Hindu and Muslim law applied on them.

**Administration of Justice in Madras**

It was developed in three stages.
They are:
Stage I:    1639 – 1678
Stage II:   1665 – 1683
Stage III:  1683 – 1726

            In 1639 Francis Day acquire a piece of land from a Hindu Raja for the East India Company and constructed a fortified factory were Englishman and other Europeans and therefore the area of the factory came to be known as while town and the people residing in the villCouncil. The serious criminal cases referred by them to the Company’s authorities in Enage Madras, Patnam were mostly Indians and therefore it came to be known as Black Town. The Whole Settlement Consisting of white town and black town came to be known as Madras. In judicial administration in Madras divided in 3 stages. First, Second and Third.

**STAGE –I (1639-1678)**

            White town before 1665 Madras was not presidency town and it was subordinate to Surat. The administrative head was called ‘Agent’ and he was to administer the settlement with the help of gland for advice. But there was defects the judicial power of the agents and council was vague and indefinite and much delay also, they did not have any elementary knowledge about law. They were Merchant. There was no separation between executive and judiciary.

            The president of the Surat factory and members of His Council constituted a court to decide dispute between the Englishman interest in accordance with their own laws and customs. They were to decide both civil and criminal cases.

            Capital offences dealt by a jury there was no separation between executive and judiciary. The president and the members of his council who were to decide cases and administer justice were merchant. They did not have even elementary knowledge of English law.

            The cases were decided by them according to their wisdom, commonsense. And the native judges were corrupt bribery was rampant. They had no request for law and justice.

Surat was the chief trading center till 1687. But there after it lost its importance because in 1687 the headquarters of the president and council were transferred from Surat to Bombay.

**Black town**

            The old judicial system was allowed to function there was a village head man known as Adigar or Adhikari who was responsible for the maintenance of Law and Order. Adigar administered justice to the native at the Choulby Court. According to the long established usages, Choulby Court was court of a petty cases. The Company had no power to inflict death sentences under the Charter of 160 and the agent in Council could inflict such a sentence only under the authority of local sovereign. The appeals front the Choulby Court were to be heard by the agent in Council. An Indian native named Kannappa was appointed Adigar but he misused his power and consequently he was dismissed from the office and the English servants of the office and the English servants of the company were appoined to suit at the Choulby court.

**Charter of 1661**

            It was granted by the British Crown it conferred board powers on the East India Company. The charter authorized the Governor and Council of Englishman inhabiting the settlement of the company. The Governor and Council of each factory to hear and decide all type of civil and criminal cases. Including the cases of capital offences also and it could award any kind of punishment. Including death sentences.

            Under the Charter of 1661, the cases of Indians inhabiting in the settlement of the company were to be decide according to English law. The powers conferred on the company could only be exercised by the Governor the chief factor and Council were empowered to send offenders for punishment either to a place where there was a Governor and Council or to England.

**STAGE – II (1665 – 1683)**

In 1665 one Mrs Ascentra Dawes was charged with the commission of Murder her slave girl and the Agent- in – Council referred the case to the Company’s authority in England for advice. After raising the status of agent and Council of the factory at Madras to try Mrs. Dawes with the help of Jury and an unexpected verdict of not guilty was given and consequently Mrs. Dawes was acquitted. Later on 1678 the whole judicial administration was re-organized. The judicial administration in both the towns was improved.

**White town**

            The court of Governor and Council was declared to be the High Court of Judicature. It was to hear all case of the inhabitance of both towns with the help of jury and also hear the appeals from the Choulby Court. It was decide cases according to English Law. The Court was to meet twice a week.

**Black town**

            The Choulby Court was also re-organized. The number of the judges was increased from 2 to 3. All the judges were Englishmen. At least 2 of them were to sit in the Court for 2 days in each week. The Choulby Court was empowered to hear petty criminal cases. It was also empowered to hear petty civil cases up to 50 pagoda and the cases of higher value with the consent of the parties.

 **STAGE-III (1683 – 1726)**

            Admiralty Court on August 9 1683 Charles II granted Charter to the Company to establish the courts which was to consist of person learned in the civil law and two mercantile, maritime trespass, injury and wrongs etc. again April 12 1686 Charles II issued a new charter with same provisions. Chief Judge of the Admiralty Court was known as the Judge Advocate. The admiralty court having the jurisdiction to hear and decide all mercantile and maritime cases.

            In 1687 company sent from any land Sir John Biggs a professional lawyers learned in Civil Law to act as the Judge Advocate of Admiralty Court bestowed justice in all cases civil, criminal as well as maritime. Sir Biggs died in 1689 and Governor again took the charge of judicial function. In 1692 the company sent John Dolben as new Judge advocate and in 1694 he was dismissed on the charge of taking bribes.

            In 1696 company directed that members of the Council should in succession serve as the judge Advocate after Willian Fraser a Merchant was appointed as Judge Advocate. Later he resigned and no one was ready to become the Judge Advocate, so company made the Court registrar the Judge Advocate.

**Madras mayors court (1688)**

            At the time in England there they got London corporation and they got London mayors court as per the British Law. That time municipal corporation enjoyed the Judicial power also company issued the charter and started Madras corporation utilizing the power given by British Crown.

            In the year 1687 Company established Madras Corporation and Mayor’s Court was the part of this corporation. In the year 1686 Madras government levied a house tax on the Madras City population to repair the City wall. But people of Madras, Local people did not pay tax and Company faced problems and difficulties to collect tax, after this company decided that to make the tax collection easy a body should be formed consisting of English men as well as Local Indians population so it will become easy for the company officials to collect the tax.

            The corporation came in to existence on September 29 1968 which consists of a Mayor, 12 Alderman and 60 to 120 Burgesses. It was decided that every year new Mayor will be elected from Alderman by Alderman and Burgesses and retiring Mayor can be re-elected by them.

            The Alderman and Burgesses got the power to remove the Mayor if he is unable to perform his duties, only Englishman becomes the Mayor. The Alderman hold the office as long as they stayed in Madras City indirectly they hold the office for life long. Mayor, Burgesses holds the power to remove the Alderman from office also if he did not perform well.

            Among the Alderman minimum three were required to be British Servants of the Company and other nine can belong to any nationality or religion.

The First Alderman were as Follows –

a)    Englishman – 3

b)   Hindu – 3

c)    Frenchman – 1

d)   Portuguese- 2

e)    Jews and Americans – 3

The charter appointed 29 Burgesses and then remaining Burgesses were appointed by the Mayor and Alderman. Among 1st 60 Burgesses the caste head were selected as the Burgesses.

This was the nature of 1st corporation the Mayor and three Senior Alderman were to be the justice of the peace. The Mayor and Alderman were to form a court of record which was authorized to try civil as well as criminal case. This court was known as Mayors court.

The Mayor’s Court was authorized to give following punishments –

Fine, imprisonment and corporeal punishment. The convinced person gets right to file appeal to the Admiralty Court.

As Mayor and Alderman did not have legal knowledge the provision was made for the appointment of the recorder of the Court. He helped the Mayor regarding the cases and he also got the power to vote just like Alderman. The Recorder of the Court was required to be skillful in the law as well as the servant of the Company. The Charter appointed the Judge Advocate Sir Biggs as the 1st Recorder. Only in the year 1712 the court got power to give death sentence to native people.

The Mayor Court did not follow uniform punishment for the same crime. It depends on the Judge discretion for this, the reason was that the Mayor and his team did not have any legal knowledge. Sir Biggs got the experience of working as a recorder in the London but here in Madras the problem was that Sir Biggs sat in the Admiralty Court were went. But company ignored this fact after the death of Biggs. No recorder was appointed. Like this in the period 1686 to 1726 in Madras three Courts Functioned.

1)    Mayor’s Court

2)    Choultry Court

3)    Admiralty Court.

After 1704 Governor and Council heard the appeals from the Mayors Court as Admiralty Court to stop function. In this period also the Criminals were so long kept in jails, that even people forget the crimes. Justice system was very slow and no one bothered. The capital punishment was given by hanging. Robbery was punished with death, witch craft was punished with fine.

**Admiralty court**

            In 1683 King Charles II issued a Charter. It empowered the Company to establish Courts of Admiralty in India. The Court of Admiralty was authorized to try all traders who committed various crimes on the high seas. The court was empowered to hear and determine all cases concerning maritime and mercantile transactions. The court was also authorized to deal with all cases of forfeiture of Ships, Piracy, Trespass, Injuries and Wrongs. It was stated that the court would be guided by the laws and customs of merchants as well as the rules of equity and good conscience in the task of administration of justice.

            The provision of the Charter of 1683 was repeated by James II in a charter issued in 1686. On 10th 1686 the court of admiralty was established at Madras John Grey was appointed judge of the court and to assist him 2 other English man were appointed as his assistants on 22nd July 1687. Sir John Biggs who was a Professional Lawyer learned in Civil law was appointed as Judge Advocate in Chief Judge of the Court.

            Thereafter the Governor and Council relinquished the judicial function and ceased to sit as court. The Jurisdiction of the Admiralty court was not confined to Mercantile and Maritime Cases. It also decided both civil and criminal cases. Further it heard appeals from the Mayor’s Court. Thus it became a General Court of the Settlement. The Admiralty court was functioning regularly till 1704, but thereafter it ceased to sit on regular basis and gradually it disappeared, and its jurisdiction was transferred to the Governor and Council.

**Administration of justice in Bombay**

**Period 1668 – 1726**

            Portuguese were the 1st European to acquire the island of Bombay in 1534 from the King of Gujarat in 1661. Portuguese King Alfonsus VI transferred the island to Charles II as Dowry on the marriage of his sister Catherine with the British King. Charles II transferred it to the East India Company in 1668 for an insignificant annual rent of 10 pounds.

**Judicial system**

            Before 1726, the Judicial system the Island of Bombay grew in Three Stages –

1)    First Stage – (1668 – 1683)

2)    Second Stage – (1683 – 1690)

3)    Third Stage – (1781 – 1726)

**Charter of 1668**

            The political position of Bombay was quite different from that of Madras, the King of Gujarat and from that of Madras, the king of Gujarat and from that time onwards it was under the political control of the Portuguese. In 1668, the charger authorized the company the other comprised of Mahim, Parel, Sion and Worli. A separate court of judicature was established. For each division at Bombay and Mahim. Each court consisted of Five Judges, the custom officers of each division, an Englishman, was empowered to preside over the respective court. Three Judges formal the quorum of the court. As it was not possible for an Englishman to have adequate knowledge of India Laws, some Indians were also appointed Judges to assist him in the court of each division. The courts were authorized to hear, try and determine cases of small thefts and all civil actions up to 200 (it was a Portuguese Coin 20 Xeraphins were equal to nearly Rs.150) in value. An appeal from the court of each division was allowed to the court of Deputy Governor and Council. A part from the appellate Jurisdiction the court of Deputy Governor and Council also had original jurisdiction in important. Felonies which were to be tried with the help of Jury and the laws of the company. Englishman was under the jurisdiction of this court. Further appeal to the president and council at Surat was discouraged except in rare cases to legislate and to exercise judicial authority in the island of Bombay. It was further stated that such laws should be consonant to reason and not repugnant or contrary to the laws of England and they were also required to be as near may be agreeable to the laws of England. The system of courts and procedure was to be similar to that established and used in England. The Charter of 1668 resulted in a transition of the company from a trading association to a territorial sovereign invested with powers of civil and military government.

            The president of Surat, Sir George Oxenden, received the Company’s order in September 1668 to visit the Island of Bombay and establish the executive government under a Deputy Governor and Council. Oxenden visited Bombay in January 1669. He died in July 1669. The next Governor of Surat – Gerald Aungier, made same reforms in the Island of Bombay in 1670

**Judicial reforms of 1670**

            As per the reforms of 167 the Portuguese Laws and Customs were allowed to continue the Island of Bombay was divided into two divisions. One division consisted of Bombay, Mazgaon and Girgaon. The other comprised of Mahim, Parel, Sion and Worli. A separate court of judicature was established for each division at Bombay and Mahim. Each court consisted of Five Judges. The customs officer of each division, an Englishman, was empowered to preside over the respective court. Three judges formed the quorum of the court. Three Judges formed the quorum of the Court. As it was not possible for an Englishman to have adequate knowledge of Indian Laws, some Indians were also appointed Judges to assist him in the Court of each division. The Courts were authorized to hear, try and determines cases of small thefts and all civil actions up to 200  xeraphins (it was a Portuguese coin 20 xeraphins were equal to nearly Rs.150) in value. An appeal from the court of each division was allowed to the court of Deputy Governor and Council. Apart from the appellate jurisdiction the court of Deputy Governor and Council also had original Jurisdiction in important Felonies which were to be tried with the help of jury and the Laws of the Company. Englishman was under the jurisdiction of this Court. Further appeal to the President and Council at Surat was discourages except in rare case.

**New judicial plan of 1672**

            It was realized within the next 2 years that the judicial system of 1670 was defective in various respects. Augier the Governor was himself not satisfied with the working of the Courts. The Judges of the Superior and Inferior Courts had no knowledge even of the elementary principles of law, they were Merchants. The judicial and executive powers were exercised by the same person. As consequences, the abuse of power created various new problems. Order to remove these defects a new plan was prepared in 1672 for the administration of Justice in Bombay.

            According to the new plan the government issued a proclamation on 1StAugust 1672 declaring the introduction of English Law into Bombay. The Portuguese Laws and Customs were totally abolished under the new plan. The Judicial Machinery was again organized. A new central court known as the Court of Judicature was established. The Court of Judicature was empowered to exercise its Jurisdiction over all Civil a and Criminal and Testamentary cases. George Wilcox appointed its Judge assisted by other Justice. The Court sat once a week to try civil cases with the help of jury. The court charges a fe of five percent of valuation of the suit from the litigants.

            The judges were prohibited from carrying on private trade or business and instead he was granted a salary of Rs. 2000 per year to meet his expenses. An appeal from the court of Judicature was allowed to the Deputy General and Council. Juries were duty employed and paid. Attorneys were allowed to practice. English procedure including arrest and imprisonment was followed. As far as possible the English substantive law including statue law was made applicable. In framing the new scheme Aungier was primarily concerned with the speedy and impartial administration of Justice.

            Justice of the Peace was appointed to administer criminal justice. For this purpose Bombay was divided into four divisions, namely, Bombay, Mahim, Mazagaon and Sion.in each division a justice of the Peace, an Englishmen was appointed. They acted as committing Magistrate to arrest the accused and to examine the witness. The record was then placed before the Court of Judicature which met once a month to decide criminal cases with the assistance of the Justice of Peace, who acted as assessors in the Court.

            The scheme of 1672 also created a Court of Conscience to decide petty civil cases. Once a week the court dealt summarily with cvil cases under twenty Xeraphins. The decision of the Court was final and no further appeal was allowed. No Court-Fee was charged from poor persons and, as such the Court Become famous as, “Poonam’s Court”. George Wilcox, Judge of the Court of Judicature, also presided over the Court of Conscience which met only once a week to deal with petty civil cases.

            George Wilcos, the first Judge of the Court of Judicature died in 1674. James Adams was chosen to succeed Judge Wilcox but he was not well – versed in law. After a few months in 1675, his assistant Niccolls was appointed judge in his place. In 1677 Niccolls was suspended and later dismissed by the Council in various charges. Gary succeeded Niccolls as Judge and remained in the office up to 1683. During this tenure, the salary and rank of a Judge was reduced and the Council became superior in power and position.

            Keignwin’s rebellion, which began in December 1683, and continued up to November 1684, gave a death – blow to Aungie’s judicial system in the Island of Bombay.

**Admiralty Court (1684 to 1690)**

            As stated above, the development of Courts at Bombay was interrupted due to the Keignwin’s rebellion. After the rebellion was suppressed, efforts were made to set-up a regular judicial system at Bombay. The Company found its authority to establish courts under the earlier Charter of 1683 granted by Charles II. The Charter provided for the establishment of Courts at such places as the Company might direct for Maritime causes of all kinds, including all cases of Trespasses, Injuries and Wrongs done or committed upon high seas or in Bombay or its adjacent territory, and each Court was to be held by a learned judge in civil law assisted by two persons chosen by the company. Such Courts were required to decide cases according to the rules of equity and good conscience and the laws and customs of merchants. Accordingly, an Admiralty Court was established at Bombay in 1684. Dr. St. John was also authorized to act as Chief Justice of the Court of Judicature. The Court of Judicature was again created, as the authority of the Admiralty Court was not sufficient to cover all other civil business.

            John Child, Governor of Bombay at Surat, was not in favour of accepting the theory of judicial independence which was adopted by dr. St. John in his judicial decisions. It gave rise to conflicts between the Governor and the Chief Justice. Dr. St. John’s judicial independence was interrupted by the Governor John Child as insubordination towards himself. In 1685 the powers of Dr. St. John to act as Chief Justice of the Court of Judicature were withdrawn by the Governor. Vux, a member of the Bombay Council was appointed as judge to preside over this Court, in place of Dr. St. John. These steps further developed the existing conflict between the Governor and the Chief Justice. Dr. St. John strongly criticized the transferring of his power to Vaux, a new judge, who according to him was ignorant of civil laws. In due course the Governor and Dr. St. John’s dismissal, Sir J. Wyborne, Deputy Governor of Bombay, was appointed as the Judge of the Admiralty Court. In 1688 Vaux succeeded Sir J. Wyborne and remained in the office up to 1690.

            In 1690, Siddi Yakub Admiral Emperor invaded the island of Bombay and the judicial system of Bombay came to an end. From 1690 to 1718, in fact, the machinery to administer justice was almost paralyzed in Bombay. Thus the period from 1690 to 1718 is a dark period in Bombay’s Legal History.

**Court of judicature**

            A new period in the Judicial history of Bombay began with the revival and inaugutration of a court of judicature on 25thMarch,1718 by Governor Charls Boone. It was established by the order of the Governor and Council which was later on approved by the Company authorities. The court of Judicature of 1718 consisted of ten Judges in all. It was specially provided that the Chief Justice and Five Judges will be Englishman. The remaining Four were required to be Indian representing Four different communities, namely, Hindus, Mohammedans, Portuguese – Christians and Parsi. All English Judges were also members of the Governor’s Council and enjoyed status superior to Indian Judges. Three English judges formed the quorum of the court. The Court met once a week. Indian Judges, who were also known as “Black Justice” were included mainly to increase the efficiency of the Court and their role was mostly that of assessors or assistants of the English judges. They do not appear to have enjoyed equal status with English judges.

            The Court of 1718 was given wide powers. It exercised jurisdiction over all civil and criminal cases according to law, equity and good conscience. It was also guided by the rules and ordinance issued by the Company from time to time. It was necessary for the Court to give due consideration to the customs and usages of the Indians. Apart from its jurisdiction over probate and administrative matters, it was further authorized to act as a Registration House for the registry of all sales concerning houses, lands and tenements.

            An appeal from the decision of the Court of Judicature  was allowed to the Court of Governor and Council in cases where the amount involved was Rs. 100 or more. A notice to file an appeal was to given within Forty-Eight hours after the judgment was delivers to the Chief Justice of the Court of Judicature. Moderate fees were prescribed by the Court for different purposes. For filing an appeal a fee of Rs. 5 was to be paid

**Administration of justice in Calcutta 1690- 1726**

1. **Mughal Judicial system**
2. **Kaziz and Courts**

 **3.**    **Nawabs Courts**

In the year 1668 the grandson of Aurangzeb Azimush Shan, and the Subedar of Bengal gave Zamindari of villages, Calcutta, Sutanati and Govindapur for annual revenue of 1195 rupees to the East India Company. In the December 1699 Calcutta became Presidency town and Governor was appointed to administer he settlement. As a Zamindar company got all powers just like other zamindar of that time. Bengal Zamindar  in Mughal Empire zamindars got judicial power but collected the revenue and maintained law and order in the zamindari area or village for judicial purpose. That time Kaziz Court were established in each District, Parganah and Villages.

            They handled civila dn criminal matters. Normally villages panchayats solved all problems. The Judicial System was simple as everyone knew each other and transaction pf each other Moghul Kings never paid any attention to Judicial System that time nothing was organized. The highest bidder became the Kazi. Justice was purchased, corruption was rampant Kazi never got salary so Kazi court fined the criminal and earned money. After this demand money from the complainant for giving him justice. The other zamindars when gave death sentence the appeal went to the Nawab, but company never did this the appeal from Zamindar’s. Collectors Court went to the Governor and Council.

            In Calcutta that time Collector enjoyed all the powers up to the year 1727. With the Charter of 1726 the new system was started in Calcutta presidency. Before this Charter the authority was given by company and zamindar but the Charter of 1726 was a Royal Charter. The important of this company but after this Charter Court got their permit authority from the British Crown.

**Mayor’s court**

**Establishment of Mayors Court**

 The mayor and two council members gave justice and appeal went to the Governor within 14 days. Further appeal could be made to the king in council if matter involved more than 1000 pagodas This way first time Indians got right to file appeal in the king in council.

 A sheriff was appointed for each ten miles of area by the Governor and council annually, in simple terms he was the police officer. When complained was given to the court, the court issued the summons in writing to the Sheriff and he brought the accused in the court, he handed the summons to the concern party. If party accused did not come on that day, the warrant was issued and Sheriff brought them before the courts, bail was granted sometimes.

 For criminal jurisdiction, justice of peace was established same like England
 Criminal jurisdiction system followed all the British criminal system and procedures.
Charter of 1726 empowered the governor and his council to make by laws, rules and ordinances for the regulation of corporation. In Madras charter became effective from the 17th August 1727. In Bombay 10th February 1728 Calcutta December 1727 the implementation of charter started. The company directed the courts to maintain records and send them to England to know how they are working. With these establishments common Indians also start to file the more and more cases in the courts. Mayors Court, Governor, and Council always got disputes regarding jurisdiction in presidency towns. This fights resulted into the weakening of Judiciary in the future and executive became powerful. Company adopted policy not to get involved in the Indian customs and disputes but if the matter went to the Mayors Court they adopted English procedures.

 Mayor's Court under the Charter of 1687 — A Corporation was set up by the Company at Madras on 29 Sep., 1688, under the Charter of 1687. It was created with the purpose of associating natives with the Englishmen Its to fulfill this purpose, the Company wanted to undertake certain public fare activities for which funds were needed. The Corporation cotters taxes and raised funds from the inhabitants of Madras. Composition—The Madras Corporation consisted of an English Mayor, 12 Aldermen and 60 or 120 Burgesses. Out of the twelve Aldermen, three were to be the covenanted English servants of the Company while the rest could be of any nationality. The Mayor was to hold office for one year and he was elected by the Aldermen from amongst themselves. The aldermen held office for life or till the residence in Madras, The vacancy of an Alderman was to be filled up by election from amongst the Burgesses. The Burgesses were to be elected by the Mayor and Aldermen while few of them were nominated by the Company from the heads of the various castes.

 Civil and Criminal jurisdiction—The Mayor and Aldermen constituted a civil court, while the Mayor and three senior Aldermen were Justices of Peace having criminal jurisdiction. The Mayor and two Aldermen formed the quorum. The Court held its sitting only once in a fortnight and decided criminal cases with the help of jury. The Court could award the sentence of imprisonment or fine. Appeals from the decisions of the Mayor's Court lay to the Admiralty Court in ease the value of the civil case exceeded three pagodas, and in criminal cases, where the offender was sentenced to death or loss of limb.

 Court of Record—The Mayor's court constituted a Court of Records since a **Recorder** was also attached to the Court. As all the members of the Mayor's Court were lay persons without expertise in law. It dispensed justice "in a summary manner according to equity, justice and good conscience" and law enacted by the Company. Obviously, this was bound to result into uncertainty and lack of uniformity in laws.

 For the purpose of providing the services of a person having legal knowledge, the Company appointed Sir John Biggs, the Judge-Advocate of the Admiralty Court, as the Recorder of Mayor's Court in 1688. This appointment of Sir John Biggs as a Recorder of the Mayor's court created an anomaly because as a Judge-Advocate of the Admiralty Court, he also heard appeals from the Mayor's Court, with which he was associated as a Judge. However, this anomaly did not last long since Sir John Biggs died in 1689, and thereafter, the Company did not appoint any Recorder in the Mayor's Court.

**Mayor's Court under the Charter of 1726**

 Working of the Mayor's Court of 1726. The Charter of 1726, adopted the principle of independence of judiciary to a considerable extent which was a fortunate development in the legal history of India. But the constant assertion of judicial independence by the judges of the Mayor's court proved irksome to the Governor and Council which resulted into constant conflict and hostility between the two. As rightly observed by Kaye, this made the Corporations, and consequently the Courts, largely autonomous but the Council at times sought to interfere with the functioning of the Mayor’s Court and tried to dictate its terms which the Courts did not like. The strained relations between the Mayor's Court and the Governor and Council also led to the serious differences between the Government and the Corporation which are reflected in the following cases-

 that the Mayor's Court had no authority to decide cases involving disputes relating to caste or religion of natives and warned the Mayor's Court not to interfere in such cases. The Case of Arab Merchant—In 1930 a dispute arose between the Court and the Council. An Arab merchant brought a suit in the Mayor's Court for recovery of the valuable pearls which were alleged to have been extorted from him by the men who saved him from a burning boat from the coast of Gujarat. The defendants had already been tried earlier for piracy and acquitted. The Council made suggestion to the Mayor's Court against the validity of merchant's claim. But the Mayor's Court ignored the suggestion and decreed the suit. On appeal, this decision was reversed by the Governor and. Council by casting vote of the Governor.

 The Oath Case of Bombay—In Bombay, a dispute arose in 1726 over the issue of form of oath to be prescribed for Hindu witnesses. The Mayor and Aldermen of Bombay were usually the members of the Grand Jury at a Quarter sessions. A conflict arose between the Bombay Council and the Mayor's Court as to the form of oath for Hindu witnesses. The Grand Jury held up two successive sessions by refusing to find and 'true bills', unless the Hindu interpreter and witnesses were sworn upon the 'Cow' instead of the holy 'Geeta". This touched the sentiments of the Hindu natives and they felt aggrieved.

**Comparisons of the Mayor's Court Established Under Charter of 1687 and 1726**

Although the Mayor's Court of 1726 were established on the parallel lines to the Mayor's Court of 1687 yet the two differed in the following respects—

1. The Charter of 1687 being a Company's Charter, the Mayor's Court of Madras established under it was a Company's Court whereas the new Mayor's Court under the Royal Charter of 1726 was a Crown's Court.

2. The earlier Charter of 1687 conferred both, civil and criminal jurisdiction on the Mayor's Court but the new Charter of 1726 empowered the Courts to try and hear only the civil cases. Thus, the Charter of 1687 had a wider scope as compared with the Charter of 1726.

3. Under the Charter of 1687 appeals from the Mayor's Court lay to the Admiralty Court while the Charter of 1726 provided that appeals from Mayor's Court lay to the Governor and Council and a second appeal to the Court of King-in-Council of England. There was, however, no provision for second appeals in the earlier Charter of 1687.

4. The Mayor's Courts established under the Charter of 1726 possessed testamentary jurisdiction which the Charter of 1687 had not provided for.

5. The-Charter of 1687 provided fora 'Recorder' in the Mayor's Court who was to be a professional lawyer to advise the court in legal matters. But the Recorder of the Mayor's Courts established under the Charter of 1726 was not necessarily to be a legal expert and judges appointed in the Court were mostly lay persons without any legal training or experience. In this sense, the Charter of 1687 was more in tune with the imperatives of justice as compared with the Charter of 1726.

6. The Madras Corporation established under the Charter of 1687 consisted of twelve Aldermen out of which at least three were to be Englishmen. These Aldermen acted as judges of the Mayor Court, But the new Corporations set up under the Charter of 1726 consisted of nine Aldermen, out of which seven were to be Englishmen. Thus the new Mayor's courts were far more English dominated than the earlier one.

7. No specific procedure and technical rules of law were provided for administration of justice in the old courts but the Mayor's Court of 1726 was bound by the laws and procedure of English Courts of the Crown.

8. Under the Charter of 1687, the Executive Government had nothing to do with the administration of justice but the Charter of 1726 invested the Governor and Council with the power to appeals and decide criminal cases.

In what respect the Charter of 1726 was Inferior to the Charter of 1687 ?—It may be noted that criminal justice in Madras was administered by the Mayor's Court and Admiralty Court established under the Charter of 1687 whereas the Charter of 1726 vested criminal judicature in the executive and this was certainly a retrograde step. Having once divested the executive of its judicial powers, it could not be regarded as a progressive step by any test or standard, to re-invest it with judicial powers. A cardinal principle of good government is to keep judicial and executive powers separate in order to secure liberty and property of the people. Form this point of view the .Charter of 1726 was inferior to that of 1687.

Besides, similar was the position with respect to the Indians, participation. The Madras Corporation of 1687 had a sizable Indians representation whereas the corporation of 1726 was to have only two non-English Aldermen and, in practice, none was ever appointed, The mayor's Court of 1726 was thoroughly an English Court with no Indian's participation and it compared unfavorably with the old madras mayor's court of 1687 in this respect also.

**Fate of choultry courts**

After the Mayor’s Court came on the scene, the Choultry Court lost its importance and functioned as a court of petty jurisdiction trying offences and civil cases up to 2 pagodas. On criminal cases it gave fines, imprisonment, pillory, whipping or slavery as punishment.

**common crimes and punishments**

In the Initial years the Court was doubtful about his power to award the death sentence but in 1712, the Governor and the Council decided that it could award death sentence to natives only. There was a lot of delay in trials and several prisoners were found to be confined to jail for too long. Though capital punishment was to be awarded by hanging some Indians were executed or whipped to death. The governor and council had the power to stay a death sentence. Piracy was a capital offence and punishable with death or banishment. Robbery was punished with death. Witchcraft was punished with fine and pillory. Forgery was to be punished with imprisonment and banishment. Brahmins were not given death penalties in observance of the Hindu sentiments; they were banished instead. A principle called ‘benefit of clergy’ under the English Ecclesiastical Law was invoked by the Englishmen as defence in cases of manslaughter; the accused was branded on the hand and then discharged.

**Future of the judiciary**

 The British Parliament enacted the ***Act of Settlement, 1781*** .The Act directed the application of personal laws for Hindus and Muslims in matters regarding inheritance, succession, caste, marriage, adoption and the like while English Law was applied to others and in all other causes. Nandkumar’s case illustrates the anomalous character of the impact of the application of English law on the Indians and depicts the difficulties that arise.The expansion of its establishments brought new challenges to the East India Company. The Company requested the King to issue a Charter by which special powers could be granted to it. The Company was granted Charter by King George I in 1726 to establish “Mayor's Courts” in Madras, Bombay and Calcutta (now Chennai, Mumbai and Kolkata respectively). Mayor's Courts were not courts of the Company, but courts of the King of England. Mayor's courts superseded all existing courts established in the above places. The Mayor's Courts were authorized ***'to try, hear and determine all civil suits, actions and pleas'*** that may arise within the three towns or within the factories of the Company. The Court consisted of a Mayor and nine Aldermen, seven of whom, including the Mayor, were required to be naturally born British subjects. Aldermen were elected from among the leading inhabitants of the settlement to hold the position for life. The Mayor was elected from the Aldermen.

 The Mayor's Courts contributed significantly to the formulation of a uniform pattern of judicial functioning in India. The Mayor's Courts administered English law, which was assumed to be the ***lex loci ('law of the place')*** of the settlement. The inhabitants of the settlement were governed by the English law, irrespective of their nationality. English law did not extend outside the settlements, and there the Indians were subject to their own laws.

 The Charter of 1726 did not specify the law to be applied by the Mayor's Courts. The Charter merely stated that the Court was required to 'give judgment and sentence according to justice and right'. However, based on the past practice and in the light of the 1661 Charter, the then existing English law, or principles of English Common Law and Equity were applied. It is generally understood that the Charter of 1726 indirectly brought into application the laws of England- both Common Law and statute law, into the three British Settlements in India. This is one of the distinctive outcomes of the 1726 Charter.Appeals from the Mayor's Court were made to the Court of Governor and the Council. The Governor and five members of the Council were appointed Justices of Peace and constituted a criminal court of Oyer and Terminer (a partial translation of the Anglo-French oyeretterminer which literally means 'to hear and determine'). The Court of Governor and Council were required to meet four times a year for the trial of all offences, except that of high treason. However, a second appeal in cases valued at 1,000 pagodas or more, was available to the King-in-council in England. The Mayor's Courts established under the Charter of 1726 had severe limitations. There was no clarity regarding the applicable law, although the Company made considerable efforts to apply the English Law. The jurisdiction of the Mayor's Court over natives was relatively uncertain. In several instances, the Mayor's Court annoyed the natives by applying the principles of English Law, completely disregarding their personal laws and customs. In 1746, the French occupied Madras, after which the functioning of the Mayor's Court was suspended in that City. However, the French surrendered Madras to the British in 1749 after the conclusion of the peace treaty of Aix-La Chappelle. Using this opportunity, the Company requested the King to remove some difficulties related to the 1726 Charter. King George II issued another Charter on 8 January 1753, which by and large left the 1726 Charter intact.

 By virtue of the 1753 Charter, the Mayor Courts were re-established in the three settlements with the same jurisdictions and powers as in the Charter of 1726. To avoid disputes between the Governor and Council, the Charter brought the Mayor's Court under the control of the Governor and the Council. The Mayor, instead of being selected by the Aldermen was to be selected by the Governor and Council. Furthermore, suits and other actions by natives were expressly excluded from the jurisdiction of the Mayor's Court unless both parties had submitted them to their determination. The jurisdiction of the Mayor's Court was restricted to suits of the value of over five ***(5) pagodas***. It is notable that Courts such as the Mayor's Courts were established for deciding mainly the disputes of the British natives or other foreigners. Therefore, in all the three settlements, different types of courts existed to decide the cases of the natives. In Madras, the Choultry courts existed to decide cases up to the value of 20 pagodas. In other words, Choultry courts heard, by and large, petty cases and continued up to the year 1800. In Calcutta, the natives were subject to the Zamindars' courts. The East India Company as the Zamindar administered these courts. Zamindars' courts decided civil matters, viz, issues involving land, property and personal wrongs. It is also reported that the Zamindar courts and the mayor courts disputes relating to jurisdictions on certain civil matter. In Calcutta to decide criminal matters. However, in Bombay no separate courts were established to decide disputes among the natives. The reason was that the Company claimed complete sovereignty over the island and did not want to treat the natives differently.

 **Charter 1726 (24/9/1726)**

 *This period mainly includes the charters of 1600, 1609, Firman of 1618 by Emperor Jahangir, Charters of 1635, 1657, 1661, 1668, 1683, 1686, 1693 and 1698*,Till 1726 the administration of justice in three presidencies was haphazard and it became unified by the charter of 1726 When Mayor’s court was established for all three presidencies. The Company participated in administration of justice in cooperation with the local Mughal authorities. some changes were brought in the administration of justice in three Presidency Towns with the intervention of some Charters issued from time to time by the Company though these changes were fringe and different in three Presidency Towns.

Main Features of Charter of 1726—the main features of the Charter of 1726 are as under—

1. The Charter for the first time established the Crown's Court in India.

2. The Charter brought about a uniform system in all the three Presidencies of Bombay, Madras and Calcutta and the different types of systems exiting till then were abolished.

3. The judicial system established.

The origin of the Mayors Courts is embedded deep in the Legal History of India. The Justice that was administered by the East India Company at Madras, Bombay & Calcutta was uncertain & lacked uniformity. The English Government felt the need for instituting Royal Courts on a uniform basis in all presidency towns, reserving ultimate power in the Crown-in-council. This was accomplished with the Company's Charter of 1726, the three towns were to have Corporations. The Mayor and Aldermen constituted the 'Mayor's Court' with right of appeal to the 'Governor and his Council' and thereafter to 'the King in Council'.

The Mayor's Court had civil and probate (will) Jurisdiction and was not subject to the arbitrary will of the executive. Madras had a corporation and Mayor's Court from 1688 but its criminal jurisdiction was taken away. The Charter of 1726 undermined the powers of the Mayor's Courts and made the local Governor in council all powerful. Originally Mayor's Court was a court of record with criminal and civil jurisdiction. It was to deal with offences which imposed fine, imprisonment or corporeal punishment. A right of appeal to the Court of Admiralty was guaranteed, in Civil and Criminal cases. The Mayor and two Alderman formed the quorum of the Mayor's court sitting once a fortnight. The jury system appears to have been followed in Mayor's court in criminal proceedings. But, under the Charter of 1726, the Mayor and Alderman of each corporation constituted a court. The Court met not more than thrice a week. The process of the court was given testamentary jurisdiction. Probate and letters of administration could be granted by it. It was bound by the laws and procedures of English Courts.

The Corporation and the Mayor's court, were completely independent of the Executive. Hence, the Charter of 1726 introduced independence of the judiciary to a considerable extent. The Crown's Charter of 1754 introduced certain changes. The Mayor was selected by the Governor in Council. Hence, he was a nominee of the Govt. The aldermen were also chosen by Governor in criminal court. Requests Courts were introduced for cheaper and speedy trials in minor cases up to Rs. 15/-. This court was subservient to the Council. These charters introduced English procedural laws in India.

The Mayor's Court entertained suits between natives if both the parties agreed. The object was not to interfere with the local people. Hence, the court was mainly available to the Europeans. The result was there were no courts to the Indian people. The structure of the courts was as follows:

Civil cases

-Court of Requests.

-Mayor's Courts

-Privy Council.

Criminal Cases

-Justice of the Peace.

-Court of Quarter Session.

-Defects of the Judicial system of 1753

i)   As the Governor in Council was appointing the judges, the judges were subservient and could not render justice when the E.I. Company was' a party.

ii)   Judges were not aware of the civil and criminal law.

iii) The Mayor & others had private trade activities.

iv)  Jurisdiction was confined to Presidency towns only. Hence, in Moffusils Englishmen could do injustice & escape.

**Necessity of judicial reforms**

            The judicial administration in the settlement of the East India Company before 1726 was not of high order. The judicial administration was executive ridden. There was no uniform judicial system in the settlement of the company. The Courts were of the Courts of East India Company consequently their decisions were not accepted by the court un England. The director of the company therefore presented a petition to King George I stating that there was a great want at Madras, Fort William and Bombay of proper and competent power and authority speedy and effectual administration of justice in civil cases and for trying and punishing of capital and other offences.

            In the year 1726 King George I issued a Charter to the Company. The Charter of 1726 became an important land mark in the legal history of India due to its various vital provision having charter is that this charter introduced uniformity of Justice system in all 3 presidency town. The Charter established Civil and Criminal Courts in each presidency towns.

            The another important point is that before 1726 the Court got authority from the company but after this Charter the Courts got authority from the Royal British Crown. The Court which were present that time in England with the Charter of 1726 the appeals from Court in India went to the Privy Council in England.

            The way English law system became accepted to Indians. Indians did not find it foreign and Indian did not have any other judicial system as such with this Charter in each Presidency town local legislature was established Charter 1726 is also known as Judicial Charter as this is the beginning of development of Indian law system and judiciary.

**Establishment of corporation**

            The Charter of 1726 provided for the establishment of a corporation in each town i.e. Bombay, Calcutta, and Madras. Each corporation consisted of a Mayor and nine Aldermen. It provided that the mayor would be elected every year by nine Aldermen and the retiring mayo from amongst the Alderman. An Alderman was appointed either for life or for the term of his residence in the presidency town. The Governor – in – Council was empowered to dismiss or remove any of the Aldermen on reasonable cause.

