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Judicial Systems in India: Ancient & Mediaeval Period

"First come the family arbitrators; the judges are superior to the families; the Chief Justice (Adhyaksha) is superior to the judges; the king is superior to all of them and his decision becomes law". (Brihaspati)

Dr. Radhakumud Mukerjee: *Local Government in Ancient India*, pp. 29-34;
Dr. P.N. Sen: *Hindu Jurisprudence*, p. 363

Caste divisions in society, constant struggles, mutual distrust, lack of political unity, want of leadership, old warfare system and treachery of local individuals in the states contributed to the downfall of Early Hindu Kingdoms.

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Legal history of India can conveniently be studied under four important periods—Hindu period, Muslim period, British period and after Independence. Hindu period extends for nearly 1500 years before and after the beginning of the Christian era. Muslim period begins with the first major invasion by Muslims in 1100 A.D. British period begins with the consolidation of the British power in the middle of the eighteenth century and lasts for nearly two hundred years. The modern period

began with the withdrawal of the British when on 15th August 1947, India was declared independent.

A. HINDU PERIOD : JUDICIAL SYSTEM IN ANCIENT INDIA

During the Hindu period in ancient India, Hindu society, institutions and beliefs gradually developed and a definite shape was given to them. Many important beliefs and doctrines of today are deep-rooted in the ancient Hindu ideology. In order to understand properly the ancient judicial system of India it is of vital importance to consider briefly three important factors: *Firstly*, the social institutions in ancient India, *secondly*, its political system and institutions and *lastly*, its religion and religious philosophy.

1. Ancient Hindu Social Order, Institutions and Religious Philosophy

In determining the social order two important concepts may be stated, namely, the caste system and the joint family system.

(*i*) *Caste system*.—The caste system emerged in ancient India as unique and one of the most rigid social systems ever developed in any part of the world.[1] A caste was a social group consisting solely of persons born in it.[2] Whole society was divided into four main castes. The four castes were precisely and clearly defined and rules pertaining to their lawful activities and functions dominated all social activities. The *Brahmins* were considered to be the most superior caste. The scholars and priests of the Hindus belonged to this caste. They had in law and in fact privileges and prerogatives not held by other sections of Hindu society. The *Kshatriyas* were the nobles and warriors and to this caste rulers of various States and kingdoms mostly belonged. The *Vaisyas* were the merchants and traders. The *Sudras* were the workers and ranked lowest. The caste was determined by birth. The members of the three upper classes, namely, *Brahmins, Kshatriyas* and *Vaisyas* were the elite of Hindu society. Caste determined the pattern of life amongst Hindus relating to their status, living, marriage, profession and social obligations. Caste consciousness had become a marked feature in social relationship.[3] The basis and continuance of caste system depended on the vast network of sub-castes. Sub-caste relationships were based on specialisation of work and economic independence. The caste association further diluted political loyalties. In later centuries caste exclusiveness became absolute and reached its peak in caste panchayats. Each caste panchayat was regarded as a supreme authority for the particular caste in each village. It gave stability to Indian society. Though the caste system was conservative still it was most needed to suit the requirements of ancient India.[4]

(*ii*) *Joint family system*.—The joint family system was another important institution which determined the social order amongst Hindus in ancient India. A

1. Shamasastri, *Evolution of Indian Polity*, p. 73 ; *see* also A.L. Basham, *The Wonder that was India*, Ch. V., pp. 147-149 ; R.C. Dutt, *The Early Hindu Civilisation*, pp. 53, 145, 227 ; *Later Hindu Civilization*, pp. 58-82.
2. See Ronald Segal, *The Crisis of India*, Ch. II, pp. 34-37 ; Irawati Karve, *Hindu Society—An Interpretation*, pp. 90-92.
3. G.S. Ghurye, *Caste and Class in India*, p. 47, For Caste distinctions in Law, see J.W. Spellman, *Political Theory of Ancient India*, pp. 111-112.
4. The Caste system is gradually dying out in Modern India. *See* also Sir Percival Griffiths, *Modern India* (New York, 1957), p. 31.

family was regarded as a unit of the Hindu social system.[5] An ancient family included parents, children, grand-children, uncles and their descendants, and their collaterals on the male side. This social group had common dwelling and enjoyed their estate in common. At the head of the family was the patriarch, whose authority was absolute over the members of his family. He represented all the members of his family before the law and claimed absolute obedience from them. The family group was bound together by *Sradha*[6] ceremony. A number of families constituted a *sect*, gram or village which became an administrative unit also. The concept of family led to private property which in turn led to disputes and struggles which necessitated law and a controlling authority. In later centuries problems concerning the division of land and inheritance came in for special attention. Two systems of family law, namely, Mitakshara and Dayabhaga, became the basis of civil law.[7] They dealt with property rights in a Hindu joint family and mostly amongst land-owning families.