**1)**    **Legislative Power –**

The Governor – in – Council of each presidency town was entrusted with the power to make by-laws, rules ordinances to regulate the working of the Corporation and also for the better administration of the inhabitants of the settlements. The Governor – in – Council was required to obtain in writing prior approval and confirmation of such rules, by-laws, etc. from the Court of Directors of the Company. It is, therefore, said that the Charter of 1726 for the first time created a subordinate legislative authority in each of the three presidency town of India.

**2)**    **Mayor’s Court –**

The Charter of 1726 provided for the establishment of a Mayor’s Court for each of the presidency town. It was to consist of the Mayor and Nine Aldermen were required to be present to form the quorum of the Court. The Mayor’s Courts were declared to be Courts of Record and were authorized to try, hear and determine all Civil Cases. The Mayor’s Court was also granted testamentary jurisdiction and power to issue letters of administration to the legal heir of the deceased person. It was authorized to exercise its jurisdiction over all persons living in the presidency town and working in the Company’s subordinate factories.

The procedure of the Mayor’s Court was clearly laid down by the Charter. The Sheriff, an officer of the Court, was appointed by the Governor – in – Council every year to serve the processes of the Court. On the written complaint of the aggrieved party the Court issued summons directing the Sheriff to order the defendant to appear before the Court. In case the defendant failed to appear on the fixed day, a warrant was issued by the Court asking the Sheriff to arrest the defendant and present him before the Court to face the charges. The Court was empowered to release the defendant on such bail or security as it considered suitable. The judgment of the Court was followed by a warrant of execution issued to the Sheriff to implement the decision. The Sheriff was authorized to arrest and imprison the defendant. The whole procedure of the Court was based on the procedure as adopted by the Courts in England.

An appeal was allowed to the Governor – in – Council from the decision of the Mayor’s Court in each presidency town. A period of Fourteen Days, from the date of judgment, was prescribed to file an appeal. The decision of the Governor – in – Council was final in all cases involving a sum less than 100 Pagodas. In case the sum involved was wither 1000 Pagodas or more, a further appeal was allowed to be field to the King – in – Council (His Majesty’s Privy Council) from the decision of the Governor – in – Council. Thus the Charter introduced a new system of first and second appeals, making the King of England the ultimate fountain of justice for litigants in India.

**3)**    **Justice of Peace**

The Charter provided that in each presidency town, the Governor and five senior members of the Council will have criminal jurisdiction and would be justices of the peace. They were empowered to arrest and punish persons for petty criminal cases. These Courts were entrusted with the same powers as similar Court in England. These courts were authorized follow the procedure followed by Court in England. Thus the Charter of 1726 made the beginning of important English ideas, technical forms and procedure of criminal justice into India.

**Consequences of the charter of 1726**

            The year 1726 saw the abolition of the Court of Admiralty at Madras. By establishing the Mayor’s Court at the three presidency town of Bombay, Calcutta and Madras, the Charter introduced a uniform judicial machinery for justice in India. The civil and criminal courts established under the Charter derived their authority directly from the King and not from the Company. In this respect, these courts were superior to the Courts which were established in 1686 by the Company. The King in England, in whose name justice was administered in England, also became the fountain of justice for Courts in India. It added prestige and status to these Courts not only in India but also in England.  These courts may therefore be said to be Royal Courts. The very fact that the Courts in India derived their authority from the King, in the field of judicial set-up, paved the way for importing English ideas of law and justice, in to India. It was through the Privy Council that the principles of English law were gradually applied in deciding cases wherever Indian law was silent or defective according to English Judges. Apart from this, the deep – rooted English tradition of showing respect to the decisions of the highest judiciary was also adopted in India. With the adaptation of the doctrine of precedent in India, the principles of English law greatly influenced Indian law and legal institutions. The Charter of 1726 itself played an important role in introducing English Common and Statue law in India.

**The charter of 1687 and the charter of 1726 – distinction**

1)    The Charter of 1687 applied to Madras only whereas the 1726 Charter applied to all presidency towns.

2)    The mayor’s Court established in 1687 was a Company’s Court. Three Mayor’s Courts established in 1726 were Royal Courts as they were created by King’s Charter of 1726. Naturally, the status of these Courts was recognized by the Courts in England.

3)    The old Mayor’s Court at Madras was empowered to exercise its jurisdiction over all civil and criminal matters and an appeal was allowed to go to the Admiralty Court. On the other hand, the Mayor’s Court established in 1726  were entrusted with civil jurisdiction only, and from their decision, first appeal was allowed to the Governor-in-Council in the respective presidency town, and a further appeal was allowed to go to the King – In – Council in all cases involving a sun of 1000 Pagodas or more.

4)    No specific rules of law and procedure were laid down for the old Mayor’s Court at Madras. The Mayor’s Courts, established by the Charter of 1726, were required to follow a well-defined procedure based on English and practice. Thus the former can be said to be governed more by principles of equity whereas the latter was governed by English Law.

5)    A lawyer known as Recorder was attached to the old Mayor’s to the old Mayor’s Court at Madras advice the Court, while no such officer was attached to the three new Mayor’s Courts.

**Defects in the charter of 1726**

            After the Charter of 1726 was actually implemented and the Mayor’s Courts began their functioning, gradually the defects and lacunae in the provisions of the Charter came into limelight. It was realized that the Charter was not quite clear in its language. The working of the Mayors Courts at Bombay, Calcutta and Madras created many difficulties for native Indians. For the first time, the Mayor’s Court administered English law in India. The English law contained both common law and the statute law. Nearly all the common law and statue law as it existed in England in 1726 was introduced in the three presidency towns of India. It completely ignored the Indian customs and traditions, and was hardly suitable to Indian conditions in those days. The Mayor and Aldermen, who presided over the Mayor’s Court, were either senior servants of the Company or dependent on the Company’s pleasure for their stay in India. They had neither any regular legal training nor any judicial experience to their credit. Evil consequences were therefore bound to follow. As there was no specific mention about jurisdiction, the Courts decided that it was empowered to exercise its jurisdiction even in such cases where both parties were native Indians. All these created great dissatisfaction and unrest amongst the native inhabitants of each presidency town.

            The Charter of 1726 created a Corporation and a Mayor’s Court in each presidency town. The Mayor’s Court was constituted to work independently but its relationship with executive. Governor – in – Council was not stated clearly. In actual practice, the executive machinery expressed its hatred and jealousy against the independent attitude of the Mayor’s Court. The executive tried to dictate its terms to the judiciary. But the Mayor and Aldermen came into conflict with the Governor – in – Council in many cases at Bombay, Calcutta and Madras. Instead of the smooth working of these two wings – executive and judiciary – their relations became severely strained in each presidency town.

            The inhabitants of Bombay, Madras and Calcutta were the greatest sufferers due to the constant conflicts between judiciary and the executive. It created an atmosphere of great unrest in all the three presidency towns. A petition was sent to the Court of Directors of the Company, in its reply, made it clear that conflicts should be decided among themselves (natives) according to their own customs. If they request and choose them to be decided by English laws, then only the matter can be pursued according to the directions of the Charter of 1726.

**Charter 1753**

The Provisions of Charter of 1753—The Charter of 1753 was a modified and

reformed version of the Charter of 1726. The conflicts and clashes between Mayor's

Court and the Governor and Council created much confusion and chaos in the

Presidencies in India. The Company, therefore, requested the British King George U to

issue a fresh Charter so as to introduce suitable amendments in the earlier Charter of1726, The Charter of 1753 was an attempt to improve upon the earlier Charter of 1726

which suffered from several lacunaes and defects. The main provisions of this charter

were as follows—

1. Revival of Mayor's Courts with Modification—The British King George II

granted a new Royal Charter fur the Presidencies of Madras, Bombay and Calcutta

whereby the Corporation of Madras which ceased to function because of French

occupation during the period Tor 1746 to 1749 was revived again and the jurisdiction

of all the three Mayor's Courts of Presidencies were modified to overcome the

shortcomings of its earlier working.

2. Mayor's Courts were Subordinated to the Governor and Council—With a

view to end the strained relations between the Mayor's Court and Corporation on the

one hand and the Governor and Council on the other, the Charter of 1753 brought the

Corporation of each Presidency under the control of the Council by changing the mode

of appointment of Mayor and Aldermen. Under the new Charter, the Governor and

Council was empowered to select the Mayor out of a panel of two names elected by

the Mayor and Aldermen. The Council also assumed full power to appoint Aldermen

in the Corporation and dismiss them. Thus, the Mayor's Court was completely

subordinated to the Executive Council.

3. Natives were to be Governed by Their Own Laws—The Charter of 1753

provided that the Mayor's Court were not to try civil cases between natives, such cases

being left to be decided by the natives themselves. However, the Mayor's Court could

decide only those cases of the natives in which both the parties consented to accept the

jurisdiction and decision of the Court. Some authorities have asserted that though the

Charter clearly provided that cases of natives were to be decided by their own laws,

customs and usages, but this was never followed in practice in Bombay.

4. Change in Oath System—In order to end the controversy regarding the taking of

oath, the charter expressly provided that the native Indians and Christians could be

allowed lo hike with in such a manner as they deemed most binding on their

conscience to speak out the truth.

5. Depositing of Court-fee by (lie Litigants—This charter provided that the litigants

would deposit money of court fee with the Government and not with the Courts. This was intended lo ease the burden of courts.

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6. Establishment of the Court (if Requests—The Charter provided for the

establishment of a new Court, culled the Court of Requests in each Presidency town to

decide civil cases uptb five pagodas. The civil cases exceeding this value were to he

decided hy the Mayor's Court. The object of establishing Courts of Requests was to

provide cheap and quick justice. It consisted of Commissioner varying from eight lo

twenty four in number and three of them were to sit in rotation once a week. The first

Commissioners were to be appointed by the Governor and Council but thereafter half

of them were to be appointed by the Governor mid Council but thereafter half of them

were to retire every year and the vacancies so caused, were to be filled in by the

remaining Commissioners, through Ihe system of ballots. Thus, the Court of Requests

was an inferior court subservient to the Council. Its jurisdiction was extended to all

inhabitants, including the natives.

**Judicial Arrangement under the Charter of 1753**

The following courts were established under the Clnirlcr of 1753 for the administration of justice in the three Presidencies—

1. The Court of Requests—This court was to decide summarily the petty civil cases

upto five pagodas. Now these cases could not be tried by the Mayor's Court.

2. The Mayor's Court—This Court had jurisdiction to hear civil cases involving a

sum exceeding five pagodas. It had jurisdiction over the cases of natives provided both

the parties lo the suit voluntarily submitted to the jurisdiction of the court.

3. The Court of Governor-in-Council—This court had exclusive jurisdiction over

criminal cases, as the Governor-in-Council acted as Justices of Peace and held Quarter

sessions to decide criminal cases. It was also empowered to hear appeals from the

Mayor's Court.

4. The Court of King-in- Couticil—The King-in-Council in England was empowered

to hear appeals from the Court of Governor-in-Council in all-civil cases involving a

sum of 1,000 pugodas or more.

Working of Judicial System King-in- Council under the-Charter of 1753—The

judicial system introduced by the Charter of 1753 created difficulties in settlement of

civil cases of the natives residing in the presidency of Madras and involving a sum

exceeding 5 pagodas. The court of Requests could decide cases only upto the value of

five pagodas.

These cases could not be tried by the Mayor's Court unless both the parties voluntarily

submitted to the jurisdiction of the court and accepted its decision. The problem

continued in the Presidency of Madras until the introduction of the Recorder's Court in

1798. The Presidency of Calcutta did not have this problem because of the existence of

the Zamindar's Court which had jurisdiction to decide the cases of the natives. So far

the Presidency of Bombay was concerned, it appears that the exemption granted to

natives from the jurisdiction of Mayor's Court by the Charter of 1726, was in fact

never" effectively followed in practice and the Mayor's Court freely decided the cases

of natives ignoring the exemption granted to them by the earlier Charter.

Defects of the Charter of !753—The Charter of 1753 was mainly devised to do away

with the jurisdictional conflicts between the Mayor's Court and the Governor and

Council. For this purpose the exact limits of the jurisdiction of the Mayor's court were

outlined in the Charter and this Court now ceased to have jurisdiction over the cases

involving natives except where both the parties voluntarily submitted to its jurisdiction

and judgment. It was also expressly provided that the Mayor's Court could hear suits

against the Mayor, Aldermen or the Company. Despite these positive achievements,

the judicial system introduced by the Charter of 1753 suffered from the following

defects—

1. The Mayor's Court-of each Presidency consisted of company's servants who were

appointed by the Governor and Council. Thus, the court lost all its independence and

could no longer remain impartial in cases where the company was one of the parties to

the suit.

2. The servants of the company were allowed to carry on their private trade.

Consequently, there were often disputes between them and the natives. The Mayor's

court being a court of the company's junior servants, usually took the partisan view and

favoured their fellowmen. Beside, the Governor and Council also exerted undue

pressure on the judges of the Mayor's court. This frustrated the cause of justice.

3. The Governor and Council had jurisdiction over civil as well as criminal cases.

They were also the executive Heads of their Presidency. Consequently, they exercised

certain legislative powers as well. Thus, all the three functions were centralised in a

single authority which was a derogate step so far indpenendence of judiciary was

concerned.

4. The judges of the Mayor's Courts were laymen and not well versed in law. They

were supposed to follow the English law but had no knowledge of it. In the absence of

law-reporting in India, the complicated cases had to be referred to England for opinion.

This caused difficulties and delay in the disposal of cases.

5. The exclusion of Indians in sharing the administration of justice was the most

disgusting feature of the history of early courts. Significantly, the Indian Christians

were allowed to participate as Jurors in the court of Sessions under the Charters of

1726 and 1753.

6. The territorial jurisdiction of all the courts established under the Charter of 1753

was confined to the respective Presidency. Therefore, there was no forum to take

cognizance of cases arising beyond those limits whereas the activities of the English

Company and its servants had extended beyond these territories.

Inspite of the above mentioned defects in the judicial scheme introduced by the

Charter of 1753, it must be accepted that it made a good beginning for the

establishment of a uniform judicial system in the company's settlements on the basis of

English law and procedure and thus laid the foundation for an improvised judiciary in

times to come. In 1770 Bolt made a bold attempt to make the Mayor's courts

independent of the control of the Governor and Council who had the power of

obstructing and interfering with the course of justice in presidencies. He suggested that

appellate jurisdiction of the Governor and Council's Court should also be abolished

and instead, a Court of Appeals should be instituted to hear appeals from the Mayor's

Court. This Court of Appeals should also be completely indpenendent of the Governor

and Council's influence. However, these suggestions of Bolt could not be

implemented. In 1774 the Mayor's Court of Calcutta was replaced by the Supreme

Court of Judicature. The Mayor's Courts at Bombay and Madras were replaced by the

Recorder's Court in 1798 by the Charter issued by King George 111 on Feb. 1, 1798

for this purpose.

Comparision of the Charter of 1753 with the Charter of 1726—Taking into

consideration the various provisions noted above it can be said that in effect the Mayor

and Aldermen became the nominee of the Government. The Charter of 1753 reduced

the powers and independence of Mayor's Court was no doubt, retrograde step and

Charter of 1753 was inferior to that of 1726 in the respect. Criticising the system, Bolt

said that the "Mayor's Court had the power of electing their own members to fill up

des," that court was the bulwark of all security with regard to property in the settlement

and might be considered in a great degree as independent. "But the Charter of 1753

transferred the right of nominating Aldermen to the Governor and Council who thus

got the 'unconstitutional' power of "making and unmaking the judges." The Govt. had

now the power to appoint and dismiss the Aldermen i.e., judges of the Mayor's Court,

and therefore, the judiciary both civil and criminal, became very closely connected

with the executive. Judiciary infact became a mere branch of executive whereas the

separation of executive from judiciary is the cardinal principle for imparting an

unbiased justice.

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|  |  **Chapter – II** **Adalat System*** **Grant of Diwani and Execution of Diwani functions**
* **Judicial plan of 1772 and its Defects**
* **Judicial plan of 1774**
* **Reorganization of Adalats in 1780**
* **Reforms of 1781 and The first civil code**
* **Reforms in the administrations of criminal justice**
* **The Regulating Act 1773**

**1. a) Case of Raja Nandkumar (1775) ; whether a judicial murder ?  b) The Patna Case (1777-79)  c) The Cassijurah Case (1779-80)****2. Act of settlement 1781****3. Major defects** |  |

 **Chapter – II**

 **Adalat System**

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 **Grant of Diwani and Execution of Diwani functions**

 On 12 August 1765, Shah Alam II issued a Farman granting to the East India Company, the Diwani of Bengal, Bihar and Orissa in perpetuity, requiring it to pay 26 lakh rupees annually to the imperial exchequer. The balance of the revenue of these three provinces was to be spent on 'the expenses of the administration of Bengal and maintenance of the family of the Nawab of Murshidabad (fifty lakhs), and the cost of the military defence of the provinces. Thus it was essentially as revenue collectors that the English began their actual occupation of the country, and it was the exigencies of the revenue service that compelled them to elaborate a system of government, and extrude the native sovereignty by a long process of its function. Under the plea that they were acting within the constitution of the Mughal empire, the Company's servants built up a system of internal government, and 'when the walls of their building reached certain height, the sun of British Crown rose to its meridian, and the shadow cast by the setting constellation of the Mughal empire disappeared forever.,2 According to Firminger, 'the history of revenue administration is thus the backbone ofthe history of the English occupation of Bengal. the Company as revenue administrator of Bengal, Behar and Orissa, were attempted by the early 'reformers' in utter ignorance of the economic principles. The failure of two experiments to introduce bimetallism and to eliminate discount on coins of older mintage by issuing coins with fixed dates, prompted the Court of Directors of the East India Company to establish an official enquiry to diagnose the currency crises of Bengal. The recommendation of this enquiry laid the agenda of the currency reforms in Bengal. In Bengal too, Official committees were appointed and on the basis of their recommendations a number of measures to reform the existing currency were adopted. The Company Rule in Eastern India: The grant of Diwani of Bengal, Bihar and Orissa in 1765 confirmed and consolidated all the political and military advances that had been made by the East India Company during the previous decade. The new acquisition was seen as a panacea of all the financial problems lately faced by the Company. Clive even predicted that the 'gain' would be able to 'defray all the expenses of investments in good for export, furnish the whole of the China treasure, answer the demands of all other settlements in India, and leave a considerable balance in treasury.

Sadar Diwani Adalat was the Supreme Court of Revenue in British India established at Calcutta in 1793 by the British Parliament. Its judges were the Governor General and Council Members of the East India company assisted by native judges and officers of revenue

It was established to allow Hindu Indians to be governed by Hindu law in matters of property, and not as before by Muslim law, although they were still subject to Muslim criminal law.

In each of the districts of British India subordinate courts of revenue, with definitive jurisdiction of up to 500 rupees, were established in which the judges were the "Collector" of that district (a covenanted servant of the East India Company) and his deputy and register, assisted by native officers. For cases exceeding 500 rupees appeals were allowed to the adar Diwani Adalat.

The court was abolished after the Indian Mutiny of 1857–58.

**Importance of Diwani Adalat**

After the defeat of the confederate army of the Bengal Nawab, Nawab of Oudh and the Mughal Emperor the English East India Company was surely in an advantageous position.

 Robert Clive came to an understanding with the Mughal Emperor and agreed to return Kara and Allahabad to him.

 In return for this Shah Alam the II granted the diwani rights of Bengal, Bihar and Orissa to the English East India Company on an annual payment of 26-lakhs of rupees.

 Robert Clive, on behalf of the English East India Company received the grant of diwani from Shah Alam the II.

 The importance of the grant of diwani lies, firstly, in the fact that prior to this there was no legal recognition of the authority of the East India Company over the Nawab of Bengal.

 The Company had been enjoying the political and economic rights forcibly.

 But with the grant of diwani the Company's rights were now established on a legal basis.

 Secondly, since the English now came to control the finance of Bengal they no longer had to depend on the supply of money from England for trade in India.

 Thirdly, the partial takeover of the diwani functions by the East India Company resulted in immense suffering to the people of Bengal.

 Adalat system was introduced by the company to administer justice in the mofussil areas.

 In the beginning company started adalat system in the year 1772 in Bengal, Bihar, and Orissa. later it was introduced in the mofussil of Bombay and Madras when company saw the good results in the Bengal .First the experiment was made in the Bengal and when successful it was introduced into the Bombay and Madras Mofussils

 That time when Nawab Siraj –ud-daula saw the rising power of East India company in the Bengal , he attacked the Calcutta and captured the Calcutta in the year 1756

 After this east India company under the leadership of Clive attacked the Calcutta and recaptured Calcutta in the year 1757

 Same year Battle of Plassey was fought and Nawab was defeated.

 After this real power in Bengal went to the company but company made the Mir Jafar the Nawab and gave him civil government.

 When Calcutta council was dissatisfied with the performance of Mir Jafar as Nawab they replaced him , and Mir Kasim became the Nawab in the year 1760 In the year 1763, again Mir Jafar was made the Nawab.  In the year 1765 the minor son of Mir Jafar, Najam-ud-daula became the Nawab. This way slowly east India Company increased its power in the Bengal.Nawab of Bengal was just a puppet in the hands of East India Company. When company wanted, company changed the Nawab.As company was supreme, why it did not declare itself was the ruler of Bengal

  There were few reasons. The first and most important reason was that that time British Constitutional law if No British Person can claim the sovereignty over any territory for himself, it must vest in crown and this way crown and parliament got the authority to legislate that area. The second reason that East India Company was afraid of French as well as Portuguese as they would create international problems for company as well as problems in the Bengal for company. Therefore, company took the easy way out, used Nawab as the Puppet, and controlled Bengal through him. In the year 1765 Moghul Emperor Shah Alam granted to the company the diwani of Bengal , Bihar and Orissa

  The company agreed to pay annually 26 lakh rupees to the Moghul Emperor and got right to keep the all-surplus amount of collected revenue.

 The grant of the Diwani gave to the company a de jure status of an official of the Moghul Emperor.

 The company was real controller but still company adopted this policy of not becoming direct ruler.During the time of Moghul administration, Moghul Emperor appointed two persons in the province that is Subah; one was called as Nawab and second was Diwani.

 Nawab or Nizam controlled the criminal justice system as well as military and maintained the law and order in the Province.

  Diwan or Diwani gave right to collect the revenue, and decide civil and revenue cases. Diwan send the collected revenue to the central authority or treasury

 This way the power of divided between Nawab and Diwan and both acted and controlled each other  Nawab got the military but no money

 Diwan got the money but no military so this way Moghul Emperor kept his control on both as none of them can become powerful than the Moghul Emperor.

 Regarding Bengal, we can see that Nawab of Bengal was the Puppet of East India Company and Now East India Company became the Diwan of the Bengal.

 Now again company made the agreement with the Nawab that he will not maintain the army and company will pay him an annual allowance of 53 lakh rupees for his expenditure and criminal judicature.

 After this agreement, company became Supreme Authority regarding Bengal.

 The nawab of Bengal also agreed that a Deputy Nawab will be appointed by the Calcutta government and Nawab will work as per his advice and Nawab cannot remove him from his post. Thus East India Company got the responsibility of maintaining military, collecting revenue and civil justice, criminal justice was seen by deputy Nawab, and expenses regarding criminal justice were made through the allowance of Nawab.  After getting, the Diwani in the beginning company did not make any changes in the procedure of collecting revenue or civil justice as company was not aware how it functioned. Moreover, they were less in numbers.

 The company appointed Mohammed Reza Khan at Murshidabad and Raja Shitab Roy at Patna to control the working of old system; they both were supervised by two English officers situated at Murshidabad and Patna.

 Mohammed Reza khan was appointed as the Naib Nazim and he look after the administration of criminal justice system on behalf of Nawab.

 As both these, two were reported to the East India Company they knew who the real master was so they never went against the Company servants.

 Using them company officials made lot of money in a short period.  The east India company servants did the private business also and made more money. In the year 1765, Clive became the Governor of Bengal and he himself described the situation of Bengal as follows. ‘I shall only say that such a scene of anarchy, confusion, bribery and corruption and extortion was never seen or heard of in any country but Bengal.  In this way Bengal was ruin by Bengal officials as well as East India company officials, everyone became the criminal and robbed the Bengal.

 To improve these matters in the year 1769 Governor Verelst appointed company servants as supervisors in the districts. The supervisors were to collect information regarding condition of the soil, collection of land Revenue and administration of justice .They were to check the corruption and supervise the justice system. The supervision extended to practically on all the functions of Diwani

 The governor and council described the justice system as , corrupt bargain with the highest bidder  The proper procedure of maintaining records was started.  Kazis and Brahmins who administered the justice were given Sanads, which were duly registered so that non-authorized persons cannot give the justice.

 However, the scheme of Supervisors failed as they were in less numbers and has to look after more work. Majority times they also became corrupt.

 In the year 1771 Bengal face the acute Famine and in that one fifth of the population was swept away. That time company saw reduction in the revenue collection. In addition, company officers blamed that Indian officers are doing more corruption. Therefore, Company as a diwan decided to take full charge of collection of revenue. The company officers just wanted to increase their corruption share so they brought this idea.

 After this, Governor and Council at Calcutta were to become responsible for providing solutions for administrative problems. This is the beginning of new judicial system in the Mofussil That time judicial officers kazis were appointed not on the merit but matter of official favor Zamindars were also corrupt and ruled the villages as they wished.

 Judicial officers did not get the salary so they use this power and did the corruption to make money. There was no procedure established that time. Corruption was everywhere and honesty was sold everywhere. To reform this entire situation Warren Hastings was called to formulate a scheme for the execution of functions of Diwani.

**Judicial plan of 1772 and its Defects**

After the Britishers had acquired the Diwani rights of Bengal, Bihar and Orissa in 1765, there came up the concept of Mofussils which was used to refer to the territories which surrounded the presidency towns that were brought under the control of Britishers. Though there was well established system of a judicial set up in the presidency town of Calcutta, Bombay and madras under the garb of Mayor’s court and Court of Governor-in-council but the same was required in these adjoining areas which were to be called Mofussils.

## Judicial system in Mofussils

After the Diwani rights were attained by the colonial giant, the role of proper implementation had fell on the then governor of Bengal presidency- Warren Hastings, as his predecessors starting right from the times of Lord Clive had condoned the oppressions of Ryots by Zamindars and petty tyrants which was proving to be detrimental to the colonial administration in these areas. Keeping into mind such a corrupted set up, Warren Hastings went on to introduce reformative judicial measures because of the following reasons:-

### 1. Connection between Revenue and judicial administration:

Revenue administration was a crucial function for the Britishers, not to mention that it was one of the major source of their finances, but  to collect revenue it was essential that there was property in the provinces and the prosperity could be preserved only if there existed an order of peace so that people did not get distracted from their occupational works, specially those engaged in agricultural occupation. Such a state of peace would have given them impetus to improve so that in the end they will be in a position to meet the government dues. This peace and order again depended upon security of life and property which could have been ensured only if there was a proper judicial system in place, which at the time was absent.

### 2. No centralized judicial set up:

With the dissolution of the Mughal empire, and weakening of the Nawabs power in Bengal and surrounding areas, the only judicial set up which existed also broke down such that every person who had a local authority or power (Zamindars etc) began to exercise judicial power as well, in order to achieve self-aggrandizement. Now the Kazis were not selected on the basis of merit or character but on the basis of degree of favour that they forwarded to officials. And since they were not meritorious, they began to misuse their power as there was no system of checks placed on them.

### 3. Corruption in the courts:

Moreover, even the courts which were so had become corrupt as the courts used to charge commissions from the parties on the amount that used to be recovered by them by the help of court and this practice was against the very principle of natural justice as such practice made judges party to the cause they decided by making them a profiteer from the case. This practice was common also because of the lack of motive or incentive for the judges to act impartially. They did not even use to get a regular salary and thus adopted to such a bribe culture. It was highlighted by Arthur Keith that ‘courts were the instrument of power more than an instrument of justice’

### 4. Atrocities of Englishmen:

The incursion of the Englishmen made the judicial system even more worse. The company servants used to seize the lands or properties of any Indian against whom they used to have any kind of claim. Further, they even used to hold such an Indian as their prisoners, not releasing them until the claims or debts were paid. In doing so, the company servants did not even used to seek consent of the officers of the Nawab’s Government which at that time was too weak and thus, were forced to overlook such disputes.

## JUDICIAL PLAN OF 1772:

Under the prevailing circumstances mentioned above, Warren Hastings went on to introduce a scheme of judicial administration in 1772 along side a system of revenue administration which went on to lay foundation of Adalat system in India.

Under this plan the territory of Bengal, Bihar and Orissa was divided into multiple districts and in each district, an English servant of company was appointed as the collector who was to be responsible for collection of revenue alongside having judicial powers.

### Different courts in Adalat System: (in order of the hierarchy)

#### 1. Small Cause Courts

These courts were present in each of the village or pergunnah and used to deal with small or petty cases. Decisions of these courts used to be binding up to the value of Rs 10. these courts were headed by either the village headman or the head farmer of the respective pergunnah.

#### 2. Mofussil or district courts:

* ***Mofussil Diwani Adalat-***these courts used to be present in each district and had jurisdiction over the revenue and civil cases including the disputes related to marriages, inheritance, castes, debts, contracts, disputed accounts, personal properties, partnership and demand on rent. It used to have pecuniary jurisdiction of up to Rs 500 such that decisions of this court up to this amount was final. Collector of the district use to act as the judge of this court who use to work in assistance with the native law officers such as the Kazis and Pundits. These law officers used to assist the judge as the collector did not has the knowledge about the personal laws of the Hindus and the Muslims which was to be applied to different disputes which were presented before the court.
* ***Mofussil Nizamat Adalat-***these courts were also known as Fauzdari Adalats. These courts were also present in each district but unlike the mofussil Diwani Adalat, it used to deal only with the criminal cases. Further, it was not empowered to try cases involving death sentences or cases demanding forfeiture of property of the accused as such cases were to be submitted to Sadar Diwani Adalat for final orders. These courts were presided over by the Muslim law officers only. The Moulvi used to expound the law, while the Kazi and the Mufti used to give Fatwa and render the judgment accordingly. But alongside these officers of law, collectors also used to have an important role in these courts which was that of a supervisor. He used to see that all the necessary witnesses were heard, that the  cases were tried regularly and that the judgments were impartial.

#### 3. Sadar or Provincial courts:

* ***Sadar Diwani Adalat–***this was the apex court for civil cases in the province. It used to have both the appellate as well as original jurisdiction as it not only used to hear appeals from Mofussil Diwani Adalat but also used to take up cases which involving dispute of over Rs 500. It used to charge five percent of the amount of dispute on each petition or appeal. It was presided over by the governor and his council, and was located in the presidency town of Calcutta. Its first sitting took place on 17th March, 1773.
* ***Sadar Nizamat Adalat–***this was the apex court for criminal cases in the province. Similar to Sadar Diwani Adalat, it also used to have both original as well as appellate jurisdiction. As mentioned above, it used to have specific jurisdiction to decide over matter of death sentence and forfeiture of property. In cases of death sentence, the death warrant was prepared by this Adalat and was to be signed by the Nawab as the head of the Nizamat. This court was presided over by Daroga-I-Adalat who used to act as the judge of this court. He was assisted by a Chief Kazi, a Chief Mufti and three Moulvies. Similar to Mofussil Nizamat Adalat, there used to be a supervisory authority in the form of Governor-in-Council who used to keep a check over the functioning of this court. It was earlier located in Calcutta but was later shifted to Murshidabad, where the Nawab resided, in order to reduce the effort which used to be there to get his signature in cases of death sentences. Another development which was seen later was the development of the office of Naib Nazim in which Mohd. Reza Khan was appointed, who was to work and give assent on behalf of Nawab.

### Defects of the 1772 Plan

#### 1. Insufficient number of courts at village level (small causes courts)-

There were very less number of small causes court present in the village areas and even the courts which were there had pecuniary jurisdiction of upto Rs. 10 only which was too small in amount in many cases. Thus, a dispute of slightly greater amount had to be referred to district courts which again used to be expensive and time consuming for people living in these areas which was in great number as the means of travel was not adequate.

#### 2. Concentration of too much power in the hands of collector

Too much power was concentrated in the hands of the collector in the district as they used to be the administrator, tax collector, civil judge and supervisor of criminal judicature which led to following issues:-

*i) Party to the revenue cases-* Since he was the civil judge along the tax collector, he used to be party to the dispute and thus it was against the principle of justice.

*ii) Carrying their private trade-* The collector also started carrying their own private trade as they were able to monopolise their trade through their powers for their own benefits even if it was to the detriment of people.

*iii) Difficulty in supervision of collectors-* It was difficult for Calcutta council to supervise and keep check on the collectors as they used to be preoccupied in their own work and also because the means of communication was poor.

##  JUDICIAL PLAN OF 1774

The defects of Plan of 1772 was apprehended not only by Warren Hastings but also by the company director who asked the governor and council to withdraw the collectors and search for an alternate arrangements and thus the Calcutta government went on to implement the new plan for collection of revenue and administration of justice on November 23, 1773, and put it in force in January, 1774.

### Features of Plan of 1774-

#### 1. Appointment of Amils/Diwans

The collectors were replaced by the Amils or Diwans who were appointed in each district. He was to act as revenue collector as well as judge of Mofussil Diwani Adalat.

#### 2. Divisions

The territory of Bengal, Bihar and Orissa was divided into six divisions headquartered at Calcutta, Murshidabad, Dinajpur, Dacca and Patna such that each division used to have several districts under its command. For example- Patna division had the whole of bihar under it.

#### 3. Provincial Councils

A Provincial Council consisting of 4-5 covenanted servants of the company was created in each divisions which had the following functions:-

i)*Supervision of revenue collection*– They were to supervise the collection of revenue by the Amils.

ii) *Hear appeals from Mofussil Diwani Adalat*– They used to hear appeals from Mofussil Diwani Adalat such that an appeal lie to Sadar Diwani Adalat if the dispute involved matter above Rs. 1000 in value.

Thus, it became link between Mofussil Diwani Adalat and Sadar Diwani Adalat and all cases irrespective of value were appealable in the Provincial Council.

iii) *Court of first instance*– It also had an original jurisdiction and used to act as court of first instance in the divisions where they were located such that cases arising in the division town(headquarters) could be directly referred to these courts.

It proved to be beneficial as an appeal system was created close to district adalats and thus supervision of the working of district judges was possible which was not in the previous case of governor and council.

### Defects of the 1774 Plan

Just like the collectors, the members of the provincial council were also potentially mischievous and could have monopolised the trade within their jurisdiction. However, they were more distrustful in comparison to collectors because the collectors used to be junior servants and could have been controlled by the governor and council but these members used to the the senior members of the company having a status equal to that of any member of the council and thus the governor and council could not control their actions because of their pull and influence. Thus, people putting themselves at the mercy of the Provincial Council would not dare to raise their voices against their unjust treatment.

The system was said to be ahead of its time. Every minor deficiency was attempted to be rectified by the governor general of Bengal. The system so created was also assisted by the Regulating Act of 1773 which led to the creation of supreme court with an aim to separate the judicial administration from the revenue administration as both were very much connected since the same officers often use to have both the duties of revue collection and adjudication but still it was not achieved as per the expectations and thus an another attempt was made to eliminate the deficiency   in the form of reorganisation of the adalat system in 1780 which observed the official separation of the revenue and judicial administration. The Provincial Councils which were tasked with both revenue collection and imparting of justice were now limited to collection of revenue and handling of the revenue cases while all the judicial function handed back to diwan adalats which were established in each of the Provincial Councils as well that is, Calcutta, Murshidabad, Dacca, Burdwan, Dinapur and Patna.

Even after this reform, the adalat system was not able to achieve the perfection so desired by Hastings but the existence of such a system of judicial administration in itself was praiseworthy. This system further led to the system of courts which exist even today.

 **Reorganization of Adalats in 1780**

Warren Hastings knew that the judicial plan of 1774 was not perfect, and when Warren Hastings again got the chance and He made changes to the judicial plan of 1774, On April 11, 1780 new plan was introduced.

As per the plan of 1780 judicial and executive functions were separated.
Adalats – Function to do civil justice, no revenue work
Provincial Council - No judicial work, only revenue related work, collection and revenue cases.

But with this plan the problem was that, area was vast and adalats were few to administer those large areas, because of this, cases were more, time was limited with the judges and thus arrears piled up in every adalat.
2nd problem was that witnesses have to travel lot to reach the adalats
There was only one Adalat in the whole of Bihar.
Because of this people thought it is better not to file the cases in courts, as filing cases in court meant, delayed justice, physical harassment, waste of time and money.

As per the judicial plan cases up to Rs.100 were referred to the person who stayed near the place of litigant ,but before this it was compulsory to file the case in the Adalat, and 2nd problem was that the person who work as judge has to work as a honorary judge and he did not get any salary . The Zamindar or public officer acted as an honorary judge and they charged money for this and also zamindar got the chance to do corruption as he became the honorary judge.

Warren Hasting was not satisfied with the plan of 1780 he always thought about the improving judicial system in India. The judicial system of East India Company.

On 29th September 1780 Warren Hastings proposed in the Council that chief justice Sir Elijah Impey be requested to accept the charge of the office of the Sadar Diwani Adalat.

Impey accepted this offer.
He remained in Sadar Adalat for a year but he introduced, made lot of reforms in sadar adalat.
Impey Drafted many regulations to reform the adalats.
On November 3, 1780 first reform, regulation was passed to regulate the procedure of the diwani adalats.
As per this rule , the Mofussil judge has to decide the facts , he was allow to take the help of Hindu Pundits or Muslim Mulla if it was necessary to understand the cause or case.
Impey Compiled a civil procedure code for the guidance of the Sadar Adalat and mofussil diwani adalats It was the first code of civil procedure to be prepared in India .
It was promulgated by the Council on July 5, 1781 in the form of a Regulation.
It was the digest of the civil rules
The code consolidated at one place a detailed civil procedure.
The code contained 95 clauses and with it all the previous regulations relating to civil procedure were repealed.
The code of 1781 clearly defined the functions, powers and jurisdiction of Sadar Diwani Adalat.
This code was translated in Persian and Bengali language that time.

In India, Impey was doing great job, but in England People were not happy with the Impey because of following reasons –
Impey was appointed as the Supreme Court judge to monitor the Company affairs in India.
But in India Impey stated to work as a company servant when he accepted to work as the Judge of Sadar Adalat. Accepting this violated the Regulation act.
Because of other job, they believed that Impey would not do the justice with the job of Supreme Court.

Because of all above reasons , on 3rd May 1782 in England House of Commons adopted a resolution requesting the crown, king , to recall Impey to answer the charge of having accepted an office and violating the Regulating act.
After this Impey left India on 3rd December 1782
From the Impey appointment one should learn that what ever post or job may be, the concern person must be studied in that profession.
EG.
Sports minister should be a sports man in his youth, Agriculture Minister should be graduate from the agriculture collage.

Regarding criminal justice system Warren Hasting took following steps.
Machinery was created for the purpose of arresting criminals and bringing them before the fozdari adalat for the trial. This system never existed in India before this.
A new department, office of the Remembrancer was created at Calcutta to keep watch on the functioning of criminal adalats.
The department was to work under the Governor General.
The head of the department was known as Remembrancer of criminal courts.
All criminal courts were required to send periodical reports to this department.
Everything was done as per the Muslim criminal law and Warren Hasting was not happy with many things, and wanted to reform them, he tried his best but company heads did not accept his views.
Because of this in criminal justice system, everyone made money using the corrupt ways.

**Reforms of 1781 and The first civil code**

The Amending Act of 1781 was passed by British Parliament on 5th July 1781 to remove the defects of Regulating Act 1773. It is also known as **Declaratory Act ,** **1781.**The key provision of this act was to demarcate the relations between the Supreme Court and             Act of Settlement the Governor General in Council.

#### Key Provisions of the Act – Limiting Powers of Supreme Court

One of the biggest problems created by the Regulating Act was the tussle between the Supreme Court and the Governor General in Council. This was done by curtailing several powers of the Supreme Court in favour of the Governor General in Council. These were as follows:

* Under the Regulating Act 1773, the servants of the company came within the jurisdiction of the Supreme Court, and this brought them under dual control of Governor General in Council and Supreme Court. The 1781 amendment exempted the actions of the public servants in the company in their official capacity.
* Revenue collectors (including Zamindars) and judicial officers of the company courts were also exempted from Jurisdiction of the SC.
* The court’s geographic jurisdiction became limited to only Calcutta.
* Its appellate jurisdiction was also skirted. The amending act provided that appeals were to be taken from the provincial courts to the Governor-General in council.
* Further, the act empowered the Governor-General and Council to convene as a Court of Record to hear appeals from the Provincial Courts on civil cases. This means that appeal could be taken from the provincial courts to the Governor General & Council and that was to be the final court of appeal.
* The Act also asserted that Mohammedan cases should be determined by Mohammedan law and Hindu law applied in Hindu cases.
* Under the Regulating Act, the Governor General in Council was empowered to issue rules, ordinances and regulations but they were to be registered in the Supreme Court.

The above discussion makes it clear that Amending Act of 1781 was the first attempt in India towards separation of the executive from the judiciary by defining the respective areas of jurisdiction.

**Reforms in the administrations of criminal justice**

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| The administration of justice at the time Warren Hasting took over as Governor of Bengal was in a bad shape. It was almost verging on a total collapse. The dual system of government proved very defective and unsatisfactory. The courts had become the instruments of power rather than of justice, useless as means of protection but apt instruments for oppression. On realizing the fact that the system of double government had failed the company authorized the then Governor Warren Hastings to adopt such regulations and pursue such measures as shall at once ensure every possible advantage to the Company and free the ryots from the oppression of Zamindars and petty tyrants.Warren Hastings hence proceeded to make major changes in the administration of justice. This paper work views the various reforms made by Warren Hastings during his time in India. This administration of justice maybe studied in four stages. To start with Warren Hastings realized the very fact that an impartial and regular administration of justice was extremely essential for creating conditions for a better collection of land revenue. Thus changes were made in regard to civil and criminal justice while various other provisions were also introduced. Moreover one of the major development which took place was that the three presidencies—Bengal, Bombay, and Madras— were divided into a number of districts for the betterment of administration. Lastly, the appointment of Impey helped in fulfilling the need of reforming the judicial system under the control and supervision of a powerful authority. In fulfillment of his duties, his work of compiling the Civil Procedure Code was quite recommendable. It was for the first time that the law was put on solid and certain grounds so that the people could know as to what the procedure of courts was.**Administration Of Justice: First Stage**The Judicial Plan of 1772 as been formulated by Warren Hasting consisted of 37 regulations dealing with civil and criminal laws. It was the first Anglo-Indian Code, which worked out on the basis of experience and common observations. An endeavour was made to adopt it to the manners and understandings of the people and exigencies of the country, adhering as closely as possible to their ancient usages and institutions. The idea was to retain, as far as possible, the native magistracy and codes of law, recorded and oral, to which the people had become accustomed. The plan aimed at correcting the defects without destroying the traditions of the local systems. Thus the diwani area of Bengal, Bihar, and Orissa was divided into several districts, each with an English collector as its head. This ‘district’ was the main administrative unit in the plan. The main features of Judicial Plan of 1772 may be explained under the following headings:Civil Justice: A Mofussil Diwani Adalat was established in each district to decide civil cases. The collector was the judge of this court. The court took cognizance of all civil cases including property, inheritance, succession, caste, marriage, contracts, accounts etc. In the suits regarding inheritance, marriage, caste and other religious usages and institutions, the Hindu law was applicable to the Hindus while the laws of Koran was applied to the Mohammedans. The collector in matters of Hindus and Muslims was helped by pandits and kazis respectively who expounded the law. Appeals from these courts were to be heard by the Sadar Diwani Adalat at Calcutta where the subject matter of the case exceeded Rs. 500. This court comprised Governor as its President and at least two members of the council aided by Diwan Treasury and Chief Kanungos.[1]Criminal Justice: A Mofussil Faujdari (or Nizamat) Adalat was established in each district for the trial of crimes and misdemeanours.[2] This court was assisted by a Kazi or Mufti and two Maulvies who expounded the law, while the Collector had a general supervision over the court. The court had full power to decide and punish all criminal cases though they were not empowered to award death sentence. In such cases, the court’s decision was submitted to Sadar Nizamat Adalat for confirmation and finally to the Nawab for his sentence.Sadar Nizamat Adalat, established at Calcutta, was presided by an Indian judge known as Daroga-i-Adalat who was to be assisted by the chief Kazi, chief Mufti and three Maulvies to hear the appeals from the Faujdari Adalat.Revenue Administration: The whole revenue system was reorganized under the Hastings plan of 1772. The revenue Boards at Murshidabad and Patna were abolished and a supreme authority called the Board of Revenue was set up at Calcutta which consisted of the Governor and all the members of the Council. The Treasury was also shifted to Calcutta. Further, the district supervisors were appointed as Collectors of revenue and also native Naib Diwans as heads of the native executive in districts.Moreover, the Board of Revenue comprising Governor and his Councilors at Calcutta sat twice a week for issuing necessary orders and instructions to the Collectors of Districts and inspecting, auditing, and passing the revenue accounts. The plan of 1772 was in many respects a boon to the people at that time. The change in judicial system brought back the confidence of the people in the government and the justice. However, a grave defect in the plan was that the Collector acted as the administrator; the Judge and the Magistrate in the district i.e. there was over-centralisation of powers in a single official.Miscellaneous Provisions: A few provisions were made to promote pure and impartial justice. All cases were to be heard in open court. All adalats were to maintain proper registers and records. District adalats were to transmit abstracts of their records to Sadar Adalats. This precaution was necessary so as to discourage judicial officers from misusing their power. To make justice inexpensive, the old vexatious impositions on administration of justice were abolished and moderate fees were prescribed for trial of civil cases which was bound to give relief to people. To supplement the work of the courts, the method of arbitration was also provided for.**Despite the merits of Judicial Plan of 1772, it had certain demerits which are stated as follows:**One of the major defects of the Plan was that there was over-centralization of powers in a single official, namely, the Collector. He was overburdened with heavy work as he was singularly required to shoulder the responsibility as an administrator, revenue collector, civil judge and a magistrate in his District.The Judicial Plan had a limited application only in the territory of Bengal, Bihar and Orissa. It was based on an erroneous assumption of Hastings that Indian population consisted of only the Hindus and Muslims. There were other communities and races for which there was no provision made in the Judicial Plan.[5]Though the functioning of Adalats was under the supervision and control of the Sadar Adalat at Calcutta, but in absence of adequate means of communications it was almost impossible for the government at Calcutta to keep a constant watch on the working of the Collectors of the districts. In absence of an effective control, the Collectors indulged in private trading and misused their position and power for personal gains.The judges of the courts being Englishmen, they did not have knowledge of personal laws of Hindus and Muslims. Though native laws officers were appointed to assist the English judges, but they could easily misguide the judges by deliberately misinterpreting the provisions of the Quran and Shastras.The functions of revenue collection and civil administration were combined in a single official, the Collector. Therefore there was no separation between revenue collection and civil administration. Obviously, the Collector paid more attention to revenue collection than the civil administration. **Administration Of Justice: Second Stage**The abolition of the institution of Collector in 1773 on the advice of the Court of Directors of the Company in England up-set the judicial arrangement of 1772 and a new Plan became an urgent need of the time. Warren Hastings prepared new Plan on November 23, 1773 which was implemented in January 1774.[6]The various changes made in regard to revenue, civil justice, criminal reforms are as follows:Revenue: Collectors were re-called from the districts and in their place an Indian officer, called Diwan or Amil, was appointed. He was to act as a judge of the Mofussil Diwani Adalat and collected the land revenue also. The entire Mofussil area in Bengal, Bihar and Orissa was divided into six divisions with the Headquarters as Calcutta, Burdwan, Murshidabad, Dinajpore, Dacca and Patna.[7] Each division had a Provincial Council consisting of a Chief and four senior servants of the Company. A Committee of Revenue was instituted at Calcutta for superintending that Division, consisting of two members of the Council and three senior servants, assisted by a Diwan and others. The Councils and the Committee were to supervise the collection of revenue in their Divisions. Indian Naib Diwans were appointed in the districts under each Provincial Council to look after the same work. Complaints against the Head Farmers, Naib Diwans, Zamindars and other principal officers of the government, relating to their conduct in the revenue, were to be decided by the Provincial Councils. Aggrieved parties might ultimately go to the Board of Revenue at Calcutta.Civil Justice: The provisions relating to appeals in civil cases were also considerably liberalised under the plan of 1774. Now all cases decided by the Mofussil Diwani Adalats were appealable to the Provincial Council irrespective of the value of the subject matter of the suit. There was also a provision for second appeal to the Sadar Diwani Adalat in cases exceeding the value of Rs. 1000/-.[8]Criminal Reforms: The Officers of the Faujdari Adalats were forbidden to hold farms or other offices in the Mofussil and were obliged to reside in their districts on pain of forfeiting their employments. Complaints against them were to be lodged with the Governor-General who would refer them to the Sadar Nizamat Adalat for inquiry and determination. Although the new system was an improvement over the earlier one, the change did not give good results for long. The Council took the place of the Collector in creating the difficulties and monopolising the trade within its jurisdiction. Warren Hastings detected this defect very soon but he could not make any change till 1780 when entirely a new modified system was established. **Administration of Justice: Third Stage**The defects of the system set up in 1774 were seen in the Patna Case[9] which is concerned with the conflict between the jurisdiction of Supreme Court and function of adalat in mofussil areas.As it was in practice those days, the Mofussil Adalat as well as the Provincial Council employed services of Kazis and Maulabis to interpret the Muslim law. The judicial commission arrived at a decision after taking into account the consultation of the Maulabis and Kazis. Thus it became a practice to neglect judicial work.In this case, the Maulabis and Kazis were given the power to take the evidence of the case and arrive to a decision. No established law was followed while taking the evidence and the Provincial Council passed a judgement based on the evidence collected by irregular procedure.The Supreme Court held that the Provincial Council did not delegate its judicial decisions according to the procedures held by the Supreme Court. Thus an order was passed by the Supreme Court to send the wrong-doers to jail.The decisions of the Supreme Court were criticized to a large extent. Following this, the work in Mofussil Adalat came to a halt because no officers in this adalat were ready to take up judicial work as they will have to go to jail. The work of revenue collection also suffered because most of the revenue officers left their jobs. The defect when came to the knowledge of Warren Hastings, could not continue any longer and he remedied it by giving a new judicial plan promulgated on 11 April 1780.[10]The basic feature of this plan was the separation of revenue matters from judicial matters. Henceforth, there were established separate authorities(a) To deal with the collection of land revenue and to decide the disputes arising there from and(b) For the pur­pose of deciding other disputes.Under this system the provincial councils were left only with the function of collecting the land revenue and deciding revenue disputes and other judicial functions were taken away from their hands. |  |

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**Administration of Justice: Fourth Stage**
Under the Plan of 1772, a Sadar Nizamat Adalat was established at Calcutta. In 1775, it was shifted to Murshidabad probably to avoid any interference from, and conflict as to jurisdiction with, the Supreme Court. There it was put under the authority of the Naib-Nazim Reza Khan. In 1776, a plan for criminal justice from Reza Khan was adopted, under which twenty-three Fauzdari Adalats in all were established in the districts. But as the system had once become loose and the Collector or the Governor-General and Council could not get enough time to have an effective control over these courts, they failed to pro­vide justice to the people. Justice was neither given in time nor any principles of justice was taken into consideration. The accused had to remain in detention for years before his trial was finalised. The conditions of prisons were inhuman. There were number of defects in the system which required total overhauling of criminal administration of justice. The Mohammedan law of crimes was also very defective. Warren Hastings was quite conscious of all this and in the year 1781 he drew a scheme for some reforms in the criminal judicial administration.

**Conclusion**
The work of Warren Hastings has left a deep impact on the History of India. Though on one hand his contributions to the administration of justice are appreciable to some extent, but on the other hand the reforms made by him had its own flaws.

Appreciating his contributions, the various reforms implemented by him justify that he was not only a capable administrator but also a great inventive genius. He adopted the method of “trial and error” in uprooting the evils of the existing judicial and executive systems and never hesitated even in taking bold steps to remove such evils. As the first Governor-General he proved himself as one of the most faithful servants of the English East India Company, who played a vital role in further strengthening the foundation, which was earlier laid down by Clive, for the future expansion of the British Empire in India.

Now taking into account his flaws, one may notice that, certain areas like the constitution of criminal courts, the defects and severity of Muslim criminal law, the mode of trial and proceedings in the criminal courts, which mainly required vital reforms and special attention were left untouched by him. While on the other hand, he only touched the fringe of the whole problem of improving the criminal justice.

But considering his limitations which arose due to his conflict with hostile Members of the Council, wavering support of the Company’s Directors in England, antagonistic interests of political parties in England prejudicing his reputation, his failure to implement his ideas and plans in this regard, is justifiable

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|  | **Diwani Adalat**A new court, called the Provincial Court of Diwani Adalat was established at each of the headquarters of the six divisions. This Adalat was presided over by an English covenanted servant of the Company who was called the Superintendent of the Diwani Adalat. He was to be appointed by the Governor-General and Council. This Court was to hold its sittings thrice a week and decide civil cases pertaining to property, inheritance and contracts. It was also empowered to hear cases relating to inheritance and succession of Zamindari and Talukedari which were hitherto within the purview of the Governor and Council. The decision of the Provincial Court of Diwani Adalat in cases upto the value of Rs.1000/- was final and in cases exceeding this value, an appeal lay to the Sadar Diwani Adalat at Calcutta which consisted of the Governor General and Council.The plan of 1780 was certainly a great improvement upon the plan of l774. Its main merit lay in its effecting the separation of the judicial from the executive functions. It was a welcome change. The plan, however, suffered from defects also. The Superintendents of the Diwani Adalats were not selected from the senior servants of the Company. Some of them were illiterate, ignorant of the Eastern languages and most extravagant, dissipated young men.There was a tendency of the new Adalats to come into conflict with the Provincial Councils. The Governor-General-in-Council had no time to sit at the Sadar Court to hear appeals and supervise the work of these Courts. Without the support and control of some powerful authority, it was impossible for them even to subsist; there was possibility of their sinking into contempt or becoming instruments of oppression. There were only six Diwani Adalats. This number was very small in a vast area of Bengal, Bihar and Orissa. This resulted into great expense on the part of the suitors, waste of their time and energy and inconveniences they suffered from, on account of long journeys. Even those persons, whose cases, not exceeding Rs. 100 in value, were referred to Zamindars or public officers, had to come at least once to the Divisional Headquarters for such reference. The Zamindars or public officers as honorary Judges. There was thus a danger of their abusing the authority to their own advantage. Further the paucity of the Courts put a very heavy strain on the Diwani Adalats.The Provincial Council which was left only with revenue functions also had the power to decide the disputes relating to revenue matters and to that extent it worked as a court in its own cause which was against the principles of natural justice. Appointment of Impey at Sadar Diwani Adalat: There was an urgent need of reforming the judicial system under the control and supervision of a powerful authority. From the beginning, the business of the Sadar Diwani Adalats was not only to receive appeals from the inferior Courts in all cases exceeding a certain amount but to receive and revise their proceedings, to attend to their conduct, to remedy their defects and to form generally such regulations and checks as experience should prove to be necessary to the purpose of their institution. The Governor-General and Council, who previously constituted the Sadar Diwani Adalat, admitted their incapacity of exercising these powers and expressly stipulated that Chief Justice Sir Elijah lmpey should act as the sole Judge of the Sadar Diwani Adalat on a salary at their pleasure. They thought that this would lessen the tension between the Council and the Court, would facilitate and give vigour to the course of justice, lessen the burden of the Council and add, to its leisure for occupations more urgent and better suited to the genius and principles of Government. The Governor-General and the Councillors were non-lawyers. Impey, being an experienced and trained lawyer was expected to discharge judicial functions in a far better way and curb out evils from the judicial establishment of the Company.[11]Elijah Impey was, therefore, appointed the sole Judge of the Sadar Diwani Adalat in October, 1780. He continued in this office till November, 1782 when he was recalled to England. In fulfillment of his new duties, Impey prepared thirteen articles of Regulations for the guidance of the Civil Courts. They were afterwards incorporated, with additions and amendments, in a revised Code, consisting of ninety-five articles, which was passed in July, 1781. This was the first Civil Procedure Code of India. The aims were to explain such rules, orders, and regulations as might be ambiguous, to revoke such as might be repugnant or obsolete to frame a consistent Code, to formulate the procedure and jurisdiction of the civil courts, to prescribe a general table of fees, to make the law of civil procedure cognizable to the people, to provide for arbitration and appeals to the Sadar Diwani Adalat, to provide for the limitation of suits, giving in most cases a term of twelve years, to protect the litigating people from the extortions or frauds of the unscrupulous officers of the Courts, and so on.  |  |

**REGULATING ACT 1773**

The company servant made lot of money in India when they went to U.K started to live lavishly and even they bought the seals of house of commas. The population of U.K started to doubt the working of east India Company. The shareholders of the company voted and started to get the big dividends from the year 1676 it was the rule that the company will pay to the British exchequer, 4 lakh pounds every year to retain its territorial acquisition and revenues. The company servants made money started to become rich and company was making losses, so company approach to British government for loan. After this House of Commons appointed a select committee and a secret committee to probe the affairs of company before giving company the loan amount. The report suggested that company should be brought under the British parliament and reports mentioned the evils of company affairs. After the parliament enacted the regulating act 1773 to remove the prevailing evils. Parliament amended the constitution of company brought company under the British parliament with this era of parliamentary enactment started.

**PROVISION OF REGULATING ACT:**

The term of the directors of east India Company was increased from 1 year to 4 years and provision was made that every year one fourth directors were elected in rotation. The voting power of shareholders was restricted. The company directors were required to lay before the treasury all correspondence from India relating to revenue and before a secretary of state everything dealing with the civil and military affairs o the government of India. The act appointed a governor general and council of 4 at Calcutta.

            They got all the powers civil and military regarding all the company acquisition as well as revenue in the kingdoms of Bihar Bengal and Orissa. Warren Hastings appointed the 1st governor general and pother came from England. All were to hold office for 5 years but king can remove them if courts of the directors recommended the removal. The Governor general got only one vote and casting vote in case of the Governor general did not get the power to overrule the majority vote because of this other council members always opposed the policies of warren hasting and the 1st 6 years warren hasting found it very difficult to introduced new laws or policy. In the year 1776 one member from the council died and warren became powerful because of casting vote only in the year 1786 Governor general got the right of vote to override the decision of council because of experience they knew that without vote Governor and council fails to show the results and implement policies. The regulating act put the madras and Bombay presidency under the supervision of Calcutta presidency in matters of war and peace. The subordinate presidencies were required send regularly all details of revenue and other important matters to the governor general only in emergency situations subordinate presidencies were allowed to take decisions if required because of necessity. This madras and Bombay presidency always took the decisions without fearing Governor General.

**Features of regulating act**

1)    Election for Directors

2)    Control over correspondence

3)    Appointment of Governor General and council

4)    Extent of Governor General is power

5)    Bombay and Madras under control of Governor General

6)    Establishment of Supreme Court

7)    Legislative power under the Act of 1773

8)    Prohibition from engaging private trade

9)    Power to punish English servants

10)  Justice of peace

**Raja Nand Kumar**

 Raja Nand Kumar a Hindu Brahmin was a big Zamindar and a very influential person of Bengal. He was loyal to the English company ever since the days of Clive and was popularly known as “black colonel” by the company. Three out of four members of the council were opponents of Hastings, the Governor-General and thus the council consisted of two distinct rival groups, the majority group being opposed to Hastings. The majority group comprising Francis, Clavering and Monson instigated Nand Kumar to bring certain charges of bribery and corruption against warren Hastings before the council whereupon Nand Kumar in march, 1775 gave a latter to Francis, one of the members of the council complaining that in 1772, Hastings accepted from him bribery of more than one Lakh for appointing his son Gurudas, as Diwan. The letter also contained an allegation against Hastings that he accepted rupees two and a half lakh from Munni begum as bribe for appointing her as the guardian of the minor Nawab Mubarak-ud-Daulah. Francis placed his letter before the council in his meeting and other supporter, monsoon moved a motion that Nand Kumar should be summoned to appear before the Council. Warren Hastings who was presiding the meeting in the capacity of Governor-General, opposed Monson’s motion on the ground that he shall not sit in the meeting to hear accusation s against himself nor shall he acknowledge the members of his council to be his judges. Mr. Barwell ,the alone supporter member of Hastings ,put forth a suggestion that Nand Kumar should file his complaint in the Supreme Court because it was the court and not the council ,which was competent to hear the case. But Monson’s motion was supported by the majority hence Hastings dissolved the meeting. Thereupon majority of the members objected to this action of Hastings and elected Clavering to preside over the meeting in place of Hastings .Nand Kumar was called before the council to prove his charges against Hastings. The majority members of the council examined Nand Kumar briefly and declared that the charges levelled against Hastings were proved and directed Hastings to deposit an amount of Rs.3, 54,105 in treasury of the company, which he had accepted as a bribe from Nand Kumar and Munni Begum. Hastings genuinely believed that the council had no authority to inquire into Nand Kumar’s charges against him. This event made Hastings a bitter enemy of Nand Kumar and he looked for an opportunity to show him down.

**Facts of the case**

Soon after, Nand Kumar was along with Fawkes and Radha Charan were charged and arrested for conspiracy at the instance of Hastings and barbell.

In order to bring further disgrace to Raja Nand Kumar, Hastings manipulated another case of forgery against him at the instance of one Mohan Prasad in the conspiracy case. The Supreme Court in its decision of July 1775 fined Fawkes but reserved its judgment against Nand Kumar on the grounds of pending fraud case. The charge against Nand Kumar in the forgery case was that he had forged a bond in 1770. The council protested against Nand Kumar’s charge in the Supreme Court but the Supreme Court proceeded with the case unheeded. Finally, Nand Kumar was tried by the jury of twelve Englishmen who returned a verdict of ‘guilty’ and consequently, the Supreme Court sentenced him to death under an act of the British parliament called the Forgery Act which was passed as early as 1728.

Serious efforts were made to save the life of Nand Kumar and an application for granting leave to appeal to the king-in-council was moved in the Supreme Court but the same was rejected. Another petition for recommending the case for mercy to the British council was also turned down by the Supreme Court. The sentence passed by the Supreme Court was duly executed by hanging Nand Kumar to death on August 5, 1775.In this way, Hastings succeeded in getting rid of Nand Kumar.

**Critical appraisal**

 Chief Justice Impey in this case acted unjustly in refusing to respite to Nand Kumar. No rational man can doubt that he took this course in order to gratify the Governor-General. The trial of Nand Kumar disclosed that the institution of Supreme Court hardly commanded any respect from the natives as it wholly unsuited to their social conditions and customs. The trial has been characterized as“judicial murder” of Raja Nand Kumar which rudely shocked the conscience of mankind. Raja Nand Kumar’s trial was certainly a case of miscarriage of justice.

**Patna Case**

 1777-1779 Shahbah Beg Khan, native of Kabul came to India and settled down in Patna. He married Nadirah Begum and acquired a large amount of money while in the service of company. Shahbaz Beg, a soldier in the Company’s army, had no son and so he called his nephew Bahadur Beg from Kabul to live with him. He expressed a desire to adopt Bahadur Beg and to hand over his property to him. But before he could do so, he died in 1776. Thereafter, a struggle ensued for property between Bahadur Beg and Shabhaz’s widow Nadira Begum. The Begum claimed entire property on the basis of gift said to have been executed in her favour by her late husband. Bahadur Beg claimed the entire property as the adopted son of the deceased, he filed a suit against the Begum in the Patna Provincial Council which also functioned as a Diwani Court for the town.

The Patna Council remitted the entire case to its law officers Kazis and Muftis md required them to make an inventory of property of the deceased, to collect the property and seal it, and according to “ascertained facts and legal justice” to transmit to the Council a written report specifying the shares of parties. Under the Regulations then prevailing, the law officers were neither to perform any executive functions nor were they to concern themselves with deciding the questions of fact, their only function was to expound the law applicable to the facts of the case.

The law officers locked and sealed the house of the deceased. The widow of the deceased was insulted and humiliated to such an extent that she left the house and took refuge in a mosque. They rejected her claim holding that ^itt deeds were forged. As Muslim law does not recognise adoption, Bahadur Beg’s claim was also rejected. The deceased’s property was thus to be divided according to the Muslim law of intestate succession.

The widow approached the Supreme Court and filed an action against Bahadur Beg, the Kazis and Muftis for assault breaking and entering her house and taking away her property, and claimed damages amounting to Rupees 6 lakhs. Bahdur Beg, Kazi and Mutis were arrested and brought from Patna to Calcutta and were lodged in prison.

The legal issues raised in trial, which started in November 1078, were, (1) Whether Bahadur Beg, who lived outside Calcutta was subject 10 the jurisdiction of Supreme court, and (2) Whether the law officers could be prosecuted for acts done in their judicial capacity?

On the first issue, the court said that Bahadur Beg was a farmer of land revenue and he was not different from the revenue Collector and therefore was ‘directly or indirectly in the services of the Company’. On the second issue, the court held that although the Patna council was a legally constituted court having jurisdiction to decide the civil disputes between the Indians, it had no jurisdiction to delegate its functions to the law officers, the Kazi and Muftis.

The court criticised the manner in which the Kazi and Muftis had acted for ascertaining facts. All the proceedings in the Council were ex parte without any I notice being given to the Begum. No regular trial was held and witnesses had not been examined on oath. Thus, the law officers were tried not for what they had done in the discharge of their regular functions, but for something outside thereto  the court had an undoubted jurisdiction over the Company’s servants.

The Supreme Court awarded damages of Rupees 3 lakhs to the widow which was quite inproportionate. The Patna case brought to light the inherent defects in the Dmpany’s judicial system (that is Adalats and Councils). Also, the case involved he question of the Supreme Court jurisdiction and its relationship with the officials Of the Adalats. A lesson was perhaps learnt, which became the basis of further reforms in administration of justice carried out later.

**Cossijurah Case**

The Cossijurah Case illustrates another aspect of the administration of the Company in India. This case is known for the fact that it brought out the defects in the Charter which created the Supreme Court at Calcutta. The Charter did not demarcate either the jurisdiction of the Court or the position of the Governor-General-in-Council. As a result of this confusion, there were occasions, when the Supreme Court issued writ of capias against the directions of the Council. In the Cossijurah case the confrontation between Supreme Court and the Council became evident to the highest degree. This case in brief as follows,

One Zamindar, the Rajah of Cossijurah was heavily indebted to Cossinaut Baboo. When Cossinaut requested for the return of his money, the Zamindar showed reluctance by making one excuse or the other. The Baboo therefore approached the Revenue Board where also his efforts brought no result. Finally he sued the Rajah in the Supreme Court at Calcutta. In his affidavit, he stated that the Rajah was in the service of the Company having been employed in the collection of the revenues. The affidavit also stated that the Rajah was subject to the jurisdiction of the Supreme Cc art. The Supreme Court issued a notice to the Rajah directing him to appear before the Court. In the meantime the matter was referred to the Council at Calcutta which referred the matter to the Advocate-General for his advice on the point whether the Zamindar was amenable to the jurisdiction of the Supreme Court. The Advocate-General advised that the Supreme Court had no jurisdiction over the Zamindar. Thereupon the Governor-General-in-Council issued instructions to all the farmers and landholders that they were not subject to the jurisdiction of the Supreme Court and that they could ignore the process of the Court.

The Rajah of Cossijurah had gone into hiding to avoid the process of the Supreme Court. The Supreme Court issued another notice to the Rajah who did I not pay any attention to the notice in view of the instructions from the Governor-General-in-Council. In fact the men of the Zamindar drove away the Sheriff and other officers who had come to arrest the Zamindar on a writ of capias. Thereupon the Supreme Court issued another writ for the confiscation of the property of the Rajah. The Court sent the Sheriff along with some armed constables.

The Council also came into motion, it decided to protect the Zamindar. Accordingly it despatched a much larger armed force to prevent the arrest of the Zamindar. In the meantime the Sheriff and officers caught hold of the Zamindar physically, assaulted him, insulted the ladies, and did many acts of sacrilege in respect of the idols of the gods placed in a room. By that time the Commander of the army which had been despatched already reached the spot under the orders of the Governor-General-in-Council. He arrested the Sheriff and his men and took them to Calcutta, where they were released. Thereafter the Supreme Court issued a writ for the arrest of the Commander. This writ was also prevented by a similar show of armed force.

When all efforts to recover his money failed, Cossijurah decided to file a suit against the members of the Council. Accordingly he brought an action against the Governor-Gerieral and the other members of the Council in the Supreme Court. The Governor- General and his Councillors appeared in the Court in the first ‘instance. Soon they discovered that the plaintiff had brought an action against them in their official capacity. Then they decided not to appear before the Court.

The Council issued instructions to all the Zamindars, landholders and the persons residing outside Calcutta not to pay any attention to the process of the Court and that in the case the Supreme Court persisted in issuing writs against them, the Council would protect them.

The show down between the Supreme Court and the Council brought out the inherent weaknesses and defects in the Regulating Act which did not specify the areas and the persons which were under the jurisdiction of the Supreme Court. The language of the Act was vague enough for various interpretations. These defects, however, were removed to a great extent by the passing of the Act of Settlement 1781.

**Act of Settlement 1781**

            Act of Settlement came for removal of the defects of the Regulating Act. The conflict between the Supreme Council and Supreme Court reached to a very serious stage. A petition against the Supreme Court activities in Bengal was submitted to the British parliament by the Supreme Council. Besides a petition signed by Zamindars, the Company’s Servants and other British subjects inhabiting Bengal was also sent to the British Parliament against the Supreme Court. British Parliament against the Supreme Court. The British parliament appointed a parliamentary committee to make inquiries into the matter and prepare a report. The committee prepares report on the conflict between the Supreme Council and Supreme Court in 1781. On the basis of this report, the British parliament passed an Act in 1781. This Act is known as settlement Act, 1781.

            A survey of the history of 7 years from 1774 to 1780 shows that the provision of regulating Act 1773, and the Charter of 1774 created many problems and conflict. The chain of events and the trail of the Cossijurah case pointed a\out the serious growth of conflict between the judiciary and executive. Not only the Governor- General and Council and the inhabitants of Bengal, also submitted their petitions to the King in England.

**SALIENT FEATURE OF ACT OF SETTELMENT 1781**

 The Act of 1781 was passed in order to explain and amend the provisions of Regulating Act, 1773. Some important provisions of the Act of settlement may be briefly summarized as follows:

i) The Act declared that the Governor-General and Council have immunity from the Jurisdiction of the Supreme Court for all things done or order by them in their public capacity and acting as Governor-General and Council.

ii) The Governor-General and Council and any Peron acting under their orders had no immunity before English Courts.

iii)  Revenue matters and matters arising out of its collection were excluded from the jurisdiction of the Supreme Court.

iv)  English law was not applicable to the natives. Hindu and Mohammedan personal laws were preserved in matters relating to succession and inheritance to lands, rents, goods and in matter of contract and dealings between parties.

v)   Where parties were of different religion their cases should be decided according to the laws and usages of the defendants.

vi)    The Supreme Court was empowered to exercise its jurisdiction in actions for wrongs of trespass and in civil cases where parties had agreed in writing to submit their case to the Supreme Court.

vii)  It was also provided that the Supreme Court would not entertain case against any person holding judicial office in any country courts for any wrong inquiry done by his judicial decision. Persons working under the authority of such judicial officers were also exempted.

viii)  The Parliament recognized Civil and Criminal Provision Courts. These Company’s Courts were existing independently of the Supreme Court. It was one of the most important provisions of the Act of 1781 as it completely reversed the policy of the Regulating Act.

ix)  The Act provided that the Sadar Diwani Adalat will be the Court of Appeal to hear appeals from the country courts in civil cases. It was recognized as Court of Record. Its judgment was final and conclusive except upon appeal to the King-in-Council in civil cases involving Rs. 5000 or more. Sadar Diwani Adalat was presided over by the Governor-General and Council was also empowered to hear and decided cases or revenue and undue force used in the collection of revenue.

x)   The Act of 1781 authorized the Governor-General and Council to frame Regulations for the Provincial Council and Courts.

**Chapter-III**

**Law and Administration in the Supreme Court**

* **Supreme Courts at Calcutta, Madras and Bombay**
* **Establishment of the High Courts**
* **Charter Act, 1833**
* **The Indian High Courts Act 1861**
* **Charter of Calcutta High Court**
* **Allahabad High Court**
* **The Indian High Courts Act 1911**
* **The Government of India Act 1915 : other High Courts**
* **Government of India Act 1935 : more high courts created**
* **Jurisdiction of high courts**
* **Post constitutional developments – Emergence of federalism**

**Chapter-III**

**Law and Administration in the Supreme Court**

**Supreme Court Calcutta, Madras and Bombay**

The Act of 1800 or Government of India Act 1800 was passed by British Parliament to establish a Supreme Court at Madras.

A rudimentary system of judiciary was established in the Presidencies of Madras and Bombay via the Charter Act of 1753. This system needed changes and there was an urgent need of new lawyers and judges to deal with the increasing cases. The Madras Council had brought this matter to Court of Directors in East India Company in 1791 which in turn brought in notice of the parliament. Via the Act of 1797, the British Parliament authorized the Crown to issue charters for the purpose of establishing a Recorder’s Court at Madras and Bombay. On February 1, 1798, the King issued charter and two Recorder’s Courts were established in Madras and Bombay by the end of that year. Each Recorder’s court was made of one Recorder, one Mayor and three Aldermen of the Corporation. The Recorder, who used to be a barrister with at least five years standing, was appointed by the Crown and was the President of the Recorder’s Court.

The jurisdiction of the Recorder’s Court was almost same as that of Supreme Court of Calcutta. They were able to entertain all civil, criminal, admiralty, maritime, ecclesiastical and equity cases. Like the Supreme Court of Calcutta, this court was also subject to few restrictions such as:

* It could not entertain the matters related to Governor-General and Council in their official capacity.
* The matters relating to Hindus and Muslims were to be decided by their own laws.

Appeals against the judgments of the Recorder’s Court could be filed before the Privy Council under the same conditions as they could be filed against the judgment of the Supreme Court. In this way, except the composition, the Recorder’s courts at Madras and Bombay were replica of the Supreme Court of Fort Williams at Calcutta.

The recorders court had hardly functioned for two years that the British Parliament decided to change them into Supreme Courts. As per this, the Parliament Passed Act of 1800 to authorize the Crown to establish a Supreme Court at Madras. On 26th December,1800 King George III issued a Charter which established the Supreme Court at Madras. This court came into existence on  4th September, 1801. However, in Bombay, the Recorder’s Court functioned till 1824. In 1823, the Parliament had authorized the Crown to establish the Supreme Court by a Charter and accordingly, the King issued a Charter on 8th December, 1823 establishing a Supreme Court at Bombay which came into being on 8th May, 1824.

#### Powers and Functions of Supreme Courts at Madras and Bombay

The Constitutional powers, function, limitations and jurisdiction of the two courts established at Madras and Bombay were the same as that of the Supreme Court at Calcutta. The Act of 1823 had specifically mentioned in section 17 that the Supreme Court at Madras and Bombay, shall have the power to do, execute, perform and fulfil all such acts, authority, duties, matters and things whatsoever as the Supreme Court at Fort William might be authorised or empowered to do, execute, perform and fulfil within the Territory of Fort William in Bengal or places subject to or dependent upon its Government. This provision placed the three Supreme Courts in the same position.

These Supreme Courts functioned until 1862 when they were replaced by the High Courts at all the three places.

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|  |  **Establishment of the High Courts** In the three Presidency towns of Calcutta, Madras and Bombay there were two existing judicial systems for administering justice i.e. the Supreme Court and the Sadar Diwani and Sadar Nizamat Adalat. This sort of judicial administration was inconvenient for the inhabitants of the Presidencies. In fact, it often clashed and it resulted in conflicting decisions. Ultimately, this problem was resolved by the British Parliament by enacting the Indian High Courts Act, 1861. The Indian High Courts billwas moved by the secretary of State Sir Charles Wood in the House of Commons on 6th June, 1861 and finally the Indian High Courts Act was passed by the British Parliament on 6th August, 1861. It was titled as "An Act for establishing High Courts of Judicature in India". The Act consists of 19 sections only. The Indian High Courts Act, 1861, abolished the Supreme Court and Sadar Adalat's in the Presidencies and the Act also empowered the crown to issue letter's patent under the great seal of the United Kingdom, to erect and establish high court of Judicature at Calcutta, Madras and Bombay. It further provided that the High Courts were to come into existence at such time as her Majesty might deem fit. Thus, on the establishment of the High Court, the Supreme Court, the Sadar Diwani Adalat and Sadar Nizamat Adalat at the concerned presidency were to be abolished and the records and documents of these courts so abolished were to become the records and documents of High Courts concerned.**Constitution High Courts**:The High Court’s was to consist of a Chief Justice and other puisne judges not exceeding 15 in number as her Majesty might from time to time think fit to appoint.**Qualification of judges of High Court**: A person could be appointed judge of High Court if he was either:1. A Barrister of not less than five years standing;2. A member of the Covenanted Civil Service of at least 10 year's standing who had served as Zila judge for at least 3 years in that period;3. A person having held judicial officer not inferior to that of principal Ameen or judge of a small cause court for at least 5 years;4. A person who had been a pleader of a Sadar Court or a High Court for at least 10 years.At least one third of the judges of the High Court, including the Chief justice had to be Barristers and the other one third of the judges had to be members of the covenanted Civil Service. The judges hold their office during the pleasure of her Majesty.**Laws to be applied:**The law which the high court applied was same as applied by the Supreme Court i.e. English law. However, the High court was allowed to use the principles of justice, equity and good conscience on the appellate side. In criminal law, it followed the I.P.C, 1860. So far as procedural laws are concerned the High Court's followed civil and criminal codes.**Jurisdiction of the High Court’s:**The jurisdiction of each high court depends on the letters Patent issued by her Majesty. She could give them power to exercise all civil, criminal, intestate, testamentary, admiralty and matrimonial jurisdiction. She could also confer on them original and appellate jurisdiction and all such powers and authority with respect to the administration of justice in the presidency, as she thought fit. Thus High Courts were given the following original and appellate jurisdiction.