The political system and institutions were varied and complex in ancient India. India was divided into various independent states—some monarchies and the rest tribal republics.[8] Monarchy in various forms was prevailing in ancient Hindu period. *Dharma* was the most important concept of the Hindu political thought. "In the context of the *Dharmashastras* (or Hindu Political Science) the word *dharma* came to mean 'the privileges, duties and obligations of a man, his standard of conduct' as a member of the Aryan community, as a member of one of the castes, as a person in a particular stage of life."[9] A careful examination of the ancient Legal and Constitutional system, says Rama Jois J.[10] would show that it had established a duty based society. Its postulate was not only the duty of individual towards the Society but also the duty of the Ruler towards the individuals and the Society. The legal system which was the same for the whole of India, notwithstanding the existence of large number of kingdoms, some larger in size and others smaller indicates that the concept of absolutist monarchies had always been rejected and the supremacy of "Dharma" (Law) over the Kings as declared in the authoritative texts was respected in letter and spirit. The English doctrine of "King can do no wrong" was not accepted and the King himself was subject to law. The Dharma Sastras impressed upon the Kings to look upon the people as God (Praja Vishnu) and serve them with love and reverence.[11]

Moreover, the individualistic doctrine of Laissez-fairé was never accepted and the basic philosophy that for the good of the greatest number, interests of individuals

5. The rite of commemorating the ancestors at which balls of rice called pinda were offered. Sradha defined the family and those who were entitled to participate in the ceremony were "co-pindas" (Sapindas), members of the family group.
6. Dr. L.D. Barnett, *Antiquities of India*, Ch. III, pp. 138-140. *See* also A.L. Basham, *The Wonder that was India*, pp. 155-158.
7. Most families of Bengal and Assam follow the rules of Dayabhaga while the rest of India generally follows Mitakshara.
8. Romila Thapar, *A History of India*, Ch. III, pp. 50-68.
9. K.P. Mukerji, *The State* (1952), p. 327, See Appendix I, (pp. 321-346), "*The Hindu Conception of Dharma*". *See also* Sarvapalli Radhakrishnan, *Indian Philosophy* (New York, 1922), pp. 1, 51 ; Jawahar Lal Nehru, *The Discovery of India*, p. 77 ; Amaury de Riencourt, *The Soul of India*, (New York, 1960), p. 15.
10. Rama Jois : *Seeds of Modern Public law in Ancient Indian Jurisprudence*, 1990 Edn. (Eastern Book Co.), pp. 1,2.
11. P.V.Kane : *History of Dharma Shastra*, Vol. III, p. 25 quoted by Rama Jois.

or smaller groups should be subordinated and sacrificed to the extent necessary, was deeply embedded in and formed the foundation of Dharma.[12]

Dharma or Law constituted the blue print or master-plan for the all round development of the individual and different sections of the society. Dharma is mostly misunderstood as religion, but the fact remains that it is a word of the widest import, having no corresponding word in any other language. Mahabharat[13] explains it as that which helps the upliftment of living beings, Madhavacharya[14] of Vijaynagar Empire explains it as that which sustains and ensures the progress and welfare of all. It is promulgated in the form of positive and negative commands (Vidhi and Nishedha).

Another important concept was *Saptanga* (seven limbs) of the State.[15] These were sovereign (*Swamin*), minister (*Amatya*), territory with people (*Rastra*), army (*Danda*) and friends or allies (*Mitra*). The King was the supreme authority of his State.[16] His functions involved the protection not only of his kingdom against external aggression but also of life, property and traditional custom against internal foes.[17] He protected the purity of class, caste and the family system as well as maintained social order. The nucleus of the Mauryan system was the King whose powers increased tremendously. Ashoka interpreted these as a paternal despotism. In tribal kingdoms, which contained tribal units and villages, the King was assisted by a court of the elders of the tribe and by the village headman.

The form of Hindu religion which prevailed in India previous to the spread of Buddhism is generally known as the Vedic religion,[18] while the form of Hindu religion which succeeded Buddhism is generally known as Puranic religion.[19] The Hindu religion and philosophy laid down four great aims of human life: *Dharma* (religion and social law), *Artha* (wealth or economic well-being), *Karma* (doing work) and *Moksha* (salvation of the soul). The correct balance of the first three was to lead to the fourth. These concepts played a very important role in Indian thought.[20] Amongst all the formal systems of Hindu philosophy the best known are *Nyaya, Vaishesika, Samkhya, Yoga, Mimansa* and *Vedanta.* They had a great impact on Indian thought[21] and *Yoga* and *Vedanta* are still having a great influence in various ways. As Nehru stated, "It is this philosophy which represents the dominant philosophic outlook of Hinduism today".[22]

2. Ancient Kingdoms : Administrative Units

In order to understand the ancient judicial system it is necessary to have a short account of the administrative divisions prevailing in the ancient States. Ancient India

12. See Udyoga Parva (Vidur Niti-Ch. 37-17) : Rama Jois, p. 2.
13. Shanti Parva, 109-9-11 : R. Jois, p. 8.
14. Parashara Dharma Samhita, edited by Vaman Sharma (1893), p. 63 : R. Jois, p. 8.
15. P.V. Kane, *History of Dharmasastra,* Vol. III, Ch. II, pp. 17-55.
16. Throughout the Kingdom the administration of justice was done in the name of the King.
17. P.V. Kane, *History of Dharmasastra,* Vol. III, Ch. III, pp. 56-103.
18. Vedic religion was of elemental Gods: of Indra, Agni, Surya, Varuna, the Asvinis and others.
19. Puranic religion dealt with image worship of deities.
20. See *Sources of Indian Tradition,* compiled by William Theodore de Bary, Stephen Hay, Royal Weiler and Andrew Yarrow (New York, 1958), pp. 205-366 ; *see* also R.C. Dutt, *Later Hindu Civilisation,* Ch. VI, pp. 58-64.
21. Norman D. Palmer, *The Indian Political System,* (1961), p. 21.
22. Jawahar Lal Nehru, *The Discovery of India,* (New York), p. 182.

was divided into various independent States and in each State the King was the supreme authority.[23] The King, with the assistance of his chief priest (*Purohita*) and military commander (*Senani*), carried on the administration of his kingdom. Each State was divided into provinces and these into divisions and districts, which differed in terminology as well as in area. For each province or district separate governors, according to their status, were appointed with different designations. Most often they were related to the King and in certain places their appointment was hereditary. District officers were entrusted with the judicial and administrative functions.[24]

At the meeting place of districts (*Janapada-Sandhishu*), cities also existed. The city was administered by a separate governor (*Nagaraka, Purapala*). According to Kautilya[25], each town was under the jurisdiction of a Prefect (*Nagaraka*). At the end of the fourth century B.C., Patliputra was a very flourishing town under the Maurya Emperor Chandragupta. Megasthanese, an ambassador of Seleucus Nicator, who resided there for some time, has given a detailed account of the administration of Patliputra. He states that it was under the care of a council of thirty officials who formed six committees of five members each. Each committee looked after different spheres of administration.

Apart from cities, there were a large number of villages all over India. In fact, the village was the unit of government. In the North as well as in the South, districts were classified according to the number of villages under their administrative jurisdiction.[26] The Village was based upon the bond between the family or the *clan*. Each village consisted of a village headman and village council or village *panchayat*. They assisted the district authorities in controlling the village administration. The office of the village headman was mostly hereditary. In villages he represented the King's administration and, therefore, his appointment was also at the King's pleasure. The pseudo-Sukra writing in the late Middle ages, speaks of the village headman as the mother and father of the village, protecting it from robbers, from the King's enemies and from the oppressions of the King's officers.[27]

Under the ancient Indian system of Government great importance was given to *Rajdharma* which declared that it was the personal responsibility of the King himself. His duties were manifold. It would be interesting to note that several of those duties are similar to those prescribed under the directive principles of State Policy in the Constitution of India. Naturally the number of duties were such as would require the division of work of the State into different departments and put them in charge of a person as head of the department concerned and each department would also require a cadre of officers to carry out the work of the department concerned. On this aspect as reiterated by Justice Rama Jois[28], the ancient Indian legal and

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23. A.L. Basham, *The Wonder that was India*, pp. 102-106.
24. *Epigraphic Indica*, Calcutta and Delhi, Ch. XV, pp. 130 ff.
25. Kautilya, *Arthashastra*, Ch. II, p. 36.
26. A.L. Basham, *The Wonder that was India*, pp. 104-05.
27. *Sukranitisara*, edited by Jivananda, Ch. II, p. 172 (Tr. Sarkar, Ch. II, p. 343).
28. See Rama Jois : *Seeds of Modern Public law in Ancient Indian Jurisprudence*, 1990 Edn., (Eastern Book Co.), Ch. 1, pp. 39-50 ; Ch. 3, pp. 111-117. There were 18 departments as analysed by R.S. Pandit in *Rajatarangiri*, 1-120, and as mentioned in *Mahabharata* (II, 5.38), *Ramayana* (II, 100.36), *Panchatantra* (Kielhorn's Edition III, 67-70), Kalidasa's *Raghuvansa* (XVII, 68) and in *Sisupalaradha* (XIV, 9).

conitutional system contained provisions which indicate a well developed governmental system.