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**1. Original jurisdiction:** The court had original jurisdiction in the following matters:(a) Civil Jurisdiction and(b) Criminal Jurisdiction**(a) Civil Jurisdiction:** The Original Civil Jurisdiction of the court was of two types:-**i. Ordinary Civil Jurisdiction**: The Ordinary Civil Jurisdiction extended to the town of Calcutta, Madras and Bombay and such local limit as from time to time could be prescribed by law of a competent legislature in British India. All suits of the value of Rs. 100 or more and which were not cognizable by the small court at Calcutta, Madras and Bombay were cognizable under High Courts. Further, the ordinary civil jurisdiction could be invoked only if:\* The movable property was situated within the town of Calcutta, Madras and Bombay;\*The cause of action wholly or partly arose in Calcutta, Madras and Bombay;\* The defendant was carrying on business or working for gain in Calcutta, Madras and Bombay.**ii. Extra Ordinary Civil Jurisdiction**: Extra Ordinary Civil Jurisdiction provides that the High Court could call a case pending in any lower court subject to its superintendence and could decide that case itself. This jurisdiction could be exercised in a case where the parties agreed to such exercise or the High Court thought it proper to impart justice.**(b) Criminal Jurisdiction: It is of two types also:****i. Ordinary Original Criminal Jurisdiction**: In exercise of its Ordinary Original Criminal Jurisdiction the High Court was empowered to try all persons brought before it in due course of law. This jurisdiction was made available over the native criminals and crimes committed with the local limits of the presidency towns and beyond this limit over the Britishers and Europeans as the Supreme Court used to enjoy the jurisdiction over them before the establishment of the High Court.ii. Extra Ordinary Original Criminal Jurisdiction: The High Courts were to have extra Ordinary Original Criminal Jurisdiction which was not enjoyed by the High Court. Under this jurisdiction the High Court hear any criminal case against any person within the cognizance of any court which was subject to the supertendance of the High Court. If such case was referred to the high court by the advocate general or by any magistrate or any other officer specially empowered for that purpose.**2. Revenue Jurisdiction**: The High Court was given jurisdiction to here revenue cases also which were precluded from the jurisdiction of the Supreme Court by the Act of Settlement, 1781.**3. Admiralty Jurisdiction**: The admiralty and vice-admiralty jurisdiction was also given to the high court.**4. Testamentary and miscellaneous jurisdiction**: The High Courtswere given similar testamentary, intestate and probate jurisdiction as was enjoyed by the Supreme Court. It also worked as the court of words for the administration of the estate and persons (lunatics, idiots and minors).**5. Appellate Jurisdiction**: The appellate jurisdiction of the High Court was of two types:-(a) Civil Jurisdiction: The High Court could hear appeals in all cases authorised by any law or regulation.(b) Criminal Jurisdiction: The High Court had criminal jurisdiction in all cases decided by the subordinate courts to it. It could also entertain revisions against the decision of the lower court and reference from them.**Appeals from High Court:**An appeal to Privy Council lay from judgement of High Court in civil cases when the amount involved is Rs. 10,000 or more or if the High Court certified that the case is fit one for appeal. And in case of criminal cases from its original jurisdiction or if the High Court certified that the case is fit one for appeal.

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|  | **Charter Act 1833** |

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The Charter Act, 1833 was the result of certain changed circumstances both in England and India. Policies of Warren Hastings and Wellesley created expansion of territory; administrative work and it lead to felt necessity of effective strong settlement. The laws in presidency town and Mofussil areas were not uniform also a Enlightened section of Indian society demanded reforms in educational sphere. On other hand the Parliament reforms were effected in 1830 in England which formed a new House of Commons with the ideals of liberalism, which felt that it was preposterous to leave the political government in the hand of Joint Stock Company. At the same time a move was initiated by Lord. T. B. Macaulay and James Hill in England for the reformation of law of India According to H. Cowell Parliament were directed to three leading vices (defect) in the process of Government of India.Charter Act 1833 or the Saint Helena Act 1833 or Government of India Act 1833 was passed by the British Parliament to renew the charter of East India Company which was last renewed in 1813. Via this act, the charter was renewed for 20 years but the East India Company was deprived of its commercial privileges which it enjoyed so far.End of East India Company as a Commercial BodyThe British Government had done a careful assessment of the functioning of the company in India. The charter was renewed for another 20 years, but it ended the activities of the company as a commercial body and it was made a purely administrative body. With this, British were allowed to settle freely in India.India as a British ColonyThe charter act of 1833 legalized the British colonization of India and the territorial possessions of the company were allowed to remain under its government, but were held “in trust for his majesty, his heirs and successors” for the service of Government of India.Governor General of IndiaThis act made the Governor General of Bengal the **Governor General of British India** and all financial and administrative powers were centralized in the hands of Governor General-in-Council. Thus, with Charter Act of 1833, Lord William Bentinck became the “First Governor General of British India”.Fourth Member in Governor-General in CouncilThe number of the members of the Governor General’s council was again fixed to 4, which had been reduced by the Pitt’s India act 1784. However, certain limits were imposed on the functioning of the 4th member. For example, the 4th member was not entitled to act as a member of the council except for legislative purposes. For the first, this fourth members of the council was Lord Macaulay.Split in Bengal PresidencyThe Charter Act of 1833 provided for splitting the Presidency of Bengal, into two presidencies viz. Presidency of Fort William and Presidency of Agra. However, this provision was later suspended and never came into effect.Enhanced Power of Governor General of IndiaCharter Act of 1833 distinctly spelt out the powers of the Governor-General-in-Council. He could repeal, amend or alter any laws or regulations including all persons (whether British or native or foreigners),all places and things in every part of British territory in India, for all servants of the company, and articles of war. However, the Court of Directors acting under the Board of control could veto any laws made by the Governor-General-in-Council.Codifying the LawsThe charter act of 1833 is considered to be an attempt to codify all the Indian Laws. The British parliament as a supreme body, retained the right to legislate for the British territories in India and repeal the acts. Further, this act provided that all laws made in India were to be laid before the British parliament and were to be known as Acts. In a step towards codifying the laws, the Governor-General-in-Council was directed under the Charter act of 1833, to set up an **Indian law Commission**.India’s First Law CommissionIndia’s first law commission was set up under Charter act of 1833 and Lord Macaulay was made its Chairman. The other members of this commission were English barrister Cameron, Macleod of Madras service, William Anderson of Bombay Service and Sir William McNaughton of the Calcutta Service. Sir William McNaughton did not accept the appointment.The objectives of the law commission was to inquire into the Jurisdiction, powers and rules of the courts of justice police establishments, existing forms of judicial procedure, nature and operation of all kinds of laws. It was directed that the law Commission shall submit its report to the Governor General-in-council and this report was to be placed in the British parliament.Indians in the Government serviceThe section 87 of the Charter Act of 1833, declared that “no native of the British territories in India, nor any natural born subject of “His majesty” therein, shall by any reason only by his religion, place of birth, descent, colour or any of them be disabled from holding any place, office or employment under the company”. Thus, the Charter act of 1833 was the first act which made provision to freely admit the natives of India to share an administration in the country. The act laid down that Court of Directors should nominate annually 4 times as many candidates as there were vacancies, from whom one should be selected by competitive examination. The charter act of 1833 also provided the **Haileybury college of London** should make quota to admit the future civil servants. However, this system of an open competition was not effectively operated in near future.Mitigation of SlaveryThis act also directed the Governor General-in-Council to adopt measures to mitigate the state of slavery, persisting in India since sultanate Era. The Governor General-in-Council was also directed to pay attention to laws of marriage, rights and authorities of the heads of the families, while drafting any laws.More Bishops:The number of British residents was increasing in India. The charter act of 1833 laid down regulation of establishment of Christian establishments in India and the number of Bishops was made Significance of Charter Act 1833: AnalysisFor many reasons, the Charter Act 1833 was a watershed moment for the constitutional and political history of India. Firstly, the elevation of Governor General of Bengal as Governor General of India was a major step towards consolidation and centralization of the administration of India. Secondly, end of  East India Company as a commercial body effectively made it the trustee of the crown in the field of administration. Thirdly, this act for the first time made provision to freely admit Indians into administration in the country. Indians could enter into the civil service but the process was still very difficult. Fourthly, this act for the first time separated the legislative functions of the Governor General in Council from the executive functions. Also, the law commission under Lord Macaulay codified the laws.

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**The Indian High Courts Act 1861**

The Indian High Courts Act of 1861was an act of the Parliament of the United Kingdom to authorize the Crown to create High Courts in the Indian colony.Queen Victoria created the High Courts in Calcutta, Madras, and Bombay by Letters Patent in 1865. These High Courts would be become the precursors to the High Courts in the modern day India, Pakistan, and Bangladesh. The Act was passed after the Indian Rebellion of 1857 and consolidated the parallel legal system of the Crown and the East India Company.

## Abolishing Existing Courts

The Act abolished the Supreme Courts at Calcutta , Madras, and Bombay the Sadar Diwani Adalat  and the  Calcutta; Sadar Adalat and Faujdari Adalat at Madras; Sadar Diwani Adalat and Faujdari Adalat at Bombay .

## Qualifications of High Court Judges

Each High Court could consist of a chief justice and up to 15 judges. Under §3 of the Act, judges could be selected from barristers (with 5 years of experience), civil servants (with 10 years of experience including 3 years as a zillah judge), judges of small cause courts or sudder ameen (with 5 years of experience), or pleaders of lander courts or High Courts (with 05 years of experience).

The High Court of a State is the highest court of the State and all other courts of the State work under it. Normally there is one High Court in every State but there can be only one High Court for two or more States as well, according to the constitution. There is one High Court at Chandigarh for Punjab, Haryana and Union Territory of Chandigarh. Similarly there is one High Court at Guwahati which serves Assam, Arunachal Pradesh, Mizoram and Nagaland.

**Composition:**

In every High Court, there is a Chief Justice and many other judges whose number is defined by the President of India.

Appointment of the Judges: The Chief Justice of a High Court is appointed by the President with the consultation of the Chief Justice of the Supreme Court and the Governor of the State. The other judges are appointed by the will of President, Governor and the Chief Justice of High Court.

Qualifications for the Judges

(a) He should be a citizen of India.

(b) He should have been (I) a judge for 10 years of Subordinate court under the Judicial Service of the State or (ii) an Advocate for 10 years in a High Courts in India (Article 217).

Tenure: Originally the age of the retirement of the judges of the High Courts was fixed at 60 but it was raised to 62 in 1963 according to the 15th amendment of the Constitution.

Removal of the Judges: A judge may leave his office by resigning. He will send his letter of resignation to the President. His office would be considered to have been vacated if he is appointed as a judge of the Supreme Court or is transferred to some other High Court. A judge of a High Court may also be removed like a judge of the Supreme Court. A judge of High Court may be removed by the President if the Parliament passes a motion against him by an absolute majority and 2/3rd majority of the members present and voting, both the Houses sitting separately.

**Salary**

The pay of the Chief Justice of a High Court is rupees 90,000/- per month and that of the other judges is rupees 85,000/- per month.

Powers and Functions

Original Jurisdiction:

The original jurisdiction of the High Court is restricted.

(a) Every High Court under Article 226 is empowered to issue writs, orders, directions including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-warranto and Certiorari or any of them to any person or authority with in its territory for the enforcement of the Fundamental Rights and for any other purpose.

(b) The original jurisdiction of High Court extends to matters of admiralty, matrimonial, contempt of court and cases ordered to be transferred to High Court by lower court.

(c) The High Courts of Mumbai, Kolkata and Chennai have original jurisdiction on hearing straightway cases involving the Christians and Parsies.

(d) The High Courts of Mumbai, Kolkata and Chennai exercise original civil jurisdiction when the amount involved is more than two thousand rupees.

Appellate Jurisdiction:

The appellate jurisdiction of the High Courts extends so:

(a) The High Court can hear appeals in civil cases if the amount involved in the case is at least Rs. 5000.

(b) The High Court in criminal cases hears the appeal in which the accused has been sentenced to four years imprisonment by the Sessions Judge. v

(c) The death sentence awarded by Sessions Judge is subject to approval by the High Court.

(d) The High Court hear the cases involving interpretation of the Constitution or Law.

(e) The High Court hears the cases on income tax, sales tax etc.

Power of Judicial Review:

The States High Courts like the Supreme Court has the power of Judicial Review. A High Court has the power to strike down any law of the State or any order of the executive if it violates any provision of the constitution or curtails or takes any of the Fundamental Rights of the people.

Administrative and Supervisory Power:

The State High Court performs many administrative functions within its Territorial Jurisdiction. It exercises the power of superintendence and control over all courts and tribunals throughout the territory except the military tribunals.

## Judicial Tenure and Seniority

Under §5 of the Act, judges served at the pleasure of Her Majesty. The chief justice had precedence over judges, whereas judges had seniority based on appointment.

## Jurisdiction

Under article 9 of the Act, each High Court had "all such powers and authority for and in relation to the administration of justice" including original and appellate jurisdiction over civil, criminal, admiralty, vice-admiralty, testamentary, intestate, and matrimonial matters

**Charter of Calcutta High court**

The Indian High Courts Act 1861 was a permissive legislation and gave power to the crown to establish High Courts in India.
The charter for Calcutta high court was issued on May 14, 1862 and was published in Calcutta on the 1st July, 1862 establishing the High Court from the next day.

No law is perfect, as per this common natural rule, later it was found that charter of 1862 got the defects, problems thus the new charter was issued on 28th December 1865 with few modifications in the charter of 1862.

The provisions of charter of Calcutta High Court –
1.The High court of Calcutta was constituted into a court of record.

2.The court was to have an ordinary original civil jurisdiction within the local limits Calcutta or within such local limits as may from time to time be declared and prescribed by any law by any competent legislative authority in India.

3.High court took the place of Supreme Court which was abolished.

4.The High court even got the power to exercise try matrimonial causes of the non Christians on the civil side.

5.The High court got power under extraordinary original civil jurisdiction under which it was authorized to remove and try any suit pending in any court subject to its superintendence whenever it thought proper to do so, either on the agreement of the parties, or for the purpose of justice. This way High court got power to try cases of other courts when if High court felt that the lower court may not be able to do justice in that particular case.

6.Where plaintiff had several causes of action against a defendant such causes not being for immoveable property and if the High court had original jurisdiction in respect of one of such causes, the court could call on the defendant to show cause why the several causes of action be not joined together in one suit and the court could make such order for trial of such causes as it deemed fit.

7.The high court got power to hear appeals from civil courts subordinate to it, which is appellate civil jurisdiction.

8.A new provision was added in this appellate power, it was that whenever in a civil court judgment one of the judge or from division bench whenever such judges were equally divided in opinion, these types of appeals were known as letters patent appeals as they are based not on any law but on the specific clause in the charter. Under this provision the court could hear an appeal from its original civil jurisdiction.

9.Appeals in other civil cases lay from the High court to the Privy Council

10.The high court enjoyed extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any court subject to its superintendence.

11.The High court got power, authority to try at its discretion any person brought before it on charges preferred by the advocate general or by any magistrate or any other officer specially empowered by the government in that behalf. The main purpose behind this provision was to enable the high court to hold trials for offences committed out of the presidency town.

12.High court got power to hear appeals as well as be a court of reference and revision from the subordinate criminal courts.

13.High court got power to transfer criminal cases or appeal from one court to another.

14.The High court was required to apply the Indian Penal code 1860 while acting as court of original criminal jurisdiction or a court of appeal, reference or revision. Point to be noted today also we Indians use the British India made laws.

15.High court was given jurisdiction as an insolvency court.

16.High court got power to try all civil , criminal and maritime jurisdiction [ court of Admiralty ]

17.High court also enjoyed testamentary and intestate jurisdiction.

18.High court was supposed to follow civil procedure code 1859 and criminal procedure code 1861.

With the establishment of High court in Presidency towns, it unified the Supreme Court and sadar diwani adalat. Supreme Court got power from the crown and sadar adalat got power from company, but establishment of High court unified both systems of law.
This way first time all courts were brought under the one superior high court.
Before this Supreme Court and sadar adalat clashed with each other, but High court solved this problem. All the other High courts established in other Presidency towns enjoyed same powers with little difference.

**Allahabad High Court**

The Indian High courts act 1861 gave power, authority to her majesty to issue letters patent to establish a high court for any area, territories not included within the local jurisdiction of another High court.

**Meaning of Letters Patent**

Letters patent is a type of legal instrument in the form of an open letter issued by monarch or government ,granting an office , right , monopoly, title or status to a person or to some entity such as corporation.
Letters patent are used for the creation of corporations or government offices.
In the United Kingdom letters patent are issued under the prerogative powers of the head of state, royal prerogative, this is a type of legislation without the consent of the parliament. Letter patent may be used to grant assent to legislation.

Majesty meaning –
Majesty means –
• A royal personage.
• The greatness and dignity of a sovereign
• Supreme authority or power: the majesty of the law.

Majesty is Used with His, Her, or Your as a title and form of address for a sovereign.

The territorial jurisdiction of the Calcutta high court was confined to Bengal, Bihar and Orissa and did not extend to the North western Provinces where Sadar adalats continuded to function as usual.

On March 17 Queen Victoria issued a charter and a High Court was established at Agra for the North Western Provinces which abolished the sadar diwani adalat and the sadar nizamat adalat.
The court started its working on June 11, 1886 and was shifted to Allahabad in 1875 which was known as High court of Judicature at Allahabad.
The powers of this High court were similar to the high court of Calcutta.

In 1865 in Oudh a non- regulation territory a judicial commissioners court was established.
Oudh civil courts act 1877 declared a judicial commissioners court as highest court of appeal for Oudh.
In 1925, U.P. Legislature passed the Oudh Courts act 1925 and gave status of chief court to the judicial commissioner’s court as per the demand of Oudh talukdars and population.
That time Utter Pradesh was known as united provinces.
That time 2 separate courts of appeal functioned one at Allahabad and other at Lucknow.
After Independence on July 26, 1948, the territorial jurisdiction of the Allahabad High court was augmented by the amalgamation of the Oudh chief court with it.
The Allahabad High Court however maintains a bench at Lucknow also.

**The Indian High Courts Act 1911**

The Indian High courts act 1911 modified few provisions of the Indian high courts act 1861.
The act of 1861 fixed the number of High court judges at 15 excluding the chief justice.
The act of 1911 increased the number of High court judges at 20 including chief justice.
The act of 1861 allowed establishing another High court in an area which does not come under the local jurisdiction of the other High court.
The act of 1911 modified this provision and gave power to the crown to establish additional or High courts in any territory within his majesty’s dominions in India which changed the local jurisdiction of High court.
The act also fix 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 : other High Courts**

**The Government of India Act 1915**
On 29 July 1915 British Parliament passed the Government of India [consolidating] Act 1915.

**Reason to pass this Act**

 purpose behind this act was to consolidate and reenact existing statutes relating to the government of India.
The act reenacted all the provisions made by the Indian High courts acts of 1861 and 1911 in relation to the High courts.
This act made one change with respect to the ordinary original civil jurisdiction of the High courts of Calcutta, Madras, and Bombay, the act 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.
This provision did not serve any purpose.

This act made a very wrong provision in the act.
Below is that provision.
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 counseled, 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 courts 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.

A high court of judicature was set up at Patna through letters patent issued by his majesty on February 9, 1916, in pursuance of S.113 of the Government of India act 1915.
In 1865, the Punjab Chief court was established at Lahore through an act of the Indian legislature act XXIII of 1865.
The chief court was raised to the statues of the High court on 21 March 1919 by a charter issued by George V in pursuance of the Government of India 1915.
The High court was to have jurisdiction over the Punjab and Delhi.

**Government of India Act 1935 : more high courts created**

In 1935, British Parliament enacted the government of India act to bring the constitution of the country on federal lines.

This act contained many provisions regulating the composition, constitution and working of the High courts.

The Government of India Act 1935 was passed during the "war Period" and was the last pre-independent constitution of India.
In 1947, a relatively few amendments in the Act made it the functioning interim constitutions of India and Pakistan.

The Act was originally passed in August 1935 (25 & 26 Geo. 5 c. 42), and is said to have been the longest (British) Act of Parliament ever enacted by that time.
Because of its length the Act was retroactively split by the Government of India (Reprinting) Act 1935 (26 Geo. 5 & 1 Edw. 8 c. 1) into two separate Acts:

1.The Government of India Act 1935 (26 Geo. 5 & 1 Edw. 8 c. 2)
2.The Government of Burma Act 1935 (26 Geo. 5 & 1 Edw. 8 c. 3)

The act made provision for the
1.establishment of a "Federation of India", to be made up of both British India and some or all of the "princely states"
2.the introduction of direct elections, thus increasing the franchise from seven million to thirty-five million people
3.Sind was separated from Bombay
4.Burma was completely separated from India
5.Aden was also detached from India, and established as a separate colony
6.the introductions of direct elections, thus increasing the franchise from seven million to thirty-five million people and in 1937 first elections were held.

The Indian High courts act 1911 fixed the maximum number of judges in a High court at 20.
The act of 1935 removed this limit and gave authority to the King in council to fix the number of judges for each High court from time to time.

Before 1935, High court judges hold office during His Majestys pleasure.

In England in 1701 act of settlement was passed to achieve the independence of the judiciary from the executive.

The act of 1935 fix the retirement age for the judges that is age sixty.

The act of 1935 added the rule that barristers and advocates of ten years standing were to be qualified for appointment as the High court judges.

On January 2, 1936 George V issued a charter and the Nagpur High court was established in place of the chief court.

The High court of Assam was created through the Assam High court order 1948 issued by the Government of India under s.229 [1] of the government of India act 1935 as adapted by the India Provisional Constitution amendment order 1948.

State of the Nagaland was created by the states of Nagaland act 1962. and High court of Assam became the common High court of the states of Assam and Nagaland.
This High court was renamed as the Gauhati High court by the North Eastern area reorganization act 1971 act 81.

The state of the Mizoram was created by the state of Mizoram act 1986.
The state of the Arunachal Pradesh was created by the state of Arunachal Pradesh act 1986.

The High court of Orissa was created for Orissa under the Orissa High court order 1948.

State of Andhra was created by the Andhra state act 1953 and High court of Andhra was established with effect from 1st January, 1956.
The state was renamed as the state of Andhra Pradesh by the states Reorganization act, 1956.

Like this many more High courts were created in India.

 **Jurisdiction of high courts**

The High Court of a State enjoys certain **jurisdictions** throughout the State. The Parliament may make a provision for a common High Court for two or more States or extend the jurisdiction of a High Court to one or more Union Territories.

The jurisdiction of Calcutta High Court extends to the Andaman and Nicobar Islands and the Kerala High Court has jurisdiction over Laccadive, Minicoy and Amindivi Islands.

Haryana and Punjab have a common High Court at Chandigarh. The Constitution does not attempt a detailed classification of different types of jurisdiction of the High Courts as it has done in case of the Supreme Court.

This is mainly because of the fact that during the time of the framing of the Constitution, most of the High Courts in British governed provinces were functioning well.

Thus the jurisdiction and powers of the High Courts remained mutatis mutandis the same as under the Government of India Act, 1935.

## ****Jurisdictions****

The following are the jurisdictions and powers which the High Courts enjoy all over the country.

### ****1. Original jurisdiction****:

The Constitution of India does not give a detailed description of the original jurisdiction of the High Court. It is accepted that the original jurisdiction of a High Court is exercised by issue of Writs to any person or authority including Government.

Article 226 of the Constitution vests in the High Court the power to issue writs for the restoration of fundamental rights. It reads, “Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them for the enforcement of any of the rights conferred by part III and for any other purpose”.

This power of the High Court does not derogate the similar power conferred on the Supreme Court in Article 32 of the Constitution.

The original jurisdiction of the High Courts also extends to the matters of admiralty, probate, matrimonial and contempt of Court cases. The High Courts have also full powers to make rules to regulate their business in relation to the administration of justice. It can punish for its own contempt.

### ****2. Appellate Jurisdiction****

The appellate jurisdiction of High Court extends to both civil and criminal cases. In civil cases, its jurisdiction extends to cases tried by Courts of Munsifs and District judges. In the criminal cases it extends to cases decided by Sessions and Additional Sessions Judges.

Thus, the jurisdiction of the High Court extends to all cases under the State or federal laws.

Its jurisdiction can be enlarged by the Parliament and the State Legislature. The Parliament exercises exclusive power to make laws touching the jurisdiction and power of all Courts with respect to the subjects on which it is competent to legislate. It can also legislate on subjects enumerated in the Concurrent List.

Likewise a State Legislature has power to make laws touching the jurisdictions and powers of all Courts within the Stare with respect to all subjects enumerated in the State List and the Concurrent List. But as regards the subjects in the Concurrent List the Union law prevails in case of conflict.

## ****Powers of high court****

A High Court has also the power of superintendence over all Courts and Tribunals except those dealing with the armed forces functioning in the State. In exercise of this power it may:-

(i) Call for return from such Courts.

(ii) May issue general rules and prescribe forms for regulating the practice and proceedings of such Courts, and

(iii) Prescribe forms in which books and accounts are being kept by the Officers of any Court.

This power has made the High Court responsible for the entire administration of Justice in the State. It is both judicial as well as administrative in nature. The Constitution does not place any restriction on its power of superintendence over the subordinate Courts. It may be noted the Supreme Court has no similar power vis-a-vis the High Court.

### ****Power of Transfer of Cases to High Court:****

If the High Court is satisfied that a case pending in a Court subordinate to it involves a substantial question of law as to the interpretation of the Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may :-

(a) Either dispose of it. Or

(b) Determine the said question of law and return the case to the

Court from whom it had been withdrawn together with a copy of its judgment on such question and the said Court shall on receipt thereof proceed to dispose of the case in conformity with such judgment.

By vesting these powers in the High Court the framers of our Constitution have safeguarded the possible multiplicity of constitutional interpretation at the level of subordinate Court.

The High Court has also got ample powers to call for the records of any case from any subordinate Court to satisfy itself about the correctness and legality of the orders passed by the subordinate Courts.

The High Court may either be moved by any interested party to exercise its power of revision. Even without being so moved, it can suo moto call for records and pass necessary order.

### ****Control over its Officers and Employees****

The High Court has complete control over its officers and employees. Appointments of officers and servants are to be made by the Chief Justice or such other Judge or Officer of the High Court as the Chief Justice may direct.

However, the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court except after consultation with the State Public Service Commission.

Subject to any of the Act of the State Legislature, the conditions of service of those officers and servants of the High Court are to be such as may be prescribed by rules made by the Chief Justice of the High Court or by some other Judge or Officer of the High Court authorised by the Chief Justice to be make such rules.

The power of appointment also includes powers to suspend or dismiss. The administrative expenses of the High Court, including all salaries, allowances and pensions payable to its officers, are charged upon the Consolidated Fund of the State

Finally, a High Court is also a Court of Record. Its decision will be binding on its subordinate Courts. Its proceedings and decisions have evidential value and they cannot be questioned by the subordinate Courts. Further, it can punish for contempt of itself.

Some High Courts exercise jurisdiction over the Union territories. To make the exercise of this jurisdiction effective, the restrictions are imposed on the power of the State Legislatures to make law with respect to that jurisdiction. When a High Court exercises jurisdiction in relation to a Union territory, the Legislature of that State has no power to increase, restrict or abolish that jurisdiction of the High Court.

 **Post constitutional developments – Emergence of federalism**

 Federalism in India is a historical advancement. The Federal configuration under the present constitution and its tangible operations can be grasped only on the broad canvas of its long expedition. This essay showcases Federalism in India in a twofold modus: The history of Federalism in India and the Federal Scheme under the present-day Constitution of India. The term “federal” is derived from the **Latin foedus**, which means, “covenant”. This embodies ideas of promise, obligation, and undertaking; and consequently, the federal idea draws on collaboration, reciprocity, and mutuality. Federalism is a method of segregating powers so that the central and local governments are each within a domain, harmonizing and autonomous. To be lucid, federalism postulates a constitutional apparatus for bringing unity in diversity by toning the divergent forces of centripetal and centrifugal trends in the country for the attainment of conjoint national targets.

## The Emergence of Federalism and its Evolution

The idea of federalism was initially a religious one and it was from this divine perception that the up-to-the-minute political doctrine of federalism materialized. The Bible is regarded as the first book to discuss the problems of federal polity. Ancient Israel offers the first example of a union of constituent politics grounded on a sense of shared religion nationality.

In India, Between 321 and 185 B.C. in Magadha, the Mauryans for the first time assimilated a number of kingdoms and republics which might be the first sub-continental state in Indian history India. And the Mughals, beginning with Sher Shah’s land revenue system and taking shape with Akbar’s division of his empire into 12 Subahs or Provinces provide excellent examples of a federal government.

The turning junction in India’s federal scheme came when it was taken over by the British forces. But where did the idea come from?

## Postmodern Philosophy in Different Nations: Meaning, Definition, and Features of Federalism

The classic definition of federalism is that offered by K.C. Wheare, who described the federal principle as “***the method of dividing powers so that the general and regional governments are each within a sphere coordinate and independent***. A similar definition of federalism was offered by A.V. Dicey, who identified the three leading characteristics of a “completely developed federalism” as including the distribution of powers among governmental bodies (each with limited and coordinate powers), along with the supremacy of the constitution and the authority of the courts as the interpreters of the constitution.

In the modern period, the Constitution of the United States of America, of 1787, is treated as the first experiment in establishing a federal system of government. Subsequently, federalism as a mode of political organization was embodied in the Constitutions of Switzerland, the Dominion of Canada and the Commonwealth of Australia and India.

A vital feature is the division of power between the central government and the constituent units under a constitutional scheme that cannot be changed legally by an ordinary method of central legislation. It is also essential that the arrangement assures the ability of the central government to carry out its purposes within the scope of its authority over the whole area. Hence in a federation, we find:

* Two sets of government constitutionally coordinate
* Division of powers between center and units.
* A federal court as a guardian of the constitution; and
* Supremacy of the constitution which is rigid.

## India: A Brief History of Foundation of today’s Federalism

The genesis of the present federal system in India lies in the Simon Report of May 1930 which supported the idea of a federal government in India. This support for the federal form of government for the India of the future was further affirmed in the in the First Round Table Conference of 1930. Mr. Ramsay Mac Donald, the then Prime Minister of Great Britain, speaking at the final plenary session of that Second Round Table Conference said:

“There is still difference of opinion, for instance as to the composition and powers of the Federal Legislature, and I regret that owing to the absence of a settlement of the key questions of how to safeguard the Minorities under a responsible Central Government, the Conference has been unable to discuss effectively the nature of the Federal Executive and its relationship with the Legislature”.

After the Third Round Table also flopped significantly, the British Government issued a White Paper in March 1933, which proposed a new Indian Constitution with an accountable government in the provinces and the principle of dyarchy at the Centre. As a result of the publication of the White Paper, a Joint Select Committee of both Houses of Parliament was appointed by His Majesty’s Government in April 1933 to evaluate and survey the proposals of the White Papers. These proposals were enacted into law and received the assent of the British Crown and became ultimately the basis for the **Government of India Act of 1935**.

The significance of the Act of 1935 lies in the fact that the provinces were endowed with a legal personality under a national scheme, and that the character of the national scheme was ultimately a federal system. This meant the abolition of the principle of dyarchy at the provincial level and its retention at the Centre.

But the federal construction that India follows today is poles apart from what the British came to us with. The biggest hint of federalism in India lies in the history of its foundation in 1947 when after the Partition of Pakistan from the Indian subcontinent all the provinces, presidencies, and princely states were united under an instrument of accession that signifies that all these previously sovereign or reliant states came together to be called one nation-state. The development and the journey of India as a federal country can be broadly understood by dividing it into two parts: The constitutional/legal provisions and the face of federalist India brought in by the Judiciary.

## The Constitutional Character of Federalism in India: Two-way Analysis

The constitution of India is unique with respect to its extreme detail and substance. The uniqueness of the Indian constitution is also in the fact that although it is federal in character, it declares India to be a union of states.

The constitution provides for a single citizenship like the United Kingdom and unlike the United States America that provides for dual citizenship. Single citizenship gives the constitution a unitary facet where all citizens are united under one identity as an “Indian”.

The constitution of India establishes a dual polity with the jurisdiction of making laws on different subject matters is divided between union and the state governments. The distinguishing feature here is that the residual powers lie in the hands of the central government. This attribute which is different than other countries takes makes the Indian federalism a bit intricate to fathom.

Another feature that marks India to be a federal country in nature is the written constitution. Indian constitution is the lengthiest and the bulkiest constitution in the world which clearly defines everything from rights to remedies. This strengthens the federal nature of the country and assures security to the state and citizens.

The powers in the country are split amongst the three pillars of democracy: the Legislature, the Executive, and the Judiciary. All these three props are complementary and supplementary to each other with an independent judiciary which is the upholder of the supremacy of the constitution and get to the bottom of disagreements flanked by center and states or between 2 states. This guarantees a stringent remedial system. But is that sufficient? The judiciary although independent is an integrated institution and thus gives the essence of unitary government to the constitution. Other terms of the same constitution provide for the president to appoint the constitutional heads of all states i.e. governors  and they hold their office to the desire of the president. Doesn’t that mean that the heads of the state are appointed to the pleasure of the central government? One may wonder.

The constitution of India is both stern and elastic at the same time. The rigidity of the constitution is an indispensable feature of federalism. But the same rigid constitution has hit a century of amendments in less than 75 years of Independence.

The Constitution provides for a bicameral legislature consisting of an Upper House (Rajya Sabha) and a Lower House (Lok Sabha). The Rajya Sabha is the stand-in for the states of Indian Federation, while the Lok Sabha represents the people of India as a whole. The Rajya Sabha (even though a less powerful chamber) is required to conserve the federal stability by protecting the interests of the states against the uncalled-for interference of the Centre.

Other than the aforesaid provisions the following provisions of the constitution clash with the federal nature of it:

* Union has the power to make new states or alter the boundaries of existing states.
* Union has the power to make laws on state matters and if both state and union adjudicate on a certain matter, the latter will prevail.
* The emergency articles of the constitution when conjured up, give a unitary character.

## Judicial Character of Federalism in India

The Indian judiciary has time and again heard a number of cases involving the issue of the federal character of the Indian constitution. To understand what it had to say I have collected a few cases in a chronological order that will help in understanding the judiciary’s take on this.

**State of West Bengal v. Union of India, 1963 AIR 1241.**

“The Constitution of India is not truly Federal in character. The  basis of the distribution of powers between the  Union and States is that only those powers which are  concerned with the  regulation of local problems are vested in the  States and  the residue, especially those which tend to maintain the economic industrial and commercial unity of the country are left  to  the  Union.”

**State of Rajasthan v. Union of India, 1977 AIR 1361**

“In a sense, the Indian Union is federal. But the extent of federalism in it is largely watered-down by the needs of progress and development of the country which has to be nationally integrated, politically and economically co-ordinated and socially, intellectually and spiritually uplifted. With such a system, the States cannot stand in the way of legitimate and comprehensively planned development of the country in the manner directed by the Central Government

**State of Karnataka v. Union of India, 1978 AIR 68.**

“***The Indian Constitution is not federal in character but has been characterized as quasi-federal in nature***. Even though the executive and legislative functions of the Centre and States have been defined and distributed, there runs through it all a thread or rein in the hands of the Centre in both the fields. “

**Kesvananda Bharti v. State of Kerela, (1973) 4 SCC 225.**

Some of the judges, in this case, held federalism to be a part of the basic structure of the constitution which means it can’t be tampered with.

**S.R. Bommai v. Union of India, 1994 AIR 1918, 1994 SCC (3).**

In this case, 4 different opinions were given by judges

**1. Justice Ahmadi:** Because of no mention of the words like ‘federal’ he declared it to be a quasi-federal constitution.

**2. Justice Sawant & Kuldip Singh:**Federalism is an essential feature of the constitution.

**3. Justice Ramaswamy:** Declared India to be an “Organic Federation” designed to suit the needs of the parliament.

**4. Justice Jeevan Reddy and Justice Agarwal:** Federalism in the constitution has a different meaning in accordance with the context.  This case posed restrictions on the arbitrary use of article 356.

## Challenges to Federal Character of India: 3 Recent Incidents

India’s federal experiment has undergone, over the past sixty years, many trials and tribulations.

* Formation of Telangana under Article 3 of the constitution raised a lot of questions against the federal nature of the polity.
* 100th amendment of the constitution where land was transferred to Bangladesh has posed as a serious threat to federalism in India.
* Introduction of Goods & Services Tax is a moot point. Whereas the supporters of GST argue that states too should levy taxes under it, the naysayers argue on the autonomy of states.

## Merits and Demerits of Federalism in India

Federalism in a diverse country like India has both merits and its consequences. Division of power helps in the easy governance of the 7th largest country but then a country with the second largest population needs a united government to govern people of almost every possible religion that exists. The integrated and independent judiciary is definitely a merit for the nation as it helps in proper remedy for rights. On the other hand, a written constitution with the kind of flexibility and rigidity possessed by the Indian constitution is a boon when it comes to the codification of rights but the same rigidity can stand as a bane if amendments need to be made. However, amendments to the Indian constitution are not that tough after all.[[21]](https://blog.ipleaders.in/federalism-in-india/%22%20%5Cl%20%22_ftn21)

## Present and Future of Federalism in India: Conclusion

The motto of “Unity in diversity” has always been very important to India and a federal government helps to establish a country with mutual tolerance and existence. However, for a country like India which is divided on the linguistic and communal basis, a pure federal structure would lead to disruption and division of states. With too much power given to a state, it will want to shift away from the union and establish its own government. I believe that is the reason why Jammu & Kashmir’s special powers are in question in the public time and again.[[22]](https://blog.ipleaders.in/federalism-in-india/%22%20%5Cl%20%22_ftn22)

To overcome all this and the aforementioned demerits we need to strike a balance between both unitary and federal features of the country. States should be autonomous in their own sphere but they can’t be wholly independent to avoid a state of tyranny in the nation. People of India need protection and security from such things and that is what the constitution of India with its special provisions provides. It establishes a state which is both a union and a federation at the same time and thus gives India a structure of a quasi-federal government which has united the diversity of India for past 71 years and will do the same for the centuries to come.

**Chapter- IV**

**The Federal Court of India and privy council of India**

**--------------------------------------------------------------------------------------**

* **Foundation of the Federal Court, its jurisdiction and Authority of Law**
* **Expansion of Jurisdiction**
* **Abolition of the Federal Court**
* **An Assessment**
* **Privy Council
(i) Jurisdiction, Reorganisation, Sui Generis body
(ii) Appeals from India**
* **The Supreme Court of India
(i) Origin
(ii) Constitution
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(iv) Doctrine of precedents and the Supreme Court
(v) Recent changes**

**Chapter- IV**

**The Federal Court of India and privy council of India**

**--------------------------------------------------------------------------------------**

**Foundation of the Federal Court, its jurisdiction and**

**Authority of Law**

**Reasons for the Establishment of Federal Court**

High Court was the highest court in India, over it there was Privy Council but to approach the Privy Council required huge expenses and time of the litigants. Hence the establishment of the Federal Court was made necessary. Accordingly, in Nov. 1934, the joint select committee of both the houses of British Parliament in its report recommend for the establishment of one federal court. Thus, the British Parliament passed the Government of India Act, 1935. The said Act provided for the establishment of a Federal Court in India under Section 200. Thus, on 1st October, 1937, the federal court came into being. The seat of the court was the chamber of princes in the Parliament building in Delhi. It was a court of record. Sir Maurice Gwyer was the 1st chief justice and the other two puisne judges were Sir Mohammad Sulaiman and M.R. Jayakar. The Federal Court saved time and expenses of the litigants. It was also a convenience to the Indian's. Therefore, the federal court lessened the work load of the Privy Council.

**Appointment of Judges:** 1. Chief justice and other judges were to be appointed by his Majesty; 2. They were to hold office till the age of 65 years; 3. His Majesty was empowered to remove any judge from his office on the grounds of misbehaviour or infirmity of mind or body but on the recommendation of the Privy Council

 **Qualification:**

 1. 5 year's experience as a judge of High Court;

2. 10 years standing as an advocate or Barrister;

 3. 10 years standing as a pleader in a high court.

 **Salary:**

According to section 201, The judges of the federal court were entitled to such salaries and allowances and to such rights in respect of leave and pension as were laid down by his Majesty from time to time. **Jurisdiction of the Federal Court:**

Under the Government of India Act, 1935 the Federal Court was given 3 kinds of jurisdiction:- 1. Original; 2. Appellate; 3. Advisory.

**1. Original Jurisdiction**: Section 204 of the Government of India Act, 1935 provided that, The original jurisdiction of a Federal Court was confined to:

 (a) Disputes between units of the dominion or

 (b) Disputes between the dominion and any of the units where –

(i) It involved a question of fact or a question of law on which the existence of a legal right depended;

 (ii) It involved interpretation of Government of India Act, 1935 or of any order in council made there under;

 (iii)The extent of legislative or executive authority vested in the federation by virtue of instrument of accession of the State is involved.

 But the federal court had no power to entertain suits brought by private individuals against the dominion. The court was not authorised to enforce its own decisions directly but with the aid of civil and judicial authorities throughout the federation. Section 208 provided for a right of appeal to the Privy Council from the judgements of the federal court in the exercise of its original jurisdiction, if such decision involved an interpretation of the Government of India Act, 1935 or any order in council made there under.

**2. Appellate Jurisdiction:** According to section 205 of the Government of India Act, 1935 " An appeal shall lie to the federal court from any judgement, decree or final order of a high court in British India". Provided:"that the High Court certified that the case involved a substantial question of law as to the interpretation of Government of India Act, 1935 or an order in council of the Governor General in council".

 Initially the Federal Court exercised appellate jurisdiction in constitutional cases under the Government of India Act, 1935. Its appellate jurisdiction was extended to civil and criminal cases from 1948. In this regard, Section 3 of the Federal Court (Enlargement of Jurisdiction) Act, 1947 provided that, "from 1 Feb, 1948 an appeal shall lie to the federal court in civil cases where the valuation of a civil case was not less than Rs. 50,000. So far as Criminal Cases are concerned before 1948 there was no appeal in criminal cases. Then, the Federal Court (Enlargement of Jurisdiction) Act, 1947 enlarged the jurisdiction of Federal Court in India

but later in 1949 the system of appeal from India to the Privy Council was totally abolished in criminal cases. The court was also competent to consider the nature question as mentioned in section 205.

 **3. Advisory Jurisdiction:** Under Section 213 of the Government of India Act, 1935 if at any time it appeared to the Governor-General that question of law has arisen which was of such a nature and of such public importance that it was expedient to obtain the opinion of Federal Court for its consideration and the federal court was to report to the Governor-General on the same. The question for opinion invariably involved the interpretation of the Constitution Act i.e. the Government of India Act, 1935. The Governor-General was however, not bound by the advice tendered to him by the Federal Court.

**4. Miscellaneous Powers:** The federal court under the Government of India Act, 1935 had the following 4 miscellaneous powers :-

 i. To compel attendance of any person, examine witness or production of any document;

 ii. To frame rules of procedure of Federal Court with approval of Governor-General;

 iii. To exercise supplemental powers if conferred by federal legislature for better administration of justice under the Act.

 iv. It could punish for its own contempt and could make rules for regulating its own procedure and legal practice at bar.

 **Authority of the Law laid down by Federal Court:**

 Section 212 of the Government of India Act, 1935 provided that, “the law declared by the Federal Court and any judgement of the Privy Council will be binding on all the courts in British India”. Thus, the High Court and subordinate courts in British India were absolutely bound by the decision of the Privy Council and the Federal Court.

 **Expansion of Jurisdiction :**

 In December, 1947 the Federal Court (Enlargement of Jurisdiction) Act 1947 was passed. Its aim was to meet the growing national demand and satisfy public opinion in India. It enlarged the appellate jurisdiction of the federal court so as to hear civil/criminal appeals from the High Courts to the Privy Council.

**Abolition of Federal Court**

Federal Court worked for a short period of 12 years. In place of Federal Court the Supreme Court of India was established on 25-1-1950 by the “Abolition of the Privy Council Jurisdiction Act, 1949”.

**An Assessment**

There was a right of appeal to the Judicial Committee of the Privy Council in London from the Federal Court of India. The Judicial Committee of Privy Council acted as an appellate body since 1726 with the establishment of Mayor’s Court in India. It first started working via the system of committees and sub-committees. This system was not perfect and created problems. Via the Judicial Committee Act, 1833, the Privy council was reformed and then it came into formal existence. Privy Council was thus created on 14th Aug. 1833 by the Act of the Parliament. Via this act, the Privy Council was empowered to hear appeals from the courts in British Colonies. Under the Indian High Courts Act, 1861 the high Courts were established at three Provinces. It was the amalgamation of King’s Courts and Company’s Courts. This Act provided for the right to appeal from High Courts to Privy Council from all of its judgments except in Criminal matters. In addition to this, there was a provision of Special leave to Appeal in certain cases to be so certified by the High Courts.
The Government of India Act, 1935 provided for the establishment of Federal Court in India. The Federal Court was given exclusive original jurisdiction to decide disputes between the Center and constituent Units. The provision was made for filing of appeals from High Courts to the Federal Court and from Federal Court to the Privy Council. The Federal Court also had jurisdiction to grant Special Leave to Appeal and for such appeals a certificate of the High Court was essential. India retained the right of appeal from the Federal Court of India to the Privy Council after the establishment of the Dominion of India. Then, the Federal Court Enlargement of Jurisdiction Act, 1948 was passed. This Act enlarged the appellate jurisdiction of Federal Court and also abolished the old system of filing direct appeals from the High Court to the Privy Council. Finally in 1949, the Abolition of Privy Council Jurisdiction Act was passed by the Indian Government. This Act accordingly abolished the jurisdiction of Privy Council to entertain new appeals and petitions as well as to dispose of any pending appeals and petitions. It also provided for transfer of all cases filed before Privy Council to the Federal Court in India. All powers of the Privy Council regarding appeals from the High Court were conferred to the Federal Court. Thereafter with the commencement of the Constitution of India in 1950, the Supreme Court has been established and is serving as the Apex Court for all purposes in India. It hears appeals from all the High Courts and Subordinate Courts. With this the appellate jurisdiction of the Privy Council finally came to an end.

**Privy Council**

If we overview the history of Indian Legal System, it clearly reveals that the Indian Legal System is more or less based on the English Legal System. In fact, the systematic development of Indian judicial institutions, judicial principles, laws etc. has occurred during British regime itself. Besides this, the British regime in India has also developed a hierarchical judicial system in India. Accordingly, the highest judicial authority was conferred on a body of jurists, popularly called as ‘Privy Council’. It has played a significant role in shaping the present legal system in India. The same is discussed as under.

**Origin and establishment of Privy Council:**
As it is an accepted fact that, every political system develops for itself a certain sort of legislative, executive and the judicial machinery for its smooth working and administration. Establishment of Privy Council was with the same objective. The Privy Council was nothing but the judicial body, which heard appeals from various courts of the British colonies including India.

The origin of Privy Council can be traced back to the Norman Period of English. At the beginning of 11th century, the Normans introduced a Central Government in England for controlling their executive, legislative as well as judicial Departments. There was a Supreme Federal Council of Normans. It was known as ‘Curia’ and it acted as the agency of Normans to rule England. Through it the whole administration in England was controlled. However, gradually with the passage of time, Curia gets divided into ‘Curia Regis’ and ‘Magnum Concillium’. Out of them, Magnum Concillium was to deal with executive matters whereas Curia Regis performs judicial functions.

The Curia Regis was a small body consisting of high officials of the State, members of the Royal household and certain clerks chosen by the Crown itself. Their duty was to advice the King in matters of legislation and administration and to deliver a justice. In fact, the Curia Regis acted as a final Appellate Court for England and English Empire. Gradually, the Curia Regis came to be considered as the advisory body of the King performing most of the vital functions in the field of judicial administration. Finally, during the regime of Henry II, there was a tremendous increase in the Judicial Functions of Curia Regis and it lead to the formation of two different Common Law Courts in England. They are:

1. King-in-Parliament i.e. Court of House of Lords
2. King-in-Counsel i.e. Court of Privy Council.

The former became the highest Court of Appeal for the Courts in England while the later acted as the highest Court of Appeal for all British Possessions and Settlements beyond the seas. In this way, the Privy Council was established during the middle of 16th century. It thus acted as the advisory body of the King with regard to the affairs of the State. Headquarter of the Privy Council was at Landon and its powers were implemented through the means of royal proclamations, orders, instructions etc.
 **Composition of Privy Council:**
As far as India is considered, the Privy Council acted as an appellate body since 1726 with the establishment of Mayor’s Court in India. Earlier, the Privy Council used to do its work by means of a system of committees and sub-committees. However, the committees did not have permanent existence and membership and mostly members were the persons with little judicial experience. Naturally it affected the administration of justice. In 1828, Lord Bourgham criticized such a constitution of Privy Council keeping in view the extent and importance of the appellate jurisdiction of Privy Council. Subsequently, in 1830 he became the Lord Chancellor and during his regime, the British Parliament enacted the Judicial Committee Act, 1833 in order to reform the constitution of Privy Council. In this way, officially the Privy Council was created on 14th Aug. 1833 by the Act of the Parliament. The Act empowered the Privy Council to hear appeals from the courts in British Colonies as per the provisions of the Act. Accordingly under this Act, the quorum of judicial committee of Privy Council was fixed to be four. It composed of Lord President, Lord Chancellor and other Chancellors holding judicial offices. This quorum was reduced to three in 1843. The recommendations to the Crown were given by the majority of quorum. Thereafter, by means of the Appelate Jurisduction Act, 1908 this membership of the judicial committee was extended. It also empowered His majesty to appoint certain members not exceeding two. These were nothing but the judges of High Court in British India. Thus some of the members of the Privy Council were the persons versed in Indian Laws.

**Appeals from Courts in India to the Privy Council:**

This can be discussed under following sub-headings.
**a. Charters of 1726 and 1753:**
In the Indian Legal History, the Charter of 1726 granted the right to appeal from the Courts in India to Privy Council. The said Charter established three Mayor’s Courts at Calcutta, Madras and Bombay. The provision was made as to first appeal from the decisions of Mayor’s Court to the Governor-in-Council in respective provinces and the second appeal from to the Privy Council in England. Where as the Charter of 1757, which re-established the Mayor’s Courts reaffirmed the said provisions of Appeal to Privy Council from Mayor’s Courts.

**b. The Regulating Act, 1773:**
This Act empowered the Crown to issue a Charter for establishment of Supreme Court at Calcutta. Thus the Charter of 1774 was issued by the Crown to establish a Supreme Court at Calcutta and it abolished the respective Mayor’s Court. Section 30 of this Charter granted a right to appeal from the judgments of Supreme Court to Privy Council in Civil matters if following two conditions were followed;

i) Where the amount involved exceed 1000 pagodas

ii) Where the appeal is filled within six month from the date of decision.
In the same way, the Act of 1797 replaced the Mayor’s Court at Madras and Bombay with the Recorders Court and provided for direct appeals from these Courts to the Privy Council. Thus the right to appeal from King’s Court to Privy Council was well recognized. Besides this, there were Company’s Court i.e. Sadar Diwani Adalat and Sadar Nizamat Adalat. They also recognized the right to appeal to the Privy Council from their decisions. Accordingly the Act of Settlements, 1781 provided for right to appeal from Sadar Diwani Adalat at Calcutta in Civil matters.

c. Appeals to Privy Council from High Courts:
Under the Indian High Courts Act, 1861 the high Courts were established at three Provinces. It was the amalgamation of King’s Courts and Company’s Courts. This Act provided for the right to appeal from High Courts to Privy Council from all of its judgments except in Criminal matters. In addition to this, there was a provision of Special leave to Appeal in certain cases to be so certified by the High Courts.

d. Appeals from Federal Court in India to Privy Council:
The Government of India Act, 1935 provided for the establishment of Federal Court in India. The Federal Court was given exclusive original jurisdiction to decide disputes between the Center and constituent Units. The provision was made for filing of appeals from High Courts to the Federal Court and from Federal Court to the Privy Council. The Federal Court also had jurisdiction to grant Special Leave to Appeal and for such appeals a certificate of the High Court was essential.

**e. Abolition of jurisdiction of Privy Council:**In 1933, a white paper was issued by the British Government for establishment of the Supreme Court in India so as to here appeal from Indian high Courts. It was the first step in avoiding the jurisdiction of Privy Council. After Indian independence, the Federal Court Enlargement of Jurisdiction Act, 1948 was passed. This Act enlarged the appellate jurisdiction of Federal Court and also abolished the old system of filing direct appeals from the High Court to the Privy Council with or without Special Leave. Finally in 1949, the Abolition of Privy Council Jurisdiction Act was passed by the Indian Government. This Act accordingly abolished the jurisdiction of Privy Council to entertain new appeals and petitions as well as to dispose of any pending appeals and petitions. It also provided for transfer of all cases filed before Privy Council to the Federal Court in India. All powers of the Privy Council regarding appeals from the High Court were conferred to the Federal Court.

Thereafter with the commencement of the Constitution of India in 1950, the Supreme Court has been established and is serving as the Apex Court for all purposes in India. It hears appeals from all the High Courts and Subordinate Courts. With this the appellate jurisdiction of the Privy Council finally came to an end.

**Role of Privy Council:**
The Privy Council has contributed a lot in development of Indian Legal System. It served a cause of justice for more than two hundred years for Indian Courts before independence. As far as the judicial institution is concerned, the Privy Council was a unique and unparallel among all the Courts round the world. It set the task of ascertaining the law, formulating legal principles, molding and shaping the substantive laws in India. It also helped in introduction of the concept of ‘Rule of Law’, on which we have setup the whole philosophy of our ‘Democratic Constitution’. Besides the Privy Council also lead to the introduction of Common Law in India, which forms the basis almost all present Indian laws.

The contribution of Privy Council in personal laws like Hindu Law and Muslim Law is also noteworthy. It acted as a channel, through which English legal concepts came to be assimilated with the body and fabric of the Indian law. it always insisted on the maintenance of the highest standards of just and judicial procedure, especially in the field if criminal justice. In this way; the decisions of Privy Council have enriched the Indian jurisprudence in many respects. Its contribution to the statute law, personal laws, and commercial laws is of great importance. Thus during the period of 1726-1949 and specifically after 1833 and onwards, the Privy Council has played a magnificent role in making a unique contribution to Indian laws and the Indian Legal System. The fundamental principles of laws as laid down by the Privy Council are considered as path finder for the Indian Courts still today.

At present also, the Privy Council command a great respect among Indian lawyers, judges as well as Indian public as the highest judicial institution. Some of the principles laid down by the Privy Council are still followed by the Supreme Court of India. The view taken by the Privy Council is binding on the High Courts in India till the Supreme Court has decided otherwise. One of such instance can be given in the form of ‘principle of absolute liability’ as propounded by the Supreme Court in the historic olieum gas leak case. Thus as a whole, the contribution of Privy Council is considered as remarkable for the development of Indian Legal System and Indian Judicial Administration. It has played a great unifying role in shaping divergent laws in India.

**Drawbacks of Privy Council:**
In spite this contribution of Privy Council, it suffered from following drawbacks:1. For long, it was staffed by Englishmen only, having no knowledge of Indian laws.
2. The location of the Privy Council was in England far away for common man in India making it disadvantageous.
3. The subjection to the jurisdiction to foreign judicial institution i.e. the Privy Council was considered as a symbol of slavery.
4. All this put the poor man in India in difficult situations for seeking justice.

From the above discussion, it reveals that the Privy Council has rendered a meritorious contribution in the development of Indian legal system and judicial institutions. It introduced many fundamental legal principles in Indian legal system. It shaped the judicial institutions in India. As a whole its role is very significant in developing the legal system in India as it exists presently.

 **Appeals from India**

 Appeals from the courts in India, i.e. the Crown’s Courts and, the Company’s Courts lay to Privy Council as of right. These appeals may be discussed under the following heads:-

1. **Appeals from Mayor’s Courts of 1726.—**Appeals jurisdiction of the Privy Council was made available for the first time to Indians by the Charter of 1726 by which Mayor’s Courts were established in three Presidencies of India. The first appeal from the Mayor’s Courts lay to the Governor and Council of the Settlement. The decisions of the Governor and the Council were to be final in all cases involving a subject matter up to 1000 pagodas in value. In other cases involving subject-matter worth more than 1000 pagodas, a further appeal from the Governor and Council lay to the King-in-Council, within a period of fourteen days from the date on which the judgment appealed against was recorded.
2. **Appeals from the Supreme Court under Regulating Act, 1773.** – The Regulation Act 1773, and the Judicial Charter of 1774, made provision for Supreme Court at three Presidencies in place of Mayor’s court. The Supreme Court started functioning in Fort William from 1774. An appeal from the decision of the Supreme Court could be taken to King-in-Council provided the subject-matter in dispute was worth 1000 pagodas or more. Appeal to King-in-Council in civil cases was to be made by way of petition, which was to be moved in the Supreme Court. The supreme court was directed not to allow any such appeal unless the petition for that purpose was preferred before it within six months from the date of pronouncing the judgment.
However, in criminal matters, the Supreme Court was to have full and absolute power and authority to allow or deny permission to make an appeal to the Privy Council. The Supreme court was given full powers to decided the merits of the cases, which justified grant of leave to appeals. Thus in criminal cases, the Supreme Court had the discretion to allow or not to allow appeal to the Privy Council.
3. **Appeals from the Recorder’s Court under the Act of 1797.**—The Mayor’s Court at Madras and Bombay gave place to the recorder’s Court in 1797 in which the provisions analogous to those prevailing at Calcutta were made application. In 1800, a Supreme Court with provisions of appeal to the Privy Council similar appellate provisions with the only difference that the pecuniary limitation for appeal was RS. 3000/- instead of 1000 pagodas, were made applicable. The King-in-Council had a right to refuse admit the appeal or correct or vary such decision at its pleasure.
4. **Appeals to Privy Council from Sadar Adalats.**-- Before 1781 i.e. the Act of Settlement, There was no provision for appeals to the King-in-Council from Sadar Adalats in Bengal which were established to hear appeals from the mofussils. The Act of Settlements 1781, however, appeals enhanced the status if the Sadar Diwali Adalat by constituting it to a Court of Record and conferred it a right of appeal from its decisions to King-in-Council in such civil matters which involved subjects-matter valuing 5000 or more. No rules prescribed to regulate such appeals by the Act except for prescribing the aforesaid pecuniary limit. It was only in 1797 that Regulation XVI laid down that the petition of appeal had to be presented to the Sadar DIwani Adalat within six months of the date of delivery of judgment appealed against. It was also clarified that the subject-matter had to be 5000 or more, exclusive of the cost of the suit.

**5. Appeal from Sadar Adalats of Madras and Bombay.—**A Sadar Diwani Adalat was established at Madras in 1802. In an appeal from its decision in civil matters involving subject-matter valuing Rs. 45,000 and upwards lay to the Sadar Diwani Adalat at Calcutta. But by an Act of 1818, the Sadar Diwani Adalat at Calcutta relinquished the authority to hear appeals from the Sadar Diwani Adalat of Madras and now an appeal from the Madras Sadar Adalat lay direct to the King-in-Council. However, there was no restriction as to the appealable amount.9 Accordingly, appeals from the Madras Sadar Adaiat could be taken to the Privy Council even cases where the value of the subject-matter was less than £ 5000. In Bombay, right to appeal to the Privy Council was allowed as early as 1812 under a Regulation of that year. It extended to civil cases of the value of £ 5000 or more. However, the restriction of monetary value was withdrawn by Regulation V of the Bombay Code of 1818\_ In 1827, Elphinstone Code came into existence which contained almost similar provisions of appeal to the Privy Council as were already in force, the most striking feature of which was absence of any pecuniary limit for moving an appeal.

 **Fate of Early Appeals :** The earliest appeal to the Privy Council was, Andrew Hunter v. Raja of Burdwan,1° from the Sadar Diwani Adalat of Calcutta, decided by the Privy Council in 1798, affirming the decision of the Sadar Diwani Adalat, Until 1833. there were fourteen appeals from Sadar Diwani Adalats to Privy Council including eleven from Calcutta,11 one from Madras and two from Bombay. To start with, the litigants could not make much use of the provisions of appellate jurisdiction of Privy Council because of their ignorance of the steps to be taken to bring the appeals from hearing before the Privy Council. The suitors as well as the lawyers in the Company's Adalats were not familiar with the mode, manner and procedure of conducting appeals in England. The litigants of interior mufassils had little contact with Englishmen and hence they were ignorant about the court procedure. A solicitor in England had to be appointed to represent the case of the litigant in the Privy Council and the Attorney of the Supreme Court only acted as a riaison between the appellant and the solicitor. After filing an appeal to the Privy Council, the parties waited eagerly for the decision to come from the King-in-Council, but it never came certain steps had to be taken by the parties before the case could be taken by the Privy Council in the King-in-Council and in the absence of those steps, the appeal would either be dismissed for non-prosecution or consigned tc the record office.This caused a lot of disappointment to the litigants and the disputed property was almost ruined. Thus the ignorance of the litigants about the exact procedure to be followed during the course of appeal to be taken to the Privy Council caused them more harm than good. It was in 1826 that Alexender Johnston.12 brought it to the notice of the Company's Board of Directors that many appeals involving important questions of law had been pending before the Privy Council for a number of years. These cases had not been heard because the parties concerned had not taken necessary steps in

England to pursue these appeals. The Privy Council, therefore, impressed upon the Board of Control of the Company to initiate steps to inform the parties in India about the pendency of their proceedings in these appeals and appraise them of the necessary procedure to be followed to bring their cases to a hearing, It was suggested that a Registrar of appeals be appointed to undertake the cases of respondents where the appellants had appointed agents but the respondents had not done so. Where neither of the two appointed an agent, the Registrar could act for both the parties. The Company, on its part, hesitated to appoint agents on behalf of the parties for the fear whether it would be able to recover from the parties. the cost which it might incur in bringing the appeals to a hearing. The Company therefore desired that proper regulation be promulgated laying down that in all cases in which parties concerned failed to appear by their agents to prosecute them would be disposed of and the Company would be reimbursed by the parties concerned the expenses incurred by it on prosecuting the pending appeals. As a result of this an Act13 was passed by the Parliament in 1833 reorganising the constitution of the Privy Council which now functioned as a permanent institution to dispose of appeals and petitions from overseas colonies. The Judicial Committee specially dealt with the appeals from the Indian courts which were pending before the Privy Council. It passed the following orders to expedite the disposal of pending appeals. 'By its first order of 1833, the Company was directed to bring before the Judicial Committee of the Privy Council, all the cases of appeals from its Sadar Diwani Adalats. In all forty-three such appeals were pending at the time which included eighteen cases from Bengal, ten from Madras and fifteen from Bombay Seder Adalats. By the second order of November 18, 1833, the Company was required to appoint solicitors or agents to act as counsels for different parties whose appeals were pending before the Privy Council. By the third order,, the Company was authorised to recover costs from the appellants incurred by it in bringing appeals through agents in the Privy Council. Since there was no uniformity regarding pecuniary limits of appeals from different Indian Courts. the Privy Council by an order of 1838 provided that after December 31, 1838 no appeal should be al,owed„ by any Sadar Diwani Adalat or Supreme Court of India, unless the petition was presented within six months from the date of judgment. decree or order and the value of the subject-matter in dispute in such appeal was at least Rs. 10.000/-. The order also provided for appeals by special leave in exceptional cases. The constitution of the Judicial Committee was modified in 1843 when the quorum to decide appeals from Indian Courts was reduced from 4 to 3 members.

 **The Judicature Act, 1845**

 According to the aforesaid three orders in Council the Company brought the pending appeals for disposal. In all 67 appeals were disposed of, out of which 37 were affirmed, 12 reversed, I varied, 14 compounded, 2 withdrawn and 1 was remitted. The Company had to spend a sum of £ 151537 pounds on these appeals, of which only a nominal part could be recovered from the parties. Therefore. the British Parliament passed an Act in 1845 seeking to absolve •the Company of its responsibilities of appeals. The Act laid down that the provisions of 1833 should not be applies appeal from any Sadar Diwani Adalat after January 1, 1846 and such appeals be managed by the parties themselves. Thus after 1st January 1846. management of appeals in England was taken out of Company's hands a. vested in the parties themselves.

**Appeals to Privy Council from the Indian High Courts :** Consequent to the passing of the Indian High Courts Act, 1861, the Courts and the Seder Adalats in Calcutta, Bombay and Madras were abolislhea their place the High Courts were established in these Presidency towns. An could be made to the Privy Council in any case not being of a criminal jurisdictic-r, any final judgment, decree or order of the High Court if the value of the subject- was not less than Rs. 10,000 or the High Court declared that the case was fit such appeal to the Privy Council. In criminal cases, an appeal could lie to the Privy Council from any judg, sentence of a High Court made in exercise of its original jurisdiction or in any where a point of law had been reserved for the opinion of the High Court b) exercising original jurisdiction provided the High Court certifies that the case one for appeal to the Privy Council.

 **Special leave to Appeal :** Besides, various charters and Regulations also reserved to the Sove namely, King-in-Council, power to grant special leave to appeal in those cases did not qualify to come before it 'as of right' under stipulated conditions. It could special leave to appeal even where the High Court refused to grant nec certificate or leave. Special leave could be granted in civil as well as criminal c In civil matters, though special leave was not granted in all cases yea attitude of the King-in-Council (Privy Council) was more flexible16 than in c matters. The Privy Council could grant special leave to appeal in civil matters v substantial question of law was involved or the case of a public importance or substantial character.17 In criminal cases, the approach of the Privy Council was more restrictive intervend only when there had been gross miscarriage of justice and the ess legal principles had been vioilated.18 The obvious reason for this restrictive app. of the Privy Council in criminal appeals was that such appeals were time cons and therefore would have resulted in the postponement of sentences or exe thereof passed on those found guilty of murder causing undue delay bet commission of crime and the punishment which would have diluted the deterrent effect of punishment, leaving the convicts in suspense. Yet another re was large number of criminal cases in colonies. In Ibrahim v. Rexlg the Privy Council inter-alia observed. "Leave to ap not granted except where some clear departure from the requirements of ju exists nor unless by a disregard of the forms of legal process, or by some vic of the principles of natural justice or otherwise, substantial and grave injustice has been done There must be something which, in the particular case. deprives the accused of the substance of fair trial or the protection of law.2° Referring to its prerogative to grant special leave to appeal, the Privy Council in two cases21 of appeal from the Supreme Court of Bombay made it clear that the clause referred to civil cases only and appeals in criminal cases, could go to the Privy Council only if the Supreme Court concerned gave the necessary certificate of permission.22 It is to be noted that even in the case of Nand Kumar, the Supreme Court of Calcutta had refused to grant leave to appeal to the Privy Council.23 In 1862, the privy Council considered the question of special leave to appeal to itself from the Sadar Nizamat Adalat at Calcutta in Reg v. Joykisen Mookerjee.24 On being convicted on a charge of forgery, the accused prayed for leave to appeal which was refused by the Sadar Nizamat Adalat. The Privy Council, while admitting the existence of prerogative of the Crown to grant special leave to appeal and admitting that justice had not been well administered in this case, still refused special leave on three main grounds, namely, (i) it would involve investigation and examination of the entire evidence in the case de novo ; (ii) till that time there was no precedent to grant special leave nor had any petition praying for special leave ever come from any Dominion or colonies ; (iii) the consequences of granting special leave would be destructive of administration of criminal justice. The Privy Council, however, hoped that justice would be done in the instant case by exercising the Royal prerogative of granting pardon to the accused. In Re Dillet25 case the Privy Council reiterated its earlier stand on grant of special leave in criminal cases and observed that invariably it would desist from reviewing or interfering with the course of criminal proceedings unless it is shown that there has been violation of the principles of natural justice or some substantial and grave injustice has been caused to the petitioner. Perhaps. the first case from India in which the Privy Council intervened was in 1913 because the accused in this case was condemned to death upon no evidence at al1.26 The Privy Council in Arnold v. King Emperor,27 through Lord Shaw stated that the Judicial Committee of Privy Council is not a court of criminal Appeal. It shall not interfere with the course of criminal law unless there has been gross violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, that the result arrived at was opposite to the result which their lordships would themselves have reached.

**Appeals From the Federal Court :** A Federal Court was established in India by the Government of India Act, 1935. An appeal from the decision of the Federal Court could be allowed to the Privy Council in the exercise of its original jurisdiction without leave, and in any other case, by leave of the Federal Court or His Majesty's Council, namely the Privy Council.28 It must be stated that even after the establishment of the Federal Court. the old system of appeal from High Court to Privy Council was continued and uninterrupted.

**Abolition of the Jurisdiction of the Privy Council :** Consequent to the Indian Independence in 1947, there was need to ext jurisdiction of the Federal Court by restricting Privy Council's jurisdict it.Therefore an Act called the Federal Court (Enlargement of Jurisdiction) Aa was passed which provided that an appeal would be allowed to the Federal any judgment of the High Court without leave to appeal of the Federal COUle appeal could have been brought to His Majesty's Council without any spectai under the provisions of the Code of Civil Procedure or of any other law in f with the special leave of the Federal Court in other cases. The jurisdiction of the Privy Council to hear appeals from India was co abolished in 1949 by the Abolition of the Privy Council Jurisdiction Act, 1949 came into force on October 10, 1949. The pending appeals were transferrer Federal Court except those which the Privy Council could dispose of befcev, inauguration of the Indian Constitution. With the coming into force of the Co of India on January 26, 1950, the Federal Court was replaced by the Supreme India. It was the highest court for the country and was conferred wide jurisdiction.-The last Indian case decided by the Privy Council was that of Krishnaswarni Ayyangar v. Perumal Goundan,29 from Madras which was de • December 15, 1949.Tips came to an end Privy Council's over two century relationship with India.

**The Supreme Court of India**

 **(i) Origin
(ii) Constitution
(iii) Jurisdiction and powers
(iv) Doctrine of precedents and the Supreme Court
(v) Recent changes**

The concept of Dharma or law in ancient India was inspired by the Vedas which contained rules of conduct and rites and compiled in Dharma Sutras, were practiced in a number of branches of the Vedic schools. Their principal contents address the duties of people at various stages of life, the rights and duties of the kings and juridical matters. These were basis of Hindu Law. The earliest document throwing light on the theory of jurisprudence, which forms
part of practical governance, is the Artha Sastra of Kautilya dating back to circa 300 B.C. The third chapter deals with Vyavahara i.e. transactions between two or more parties or Vivada or disputation.
During the first seven centuries of Christian era, there evolved a number of Dharma sastras which dealt extensively with Manu, Yajnavalkya, Narda and Parashara smiritis etc. In medieval India, the religious leaders endeavoured to transform Islam into a religion of law, but as custodian of justice, the rulers made the Sharia, a court subservient to their sovereign power. Theoretically the rulers had to be obedient to the Sharia and history speaks about certain cases where sovereigns unhesistengly submitted to the Qazi’s decision. The rulers sat in a Court known as Mazalim (complaints). According to Ibn Battuta, Muhammad bin Tughalaq, ruler of Tughalaq dynasty, heard complaints each Monday and Thursday. From 13th century onwards, an officer known as Amir-i- dad presided over the secular Court in sultan’s absence. He was also responsible for implementing Qazis’ decisions and for drawing their attention to the cases which constituted miscarriage of justice.
The Muftis were the expert on Sharia law and gave Fatwas (formal legal rulings) on disputes referred to them by members of the public or qazis. The Chief Judge of the sultanate was known as the qazi –i- mamalik also known as
the qazi- ul- quzat.
During Mughals period the secular judge was known as Mir- adl . He acted as a judge on the Emperor’s behalf. He was required to make impartial and personal inquiries. He was also responsible for implementing qazi’s decisions. Emperor Akbar also appointed two officers, called tui-begis, to supervise the adherence to the law and fixed a nominal amount as their fee. The same system was followed till British took over the power of India.

The promulgation of Regulating Act of 1773 by the King of England paved the way for establishment of the Supreme Court of Judicature at Calcutta. The Letters of Patent was issued on 26 March 1774 to establish the Supreme Court of Judicature at Calcutta, as a Court of Record, with full power & authority to hear and determine all complaints for any crimes and also to entertain, hear and determine any suits or actions against any of His Majesty’s subjects in Bengal, Bihar and Orissa. The Supreme Courts at Madras and Bombay was established by King George – III on 26 December 1800 and on 8 December 1823 respectively.

The India High Courts Act 1861 was enacted to create High Courts for various provinces and abolished Supreme Courts at Calcutta, Madras and Bombay and also the Sadar Adalats in Presidency towns. These High Courts had  he distinction of being the highest Courts for all cases till the creation of Federal Court of India under the Government of India Act 1935. The Federal Court had jurisdiction to solve disputes between provinces and federal states
and hear appeal against Judgements from High Courts. After India attained independence in 1947, the Constitution of India came into being on 26 January 1950. The Supreme Court of India also came into existence and its first sitting was held on 28 January 1950.

The law declared by the Supreme Court is binding on all Courts within the territory of India. It has power of judicial review – to strike down the legislative and executive action contrary to the provisions and the scheme of the
constitution, the distribution of power between Union and States or inimical to the fundamental rights guaranteed by the Constitution.

In formative years, the Apex Court met from 10 to 12 in the morning and then 2 to 4 in the afternoon for 28 days in a year. Today, it has enormous task and meeting for 190 days in a year.

Supreme Court of India came intoexistence on 26th January, 1950 and is located on Tilak Marg, New Delhi. The Supreme Court of India functioned from the Parliament House till it moved to the present building. It has a 27.6 metre high dome and a spacious colonnaded verandah. For a peek inside, you’ll have to obtain a visitor’s pass from the front office.

On the 28th of January, 1950, two days after India became a Sovereign Democratic Republic, the Supreme Court came into being. The inauguration took place in the Chamber of Princes in the Parliament building which also housed India’s Parliament, consisting of the Council of States and the House of the People. It was here, in this Chamber of Princes, that the Federal Court of India had sat for 12 years between 1937 and 1950. This was to be the home of the Supreme Court for years that were to follow until the Supreme Court acquired its own present premises**.**

The inaugural proceedings were simple but impressive. They began at 9.45 a.m. when the Judges of the Federal Court – Chief Justice Harilal J.Kania and Justices Saiyid Fazl Ali, M. Patanjali Sastri, Mehr Chand Mahajan, Bijan Kumar Mukherjea and S.R.Das – took their seats. In attendance were the Chief Justices of the High Courts of Allahabad, Bombay, Madras, Orissa, Assam, Nagpur, Punjab, Saurashtra, Patiala and the East Punjab States Union, Mysore, Hyderabad, Madhya Bharat and Travancore-Cochin. Along with the Attorney General for India, M.C. Setalvad were present the Advocate Generals of Bombay, Madras, Uttar Pradesh, Bihar, East Punjab, Orissa, Mysore, Hyderabad and Madhya Bharat. Present too, were Prime Minister, other Ministers, Ambassadors and diplomatic representatives of foreign States, a large number of Senior and other Advocates of the Court and other distinguished visitors.

Taking care to ensure that the Rules of the Supreme Court were published and the names of all the Advocates and agents of the Federal Court were brought on the rolls of the Supreme Court, the inaugural proceedings were over and put under part of the record of the Supreme Court.

After its inauguration on January 28, 1950, the Supreme Court commenced its sittings in a part of the Parliament House. The Court moved into the present building in 1958. The building is shaped to project the image of scales of justice. The Central Wing of the building is the Centre Beam of the Scales. In 1979, two New Wings – the East Wing and the West Wing – were added to the complex. In all there are 15 Court Rooms in the various wings of the building. The Chief Justice’s Court is the largest of the Courts located in the Centre of the Central Wing.

The original Constitution of 1950 envisaged a Supreme Court with a Chief Justice and 7 puisne Judges – leaving it to Parliament to increase this number. In the early years, all the Judges of the Supreme Court sat together to hear the cases presented before them. As the work of the Court increased and arrears of cases began to cumulate, Parliament increased the number of Judges from 8 in 1950 to 11 in 1956, 14 in 1960, 18 in 1978 and 26 in 1986. As the number of the Judges has increased, they sit in smaller Benches of two and three – coming together in larger Benches of 5 and more only when required to do so or to settle a difference of opinion or controversy.

The Supreme Court of India comprises the Chief Justice and 30 other Judges appointed by the President of India. Supreme Court Judges retire upon attaining the age of 65 years. In order to be appointed as a Judge of the Supreme Court, a person must be a citizen of India and must have been, for atleast five years, a Judge of a High Court or of two or more such Courts in succession, or an Advocate of a High Court or of two or more such Courts in succession for at least 10 years or he must be, in the opinion of the President, a distinguished jurist. Provisions exist for the appointment of a Judge of a High Court as an Ad-hoc Judge of the Supreme Court and for retired Judges of the Supreme Court or High Courts to sit and act as Judges of that Court.

The Constitution seeks to ensure the independence of Supreme Court Judges in various ways. A Judge of the Supreme Court cannot be removed from office except by an order of the President passed after an address in each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of members present and voting, and presented to the President in the same Session for such removal on the ground of proved misbehaviour or incapacity. A person who has been a Judge of the Supreme Court is debarred from practising in any court of law or before any other authority in India.

The proceedings of the Supreme Court are conducted in English only. Supreme Court Rules, 1966 are framed under Article 145 of the Constitution to regulate the practice and procedure of the Supreme Court.

The Supreme Court of India is a powerful judiciary. The Constitution of India has defined its jurisdiction and powers in detail, it has Original.

Appellate and Advisory Jurisdictions Besides these jurisdictions, it has a few other important functions.

**These jurisdictions and functions may be discussed under the following categories:**

**1. Original Jurisdiction:**

The original jurisdiction of the Supreme Court is mainly confined to cases regarding the interpretation of the provision of the Constitution which arise between the Union and the States or between the States themselves. No other Courts can entertain such cases.

**The Supreme Court has exclusive jurisdiction in the following types of cases:**

(a) Disputes between the Government of India and one or more States.

(b) Disputes between the Government of India and any State or Stales on one side and one or more States on the other

(c) Disputes between two or more States which involve any question of law or fact on which the existence or extent of a legal right depends.

Thus, the original jurisdiction of the Supreme Court includes the cases where either the Union and Units or the federating units are parties. Here the Supreme Court may safeguard the State Governments against the Central encroachment or vice-versa. The Supreme Court is thus expected to act as a balance-wheel in our federation.

The original jurisdiction of the Supreme Court does not include disputes between citizens of different States or those between one State and the resident of another State. Such disputes may come before it under its appellate jurisdiction.

But under Article 32 of the Constitution, a citizen can approach the Supreme Court directly for the enforcement of his Fundamental Rights. In that case the Supreme Court has power to issue directions or orders in the nature of writs of habeas corpus, mandamus, prohibition, quo-warranto, and certiorari or all of them for the enforcement of Fundamental Rights. It may be noted that this jurisdiction of the Supreme Court is not exclusive. The High Courts have also the same power to issue writs for the enforcement of Fundamental Rights.

**2. Appellate Jurisdiction:**

The Supreme Court of India is the highest Court of appeal in the country. It can hear appeals from cases decided by the High Courts and other Tribunals in the States except cases tried by a Court Martial. No appeal can be made to the Supreme Court against the decisions of Military Tribunals. Cases where an appeal can be made to the Supreme Court may be classified as below:-

#### ****(a) Constitutional Cases:****

The Supreme Court can admit Ian appeal from all High Courts if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.

Where the High Court has refused to give inch a certificate the Supreme Court may, if it is satisfied that the case involved substantial question of law as to the interpretation of the Constitution, grant special leave to appeal from such Judgment, decree or final order.

Such a certificate is given or such leave is granted, if any party in the case made appeal to the Supreme Court on the ground that the question has been wrongly decided or on any other grounds.

Such cases may be criminal, civil, or other proceedings which should have a constitutional bearing on constitutional law in the opinion of the Supreme Court. Thus the opinion of the Supreme Court and not that of the High Court is final on the question of constitutional interpretation.

#### ****(b) Civil Cases:****

On all civil cases decided by the High Courts an appeal can be made to the Supreme Court if the High Court certifies-

(i) That the case involves directly or indirectly some claim of property of important nature, or

(ii) That the case is fit one for appeal as it involves substantial question of law. The High Court certifies that the case is a fit one to appeal or in the absence of such certificate of the High Court, the Supreme Court grants special leave to appeal.

#### ****(c) Criminal Cases:****

On the judgment of a High Court on criminal cases, appeal can be made to the Supreme Court if the High Court –

(i) Has on appeal reversed an order of acquittal of an accused person and sentenced him to death, or

(ii) Has withdrawn for trial before itself the cases from any Court subordinate to its authority and in such trial convicted the accused person and sentenced him to death, or

(iii) Certifies that the case is a fit one for an appeal to the Supreme Court subject to such provision contained in the rules made by the Supreme Court in that behalf.

Even in the absence of all these conditions the Supreme Court may grant special leave to appeal to any case decided by the High Court. Article 136 of the Constitution confers discretionary powers on the Supreme Court to grant special leave to appeal from any decision of any Court or Tribunal in the country other than a Court Martial.

It means that the leave to appeal may be granted to any case without having the necessary limitations enumerated above. The power of the Supreme Court to grant special leave to appeal is not subject to any constitutional limitation.

As D. D. Basu writes, “broadly speaking the Supreme Court can exercise this power to grant leave to the aggrieved party in case where the principles of natural justice have been violated even then the party may have no footing to appeal as of right.”

Further the Constitution provides for the enlargement of the jurisdiction of the Supreme Court by an act of Parliament. The Parliament may, by law, confer on the Supreme Court power to issue directions or writs for any purpose other than the enforcement of fundamental rights.

It again may, by law, make provision for conferring on the Supreme Court such ancillary powers as may be necessary to enable it to perform the functions placed upon it under the Constitution. But such law of the Parliament must not be inconsistent with any provisions of the Constitution.

### ****3. Advisory Jurisdiction:****

Besides the original and appellate jurisdictions enjoyed by the Supreme Court, it has also advisory jurisdiction on matters of constitutional importance. Article 143 of the Constitution provides that if at any time the President thinks that a question of law or fact has arisen or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Supreme Court for consideration and the Court, after such hearing, as it thinks fit, reports to the President its opinion thereon.

It is only the advisory or consultative power of the Supreme Court. The President is not bound to accept the advice of the Supreme Court. However, it is expected that the advisory opinion of the Supreme Court may be final as it is the highest Court of the land.

This provision is included in our Constitution to enable the President to take a decision in the light of the judicial opinion in matters in which he may have doubt. To a certain extent the similar jurisdiction is possessed by the Canadian Supreme Court.

**Some of the important references made to the Supreme Court by the President are:**

(i) Kerala Education Bill (1959).

(ii) The Indo-Pakistan Agreement in respect of Beru-Bari Union and the exchange of Cooch-Bchar Enclaves (1960).

(iii) The conflict between the U.P. Legislature and the Allahabad High Court (1964).

(iv) Validity of the Special Courts Bill (1978).

(v) Conflict between union Executive and the Election commission over Gujarat election (2001).

It may be relevant to note that the Government have accepted the advisory opinion of the Supreme Court as authoritative and amended the Constitution wherever necessary.

### ****4.**** ****The Supreme Court as a Court of Record:****

Besides the original, appellate and advisory jurisdiction, the Supreme Court of India possesses a few more powers. Article 129 of the Constitution makes the Supreme Court a Court of Record.

The Court of Record in popular sense means a superior Court whose decisions and judicial proceedings have evidential value and cannot be questioned by any other subordinate Court. Further, the Supreme Court has power to punish individuals for its contempt.

The Supreme Court is authorised with the approval of the President of India and subject to any law made by the Parliament, to make rules for regulating the practice and procedure of the Court.

These mainly include the rules regarding the practice of persons before Court, the procedure for hearing appeals, granting of bail, stay of proceedings etc. The Supreme Court has also the power to review its own decisions and orders and thereby may rectify the wrong if any in its judgment.

This power to review its own judgment is necessary because there is no appeal against its judgment. This power is, however, subject to the provisions of laws made by the Parliament or rules made by the Supreme Court.

### ****5.**** ****The Supreme Court as the Guardian of the Constitution:****

The Supreme Court acts as the guardian of the Constitution in India. In a Federal State, the Constitution is supreme law of the land and the judiciary is usually vested with power to protect the constitutional provisions. The Supreme Court of America is the guardian of its Constitution.

Although there is no specific provision in the Constitution of India declaring the Supreme Court as the guardian of the Constitution, it is implied that in a Federal State, the Supreme Court is to protect the Constitution and act as a balance-wheel between the Centre and the federating units.

The Parliament and the State legislatures are supreme within their respective spheres. The Executives are made subservient to constitutional laws and regulations. If some of them exceed their limited authority the Supreme Court has power to restrict them.

The final interpretation of the Constitution is left to the Supreme Court. Chief Justice Hughes of America once remarked, “Constitution is what the judges say it is”‘. This idea holds true in almost all federal Constitutions.

### ****6.**** ****The Supreme Court and Public Interest Litigation:****

The role of the Supreme Court of India has been further widened due to emergence of the idea of public interest litigation. Under the principle of public interest litigation, the petition can be filed in the court not only by the aggrieved party but by any conscious person or organisation to seek relief on behalf of the aggrieved party.

The Supreme Court took quite a liberal view and took the stand that matters could be raised even without formally filing a suit. Even letters or telegrams to the Supreme Court by socially conscious citizens or organisations may be treated as writ petitions.

Former Chief Justice of India P.N. Bhagawati laid emphasis on public interest litigation. In 1982 the Supreme Court itself admitted in a case that “it is necessary to demonstrate judicial remedies, remove technical barriers against easy accessibility to justice and that it would readily respond even to a letter addressed by such individual acting pro bono public. No doubt, the Supreme Court has given various reliefs for the poor, uneducated, disabled and helpless people under the public interest litigation.

### ****7.**** ****Miscellaneous Functions:****

Besides the above functions, the Supreme Court of India also performs certain other functions. As per Article 138 of the

Constitution, the Parliament is empowered to extend by law the jurisdiction of the Supreme Court with respect to any of the matters included in the Union List and with respect to any matter as the Government of India and the Government of any State may by special agreement confer.

The apex court has also the special jurisdiction to decide disputes relating to the election of the President and Vice-President of India. Another special power of the Supreme Court is to enquire into the misconduct of the Chairman and members of the Union Public Service Commission. Again as per Article 141 of the Constitution, the law declared by Supreme Court shall be binding on all courts within the territory of India.

**Doctrine of precedents and the Supreme Court**

A precedent is a statement of law found in the decision   of   a   superior   Court,   which   decision   has   to   be followed   by   that   court   and   by   the   courts   inferior   to   it. Precedent is a previous decision upon which the judges have to follow the past decisions carefully in the cases before them as a guide for all present or future decisions.

In   other   words,   ‘Judicial   Precedent’   means   a judgment of a Court of law cited as an authority for deciding a similar set of facts, a case which serves as authority for the legal principle embodied in its decision. A judicial precedent is a decision of the Court used as a source for future decision making

. **Meaning :­**

A   precedent   is   a   statement   of   law   found   in decision of a Superior Court. Though law making is the work of the legislature, Judges make law through the precedent.

Inferior courts must follow such laws. Decisions based on a question of law are precedents. Decisions based on question of facts are not precedents. Judges must follow the binding decisions of Superior or the same court. Following previous binding decisions brings uniformity in decision making, not following would result in confusion. It is well settled that Article 141 of the Constitution empowers the Supreme Court to declare the law and not to enact the law, which essentially is the function of the legislature. To declare the law means to interpret the law. This interpretation of law is binding on all the Courts in India. This is called as precedent.

Definition of Precedent :­

 The term precedent is not defined anywhere. In general English it means, A previous instance or case which is, or may be taken as an example of rule for subsequent cases, or by which some similar act or circumstances may be supported or justified”.

According to salmond :­

 In loose sense it includes merely reported case law which may be cited and followed by courts.

In strict sense, that case law which not only has great binding authority but must also be followed.

 In all precedents are authority of past decisions for future cases. It must be reported, cited and followed by courts.

 **Object :­**

The main object of doctrine of precedent is that the law of the land should be clear, certain & consistent so that   the   Courts   shall   follow   it   without   any   hesitation.   In **Union of India Vs. Raghubir Singh (AIR 1989 SC 1933)** it has been held

 “The doctrine of binding precedent has the   merit   of   promoting   a   certainty   and consistency in judicial decisions, and enables an organic   development   of   the   law,   besides providing assurance to the individual as to the consequence   of   transactions   forming   part   of

daily   affairs.   And,   therefore,   the   need   for   a clear   and   consistent   enunciation   of   legal principle in the decisions of a Court.”

 **Origin of Precedent :**

­ Precedent originates from the doctrine of stare decisis. Stare decisis means to abide by the decisions. The doctrine of stare decisis brings certainty and conformity to the decisions of the court and to law.

**Stare decisis** :­

 The maxim explains the doctrine of stare decisis. When   court   settles   an   issue,   a   conflict   or   a   controversy between   parties   it   becomes   the   law   on   those   issues   and conflicts. Such a decision is a precedent. A precedent is a statement of law found in decision of the superior court. Such decisions are binding to that court and the inferior courts have to follow. The cases based on similar set of facts decided by a court may arise in any future case. Following previous decisions in similar future cases, the court may save time and avoid conflicting decisions, bringing uniformity to law. The court settles a question of law or of fact, it is best to stand by that decision while adjudicating similar cases in the future. Before   deciding   a   case,   the   Judges   look   into   previously decided  cases  of  similar  nature  by   their  own court  or by superior courts. They shall apply them on the facts or case before them and decide accordingly.

  In Indian legal system, the judges take guidance from previous decisions on the point, and rely upon them. The decisions of Apex Court and High courts are compiled and published in reports. These reports are considered to be valuable from the legal literature perspective. Those decisions are very efficient in deciding cases of subsequent cases of similar   nature.   They   are   called   as   Judicial   Precedents.   A decision is an authority for what it decides. The ratio in the decision is its essence.

The reason and   principles   on   which   a   court   decides   a   case   forms   a precedent.   A   Judicial   decision   has   a   binding   force   for subsequent   cases.   However,   the   whole   Judgment   is   not binding in future cases.

In the case of   **C    ommissioner of Income Tax ­vsM/s Sun Engineering Works Private Limited AIR 1993, SC 43,** the Hon'ble Apex Court held that, “while applying the decision   to   a   later   cases,   the   court   must   carefully   try   to ascertain the true principle laid down by the decision of the Supreme Court and not to pick out words or sentences from the Judgment   divorced   from   the   context   of   question   under consideration by the court to support their reasoning.” It is very clear that, only those statements in an earlier decision which may be said to constitute the ratio decidendi of that case are binding. Statements which are not essential or necessary for deciding the later cases, such non authoritative statements are called as obiter dicta.

 Ratio Decidendi :­ Ratio decidendi means the reason or the principle upon which the case has been decided by the higher Courts and only this much is binding on the subordinate courts while applying   the   earlier   decision.   The   ratio   decidendi   can   be ascertained   by   an   analysis   of   facts.   In   the   case  **Krishna     Kumar vs.Union of India and others    , (    1990) 4 SCC 207 it** has been observed the hon'ble supreme court that:

“In other words, the enunciation of the reason or principle upon which a question before a court has been decided is alone binding as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general   grounds   upon   which   the   decision   is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre­existing rule of law, either statutory or judge­made, and a minor premise consisting of the material facts of the case under immediate consideration. If it is not clear, it is not the duty of the court to spell it out with difficulty in order to be bound by it.”

 Obiter Dicta :­

 Obiter Dicta means all that is said by the court by the   way   or   the   statement   of   law   which   go   beyond   the requirements of the particular case and which laid down rule i.e. irrelevant or unnecessary for the purpose in hand are called obiter dicta. These dicta have the force of persuasive precedents only. The judges are not bound to follow them.  However,   obiter   dictum   of   Their   Lordships   of   the hon'ble Supreme Court is entitled to highest respect and is binding on all the Courts of the country. It is observed in case of **“Mohandas Issardas and others Vs. A.N. Sattanathan & Others, A.I.R. 1995 (Bom.) 113”**that:

“the   court   in   India   should   accept   as   an authoritative pronouncement on the particular aspect of law and treat that pronouncement as binding. The Supreme court has now taken the place of privy council and we would like to say unhesitatingly   that   we   must   show   the   same respect   for   the   'obiter   dicta'   of   the   Supreme Court that we did for those of privy council. The   Supreme   Court   is   the   highest   judicial tribunal   in   India   today   and   it   is   as   much necessary   as   in   the   interest   of   judicial uniformity and judicial discipline that all the High Courts must accept as binding the 'obiter dicta' of the Supreme Court in the same spirit as the High Courts accepted the 'obiter dicta' of the privy council.”

 Sub Silentio :­

A decision is sub silentio if an important issue ignored or was not argued by counsel. That point or issue may turn the decision of the court. Such decision is not an authority   on   the   point   which   is   not   fully   argued   is   sub silentio.

 **When Precedents cease to apply :**

­ There   are   three   main   criteria   to   oversight   the previous precedents as follows ;­

 **I]   Overruling**

 **II]  Reversing**

 **III] Distinguishing**

 **I] Overruling :­**

This is where a court higher in the hierarchy departs from a decision made in a lower court. Then the previous decision is no longer binding.

 **II] Reversing :­**

This is where a higher court departs from the decision of the lower court on appeal.

**III] Distinguishing :­**

This   is   where   the   facts   of   the   case   are deemed sufficiently different so that the previous case is no longer binding.

**Order by consent of the parties :**

­ The   court   can   pass   orders   by   consent   of   the parties. Those orders are not adjudication of the rights and liabilities of the parties. That decision does not lay down any principle. Those orders are not precedent.

**Whether judgments of Hon'ble High Court are binding as precedents :­**

Like Article 141 empowering the Supreme Court to declare the law and making its precedents binding on all the Courts, there is no specific provision directly empowering the High Court to declare the law and making its decisions binding on its subordinate Courts. But it is well settled that the Courts from a State subordinate to a High Court from that State are bound by its decisions. Question is what is the basis for this settled law

The  Honble Supreme Court in **M/s. East India Commercial Co. Ltd. Calcutta and another V/s. Collector of Customs, Calcutta (AIR 1962 S.C.1893)** held in para 31 of the Judgment as under :­

31…… Under Art. 215, every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself. Under Art. 226, it has a plenary power to issue orders or writs for the enforcement of the fundamental rights and for any other purpose   to   any   person   or   authority, including   in   appropriate   cases   any Government   within   its   territorial jurisdiction.   Under   Art.   227,   it   has jurisdiction   over   all   courts   and   tribunals throughout   the   territories   in   relation   to which its exercises jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that Court and start proceedings in direct violation of it.   If   a   tribunal   can   do   so,   all   the subordinate   courts   can   equally   do   so,   for there is no specific provision, just like in the case   of   Supreme   Court,   making   the   law declared  by   the   High   Courts   binding   on subordinate   courts.   It   is   implicit   in   the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be 13 conducive   to   their   smooth   working otherwise, there would be confusion in the administration of law and respect for law would   irretrievably   suffer.   We,   therefore, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a   proceeding   or   deciding   on   the   rights involved in such a proceeding. If that be so, the notices issued by the authority signifying the launching of proceedings contrary to the law laid down by the High Court would be invalid and the proceedings themselves could be without jurisdiction.”

 Per incuriam decisions :­

 Per incuriam decisions do not have binding effect. Per incuriam decisions mean where the court has acted in ignorance of a previous decision of its own or of a court of coordinate   jurisdiction   or   when   the   decision   is   given   in ignorance of the terms of a statute or a rule having statutory force.

The   Apex   Court   **in  State   of   Bihar   Vs.   Kalika Kuer alias Kalika Singh & others (2003) 5 SCC 448**  held that :

“A   decision   is   given   per   incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate   jurisdiction   which   covered   the case before it, in which case it must decide which case to follow; or when it has acted in ignorance   of   House   of   Lords   decision,   in which case it must follow that decisions; or when the decision is given in ignorance of the   terms   of   a   statute   or   rule   having statutory force.”

**CONFLICTING   DECISIONS   OF   DIFFERENT STRENGTH :­** If there is conflict between the decision of lesser bench, then law laid down by the larger bench will be binding. In this regard the Five­Judges Constitution Bench of Honourable Supreme Court in case of **“Central Board of Dawoodi Bohra     Community v. State of Maharashtra,    (2005) 2 SCC 673”** has observed that,

 “The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co­equal strength”. This view is also followed by Honourable Bombay High Court in case of **“Reliance General Insurance Company Ltd.     versus   Syeda   Aleemunbee   w/o.   Syed   Razaq.      First   Civil Appeal   No.   1611   of   2013,   decided   on   03.03.2014**,”  To quote Honourable Bombay High Court­

  “28) It is well­settled, judicial process demands that a judge moves within the frame­work of relevant legal rules and the   coveted   modes   of   those   for ascertaining   them.   The   judicial   robe has   its   inbuilt   discipline,   which mandates, for a High Court to adhere in tune with the precedent of Supreme Court and in particular of the larger Benches. This is more so, if there are divergent views by Honourble Judges of the   Supreme   Court,   on   identical issues.”

EFFECT OF ORDERS OF HIGHER COURT :­

Any interim order passed even by the Supreme Court is limited to that particular case and should not be used as precedent   for   other   cases   specifically   when   the   Supreme Court itself has earlier authoritatively decided the question which is squarely involved in the later case. The Hon'ble Apex Court **in “Megh Singh v. State of Punjab [AIR 2003 SC 3184]”**has held that,

  “circumstantial   flexibility,   one additional or different fact may make a world of difference between conclusion in two cases or between two accused in the same case. Each case depends on its own   facts   and   a   close   similarity between one case and another is not enough   because   a   single   significant detail may alter the entire aspect.”

 Precedents   work   like   lighthouse   to   guide   all courts. Precedents bring certainty in law. They always help the lower court judges, specially the junior judges to deal with applying the law correctly. Some times the judges may support their views with help of the precedents. These are the guidelines which must be followed by the lower courts to ensure the real justice, consistency, uniformity in the judicial decisions   and   also   provide   predictability   to   the   individual rights.

**Recent changes**

Initially the Constitution of India provided for a supreme court with a chief justice and 7 judges. In the early years, a full bench of the supreme court sat together to hear the cases presented before them. As the work of the court increased and cases began to accumulate, parliament increased the number of judges from the original 8 in 1950 to 10 in 1956, 13 in 1960, 17 in 1977, 26 in 1986 and 31 in 2008 (current strength). As the number of the judges has increased, they sit in smaller benches of two or three (referred to as a division bench )[12]—coming together in larger benches of five or more (referred to as a constitution bench) when required to settle fundamental questions of law. A bench may refer a case before it to a larger bench, should the need arise.

In practice, judges of the supreme court have been selected so far, mostly from amongst judges of the high courts. Barely seven justices—S. M. Sikri, S. Chandra Roy, Kuldip Singh, Santosh Hegde, R. F. Nariman, U. U. Lalit. L. Nageswara Rao and Indu Malhotra—have been appointed to the supreme court directly from the bar (i.e. who were practising advocates).

The supreme court saw its first woman judge when Justice M. Fathima Beevi was sworn into office in 1989.The seventh and the most recent woman judge in the court is Justice Indu Malhotra.  In 1968, Justice Mohammad Hidayatullah became the first Muslim  Chief Justice of India. In 2000, Justice K. G. Balakrishnan became the first judge from the *dalit*  community. In 2007 he also became the first *dalit* Chief Justice of India. In 2010, Justice S. H. Kapadia  coming from a Parsi minority community became the Chief Justice of India. In 2017, Justice Jagdish Singh Khehar  became the first Sikh Chief Justice of India. Indu Malhotra  is the first women justice to be selected directly from bar.

## Judicial independence

The constitution seeks to ensure the independence of supreme court judges in various ways. Per Article 50 of directive principles of state policy, the state shall take steps to separate the judiciary from the executive. Independence of the judiciary, the supremacy of the constitution and rule of law are the features of the basic structure of the constitution. Supreme court and high courts are empowered to frame *suo moto* cases without receiving the formal petitions/complaints on any suspected injustice including actions/acts indulging in contempt of court and contempt of the constitution by the executive, legislators, citizens, etc. The main purpose of supreme court is to decide constitutional issues.  It is the duty of the judiciary to frame *suo moto*cases or to probe the cases/petitions at the earliest against the executive or legislature when laws are implemented violating the basic foundation and basic structure of the constitution as the Article 38 (1) of directive principles ensures that the state/judiciary shall strive to promote the welfare of the people by securing a social order in which social, economic and political justice is animated/informed in all institutions of life.

B. R. Ambedkar clarified as given below in the Constituent Assembly debates on Article 38 (1) high lighting its inevitable implementation.

*... The word 'strive' which occurs in the Draft Constitution, in judgement, is very important. We have used it because our intention is even when there are circumstances which prevent the Government, or which stand in the way of the Government giving effect to these Directive Principles, they shall, even under hard and unpropitious circumstances, always strive in the fulfilment of these Directives. That is why we have used the word 'strive'. Otherwise, it would be open for any Government to say that the circumstances are so bad, that the finances are so inadequate that we cannot even make an effort in the direction in which the Constitution asks us to go.*

### Appointments and the Collegium

As per the constitution, as held by the court in the Three Judges Cases – (1982, 1993, 1998), a judge is appointed to the supreme court by the president on the recommendation of the *collegium*  — a closed group of the Chief Justice of India, the four most senior judges of the court and the senior-most judge hailing from the high court of a prospective appointee. This has resulted in a Memorandum of Procedure being followed, for the appointments.

Judges used to be appointed by the president on the advice of the union cabinet. After 1993 (the Second Judges' Case), no minister, or even the executive collectively, can suggest any names to the president,  who ultimately decides on appointing them from a list of names recommended only by the *collegium* of the judiciary. Simultaneously, as held in that judgment, the executive was given the power to reject a recommended name. However, according to some,jurist the executive has not been diligent in using this power to reject the names of bad candidates recommended by the judiciary.

The collegium system has come under a fair amount of criticism. In 2015, the parliament passed a law to replace the collegium with a National Judicial Appointment Commission (NJAC). This was struck down as unconstitutional by the supreme court, in the Fourth Judges' Case , as the new system would undermine the independence of the judiciary. Putting the old system of the collegium back, the court invited suggestions, even from the general public, on how to improve the collegium system, broadly along the lines of – setting up an eligibility criteria for appointments, a permanent secretariat to help the collegium sift through material on potential candidates, infusing more transparency into the selection process, grievance redressal and any other suggestion not in these four categories, like transfer of judges. This resulted in the court asking the government and the collegium to finalize the memorandum of procedure incorporating the above.

Once, in 2009, the recommendation for the appointment of a judge of a high court made by the collegium of that court, had come to be challenged in the supreme court. The court held that who could become a judge was a matter of fact, and any person had a right to question it. But who should become a judge was a matter of opinion and could not be questioned. As long as an effective consultation took place within a collegium in arriving at that opinion, the content or material placed before it to form the opinion could not be called for scrutiny in court.

### Tenure

Supreme court judges retire at the age of 65. However, there have been suggestions from the judges of the Supreme Court of India to provide for a fixed term for the judges including the Chief Justice of India.

### Salary

Article 125 of the Indian constitution leaves it to the Indian parliament to determine the salary, other allowances, leave of absence, pension, etc. of the supreme court judges. However, the parliament cannot alter any of these privileges and rights to the judge's disadvantage after his/her appointment . A judge of the supreme court draws a salary of ₹250,000 (US$3,500) per month—equivalent to the most-senior civil servant of the Indian government, Cabinet Secretary of India—while the chief justice earns ₹280,000 (US$3,900) per month.

### Oath of affirmation

As Per Article 124 and third Schedule of the constitution, the chief justice (or a judge) of the Supreme Court of India is required to make and subscribe in the presence of the president an oath or affirmation that he/she

*will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgement perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws.*

### Removal

Per Article 124(4) of the constitution, President can remove a judge on proved misbehaviour or incapacity when parliament approves with a majority of the total membership of each house in favour of impeachment and not less than two thirds of the members of each house present. For initiating impeachment  proceedings against a judge, at least 50 members of Rajya Sabha or 100 members of Lok Sabha shall issue the notice as per Judges (Inquiry) Act,1968. Then a judicial committee would be formed to frame charges against the judge, to conduct the fair trial and to submit its report to parliament. When the judicial committee report finds the judge guilty of misbehaviour or incapacity, further removal proceedings would be taken up by the parliament if the judge is not resigning himself.

The judge upon proven guilty is also liable for punishment as per applicable laws or for contempt of the constitution by breaching the oath under disrespecting constitution.

### Post-retirement

A Person who has retired as a judge of the supreme court is debarred from practicing in any court of law or before any other authority in India.

### Review petition

Article 137 of the Constitution of India lays down provision for the power of the supreme court to review its own judgements. As per this Article, subject to the provisions of any law made by parliament or any rules made under Article 145, the supreme court shall have power to review any judgment pronounced or order made by it.

Under Order XL of the supreme court Rules, that have been framed under its powers under Article 145 of the constitution, the supreme court may review its judgment or order but no application for review is to be entertained in a civil proceeding except on the grounds mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure.

### Powers to punish for contempt

Under Articles 129 and 142 of the constitution the supreme court has been vested with power to punish anyone for contempt of any court in India including itself. The supreme court performed an unprecedented action when it directed a sitting minister of state  in Maharashtra government, Swaroop Singh Naik, to be jailed for 1-month on a charge of contempt of court on 12 May 2006. This was the first time that a serving minister was ever jailed.

## Rules

The Constitution of India under Article 145 empowers the supreme court to frame its own rules for regulating the practice and procedure of the court as and when required (with the approval of the president). Accordingly, "Supreme Court Rules, 1950" were framed. The 1950 Rules were replaced by the Supreme Court Rules, 1966. In 2014, supreme court notified the Supreme Court Rules, 2013 replacing the 1966 Rules effective from 19 August 2014.

## Roster system

The supreme court decided to follow a new roster system from February 5, 2018 for allocation of matters to judges. Under the new roster system, the CJI will hear all special leave petitions (SLPs), and matters related to public interest, social justice, elections, arbitration, and criminal matters, among others. The other collegium/senior judges to hear matters related to labour disputes, taxation matters, compensation matters, consumer protection matters, maritime law matters, mortgage matters, personal law matters, family law matters, land acquisition matters, service matters, company matters etc.

## Reporting and citation

## Supreme Court Reports is the official journal of reportable supreme court decisions. It is published under the authority of the Supreme Court of India by the Controller of Publications, Government of India, Delhi. In addition, there are many other reputed private journals that report supreme court decisions. Some of these other important journals are: SCR (The Supreme Court Reports), SCC (Supreme Court Cases), AIR (All India Reporter), SCALE, etc.

## Landmark judgments

After some of the courts overturned state laws for redistributing land from *zamindar* (landlord) estates on the ground that the laws violated the zamindars' fundamental rights, the parliament  passed the 1st amendment to the constitution in 1951, followed by the 4th amendment in 1955, to uphold its authority to redistribute land. The supreme court countered these amendments in 1967 when it ruled in *Golaknath v. State of Punjab* that the parliament did not have the power to abrogate fundamental rights, including the provisions on private property. The 25th amendment to the constitution in 1971 curtailed the right of a citizen to property as a fundamental right and gave authority to the government to infringe private property, which led to a furor amongst the *zamindars*.

### Emergency (1975–1977)

The independence of judiciary was severely curtailed during the Indian Emergency (1975–1977) of Indira Gandhi. The constitutional rights of imprisoned persons were restricted under Preventive detention laws passed by the parliament. In the case of Shiva Kant Shukla (*Additional District Magistrate of Jabalpur v. Shiv Kant Shukla*), popularly known as the *Habeas Corpus case*, a bench of five senior-most judges of supreme court ruled in favour of state's right for unrestricted powers of detention during the emergency. Justices A.N. Ray, P. N. Bhagwati, Y. V. Chandrachud, and M.H. Beg, stated in the majority decision:

(under the declaration of emergency) no person has any locus to move any writ petition under Art. 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality of an order of detention.

The only dissenting opinion was from Justice H. R. Khanna, who stated:

detention without trial is an anathema to all those who love personal liberty... A dissent is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.

It is believed that before delivering his dissenting opinion, Justice Khanna had mentioned to his sister: "I have prepared my judgment, which is going to cost me the Chief Justice-ship of India." In January 1977, Justice Khanna was superseded despite being the most senior judge at the time and thereby Government broke the convention of appointing only the senior most judge to the position of Chief Justice of India. Justice Khanna remains a legendary figure among the legal fraternity in India for this decision.

*The New York Times*, wrote of this opinion: "The submission of an independent judiciary to absolutist government is virtually the last step in the destruction of a democratic society; and the Indian supreme court's decision appears close to utter surrender."

During the emergency period, the government also passed the 39th amendment, which sought to limit judicial review for the election of the prime minister; only a body constituted by parliament could review this election. Subsequently, the parliament, with most opposition members in jail during the emergency, passed the 42nd Amendment which prevented any court from reviewing any amendment to the constitution with the exception of procedural issues concerning ratification. A few years after the emergency, however, the supreme court rejected the absoluteness of the 42nd amendment and reaffirmed its power of judicial review in *Minerva Mills v. Union of India* (1980).

### Post-1980: an assertive court

After Indira Gandhi lost elections in 1977, the new government of Morarji Desai, and especially law minister Shanti Bhushan (who had earlier argued for the detenues in the *Habeas Corpus case*), introduced a number of amendments making it more difficult to declare and sustain an emergency, and reinstated much of the power to the supreme court. It is said that the basic structure doctrine, created in *Kesavananda Bharati v. State of Kerala*, was strengthened in *Indira Gandhi's* case and set in stone in *Minerva Mills v. Union of India* ,

The supreme court's creative and expansive interpretations of Article 21 (Life and Personal Liberty), primarily after the Emergency period, have given rise to a new jurisprudence of public interest litigation that has vigorously promoted many important economic and social rights (constitutionally protected but not enforceable) including, but not restricted to, the rights to free education, livelihood, a clean environment, food and many others. Civil and political rights (traditionally protected in the Fundamental Rights chapter of the Indian constitution) have also been expanded and more fiercely protected. These new interpretations have opened the avenue for litigation on a number of important issues.

### Recent important cases

Among the important pronouncements of the supreme court post 2000 is the Coelho case I.R. Coelho v. State of Tamil Nadu (Judgment of 11 January 2007). A unanimous bench of 9 judges reaffirmed the *basic structure* doctrine. It held that a constitutional amendment which entails violation of any fundamental rights which the court regards as forming part of the *basic structure* of the constitution, then the same can be struck down depending upon its impact and consequences. The judgment clearly imposes further limitations on the constituent power of parliament with respect to the principles underlying certain fundamental rights. The judgment in Coelho has in effect restored the decision in Golak Nath regarding non-amendability of the constitution on account of infraction of fundamental rights, contrary to the judgment in the *Kesavananda Bharati* case.

Another important decision was of the five-judge bench in *Ashoka Kumar Thakur v. Union of India*; where the constitutional validity of Central Educational Institutions (Reservations in Admissions) Act, 2006 was upheld, subject to the "creamy layer" criteria. Importantly, the court refused to follow the 'strict scrutiny ‘ standards of review followed by the United States supreme court. At the same time, the court has applied the strict scrutiny standards in Anuj Garg v. Hotel Association of India(2007)

#### 2G spectrum case

The supreme court declared allotment of spectrum as "unconstitutional and arbitrary" and quashed all the 122 licenses issued in 2008 during tenure of A. Raja (then minister for communications & IT), the main official accused in the 2G case.

#### Black money

The government refused to disclose details of about 18 Indians holding accounts in LGT Bank, Liechtenstein, evoking a sharp response from a bench comprising justices B Sudershan Reddy and S S Nijjar. The court ordered Special investigation team (SIT) to probe the matter. Lack of enthusiasm made the court create a special investigative team (SIT).

#### Minority reservations

The supreme court refused to stay the Andhra Pradesh High Court judgement quashing 4.5% sub-quota for minorities under OBC reservation quota of 27%.

#### Online/postal ballot for Indian citizen living abroad (NRIs)

Three judge bench presided by chief justice, Justice Altamas Kabir  issued notice to the Centre and the Election Commission of India (EC) on the PIL filed by a group of NRIs for online/postal ballot for the Indian citizens living abroad.

#### T. S. R. Subramanian vs. Union of India

While hearing *T.S.R. Subramanian vs Union of India*, a division bench of the supreme court ruled that—

* Officers of the Indian Administrative Service (IAS), officers other All India Services, and other civil servants not required to follow oral instructions, as they 'undermine credibility'.
* Civil Services Board (CSB), headed by the Cabinet Secretary at national level, and Chief Secretary at state level, be set up to recommend transfer/postings of the officers of the All India Services  (IAS, IFoS and IPS).
* Transfers of Group 'B' officers to be done by Head of Department (HoDs).
* No interference of Ministers in state, other than the Chief Minister, in transfer/postings of civil servants.

These rulings were received mostly positively, and were termed as a 'major reform'.

#### Recognition of transgender as 'third gender' in law.

In April 2014, Justice K. S. Radhakrishnan declared transgender to be the 'third gender' in Indian law, in the case, *National Legal Services Authority v. Union of India* .The ruling said:

Seldom, our society realises or cares to realise the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change.

Justice Radhakrishnan said that transgender people should be treated consistently with other minorities under the law, enabling them to access jobs, healthcare and education.He framed the issue as one of human rights, saying that, "These TGs, even though insignificant in numbers, are still human beings and therefore they have every right to enjoy their human rights", concluding by declaring that:

(1) Hijras, eunuchs, apart from binary gender, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our constitution and the laws made by the parliament and the State Legislature.

(2) Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

#### Relief to over 35,000 public servants

In B.Prabhakara Rao vs. State of A.P. involved sudden reduction in age of superannuation from 58 years to 55 years of over 35,000 public servants of State Government, public sector undertakings, statutory bodies, educational institutions and Tirupathi-Tirumalai Devasthanams (TTD). They lost first round of litigation in the supreme court. Realising the mistake, fresh legislation was brought restoring the original age of superannuation of 58 years but providing that the benefit of new legislation would not extend to those whose reduction of age of superannuation had been upheld. In challenge to this law, Subodh Markandeya argued that all that was required was to strike down naughty “not” – which found favour with the supreme court bringing relief to over 35,000 public servants.

#### Decriminalise homosexuality

A five member constitutional bench decriminalised homosexuality by partially striking down the Section 377 of the Indian Penal Code  in September 2018. The bench led by Dipak Misra  unanimously declared that criminalisation of private consensual sex between adult persons of the same sex under Section 377 of the Indian Penal Code was clearly unconstitutional. The court, however, held that the section would apply to bestiality, sex with minors and non consensual sexual acts.

## Criticism

### Corruption

The year 2008 saw the supreme court embroiled in several controversies, from serious allegations of corruption at the highest level of the judiciary,  expensive private holidays at the tax payers expense, refusal to divulge details of judges' assets to the public, secrecy in the appointments of judges', to refusal to make information public under the Right to Information Act.The chief justice K. G. Balakrishnan invited a lot of criticism for his comments on his post not being that of a public servant, but that of a constitutional authority. He later went back on this stand. The judiciary has come in for serious criticisms from former presidents Pratibha Patil and A. P. J. Abdul Kalam for failure in handling its duties. Former prime minister Manmohan Singh, has stated that corruption is one of the major challenges facing the judiciary, and suggested that there is an urgent need to eradicate this menace.

The Cabinet Secretary of India introduced the judges Inquiry (Amendment) Bill 2008 in parliament for setting up of a panel called the National Judicial Council, headed by the Chief Justice of India, that will probe into allegations of corruption and misconduct by High Court and supreme court judges.

### Pending cases

According to supreme court newsletter, there are 58,519 cases pending in the supreme court, out of which 37,385 are pending for more than a year, at the end of 2011. Excluding connected cases, there are still 33,892 pending cases. As per the latest pendency data made available by the supreme court, the total number of pending cases in the supreme court as on 1 November 2017 is 55,259 which includes 32,160 admission matters (miscellaneous) and 23,099 regular hearing matters.  In May, 2014, former Chief Justice of India, Justice R.M. Lodha, proposed to make Indian judiciary work throughout the year (instead of the present system of having long vacations, specially in the higher courts) in order to reduce pendency of cases in Indian courts; however, as per this proposal there is not going to be any increase in the number of working days or working hours of any of the judges and it only meant that different judges would be going on vacation during different periods of the year as per their choice; but, the Bar Council of India  rejected this proposal mainly because it would have inconvenienced the advocates who would have to work throughout the year.More over, various time frames specified in 'code of civil procedure’ are also diluted by supreme court judgements to give the courts right to endlessly adjourn the cases.

### Rule of law

Supreme court has not taken up the trail of many pending cases, since April 2014 (more than three years), challenging the validity of the Andhra Pradesh Reorganisation Act, 2014 which was enacted by the parliament without following the stipulated procedure in the constitution  and is claimed detrimental to the basic foundation of the constitution on which the basic structure of the constitution is resting. The basic foundation of the constitution is the dignity and the freedom of its citizens which is of supreme importance and can not be destroyed by any legislation of the parliament. Whereas the fair trial to examine the validity of the ninety-ninth constitutional amendment dated 31 December 2014, to form National Judicial Appointments Commission for the purpose of appointing the judges of the supreme court and high courts, was conducted on utmost priority and supreme court delivered its judgement on 16 October 2015 (within a year) quashing the constitutional amendment as unconstitutional and ultra virus stating the said amendment is interfering with the independence of the judiciary.[108] Disposal of the various petitions filed against Andhra Pradesh Reorganisation Act, 2014 is also equally important as it has alienated the basic rights of a vast section of Indian citizens and also against federal character of the constitution which is part of the basic structure of the constitution. Supreme court is also wasting its valuable time by not taking up the case in toto but conducted a piecemeal trail by delivering its judgement to dispose the petitions related with apportionment of assets between the newly formed states Telangana and Andhra Pradesh. Supreme court is also conducting piecemeal trail of the petitions filed by the states regarding water sharing of rivers and bifurcation of the common high court without considering the earlier pending petitions challenging the validity of the Andhra Pradesh Reorganisation Act, 2014 which is the basic cause of all these disputes. Under checks and balances as provided in the constitution, it is the duty of the judiciary/supreme court to establish the rule of law at the earliest by rectifying any misuse of the constitution by the parliament and the executive without colluding with them and to remove perceptions of people that rule of law is side lined and a section of its citizens are subjected to discrimination.

### Four judges vs chief justice

On 12 January 2018, four senior judges of the supreme court; Jasti Chelameswar, Ranjan Gogoi, Madan Lokur and Kurian Joseph addressed a press conference criticizing Chief Justice Dipak Misra's style of administration and the manner in which he allocated cases among judges of the supreme court. However, people close to Misra refuted the allegations that allocation of cases was unfair. On 20 April 2018, seven opposition parties submitted a petition seeking impeachment of Dipak Misra to the Vice President Venkaiah Naidu, with signatures from seventy-one parliamentarians. On 23 April 2018, the petition was rejected by Vice President Venkaiah Naidu, primarily on the basis that the complaints were about administration and not misbehaviour, and that thus impeachment would seriously interfere with the constitutionally protected independence of the judiciary.

**Chapter- V**

**Growth of Legislature,
Constitutional History**

* **Development of legislative authorities in India from 1861-1935
(Constitutional Development)**
* **Growth of Criminal Law**
* **Growth of personal law of Hindus and Muslims**
* **Influence of English Law in India**
* **Prerogative writs in India**

* **Racial discrimination**
* **Growth of justice, equity and good conscience**

**Chapter- V**

**Growth of Legislature,
Constitutional History**

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**Development of legislative authorities in India from 1861-1935**

**Constitutional Development**

The history of constitutional development in India begins from the passing of the Regulating Act in 1773. The Pitt's India Act of 1784 and the successive Charter Acts from 1793 to 1853 form part of the constitutional changes under the East India Company's rule. The Revolt of 1857 brought about important changes in the British administration in India. The rule of the East India Company came to an end. The administration of India came under the direct control of the British Crown. These changes were announced in the Government of India Act of 1858. The 'Proclamation of Queen Victoria' assured the Indians a benvelont administration. Thereafter, important development had taken place in constitutional history of India as a result of the Indian National Movement.

## Government of India Act of 1858

The Governemnt of India Act of 1858 was passed by the Parliament of England and received royal assent on 2nd August 1858. Following are **the main provisions of the Act:**

East India **Company's rule came to an end** and the Indian administration came under the direct control of the Crown.

In England, the **Court of Directors** and **Board of** **Control**were**abolished**. In their place came the **Secretary of State for India**and**India Council**wereestablished. The Secretary of State would be a member of the British cabinet. Sir Charles Wood was made the first Secretary of State for India. India Council consisting of 15 members would assist him

The Governor General of India was also made the **Viceroy of India**. The first Viceroy of India was LordCanning.

All the previous treaties were accepted and honoured by the Act.

## Queen Victoria's Proclamation

On 1 November 1858 the Proclamation of Queen Victoria was announced by Lord Canning at Allahabad. This royal Proclamation was translated into Indian languages and publicly read in many important places. It annonced the end of Company's rule in India and the Queen's assumption of the Government of India. It endorsed the treaty made by the Company with Indian princes and promised to respect their rights, dignity and honour. It assured the Indian people equal and impartial protection of law and freedom of religion and social practices. The Proclamation of Queen Victoria gave a practical shape to the Act of 1858.

## Indian Councils Act of 1861

The Indian Councils Act of 1861 increased the number of members in the Governor-General's executive Council from 4 to 5. Further the Governor-General's Executive Council was enlarged into a Central Legislative Council. Six to tweleve 'additional members' were to be nominated by the Governor-General. Not less than half of these members were to be non-officials. Thus a provision was made for the inclusion of Indians in the Legislative Council. The functions of these members were strictly limited to making legislation and they were forbidden from interfering in the matters of the Executive Council. They did not possess powers of administration and finance.

Legilative Councils were also established in the provinces. The number of additional members in the provinces was fixed between four to eight. So, this Act was an important constitutional development and the people of India came to be involved in the law malking process. The mechanism of Indian legislation developed slowly and reinforced further by the Acts of 1892 and 1909.

## Indian Councils Act of 1892

The Indian Councils Act of 1892 was the first achievement of the Indian National Congress. It had increased the number of 'additional members' in the Central Legislative Council. They were to be not less than 10 and not more than 16. It had also increased the proportion of non-officials - 6 officials and 10 non-officials. The members were allowed to discuss the budget and criticize the financial policy of the government. In the provinces also the number of additional members was increased with additional powers.

## Minto- Morley Reforms of 1909

The Indian Councils Act of 1909 was also known as Minto-Morley Reforms in the names of Lord Morley, the Secretary of State for India and Lord Minto, the Governor-General of India. Both were responsible for the passing of this Act. It was passed to win the support of the Moderates in the Congress.The important provisions of this Act were:

The number of 'additional members' of the Central Legislative Council was increased to a maximum of 60. Elected members were to be 27 and among the remaining 33 nominated members not more than 28 were to be officials.

The principle of election to the councils was legally recognized. But communal representation was for the first time introduced in the interests of Muslims. Separate electorates were provided for the Muslims.

The number of members in provincial legislative councils of major provinces was raised to 50.

The Councils were given right to discuss and pass resolutions on the Budget and on all matters of public interest. However, the Governor-General had the power to disallow discussion on the budget.

An Indian member was appointed for the first time to the Governor-General's Executive Council. Sir S. P. Sinha was-the first Indian to be appointed thus.

In Bombay and Madras, the number of members of the Executive Councils was raised from 2 to 4. The practice of appointing Indians to these Councils began.

Two Indians were also appointed to the India Council [in England].

The Minto- Morley reforms never desired to set up a parliamentary form of government in India. However, the Moderates welcomed the reforms as fairly liberal measures. The principle of separate electorates had ultimately led to the partition of India in 1947.

## Montague-Chelmsford Reforms of 1919

The political developments in India during**division**the **of**First World War such as the Home Rule Movement led to the August Declaration. On 20th August, 1917 Montague, the Secretary of State for India made a momentous declaration in the House of Commons. His declaration assured the introduction of responsible government in India in different stages. As a first measure the Government of India Act of 1919 was passed by the Parliament of England. This Act is popularly known as Montague-Chelmsford Reforms. At that time Lord Chelmsford was the Viceroy of India.

The main features of the Act were:

**Dyarchy**was introduced in the provinces. Provincial subjectswere divided into **'Reserved Subjects'** such as police, jails, land revenue, irrigation and forests and **'Transferred** **Subjects'**such as education, local self-government, publichealth, sanitation, agriculture and industries. The Reserved subjects were to be administered by the Governor and his Executive Council. The Transferred subjects by the Governor and his ministers.

A bicameral (Two Chambers) legislature was set up at the centre. It consisted of the **Council of States** and the **Legislative Assembly**. The total member in the LegislativeAssembly was to be a maximum of 145, out of which 105 were to be elected and the remaining nominated. In the Council of States there would be a maximum of 60 members out of which 34 were elected and the remaining nominated.

The salaries of the Secretary of State for India and his assistants were to be paid out of the British revenues. So far, they were paid out of the Indian revenues.

A High Commissioner for India at London was appointed.

The most important defect in this Act was the powers under the system of Dyarchy in the provinces.

## The Government of India Act of 1935

The Government of India Act of 1935 was passed on the basis of the report of the Simon Commission, the outcome of the Round Table Conferences and the White Paper issued by the British Government in 1933. This Act contained many important changes over the previous Act of 1919.

Following were the salient features of this Act.

Provision for the establishment of an All India Federation at the Centre, consisting of the Provinces of British India and the Princely States. (It did not come into existence since the Princely States refused to give their consent for the union.)

Division of powers into three lists: Federal, Provincial and Concurrent.

Introduction of Dyarchy at the Centre. The Governor-General and his councillors administered the 'Reserved subjects'. The Council of Ministers were responsible for the 'Transferred' subjects.

Abolition of Dyarchy and the introduction of Provincial Autonomy in the provinces. The Governor was made the head of the Provincial Executive but he was expected to run the administration on the advice of the Council of Ministers. Thus provincial government was entursted to the elected Ministers. They were responsible to the popularly elected Legislative Assemblies.

Provincial Legilatures of Bengal, Madras, Bombay, United Provinces, Bihar and Assam were made bicameral.

Extension of the principle of Separate Electorates to Sikhs, Europeans, Indian Christians and Anglo Indians.

Esatblishment of a Federal Court at Delhi with a Chief Justice and 6 judges.

The working of the provincial autonomy was not successful. The Governors were not bound to accept the advice of the ministers. In reality, the real power in the Provincial Government was with the Governor. But, despite these drawbacks in the scheme, the Congress decided to take part in the elections to the Provincial Legislatures with the consideration that it was an improvement over the previous Acts

**Growth of Criminal Law**

The development of both Criminal and civil Legal systems in india dateback to the ancient period to a land that was ruled by various kings of India right from 3000 B.C.E to 1001 C.E and beyond. This country had asimilar system of law for well over 4000 years. No other country in theworld can claim such a credit and even though this land was divided intohundreds of small political kingdoms the law of the land called Neethi andDharma given by the great Hindu law giver Manu were common or similarin nature

**Criminal Justice in the Mughal Period**

 The criminal law system however was not particularly viewed as adifferent wing of the legal system and was not separated as such tillrecently. It was only after the advent of Muslim rule in India in the late 11thcentury and the establishment of the Mughal Empire that criminal justicetook crude form. The Mughals applied the Muslim law for administration of criminal justice and managed to establish a well entrenched system in theregions of Bengal, Bihar and Orissa.

**A brief introduction of the Muslim Law in India**

 The original Muslim law generally classifies criminal acts into three broad categories.Theyinclude:

•Crimes against God

•Crimes against Sovereign

•Crimes against individual

Crimes of against God are generally those crimes that are strictlyprohibited in the Quran and they include apostasy, drinking intoxicants,adultery.

Crimes against the sovereign are crimes which are viewed with lessseverity in the Quran like theft, robbery or murder. These crimes arealmost as the previous category and the punishments are often as grave.

 The final classification of crimes consists of crimes against privateindividuals. They are specifically those crimes committed against thehuman body like maiming or causing grievous hurt.

Accordingly, the Muslim law along with the classification also prescribespunishments for these crimes and there are four kinds of punishments forthat are used in this law.

•Kisa or Retaliation

•Diya or Blood Money

•Hadd or limits

• Tazeer or Discretionary Punishments

These Muslim laws and the prescribed punishments were applied andadministered by learned men called Qazi’s in accordance with thesituation or case presented before them.

Kisa

This punishment applied to crimes which included wilful killing or causinggrave injuries and mutilation. Cases of murder were also prescribed thepunishment of Kisa. In principle, kisa meant life for life or limb for limb andit was regarded as the right of man gave the injured party or his heirs aright to choose a similar injury on the accused.

Diya

 This punishment was prescribed for cases where injury was causedunintentionally and some amount of money or blood money as it wasknown was awarded to the victim by the person who caused the injury.Diya could be exchanged for Kisa but this depended on the victim and thispractically meant that Diya could be used as an alternative to Kisa.

Hadd

This punishment was prescribed in cases which were characterised asbeing ‘being against god’ and as Hadd literally means limit or boundary,these punishments couldn’t changed or varied and they had to befollowed as a matter of course. The punishments prescribed under Haddwere severe and they were used to deter criminals from those crimeswhich were considered to be against god.

 The main difference between Kisa and Hadd was that in Hadd, only theruler or his deputy was allowed to enforce it and the victim didn’t have theright to choose the punishment. This punishment was however applied infull coherence with the law and was applied only in the most severe cases.For instance, offences like Zina (illicit intercourse) could only be punishedif there were four male eye witnesses and an accused person could onlybe convicted if he made a confession in front of the quazi. Thus theconsolation from the severity of Hadd was the rarity with which it wasused.

 Tazeer

This punishment was the kind of punishment which was directly under thediscretion of the judge and there were no fixed limits to prescribe thepunishments. Offences related to the sovereign often fell under the ambitof Tazeer and punishments generally consisted of exile or imprisonment.

These punishments were not as severe as Hadd and it let itself becontrolled by the government or other regulatory agencies. Tazeer alsowas used in special circumstances where Hadd or Kisa couldn’t be used.

**Fallacies of the Muslim Criminal system**

 The Muslim criminal system in spite of being established for manycenturies still had many discrepancies and was heavily criticised by thetime the East India Company set up its base in India.

One of most glaring fallacies was the fact that these laws were uncertainand ambiguous. It contained many illogicality’s and was based on thoseconcepts which the west had already discarded many centuries back.

The lack of an organization in the laws and the complexities whichfollowed it caused many problems in the proper administration in justice. The lack of a clear distinction between private law and public law and thefact that more emphasis was given to crimes recognised as being‘against god’ and less attention was given on crimes which in reality weremore severe (like maiming and murder) is a glaring example of thedeficiencies of the Muslim criminal system. Also, as the laws wereadministered by Qazi’s, there always existed a certain doubt as towhether full justice was done to the case. This was because there alwaysexisted a difference in opinion among Muslim jurists and this gave a greatdeal of leeway to the Qazi to interpret the case and the law. Qazi’s couldby coerced or corrupted to misapply the law. Another defect was thatwhile the punishments appeared to be severe, they were rarely appliedand were practically left unused.

 The primitive nature of the Muslim law in India is best seen in cases whichinvolved murder or homicide. For instance, these crimes were consideredto be private crimes and the right of the victim to claim Kisa was the rightof the private man and not the right of god or the public. The state assuch did not regard it as a duty to movesuo motu(on its own motion) inthe case of murder.

Uncertainty of punishment in many other heinous crimes also resulted inthe widespread dissent against the Muslim criminal system. It is very clearthat this law of crimes was not entirely suited for the control of crime insociety as the law was deficient and inadequate. It contained manyloopholes through which many serious criminals could have their way. These glaring defects were recognised and over time many attempts weremade to change and eventually replace the Muslim law.

**Criminal Justice in the British Period**

With the emergence of the British rule in India, gradual changes startedappearing in the judicial system and more importantly in the criminaladministration of justice. However until the late 1850 have there werevery few substantive reforms in this sector. Reforms in the criminalsectors took place in 1772, 1790-93, 1797 and 1799-1803.

**Reforms of 1772**

 These reforms were launched by Warren Hastings in 1772 in the provincesof Bihar, Bengal and Orissa. The only change in the criminal sector in thisreform was that the government recognized the menace being caused bydacoits and introduced severe punishments to weed them out. Thegovernment took upon itself to detect and bring these robbers to justiceand use the most rigorous forms of punishment for the severe damagethey were causing. Apart from this, Warren Hastings formulated aproposal for modification of the Muslim legal system.

**Reforms of 1790-93**

It was during this period that a systematic attempt was made to modifythe Muslim criminal law and this process was initiated by Cornwallis in1790. As observed earlier there existed many glaring defects in theMuslim legal system and as Lord Cornwallis remarked that the generalstate of administration of criminal justice in the provinces was exceedinglyand notoriously defective.

To start with, the government under Lord Cornwallis divested the Nazim of any authority over the Nizamat. He abrogated crucial Muslim lawsformulated by Abu Hanifa that illogically maintained that a murdered wasnot liable for punishment if the crime was committed by strangling,drowning, poisoning, or with a weapon which was not made of iron. It wasalso declared that the kin of the deceased didn’t have any right to remitthe sentences of the offender. The government in 1791 also abolished thepunishment of mutilation and imprisonment and hard labour weresubstituted in its place.

 The government also introduced many changes related to the SadarDiwani Adalat. For instance, judges were required to transmit those casesto the Adalat where they disapproved the fatwa of the law officers.Another important change was that in cases related to murder, the refusalof the heir to prosecute, the non appearance of the heir in court, or whenheirs were legally incompetent, the court was to forward this case to theSadar Diwani Adalat which in turn after looking at the facts of the casewould pronounce the judgement. The government also decided thatmurder would no longer be a private wrong and it was a matter of thestate to punish the accused. The regulation IX of the Cornwallis Code of 1793 included these amendments and made some much needed changesin the criminal judicial system.

**Reforms of 1797**

As some confusion existed on certain points in the law of homicide, thelaw was explained and restated in 1797 through regulation IV. Thepurpose of the Regulation was to finally do away with “all operation of thewill of the heirs in case of murder’. It was now laid down that a prisonerconvicted of wilful murder was to be punished without any reference tothe heirs of the person killed as if,

•All heirs of the person slain entitled to prosecute the prisoner for“Kisa”, had attended and prosecuted him.

• That all heirs were at an age competent to demand “Kisa”.

•And that they had all demanded “Kisa”

.If after trial, the law officer declared the prisoner not guilty, the judge wasto acquit him; but in case the judge did not approve the verdict, he was torefer the proceedings to the sadder divan Adalat. Another innovationmade at the time was to substitute imprisonment for blood money(Diya).In cases where under the Muslim lawman person convicted of homicide was liable to pay blood money, the court of circuit was tocommute the fine to imprisonment for such period as it consideredadequate for the offence. A sentence for life imprisonment had to bereferred to the Sadar Nizamat Adalat.

Further, it was laid down that in any case not provided for by theregulations, the court was to adhere to the Muslim law, even if it appearedto it to be repugnant to justice, if the same was in favour of the prisonerbut if against the prisoner, the court was to recommend a pardon, ormitigation of the punishment, to the governor-general-in -council. Thecourt was also to propose a new Regulation to provide against arecurrence of a similar case in future. In this way, the rigours of theMuslim law were generally mitigated somewhat. But this was a clumsyarrangement. Regulation IV of 1797 made putting to death of a person asa sorcerer punishable as murder. It also gave power to the Sadar NizamatAdalat to order transportation beyond the seas of convicts for life or for 7years or more.

.Regulation XIV of 1797 was an important measure which was inspired byhumanitarian and benevolent spirit. It was designed to remedy an evilflowing directly from those rules of the Muslim Law which condemnedprisoners guilty of murder, in certain circumstances, to pay “Diya”. In thecircumstances, the sentence to pay “Diya” was like condemning them tolife imprisonment. To remove this evil and to mitigate the hardship of these unfortunate people, Regulation XIV of 1797 granted relief to thepersons already in prison on account of their inability to pay blood money.

 The offence of perjury had very much increased and therefore, byRegulation XVII of 1797 severe punishments were prescribed with a viewto discourage the offenc.

**Further reforms: 1807-1832**

 The process of modifying and adapting Muslim Law of crimes continuedduring this period. Punishments for perjury and forgery were enhancedthrough Regulation VIII of 1808 as these crimes had increasedenormously. By Regulation XVII of 1817, the law relating to adultery wasrationalised and modified. The need for four competent male witnesseswas rigorously insisted upon and presumptive proof was not regardedsufficient to warrant conviction for the offence. The law of evidence toowas so technical that it made conviction of a person for the offence almostimpossible. The regulation laid down that conviction for the offence of adultery could be based on confessions, creditable testimony orcircumstantial evidence. The maximum punishment to be inflicted for theoffence was fixed at thirty nine stripes and imprisonment with hard labourof up to seven years. Married women were not to be prosecuted on such charges.

 The same regulation also introduced several changes in the law of evidence with a view “to provide for the more effectual administration of criminal justice in certain cases”. The Regulation declared that the Islamiclaw's “exceptions to the competency or credit of witnesses are in someinstances inconsistent with the end of public justice”. Accordingly, it waslaid down that if the Islamic law declared the evidence of a witnessinadmissible on grounds which appeared to the judge “unreasonable andinsufficient”, this was no longer to be followed: the evidence had to betaken and the Muslim law offices had to give their “fatwa” on theassumption that there was no objection against the witness.

In 1829, through regulation XVII, a great social reform was introducedamongst the Hindus with the abolition of sati. This offence was madepunishable in the same way as culpable homicide. Even persons guilty of aiding and abetting sati were to be punished by fine or imprisonment orboth.

**The growing dominance of English Law and the downfall of theMuslim Criminal System**

 The Muslim criminal law was archaic and primitive system and it could nothave been practicable to keep it in operation for a hundred years withoutbeing reformed extensively. It was incumbent on the Government toreform the traditional law with a view to secure an effective

administration of criminal justice in the interest of protecting life, libertyand property of the people and for avoiding manifold inequalities andinjustices which resulted from the strict administration of the traditionallaw. In the initial stages there was reluctance amongst the Britishadministrators to interfere with the established law, but this complex wasshed under the leadership of Cornwallis who was convinced that there wasno alternative before the government but to undertake extensiveadjustments in the system.

To start with, the method adopted to modify the law was somewhatindirect and circuitous. The reason for adopting such a course was thatthe Muslim Law officers formed an integral part of the judicial machineryat that time. They could not be dispensed with but at the same time it wasdifficult to prevail upon them to depart from the traditional law and to givetheir fatwa’s according to the modified version of the law. In order torespect their religious susceptibilities and to make the system workable,the expedient adopted was to require the law officers to give the fatwa’son the basis of certain supposed circumstances or fictions as they mightbe called. The English judges being ignorant of the customs, manners andlanguages of the people had not yet developed enough confidence todispense justice without the help of the law officers, and the latter beingstaunch traditionalists could not be prevailed upon to accept deviationsfrom the orthodox system.

But as the time passed on the situation changed and direct modificationsin the law came to be made. As seen earlier in 1793, the regulation of IXgave to the judge discretion to refer the proceedings to the Sadar NizamatAdalat if he disagreed with the fatwa proposed. Under this statutoryprovision, references were constantly made by the Courts of circuits to theSadar Nizamat Adalat and many changes were thus introduced indirectlyinto the law through the judicial verdicts or intervention of the SadarAdalat.

 The first step in the direction of reducing the importance of the Muslimlaw officers was taken in 1810 when Regulation I made provisionsenabling “the Court of Circuit to dispense with the attendee and fatwa of their law officers.”In such cases, the court was not to pass any orders orsentences itself, but was to transmit, the proceedings of the trial alongwith its opinion to the Sadar Nizamat Adalat which was finally to proposethe sentence .The need to make such a Regulation arose out of the casewhich arose in Banaras in December 1809.There arose some tensionbetween Muslim weavers and the Hindus leading to pollution of Religiousplaces of each other. When a question of trial of mischief makers arose,the Hindus objected to being tried by the Muslim law officers who were

bound to give fatwa’s according to Muslim law. Accordingly, the regulationwas made enabling the Court of Circuits “to dispense with the fatwa of their law officers”

.In 1817, the Sadar Nizamat Adalat was given power to convict andsentence an accused acquitted by its law officers, and in 1822, the courtgot the power to acquit an accused notwithstanding the fatwa of conviction. Regulation VI of 1832 was very important insofar as it markedthe end of the Muslim Criminal law as a general and compulsory system of law applicable to all Muslims and non-Muslims alike. It was reported to thegovernment that it was offensive to the sentiments and feelings of thenon-Muslims to be tried and punished under the Muslim criminal law andtherefore provision was now made to enable the non-Muslims to claimexception from the same. Regulation VI of 1832 made a number of provisions.

 The judge was authorised to avail himself of the assistance of respectableIndians in one of the three ways while conducting a criminal trial. First, the judge could refer the entire case, or any point thereon, to a Panchayat of persons who would carry on their enquiries apart from the court, andreport the result to the judge. Secondly, the judge could constitute two ormore persons as assessors so that he could obtain the advantage whichmight be derived from their observations particularly in the examinationof witnesses. Thirdly, the judge could employ the Indians more nearly asthe jury. In a case in which any of the above three methods was adopted,the fatwa of the Muslim law officers became unnecessary and it could bedispensed with by the judge. It was also provided that when a person notprofessing the Muslim faith was brought to a trial on an offence, he mightclaim to be exempted from being tried under the Muslim law of crimes.

 The Regulation made it optional for the Sadar Nizamat Adalat as well torequire a fatwa or not from its Muslim law officers according as the Adalatthought it expedient or necessary. Thus, after the regulation of 1832, itbecame optional for the criminal courts to seek fatwa’s from the lawofficers. The old rule which made it obligatory to obtain fatwa ion eachcriminal case was abrogated. The non-Muslims thus secured a dispersionfrom the Muslim criminal law, but it was not clarified anywhere as to whatlaw was to be applied to them in place of Muslim law.

The systematic suppression of the Muslim Criminal law began in theclosing years of the eighteenth century, still, the basis of the Criminal lawfor long continued to be the Muslim law and it was on this foundation thatthe amendments had been grafted.

**The Codification of the Laws**

 The most intense phase of codification in India lasted for roughly fiftyyears from the passage of the Charter Act of 1833 to the re-enactment of the Code of Criminal Procedure in 1882. Throughout this period, therewere active debates and conflicts around how codification fit in withbroader colonial priorities and practices.

After 1833, an All India Legislature was created and through subsequentreforms through the years led to the enactment of the Indian Penal codein 1860. During the period from 1833-1860, changes were made in thecriminal law and the important ones included that thugs came to bepunished with imprisonment for life with hard labour, the status of slaverywas declared to be non-recognizable in any court of the company, dacoitscame to be punished with transportation for life, or with imprisonment forany shorter term with hard labour. It may also be mentioned punishmentsprescribed for offences by the British Administrators were very severe atfirst, with a view to suppress crime. But as society stabilized, law andorder situation improved, and incidence of crime lessened, liberalisingtendencies set in and the rigours of punishment were somewhatmitigated.

**The Development of Indian Penal Code and the Code of CriminalProcedure**

 The codification of the criminal law marks the beginning of a new era innot just Colonial India but has also had a major impact on the prevailingcriminal justice system. The Indian Judiciary still uses the Indian PenalCode of 1860 today and the credit for making this possible goes to Thomas Babington Macaulay.

The government in Britain in 1833 appointed a commission known as the‘Indian Law Commission’ to inquire into the jurisdiction, powers and rulesof existing courts and to make reports setting forth the results of theinquiries and suggesting reforms. The law commission workedintermittently on the Anglo-Indian Codes from 1834 to 1879 and one of the most important contributions of the first Law Commission was theIndian Penal Code, submitted by Macaulay in 1837 and passed into law in1860

.Given that the Royal Commission was simultaneously working on acriminal code for England, it is not surprising that Macaulay first sethimself to drafting the Indian Penal Code. The English criminal law was anatural choice for codifiers in England because it had been undergoing along process of reform. In India, however, the codification of the criminallaw did not stem from an ongoing reform process but from prevalent legal ideas about "native feelings and prejudices." Colonial lawmakers, such asMacaulay and Maine, believed that the reform of the criminal law wouldmeet with the least social resistance. Crime, they argued, was universallyunderstood whereas the civil law touched upon what Maine called "thelocal peculiarities of the country.

Another important law that was codified was the code of criminalprocedure. When it was first passed in 1861, the Code of CriminalProcedure fiercely guarded "privileges" or "rights" as they werealternatively described as and made the law both a symbolic and anactual marker of imperial power.

 The code secured the legal superiority of "European-born British subjects"by reserving to them special privileges such as the right to a jury trial witha majority of European jurors, amenability only to British judges andmagistrates, and limited punishments, all this while maintaining anddisplaying European power and prestige. As Legislative Council Member Thomas said: "Whether the planter gets justice or not at the hand of theNative Magistrate is rather a secondary consideration; the mere fact of hishaving, on some trifling charge, had to appear before and be tried by aNative Magistrate, of the same caste and family, perhaps, as one of hisown writers or contractors, will so lower him to their own level in the eyesof his two or three hundred coolies, that he will not be able to commandtheir respect anymore."

Thus, the codification of the criminal motion created a structure in theIndian Legal System and this structure continued to dominate through theyears of British Rule in India.

**Criminal Administration in the Presidency Towns and Provinces**

 The development of criminal law in India by the British led to major shiftsin the administration of justice as whole. The presidency towns of Calcutta, Bombay, and Madras along with the various provinces sawagradual change in the administration of justice and this change is asignificant observation in the history of British rule in India. Emphasismust be given on the individual regions and how laws were developed ineach of these regions.

**Criminal Administration in the Presidency Towns**

It is to be observed that most of the changes that took place in the legalsystem in India actually took place the presidency town of Calcutta. Andtherefore all the reforms discussed earlier apply to the Presidency town of Calcutta.

**Criminal law in the Madras Province**

 The Muslim law of crimes was operative in the mouffisil of the MadrasPresidency and It suffered from the same weaknesses as in Bengal before1790.These defects were removed by legislation which followedpractically the same course as in Bengal. The reforms in the criminal lawintroduced in Bengal by Cornwallis during 1790 to 1793, and which wereconsolidated in Regulation IX of 1793, were introduced in Madras throughRegulations VII and VIII of 1802

.Regulation XV of 1803 made provisions, practically on the same lines asthe Bengal Regulation LIII of the same year, regarding the doctrine of “Tazeer” and also for various types of robberies, especially thosecommitted with open violence attended with murder or other physicalinjuries .Regulation VI of 1811 provided for more effectual punishments of perjury and forgery. Under the Muslim Law, perjury and forgery werepunishable in the discretion of the judge, by flagellation, imprisonmentand public ignominy. The persons convicted of these offences werecommitted to various but inadequate punishments .To defines thepunishments for these offences, Regulation VI was passed.

Regulation I of 1818 made murder committed accidentally in execution of an unlawful intention punishable with death. Regulation I of 1822 madeprovisions for the more exemplary punishment of robbery by openviolence. Regulation I of 1825 while making a number of modifications inthe criminal law also made evidence of a non-Muslim against a Muslimadmissible in criminal trials. Regulation X of 1827 introduced trial by juryin the province of Madras.

Regulation I of 1830 abolished the practise of sati. Regulation XX of 1802,while making provisions for the trial of those who were regarded as guiltyof these offences, failed to declare the punishment to which persons heldguilty were to be subject. To maintain the just authority of thegovernment, Regulation I of 1834 prescribed the penalty of death for suchoffences. By act I of 1840, The Fodder Adalat was relieved from theobligation to take a fatwa from its law officers.

The reason to dispense with the fatwa were that the greater part of theexisting criminal law was to be found in the Madras Code of Regulationsand the rest could be ascertained from the precedents of the courts. The judges could therefore, competently administer criminal law without theaid of those officers.

**Criminal law in the Bombay Province**

In the matter of criminal law, the position of the Bombay Province wassomewhat different from that of the Bengal and Madras provinces. In themouffisils of the Bombay Presidency, the Muslim law of crimes was not thegeneral law and was not as well entrenched as it had been in themoufissils of Bengal or Madras. The reason for this was that the large tractof territories which came to constitute the Bombay Province had neverbeen under the Muslim Rule. Therefore, the British Administrators, insteadof enforcing the Muslim law of crimes uniformly to all as the general law of the land, adopted the expedient of administering personal law of crimes. The scheme was laid down in section 36 of Regulation V of 1799.

In course of time, the frontiers of the Bombay Province expandedconsiderably with the annexation of the Maratha territory. MountstuartElphinstone, the Governor of Bombay and a great admirer of Bentham,was convinced of the need for a better and more uniform system of law,civil and criminal, throughout the extensive Province of Bombay.Accordingly in 1827, his government enacted a series of Regulationswhich came to be known as the Elphinestone Code. Regulation XIV in thecode contained the criminal law to be applied in the company's courts inthe mofussil of the Bombay Presidency. The Regulation claimed that itwas an expression of the “general result of the practice of the courts “andwas designed “to secure the more steady observance of the principle of administering to individuals the law of their religion “while at the sametime also providing “a code ease of access for those individuals of thecommunity to whom, as not being subject to any specific national orreligious code of criminal law, the English law has with considerableinconvenience been hitherto applied. The Regulation had only 41 sectionsand defined and classified the acts and omissions which constitutedpunishable offences along with the scale of punishment for each offence.It applied to everyone who was not a British subject.

The fact remains that the Regulation was neither logical, nor analytical,nor systematic. Many important classes of offences were altogetherunnoticed by the regulation. This omission was sought to be made goodby one sweeping provision in S7 which provided that in addition to thecrimes specified in the Regulation, offences declared by the religious lawsof the person charged which constituted a breach of morality ,or thepeace ,or good order of society, should be liable to such punishments aswas provided by the personal law if it was one of the forms of punishmentrecognised by the code ;and if not., should be visited with an equivalentand appropriate punishment of a recognised kind. The only merit of theRegulation was that it was the First Attempt to Codify and digest Criminallaw in India.

**A note: the effect of English Law in India**

In spite of all the efforts by the British authorities to improve the legalsystem, the instability between the colonial public and the native privatewas clearly exposed during the long-running debates about uniformcriminal procedure. For instance, both locals and Britons in Indiamaintaining their right to exemption from the jurisdiction of the localcourts as a matter of personal law as well as various claims about Indianotherness in the purportedly universal realm of public law illustrate theattitude of the people on the Criminal Legal system. The government'srepeated efforts to appease the non-official community by securing

inequality  under the law indicate that a rule of law, initially conceived of as a tool to control the influx of unwieldy elements of British society inIndia, became increasingly connected to the political stability andeconomic prosperity of the empire, and not to the abstract principles of equality and uniformity.

**The Modern Criminal System**

 The most important criminal laws used in India today are the Indian PenalCode, The Criminal Procedure Code and the Indian Evidence Act. Otherlaws used for various other purposes are passes from time to time .

The Indian Penal Code contains 511 sections covering various aspects of criminal law including specific crimes like dowry. The Criminal ProcedureCode passed in 1973 contains 484 sections and defines the legal processfor adjudicating claims of violation of criminal law. The Indian EvidenceAct of 1872 which originally contained 167 sections contains rules andallied issues governing admissibility of any evidence in the courts of law.Codified laws like this build a firm foundation and help in theadministration of good criminal justice.

**Growth of personal law of Hindus and Muslims**

Indian society is governed by Hindu, Muslim and British legal

systems. The researcher has tried to analyse the evolution of these

systems and has discussed the influence of the Britishers. More

importantly codification of laws and enactment of some other

laws as Kazi Act, 1881 throws light on the initiatives of colonial

masters with regard to development of laws. It has been proved

that as far as personal laws are concerned, Britishers left them

untouched but decisions of the courts influenced them.

Present Indian society is the inheriter of three different and

distinct legal systems - Hindu, Muslim and British.^ The personal

laws of Hindus and Muslims find their source and authority in

their religious ancient texts. Since ancient time religion regulated

almost every aspect of human life both public and personal.

Rehgion was the guiding force behind all laws including personal

matters as well as crime, evidence, procedure, contract, trade and

commerce. The area of applicability of laws has been reduced,

and is only confined to such aspects of life as marriage,

dissolution of marriage, maintenance, minority, guardianship,

adoption, succession and inheritence. These personal laws were

considered immutable and beyond the legislative jurisdiction.

From a historical perspective, many areas of Hindu law and

Muslim laws have remained unaffected by centuries of political vicissitudes and socio-economic upheavals. Doubts have been

expressed as to whether or not personal laws are protected under

the religious freedom guaranteed by the Indian constitution.^ In

this chapter an attempt has been made to examine the historical

background of the application of the personal laws in India and

their immunity from the perview of state legislations. This chapter

deals with the constitutional, legislative and judicial attitudes of the

problem. The chapter is sub divided to cover three distinct

periods of Indian history namely. Ancient, Medieval and British

India.

**Growth of personal law of Hindus and Muslims**

 **Growth of personal law of Hindus**

The origin and development of Hindu law can be traced through the following distirict phases :-

**1 . Vedic Age—**The Hindu law, it is believed, originated from Vedas which emanated from Brahma. The Vedas were regarded as the codes of rules for regulation of the conduct of human beings. They being voice of God, enjoyed highest religious sanctity.

**2 . Period of Smritis.—**Next followed the period of Smriti when Rishis like Manu, Yagnavalkya, Narada and others, interpreted Vedic law in the form of Smritis to be followed by Hindus in regulating their day to day life. These saints expounded Hindu law with great authority and wisdom.

 **3. Period of Commentaries.—**later on, the commentaries such as Mitakshara, Dayabhaga and Vyavhara—Mayukha etc. completely changed the texts of Smritis written by Manu and others and gave their own interpretation to Hindu law which was still based on tenets of Hindu religion.

 **4 . The Period of Moghuls.—**During the Moghul period, the personal law of Hindus was left untouched by the Muslim rulers, significantly, most 'of the personal laws of Hindus were composed in the form of authoritative commentaries during 1100 to 1800 A.D. most part of which is covered by Moghul rule in India.The Moghul Emperor Aurangzeb deputed a Hindu learned Pandit of Bengal named Raghunandan to prepare a digest of the existing Hindu law. The Code prepared by him was called Fatwa-i-Alamgiri which consisted of 27 parts comprising the entire Hindu law.

**5. Hindu law during the British Period.—**The Presidency towns were the first to come under the British sovereignty in the seventeenth century. During the early period of British rule, the general tendency on the part of the British rulers was to allow the Hindus and Muslims to be adjudged by their respective personal laws and customs, unless both the parties voluntarily submitted themselves to the judgment of the English Law Court, i.e. the Mayor's Court.3 This principle was first followed in the administration of civil justice and was subsequently extended to the mofussils of Bengal. Bihar and Orissa by the Hastings Judicial Plan of 1772.

**The Gentoo Code :** Warren Hastings initiated certain concrete steps to codify the Hindu law for better administration of justice for the natives. The Judicial Plan adopted by Hasting's Government on 21st August 1772, used the word `Gentoo' for the first time, which meant 'a native of India' i.e. a Hindu. According to Halhed, the word 'Gentoo' has a Portugese origin which later on Europeans adopted to comprise the four sects (Varnas) of Hindus,' namely, the Brahmin, Kshatriya, Vaishya any the Shudra. However, Hyde East has expressed a doubt whether the term `Gentoo' comprised only four distinct sects of Hindus or connoted a still wider meaning to include all descriptions of Asiatics who were not Jews, Christians or Mormons. Thus, in Adaseer v. Perozebaye5 it was held that a Parsi was also included within the term 'Gentoo'. Hastings, in his Judicial Plan of 1772 inserted a specific provision that in all suits regarding inheritance, marriage, caste and other religious usages or institutions, the law of Quran with respect to Muslims and the law of Shastras, in respect of Gentoo, shall apply.8 Realising the need for a Code of native laws for guidance of the English Judges. Hastings, in 1773, summoned a batch of eleven Pandits of repute from the entire Province of Bengal and directed them to compile a Code of Gentoo laws. All the Pandits were well versed in Shastras and Hindu texts and they prepared a comprehensive Code of Hindu law in Sanskrit. It was later translated into Persian by one of its authors. Subsequently, it was translated into English from its Persian version by Nathaniel Halhed in 1775. This Code was, therefore. also known as the 'Halhed's Code of Gentoo Laws'. It consisted of twentyone chapters7 which were divided into sections and sub-sections. It dealt with both, substantive and adjectival laws including civil and criminal law. Pointing out the importance of this Code Halhed observed that, "the Code must be considered as the only work of the kind wherein the genuine principles of the Gentoo jurisprudence are made public with the sanction of their most respectable Pandits." The Gentoo Code, which was a creation of Hastings' judicious mind, proved greatly helpful for the English judges in deciding the cases of the natives. However, criticising the Code, Sir William James, a judge of the Supreme Court of Calcutta, in 1788 observed that it had many defects. In his opinion, the Persian version of the Code contained many unimportant epitomes of the original Sanskrit Code whereas several important passages were missing from it and Halhed, in his English version. had attempted to improve upon those defects. Thus the Code lacked authenticity and accuracy.8 Sir William James was himself a linguist and therefore he took upon the task of preparation of a Hindu law Code under the patronage of Lord Cornwallis and published his 'Institutes of Hindu law' in 1794 which was also called the 'Ordinances of fVlanu'. As regards the provisions of criminal law as presented in the Code, Rankin observes that they are full of impracticable absurdities. The reason being that Hindu law had ceased to be a reality in most parts of India, particularly, in the region of Bengal because of the long and continued Moghul rule for centuries and the Mohammedan criminal law had become the law of the land for the administration of criminal justice. Therefore, according to Rankin, the Gentoo Code represented the notions of a long dead past so far Hindu criminal law was concerned.9 Commenting on the shortcomings of the Gentoo Code, Gledhill remarked, "the Code is now only of a historical interest as the starting point of research by the European as well as the Indian Scholars who translated and commented on the Sanskrit version which became the literary source of Hindu law as administered by the courts."° Sir William Jones also took up the work of projecting another Digest of Hindu law but unfortunately he died and the work was completed by Pandit Jagannath. It was subsequently translated into English by Colebrooke in 1797. Later, in 1810, Colebrooke translated Mitakshara and Dayabhaga laws of inheritance and both taken together, were called the 'Treatise on the Hindu law .of Inheritance'. They were supported with notes and illustrations which proved very useful in the administration of Hindu law by the courts. Thereafter, Sir Thomas Strange" brought out his work entitled, 'Consideration on Hindu law' in 1825 and Sutherland prepared an English version of the Hindu law on Adoption in 1818. It was in 1829 that Sir W.H. Macnaughton published his 'Principles And Precedents of Hindu law'12 which was greatly appreciated by the Privy Council and it has been acknowledged as one of the most oustanding works on Hindu law compiled by a European writer. It served as a guide to the courts and lawyers and was 'the earliest attempt to make systematic use of the answers of the officers and the decisions of the courts thereon."13 A manual on Hindu law was published by T.L. Strange who was the Judge of the Madras Diwani Sadar Adalat in 1856. It proved very useful for the courts and the practising lawyers. Finally, J.D. Maine published his classic work entitled, 'Hindu law And Usage' in 1878 which is an authority on Hindu law even to this day.

 **Hindu Native Law Officers :**

 As stated earlier, the Hastings Judicial Plan of 1772 introduced Adalat System in the territory of Bengal, Bihar and Orissa which was divided into several districts, each having a Mofussil Diwani Adalat. The appeals from these Adalats were taken to the Seder Diwani Adalat in Calcutta. In these Adalats, the cases of Hindus and Muslims relating to inheritance, marriage, caste and other religious usages and institutions were to be decided according to their personal law. namely, law of Quran with regard to muslims and law of Shastras in respect of Hindus. The Cornwallis Code of 1793 also contained provisions regarding reservation of personal law in respect of Hindus and Muslims which was adopted in the Province of Bombay in 1799 and the Province of Madras in 1802. The Supreme Courts of Madras and Bombay, which were created in 1802 and 1823 respectively, also followed the same rules for the administration of civil justice. However, the Elphinstone Code of 1827 modified this rule in Bombay and provided that all civil suits were to be decided as per the Act of the Parliament or the Regulations of the provincial Government of Bombay, and in their absence, the usage of the country was to be followed. If there was none, then the law of the defendant was to be applied, and finally, in the absence of usuage as well as the law of the defendant, the courts were to decide the case according to the principle of justice, equity and good conscience.

 It may, however, be pointed out that this rule presented some difficulties, in respect of certain communities such as Buddhists, Sikh and Jain etc. when the parties under litigation belonged to either of these sects. It appears that the Supreme Courts always decided such causes by reference to law of Hindu Shastras because of the general belief that the tenets of these sects were essentially based on Hindu traditions, customs and usages, and therefore closely resembled the law of Hindus. The Supreme Court of Calcutta reiterated its earlier stand time and again, that no suitor was entitled to any special law applied in his ccse except that of a Hindu or a Mohammedan. The muslims were generally to be adjudged by the Sunni law. However, the Supreme Court of Bombay freely accepted the customs and usages of non-Sunnis if they were not against any law of the Bombay Government. The native law-officers were appointed to expound the personal law, namely, Mohammedan law in case of Muslims and the Law of Shastras with regard to Hindus.Thus they assisted the English judges in deciding the cases of the natives. The Hindu Law-Officers called the 'Pandits' and the Mohammedan Law-Officers called the 'moulvis' and 'muftis' were to confine themselves to the civil law only and they played little part in the administration of criminal justice except in the Province of Bombay. The native law-officers, namely, the Pandits and moulvies and muftis continued as officials of the Court till the Act of 1864 when this institution was abolished. Rankin opines that the abolition of the institution of native law officers was perhaps due to the fact that many authoritative works on Hindu law had been compiled by eminent English scholars for nearly a century, the existence of which had settled the law and given it a definite shape. That apart, the English judges never trusted the native law-ofiicers because in their view, they lacked honesty and integrity and were susceptible to bribery and corruption.

 **Legislation on Hindu law During British Period**

 Consequent to the abolition of the institution of the native law officers, the Hindu Pandits were deprived of their authority to expound the law since the British administrators took upon themselves the actual administration of justice in matters relating to the natives. With the changing conditions of the Indian society. certain modifications in the Hindu law were considered necessary. Therefore some enactments were passed, which altered and supplemented the Hindu law. These legislations15 made the law more adaptable and responsive to the requirements of the changing Indian society. However, the Hindu law relating to marriage, succession. guardians and wards, and adoption was re-enacted16 during the post-independence decade, i.e. 1955-56.

**Growth of personal law of Muslims**

The Mohammedan law also owes its origin to Muslim religion which is based on Quran or Al-furcian i.e. one distinguishing truth from falsehood and right from wrong. The holy book is believed to be of divine origin and comprises the total of the revelations communicated to Prophet Mohammed by Gabriel.The holy Quran forms the principal basis of Sharia which is considered to be the first and great legislative Code of Islamic law. The belief in the immutability of the holy Quran has attached much rigidity to the tenets and philosophy it embodies. The origin and development of Muslim law in India can be studied under the following different stages :-

**1 . The Commencement of the Hijra Era..—**This period ranges from 1 to 10 A.H. and marks the origin of Quranic precepts. Most of the legal precepts of the holy Quran were revealed by the Prophet Mohammed, first in the city of Medina, and subsequently in most parts of Arabia. It was believed that these revelations could not be modified or altered by any human agency.

**2. The Period of Sunna (traditions).—**This period extends from 10 A.H. to 40 A.H. and was noted for significant developments, namely, strict adherence to ancient practices and traditions called Sunna. Like the holy Quran Sunna, was also considered immutable by the attribute of divinity to it.

**3. The Period of Theoretical Study of Islamic Law.—**During the period from 40 A.H. to 300 A.H.. significant contribution was made by Bukhari to the development of Mohammedan Law through his collection'of the traditions for the purpose of theoritical study of Islamic religion. His work is recognised as an authoritative source of Mohammedan Law. The analogical deductions from traditions during this period brought flexibility in the law to some extent.

 **4. The Moghul Period.—**The period onwards 300 A.H. is noted for the modified version and interpretation of the Islamic law by the four great Imams, namely, Abu Hanifa, Malik Ibn Anas, Ash Shafei and Ibn Han bal. However, Hanabalism and Shafeism ceased to have any influence on Muslims in India during Moghul period. The two sects of Mohammedans, namely, Shia and Sunni became more, conspicuous during this period.The Shia's recognised Imams as their spiritual heads. The Moghul Emperors were Hanafis and the kazis administered Hanafi Law which was the law of the land during the Moghul rule till the commencement of the British rule in India.

**5. The British Period.—**During the early era of the Company's rule in India, most part of the country was under the influence of Muslim law. Particularly, in the territory of Bengal, Bihar and Orissa, Muslim criminal law was the law of land for dispensation of criminal justice. In civil matters muslim law was applied as personal law of the Mohammedans in accordance with the religious persuations of their sects. The civil matters in which Mohammedan law was applicable were the same as in the case of Hindus. The provisions in this regard were contained in the judicial Plan 1772 as also in the Act of 1781 and the Cornwallis Code of 1793. The Mohammedan criminal law was aradually modified through the rational principles of English law and it was finally abolished consequent to the enactment of the Indian Penal Code, 1860.

Text and Commentaries on Mohammedan Law

 Warren Hastings, out of his zeal to impart even-handed justice to the natives residing within the region of Bengal and its mofussils. suggested the translation of Hidaya, the most celebrated treatise on Mohammedan law into English. At first it was translated into Persian and then English translation from Persian version was completed by Charles Hamilton. As in the case of Halhed's Code of Gentoo Law for

 Hindus, Hamilton's treatise on Mohammedan law also contained many irrelevant 'portions while missed many important provisions of Islamic law contained in Hidaya. In 1792, Sir William Jones published his English translation of Bighayatal-Bahis, which was a treatise on the Mohammedan law of inheritance and succession to intestate property. He also translated the Persian version of 'Sirajiyya' into English which supplemented the omissions in Hidaya to a considerable extent. Subsequently, Neil Baillie improved upon Sir John's treatise on Mohammedan Law of Inheritance in 1805. Later on. he himself brought out two important treatises on Mohammedan law, namely, Fatwa al-Alamgiri and Fatwa-Alumgeeree which dealt with the law of sale under Hanafi law in detail. As in the case of Hindu law, Sir W.H. Macnaughton made significant contribution to the Mohammedan law also through his treatise entitled 'Principles and Precedents of Mohammedan law'. It was a perfect guide to the courts and lawyers. The names of Harrington, Clarke. Beauifort and Baynes deserve a special mention so far authoritative work on Mohammedan criminal law was concerned. Finally, Wilson's Anglo-Mohammedan Law was published as a digest of rules applicable to Mohammedans in civil courts in India.

 **Legislation on Mohammedan Law During the British Rule :** The British policy of non-interference with the personal law of Hindus and Muslims could not last long due to the fast changing socio-political events. They sought to reform these personal laws through the process of indirect legislation. Several enactments were brought to meet the changing needs of the time which effected Mohammedan laws. The main among them were the Muslim Wakf Validating Act, 1913 ; the Mussalman Wakf Act, 1923 ; the Shariat Act, 1937 ; the Dissolution of Muslim Marriage Act, 1939 etc. The post independence era in India witnessed revolutionary changes in the personal law of Hindus'7 and also the Muslims. In the realm of Mohammedan law, the Muslim Wald Act. 1954 repealed all earlier Acts relating to wakfs so as to provide better administration and supervision of welds in India.

**Native Mohammedan Law officers**

 The institution of Native law officers played a pivotal role in the administration of civil justice. These law officers were called 'Pandits' in case of Hindus and 'Moulvis' and 'Muftis' in case of Mohammedans. They were required to expound the law and advise the English judges in deciding civil suits. The institution of 'law officers' as stated earlier, was introduced by Hasting's Plan of 1772 and continued till 1864 when it was finally abolished by an Act of that year. The personal law of Mohammedans being mostly in Arabic, the English judges did not have adequate knowledge about the customs, habits and traditions of the Muslims. Therefore they utilised the services of muftis and moulvis to acquaint themselves with the laws and practices of the native muslims. However, the law officers were not looked with respect and their honesty and integrity was always doubted by the English judges and they hesitated in passing judgments on the basis of the advice tendered by the Muslim law officers. It may further be stated that the cadre of native law officers, whether Hindu or Muslim, was not well organised and there was lack of adequate supervision over their working. These law-officers were invariably the religious preachers and moralists rather than lawyers. they were not imparted any specialised legal training in their profession as law officers. The 'Futwa' {opinion) of the Muslim law officers on similar issues greatly differed from one court to another and it was ditficult to ascertain the correct position of law in the matter in dispute. Despite these shortcomings, the Privy Council attached great importance to the opinions of these law officers in order to ascertain a particular usage or custom in the country.18 The 'Futwa' of the Mohammedan law officer also had a great significance in the administration of the Muslim criminal law during the British rule. It was through the `Futwa' i.e. the legal opinion expressed by the native law officers that the British Government sought to introduce the English law in the civil and criminal justice system of India. They tried to modify the provisions regarding 'Futwa' through the process of Regulations and finally succeeded in replacing them by the English law. It must be stated that the British administrators followed the policy of reservation of personal law and customary law subject to legislation. However, in course of time, the customary law gained favour of the courts and took precedence over the personal law.19 Thus, the Central Provinces and the Province of Madras enacted a law in 1875 and 1878 respectively, that where a custom prevailing among a particular community is inconsistent with the personal law applicable to that community. but is reasonable and lawful in itself, then in such circumstances, that custom shall be legally binding and given effect to in deciding the civil cases between the persons belonging to that community. In Bombay, custom already occupied a preferential place vis-a-vis the personal law by section 26 of Regulation IV of 1827. Emphasising the role of custom in context of Mohammedan law, the Privy Council in Mohd Ibrahim v. Seikh Ibrahim,20 observed that in India, "custom plays a large part in modifying the ordinary law, and it is now well established that there may be a custom at variance even with the rules of Mohammedan law governing succession in a particular community of mohammedans."

**Present Position :**

The present position of the personal law of Mohammedans in India is that it applies only to certain specific topics, such as inheritance, succession, wakfs, pre-emption, gifts, marriage, parentage, divorce, guardianship and maintenance21 However, it is high time when the codification of Mohammedan law should be taken in hand and a uniform Civil Code as contemplated by Article 44 of the Constitution of India be introduced throughout India. A common Civil Code will also help the cause of national intregation by removing desparate loyalities to laws which have conflicting ideologies. It shall also ensure gender justice to all the Indian communities. The personal laws of Hindus having already been codified during 1955-56 the Indian Parliament should now initiate steps towards the codification of Musiim law without waiting any further. This would end the controversy frequently arising about the applicability of statutory laws to muslim community in India. It must further be pointed out that reforms in Muslim law have taken place to secure gender justice even in countries in which Muslims are a demographic majority, therefore, there is hardly any justification to resist changes in the personal law of the Muslims in India where they are a minority community. One can understand the difficulties involved in bringing persons of different faiths and persuations on a common platform but a beginning has to be made if the Constitution is to have any meaning. The Constitution confers legislative competence to the Parliament to introduce a uniform civil code but perhaps the Parliament lacks the political courage to make use of this constitutional provision.

**Influence of English Law in India**

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| Because it inherited a common law judicial system, India frequently relies upon foreign judgments in the interpretation of its laws.  In fact, reliance on foreign precedents is necessary in certain categories of appellate litigation and adjudication.[[1]](https://www.loc.gov/law/help/domestic-judgment/india.php%22%20%5Cl%20%22_ftn1%22%20%5Ct%20%22_blank)  Indeed, the current Chief Justice of India stated in a lecture that Indian “domestic courts are called upon to engage with foreign precedents in fields such as ‘Conflict of Laws.’ ”[[2]](https://www.loc.gov/law/help/domestic-judgment/india.php%22%20%5Cl%20%22_ftn2%22%20%5Ct%20%22_blank) Indian laws are modeled on British statutes and enactments.  The fundamental rights of citizens of India under the Constitution of India are based entirely on the U.S. Bill of Rights.  As a result, it is imperative that the higher judiciary in India follow the precedents of foreign courts in clarifying the parameters of statutes applied.  Courts are also required to review the text and interpretations of international instruments, e.g., treaties, conventions, and declarations.  The Chief Justice of India has stated, “In recent years, the decisions of Constitutional Courts in common law jurisdictions such as South Africa, Canada, New Zealand and India have become the primary catalyst behind the growing importance of comparative constitutional law.” In India, as in the jurisdictions mentioned, reliance on foreign precedents has become commonplace in public law litigation. It is recognized that Indian courts look to international as well as comparative law sources in determining creative strategies for developing norms for the protection of life and liberty guaranteed by Article 21 of the Constitution of India.  Reliance on foreign precedents is considered a vital instrumentality for the Indian Supreme Court’s decisions, which have extended constitutional protection to several socio-economic entitlements and causes, such as environmental protection, gender justice, and good governance, among others.  Access to foreign legal materials has become much easier because of the development of information and communications technology.  Thus, the Indian courts can more easily obtain and review foreign judgments and precedents for use in domestic law interpretations. Since the promulgation of its Constitution in 1950, courts in India have frequently relied on decisions from other common law jurisdictions, the most prominent among them being the United Kingdom, the United States, Canada, and Australia.  The opinions from the courts of these countries have been readily cited and relied on in landmark constitutional cases dealing with the right to privacy, including one such case in which the Supreme Court of India dealt with unauthorized police surveillance and held it was a violation of the “right of privacy” on the facts of the case presented.  In upholding this right, the Court relied on numerous decisions of the U.S. Supreme Court.  In another instance concerning freedom of the press,[[6]](https://www.loc.gov/law/help/domestic-judgment/india.php%22%20%5Cl%20%22_ftn6%22%20%5Ct%20%22_blank) the Court relied on the U.S. Supreme Court’s decision in Kovacs v. Cooper.  While subsequently upholding the death sentence, the Supreme Court of India relied on the U.S. cases of Furman v. Georgia, Arnold v. Georgia, and Proffitt v. Florida. In a recent decision of the Delhi High Court, delivered on July 2, 2009, section 377 of the Indian Penal Code (No. 45 of 1876), which describes the offense of homosexuality, was declared a violation of those rights guaranteed under the Constitution. In declaring the provision unconstitutional, the High Court relied on a number of U.S. decisions, including Griswold v. State of Connecticut, where the U.S. Supreme Court invalidated a state law prohibiting the use of drugs or devices of contraception in protecting the right of privacy; Olmstead v. United States, where the Indian Supreme Court especially considered the dissent of Justice Brandeis on the right to privacy; and the landmark abortion decision, Roe v. Wade.[[10]](https://www.loc.gov/law/help/domestic-judgment/india.php%22%20%5Cl%20%22_ftn10%22%20%5Ct%20%22_blank)

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**Prerogative writs in India**

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|  | A **prerogative writ** is a writ (official order) directing the behavior of another arm of government, such as an agency, official, or other court.[[1]](https://en.m.wikipedia.org/wiki/Prerogative_writ#cite_note-findlaw1-1)[[2]](https://en.m.wikipedia.org/wiki/Prerogative_writ#cite_note-uslegal1-2) It was originally available only to the Crown under English law and reflected the discretionary prerogative and extraordinary power of the monarch. The term may be considered antiquated, and the traditional six comprising writs may also be identified as an **extraordinary writ** or **extraordinary remedy**.The supreme court, and High courts have power to issue writs in the nature of habeas corpus , quo warranto , mandamus , certiorari ,prohibition etc., under Arts. 32 and 226 respectively. These writs have been borrowed in India from England where they had a long chequered history of development and consequently have gathered a number of technicalities. Power to issue writs is primarily a provision made to make available the Right to Constitutional Remedies to every citizen . The right to constitutional remedies as we know is a guarantor of all other fundamental rights available to the people of India. In addition to the above , the constitution also provides for the parliament to confer on the supreme court power to issue writs , for the purpose other than those mentioned above. Similarly High courts in India are also empowered to issue writs for the enforcement of any of the rights conferred by Part III and for any other purpose**Types of Writs:**There are five types of writs –Habeas corpus , Quo warraranto , Mandamus , Certiorari and Prohibition**1. Habeas Corpus:**The latin term habeas corpus means ‘you must have the body ‘ and a writ for securing the liberty was called habeas corpus ad subjiciendum. By this writ the court directs the person or authority who has detained another person to bring the body of the prisoner before the court so as to enable the court to decide the validity , jurisdiction or justification for such detention. The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention on liberty or freedom of the prisoner or detention . The great value of the writ is that it enables immediate determination of the right of a person as to his freedom. Under Art. 22 , a person arrested is required to be produced before a magistrate within 24 hours of his arrest , and failure to do so would entitle the arrested person to be released .Habeas corpus cannot be granted where a person has been committed to custody under an order from a competent court when prima facie the order does not appear to be without jurisidiction or wholly illegal . Writ of habeas corpus can be invoked not only against the state but also against any individual who is holding any person in unlawful custody or detention . In such circumstances it is the duty of the police to make necessary efforts to see tht the detention is got released but , if despite such efforts , if a person is not found , the police cannot be put under undue pressure to do impossible.In **Gopalan v.Government of India**, the Supreme court ruled that the earliest date with reference to which the legality of detention may be examined is the date on which the application for the same is made to the court.**2. Quo Warranto:**The term quowarrantomeans what is your authority . The writ of quo warranto is used to judicially control executive action in the matter of making appointments to public offices under relevant statutory provisions . The writ is also used to protect a citizen from the holder of a public office to which he has no right . The writ calls upon the holder of a public office to show to the court under what authority he is holding the office in question . If he is not entitled to the office , the court may restrain him from acting in the office and may also declare the office to be vacant . The writ proceedings not only give a weapon to control the executive from making appointments to public office against law but also tend to protect the public from being deprived of public office to which it has a right.Quo warranto prevents illegal usurpation of public office by an individual . the necessary ingredients to be satisfied by the court before issuing a writ is that the office in question must be public , created by the constitution or a law and the person holding the office is not legally qualified to hold the office in clear infringements of provisions of the constitution or the law . It is the person against whom writ of quo warranto is directed , who is required to show by what authority the person is entitled to hold the office . While issuing such a writ , the High court merely makes a public declaration of the illegality of the appointment and will not consider other factors , which may be relevant for issuance of a writ of certiorari.**3. Mandamus**Mandamusis a command issued by a court to an authority directing it to perform a public duty imposed upon it by law . For example , when a body omits to decide a matter which it is bound to decide , it can be commanded to decide the same.Mandamus can be issued when the Government denies to itself a jurisdiction which it undoubtedly has under the law , or where an authority vested with a power improperly refuses to exercise it . The function of mandamus is to keep the public authorities within the limits of their jurisdiction while exercising public functions .Mandamus can be issued to any kind of authority in respect of any type of function – administrative , legislative , quasi-judicial , judicial Mandamus is used to enforce the performance of public duties by public authorities .Mandamus is not issued when Government is under no duty under the law . When an authority fails in its legal duty to implement an order of a tribunal, mandamus can be issued directing the authority to do so . Thus , when the appellate transport tribunal accepted the applications of the petitioner for grant of permits, mandamus was issued to the concerned authority to issue the permits to the petitioner in terms or the tribunal order .Mandamus is issued to enforce a mandatory duty which may not necessarily be a statutory duty.In **Bombay municipality v. Advance Builders**, the court directed the municipality to implement a planning scheme which was prepared by it and approved by the Government under the relevant statute but on which no action was taken for a considerable time.**4. Certiorari and Prohibition**These writs are designed to prevent the excess of power by public authorities . Formerly these writs were issued only to judicial and quasi-judicial bodies. Certiorari and Prohibition are regarded as general remedies for the judicial control of both quasi judicial and administrative decisions affecting rights.‘Certiorari’is a latin word being passive form of word “certiorari” meaning inform . A writ of certiorari or a writ in the nature of certiorari can only be issued by the Supreme court under Art. 32 and a High court under Art. 226 to direct , inferior courts , tribunals or authorities to transmit to the court the record of proceedings disposed of or pending therein for scrutiny , and , if necessary , for quashing the same . But a writ of certiorari can never be issued to call for the record or papers and proceedings of an Act or Ordinance and for quashing such an Act or Ordinance.Certiorari under Art. 226 is issued for correcting gross error of jurisdiction i.e. when a subordinate court is found to have acted (1) without jurisdiction or by assuming jurisdiction where there exists none , or (2) in excess of its jurisdiction by over stepping or crossing the limits of jurisdiction or (3) acting in flagrant disregard of law or rules of procedure or acting in violation of principles of natural justice where there is no procedure specified and thereby occasioning failure of justice.A writ of prohibition is normally issued when inferior court or tribunal (a) proceeds to act without jurisdiction or in excess of jurisdiction (b) proceeds to act in violation of rules of natural justice or (c) proceeds to act under a law which is itself ultra vires or unconstitutional or (d) proceeds to act in contravention of fundamental rights.There is a fundamental distinction between writs of prohibition and certiorari. They are issued at different stages of proceedings . When an inferior court takes up a hearing for a matter over which it has no jurisdiction , the person against whom hearing is taken can move the superior court for writ of prohibition on which order would be issued forbidding the inferior court from continuing the proceedings . on the other hand if the court hears the matter and gives the decision , the party would need to move to superior court to quash the decision / order on the ground of want of jurisdiction.These writs are issued on the following grounds : when the authority is acting or has acted under an invalid law; jurisdictional error; error apparent on the face of record ; findings of fact not supported by the evidence ; failure of natural justice.**Conclusion:**These are the five types of writs which were issued by the Supreme court and High court under Arts. 32 and 226 of the constitution .Habeas corpus and Quo warranto being confined to specific situations, Certiorari and Mandamus are the two most commonly sought writs to control the actions of administrative bodies

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**RACIAL DISCRIMINATION**

After assuming power to rule over India, the Britishers considered themselves to be far superior to the natives. They were undoubtedly in a privileged position as compared with the indigenous people. This superiority complex in them sowed the seeds of social discrimination which was clearly reflected in the system of judicial administration introduced by them. The element of social discrimination prevailed both in civil as welt as criminal judicature. The Englishmen enjoyed certain immunities in matters relating to the jurisdiction of Company's Courts over them. The exemption of Europeans in civil matters continued in Bengal till 1843 and in Madras upto 1850 when it was finally abolished. However, in criminal matters this discrimination continued till 1949 when it was finally abolished by the Criminal (Removal of Racial Discrimination) Act, 1949 which was passed after the Indian independence.

**Racial Discrimination in administration of Civil Justice :**

 The Regulating Act, 1773 contained a provision that the British subjects, even though residing in the mofussils of Bengal, Bihar and Orissa, shall be immune from the jurisdiction of the Company's Court but instead, they shall be amenable to the jurisdiction of the Supreme Court of Fort William (Calcutta) which was a Crown's Court. The same position prevailed in Madras and Bombay also after the establishment of Recorder's Court in these Presidency towns. Later in 1787, so far as the Province of Bengal was concerned, it was provided that a British subject could institute a suit in the Company's Court on execution of an undertaking to the effect that he shall be bound by the authority and decision of that court in respect of his suit.

 Lord Cornwallis was the first who, as a Governor General-in-Council in 1793, initiated some measures to curtail the immunities of British subjects. In order to minimise the social discrimination, he prohibited the British subjects from residing beyond ten miles from Calcutta so that all of them would necessarily fall within the jurisdiction of the Supreme Court at Calcutta. He further laid down that those British subjects, who preferred to reside beyond ten miles of Calcutta, were required to enter into a bond to accept the jurisdiction of the Company's Diwani Adalat of the mofussils in suits not exceeding rupees five hundred in value. However, the cases of the British subjects involving an amount exceeding Rs. 500 were to be instituted in the Supreme Court at Calcutta. The Presidencies of Madras and Bombay adopted similar provisions in 1799 and 1802 respectively in civil suits involving the British subjects.

 The Charter of 1813. provided that the natives could bring a suit of civil nature against the British subjects residing in mofusils, in the Company's courts. However, the British subjects were allowed to file an appeal against the decisions of the Company's courts directly in the Crown's Court, which otherwise lay to the Sadar Diwani Adalat.

 Lord Hastings in his judicial reforms of 1814 in the administration of civil justice specifically laid down that the Indian Commissioners, Munssifs and Sadar Ameens were not empowered to take cognizance of any case in which a foreigner, British subject, European or American was involved. Thus these persons could only be sued in the Zilla or City Court which had English Judges. However, it appears that this immunity to foreigners including the British subjects caused hardships to them, Consequently, in 1827, on a petition from some of the British subjects in the Province of Bengal, the Government extended the jurisdiction of the Sadar Ameens over Europeans and Britishers. But, the position was again altered by Lord W Bentinck who prohibited munsifs, Sadar Ameens and Principal Sadar Ameens exercising jurisdiction over European and foreigners in civil cases.

 Yet another sincere effort was made to do away with the social discrimin the administration of civil justice through the Charter Act of 1833. This Charter allowed Europeans and British subjects to settle and acquire property in rn territories. The Act directed the Company's government in India to provide ad protection to natives against ill-treatment at the hands of these European E settlers who considered themselves superior to the local native inhabitants. Tre also directed the Company's government of India to take steps to bring all --subjects throughout India under the jurisdiction of the same courts as th natives, in matters of civil justice. It was Lord Macaulay, the first Law Member 7 Governor General-in-Council, appointed under the Charter Act of 1833 advocated equal treatment of the natives and the European British subjects by Civil Courts. He was not in favour of conferring special privileges on the — subjects in the administration of civil justice and wanted a uniform system adopted for all the litigants irrespective of their race, birth, domicile or religi also pleaded for abolition of the provision of the Charter Act of 1813 which pe the British subjects residing in the mofussils to take their appeals to the Su Court of Calcutta instead of the Sadar Diwani Adalat which was a Company's He argued that such a provision was contrary to notions of justice and fair play gave an impression that the Company's courts were in some way inferior to that Crown's Court so far imparting of justice was concerned. This in other words meant that British rulers proclaimed to the Indian people that there were two justice, one which was good enough for natives, while the other, was of s quality which the Britishers retained for themselves. Lord Mecaulay, ther asserted that if the British themselves showed distrust for the Company's h courts, how the natives could be expected to repose confidence in them.

 The special provision of appeal by British subjects to the Supreme instead of Sadar Diwani Adalat which was introduced in 1813, was repealed Legislative Council of India Act, 1836. It provided that no person could be exe from the jurisdiction of the Company's courts by reason of birth or domicile those of Munsif's Court in Bengal, Sadar Ameens and District Munsifs in Ma civil matters. In Bombay such a discrimination was withdrawn completely Courts including those of Munsif's Courts. The British subjects called this Ac! "Black Act" since it adversely affected their privileges. However. the discrimi provision was abrogated in Bengal in 1843 and in Madras in 1850, and herea British subjects residing in the mofussils of all the Presidencies were amenable categories of Companys courts without any discrimination whatsoever. Thus c an end the remnants of social discrimination in the administration of civil jus India.

 **Racial Discrimination in Criminal Justice :**

 The exemption of British subjects from the jurisdiction of the Co criminal courts lasted longer than in the civil courts. The Regulating Act. contained a provision that no British subject of the Crown residing in the Pray Bengal, Bihar and Orissa could be tried by any of the Company's criminal c the mofussils. They were amenable only to the jurisdiction of the Supreme Calcutta. However, in 1790 Lord Cornwallis, under his judicial scheme provision which empowered the Magistrates in Mofussils to enquire into the c against British subjects and apprehend them. If they were convinced that there was prima facie case against any British subject, they could commit him to the Supreme Court at Calcutta for trial. Thus the Indian Magistrates of Mofussils had only poke powers in respect of British offenders of the Mofussils and they could not try and punish the British offenders themselves. Similar provisions were introduced in the Provinces of Madras and Bombay in 1799 and 1802 respectively. These discriminatory provisions were highly derogatory so far natives were concerned as they could not expect even handed justice in cases where any British subject was involved as an offender.

 The Act of 1793 passed by the British Parliament empowered the Governor-General-in-Council to appoint Justices of Peace from among the covenanted servants of the Company or local inhabitants to act within the Mofussils of Presidencies and Provinces. Accordingly, the Government of Bengal, by a Regulation of 1796 provided that Magistrates of mufussils who were also to act as Justices of Peace under the Act, could apprehend British criminals and record evidence against them and commit them for trial to the Supreme Court at Calcutta. Similar provisions were introduced in Madras and Bombay in 1807.

 In 1813 the judicial powers of these magistrates were enhanced and they were empowered to punish the British subjects for offences involving assaults and use of force other than felonies, by fine not exceeding Rs. 500/- or imprisonment upto two months for non-payment of fine. However, such conviction could be set aside by a writ of certiorari in the Crown's Court at Presidency town.

 In 1832. the Governments, of three Presidencies were empowered to appoint any person residing in the Company's territories, other than the subject of a foreign State, to act as Justices of Peace who were to perform the duties of a prosecuting magistrate. These Justices of Peace were assigned three main functions, namely, (i) they conducted summary trial without the help of a jury ; (ii) investigated the charges against the accused and committed him for trial ; and (iii) prevention of crime and maintenance of peace in the locality.

 In succeeding years a good number of Britishers and Europeans settled in India. Therefore, Company's Government deemed it necessary to extend protection to natives against atrocities of the British settlers who showed contempt for native institutions and wages. Though the local magistrates had the power of apprehending and committing the British offenders for trial to the Supreme Court of the Presidency town, it caused hardships to the complainant and witnesses who had to cover long distances to reach the Presidency town to testify against the offender in the Supreme Court. As rightly pointed out by Ilbert, "the delay, fatigue and expenses involved in the process was more intolerable than the injury they had suffered."2 This obviously frustrated the cause of criminal justice.

 In 1843 an Act of the Legislative Council of India was passed by which the right of the British offenders to take the proceedings to the Crown's Court in Presidency towns by a writ of certiorari was withdrawn and instead it could now be preferred in the same courts and in accordance with the same rules as were provided in case of sentences awarded by the magistrate under their ordinary jurisdiction. However, the racial discrimination in the administration of criminal justice still continued in the sense that the Englishmen who committed petty offences were only to be tried by the English Justices of Peace or covenanted servants of the Company, and for serious offences they could be tried only by the Crown's Supreme Court.

 Even after the taking over of the Government of India by the British Crown in 1858, Europeans were allowed certain exemptions from the jurisdiction of the courts presided by the Indian judges. However, Jermy Bentham, the well-known law-reformer of England, introduced a Bill in the British Parliament to do away with the racial discrimination in criminal adjudication as it was wholly unjust to the natives. It was suggested in the Bill that all British subjects and Europeans should be brought under the jurisdiction of the Company's Courts with only one exception that such courts should not be given the power to pass a sentence of death on a British subject. However, the bill was vehemently opposed in the House and was, therefore , dropped.

 The Britishers continued to enjoy a privileged position in matters of criminal proceedings against them even under the revised Code of Criminal Procedure, 1872. The Indian Presidency Magistrate could try British subjects in the Presidency town but if the same magistrate was transferred to a Mofussil Court. he had no jurisdiction over British subjects and hence could not hold trial in their case. In order to do away with this anomaly, Lord Ripen, the then Governor General of India proposed that all the magistrates and Sessions Judges should be empowered to try the cases of Europeans and British subjects. But this measure was bitterly opposed by the Britishers and therefore had to be abandoned. It was in 1884 that the Ilbert Act was passed which provided that European British subjects should be tried by a mixed jury consisting of Indians, Americans or Europeans.

 Finally the amended Code of Criminal Procedure of 1923 Inserted a provision whereby all the Europeans and Indians were to be tried alike without any racial discrimination. The privilege of the European British subjects to be tried by English Judges or magistrates only came to an end and now the only exception provided in their case was that they were to be tried by a Jury consisting of majority of Europeans or Americans. The Indians were also given similar right to be tried by a jury consisting of majority of Indians. Thus both, the Indians as well as the Europeans British subjects were placed on same footing so far administration of justice was concerned.

 However, after the Indian Independence, an Act called the Criminal Law (Removal of Racial Discrimination) Act, 1949 was passed by the Constitutent Assembly which completely abolished the racial discrimination from the administration of justice in India.

**Justice, equity and good conscience**

“The system of equity includes that portion of natural justice which is judicially enforceable but which for various reasons was not enforced by the courts of common law.” The common law courts which developed in English jurisprudence by the end of the thirteenth century were The King's Bench, the Court of Common Pleas, and The Exchequer. Although each of these courts had jurisdiction over different subject matters, they were all regarded as "common law" courts, that is, courts governed by strict rules of law, a formalized procedure and bound by judicial precedent. At that point in time, the common law courts had no equity jurisprudence, and the Court of Chancery did not yet exist.

## Growth Of Equity

“A dual system of rights and interests, namely – legal and equitable, came to the fore due to the double system of the administration of justice in England before the Judicature Act, 1873 – 1875.”

## Evils Of The Common Law

The inflexibility of the writ system, and the consequent expense that if a writ had a minor drafting error, it would be thrown out, for example, in Pinnel's Case,  where Pinnel won as a result of Cole's drafting error, even though Cole was legally in the right.

 Many cases were lost on technicalities.

 The common law did not allow oral evidence.

 There was no power of enforcement.

 It was easy to avoid the consequences of one's actions.

 The wager of law system was unfair.

 There was no recognition of trusts.

## Important Developments In Equity

As a result of the inadequacies of the common law courts, people petitioned the King through his Chancellor. This developed into a full legal system, and the Chancellor, as petitions increased, set up the Court of Chancery (1474), the rules of which became equity.

The Earl of Oxford's Case 1615 , which decided that if equity and the common law were in conflict, equity would prevail (codified in the Judicature Act 1873 and currently contained in the Supreme Court Act 1981

## Advantages Of Equity Over The Common Law

The Court of Chancery succeeded in stopping unconscionable writs through the injunction, by which the common law claimant was restrained from continuing his action. If the claimant defied the order he would be imprisoned for contempt. It was said that there existed two legal systems - one to do injustice, and the other stop it, and that equity was the conscience of the law.

“Equity in U.S. law can be traced to England, where it began as a response to the rigid procedures of England's law courts. Through the thirteenth and fourteenth centuries, the judges in England's courts developed the common law, a system of accepting and deciding cases based on principles of law shaped and developed in preceding cases. Pleading became quite intricate. If a complaint was not dismissed, relief was often denied based on little more than the lack of a controlling statute or precedent.

Frustrated plaintiffs turned to the king, who referred these extraordinary requests for relief to a royal court called the Chancery. The Chancery was headed by a chancellor who possessed the power to settle disputes and order relief according to his conscience. The decisions of a chancellor were made without regard for the common law, and they became the basis for the law of equity.

## Remedies Discovered By The Chancellors

The Chancellor developed new remedies that were able to compensate plaintiffs more fully than the Common Law remedy of damages.

 Injunction

 Specific performance

 Account of profits

 Rescission

 Declaratory relief

 Rectification

 Estoppels

 Certain proprietary remedies, such as constructive trusts or tracing

 Subrogation

 In very specific circumstances, an equitable lien

## Equity In Indian Legal System

“Most of the equitable principles and rules have, in India, been embodied in the statute law and has been made applicable to the extent of the provisions made therein. The provisions of equity in Indian statute books might have their source in common law or in equity or in an adjustment between the two, is immaterial.

Statutory recognitions of the principles of equity are found in:

 The Indian Contract Act, 1872;

 The Specific Relief Act, 1877;

 The Indian Trust act, 1882;

 The Transfer of Property Act, 1882;  and

 The Indian Succession Act, 1925.

“The point primarily relates to the section 28 of the Indian Contract Act, 1872. The subject is of great importance from the point of view of economic justice, avoidance of hardship to consumers and certainly and symmetry of the law. The equitable doctrines featuring in the Indian Contract Act are mainly, the doctrine of penalties and forfeiture, stipulations as to time in a contract, equitable relief on the ground of misrepresentation, fraud and undue influence. In a case which went to the Supreme Court, a clause in an insurance policy provided that all the benefits under the insurance policy shall be forfeited if the suit was not brought within the specified period , the clause was held to be valid.”

“Trust and trustees is a concurrent subject [Entry 10 of List III of Seventh Schedule to Constitution]. Thus, the Act will apply all over India except when specifically amended / altered by any State Government.

The Indian Trusts Act was passed in 1882 to define law relating to private trusts and trustees. A trust is not a 'legal person'. Property of trust is held in name of trustee for benefit of beneficiary. The rules administered by the English Courts of equity under the head of justice, equity and good conscience are contained in the Indian Trust Act.”

Many doctrines of equity are contained in the Transfer of Property Act. The English doctrine of part performance has been drawn in section 53 of the Act. Section 48 and section 51 are also based on the equity principles. Equity of redemption in England was codified to Right of redemption in India as in the case of Gangadhar v. Shankar Lal and Prithi Nath Singh v. Suraj Ahir the codified law was followed.

Section 180-190 of the Indian Succession Act deals with doctrine of election in cases of will and section 35 of the Transfer of Property give effect to this doctrine in general.

It is important to bring to the notice for the researcher that though the English rules of equity have been substantially incorporated by the Indian Legislature, yet, there are many other rules of English Equity are either not been followed in India or are adopted only in a modified form, keeping in view the different ground realities of the country.” .

“In India the common law doctrine of equity had traditionally been followed even after it became independent in 1947. However it was in 1963 that the "Specific Relief Act" was passed by the Parliament of India following the recommendation of the Law Commission of India and repealing the earlier "Specific Relief Act" of 1877.  Under the 1963 Act, most equitable concepts were codified and made statutory rights, thereby ending the discretionary role of the courts to grant equitable reliefs. The rights codified under the 1963 Act were as under;

 Recovery of possession of immovable property (ss. 5 - 8)

 Specific performance of contracts (ss. 9 - 25)

 Rectification of Instruments (s. 26)

 Recession of Contracts (ss. 27 - 30)

 Cancellation of Instruments (ss. 31 - 33)

 Declaratory Decrees (ss. 34 - 35)

 Injunctions (ss. 36 - 42)

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