The very idea of having such governmental set up as early as prior to 1184 B.C. is certainly a valuable piece of evidence to show that their necessity and utility for discharging the obligations of the State had been realised and provided for.[29] Kautilya and Manu fortify this proposition.[30]

In Kautilya's *Arthasastra*[31], the realm was divided into four administrative units called *(i) Sthaniya, (ii) Dronmukha, (iii) Kharvatik* and *(iv) Sangrahana. Sthaniya* was a fortress established in the centre of eight hundred villages; a *Dronmukha* in the centre of 400 villages; a *Kharvatika* in the midst of 200 villages and a *Sangrahana* in the centre of ten villages. In each of these places and at the meeting places of districts (*Janapada-Sandhishu*), law courts were established to decide disputes between citizens.

3. Administration of Justice

(i) Constitution of Courts.—In ancient India, the King was regarded as the fountain-head of justice.[32] His foremost duty was to protect his subjects. He was respected as the Lord of *Dharma* and was entrusted with the supreme authority of the administration of justice in his kingdom. The King's Court was the highest court of appeal as well as an original court in cases of vital importance to the State.[33] In the King's Court the King was advised by learned *Brahmins*, the Chief Justice and other judges, ministers, elders and representatives of the trading community. Next to the King was the Court of Chief Justice (*Pradvivaka*). Apart from the Chief Justice, the Court consisted of a board of judges to assist him. All the judges were from the three upper castes preferably Brahmins. Sometimes some of these judges constituted separate tribunals having specified territorial jurisdiction. Brihaspati[34] has stated that there were four kinds of tribunals, namely, stationary, movable courts held under the royal signet in the absence of the King, and commissions under the King's presidency.

In villages, the local village councils or *Kulani*, similar to modern *panchayats*, consisted of a board of five or more members to dispense justice to villagers.[35] It was concerned with all matters relating to endowments, irrigation, cultivable land,

29. *Ibid.*, p. 113.
30. *Ibid.*, p. 113-120.
31. Kautilya was the greatest Indian exponent of the art of government, the duties of kings, ministers and officials and methods of diplomacy. *See* Kautilya, *Arthasastra*, Ch. III, pp. 1, 147 ; Ch. XX, p. 22, *see* also J.W. Fleet, *Introductory Note in Kautilya's Arthasastra*, trans. by R. Shamasastry (4th Edition Mysore, 1951), p. 5.
32. P.V. Kane, *History of Dharmasastra*, Vol. III, Ch. XI deals with *"Law and Administration of Justice"*, pp. 242-316. *See* also Justice S.S. Dhavan, *"Indian Jurisprudence"*, (1963), Vol. 8, Journal of the National Academy of Administration, p. 19.
33. Regarding the King's judicial jurisdiction, Kalidas in his *Abhijnana Shakuntalam*, has referred to *Dhana Mitra's case*. Dhana Mitra was a wealthy merchant who died in a shipwreck. The dispute relating to his property came before the King which he transferred to his Minister. The Minister passed an order that the entire estate of the merchant be reverted to the King. Reversing this decision, King Dushyanta ordered an enquiry to be made—whether any of his widows was expecting a child, and he was informed that one of them was pregnant. The King directed that the child after birth was entitled to the property of the deceased.
34. Brihaspati, Ch. 1, pp. 1-3.
35. *See* S. Varadachariar, *The Hindu Judicial System*, p. 88.

punishment of crime, *etc.* Village councils dealt with simple civil and criminal cases. At a higher level in towns and districts the courts were presided over by the Government officers under the authority of the King to administer justice. The link between the village assembly and the official administration was the headman of the village. In each village a local headman was holding hereditary office and was required to maintain order and administer justice. He was also a member of the village council. He acted both as the leader of the village and the mediator with the government.[36]

In order to deal with the disputes amongst members of various guilds or associations of traders or artisans (*Sreni*), various corporations, trade-guilds were authorised to exercise an effective jurisdiction over their members. These tribunals consisting of a president and three or five co-adjudicators were allowed to decide their civil cases regularly just like the other courts. No doubt, it was possible to go in appeal from the tribunal of the guild to local court, then to royal judges and from them finally to the King, but such a situation rarely arose. Due to the prevailing institution of the joint family system, family courts were also established. *Puga* assemblies made up of groups of families in the same village decided civil disputes amongst family members. According to Brihaspati:

> "First come the family arbitrators; the judges are superior to the families; the Chief Justice (*Adhyaksha*) is superior to the judges; the King is superior to all of them and his decision becomes law."[37]

Criminal cases were ordinarily presented before the Central court or the courts held under the Royal authority. The smaller judicial assembly at the village level was allowed to hear only minor criminal cases.

Vachaspati Misra has pointed out that even in ancient India the decision of each higher court superseded that of the court below. Each lower court showed full respect to the decision of each higher court. As such the King's decision was supreme.

One of the cardinal rules of the administration of justice in ancient India was that justice should not be administered by a single individual. A Bench of two or more Judges was always preferred to administer justice. "No decision shall be given by a person singly"[38], is a formula found frequently repeated in the old texts. Thus Vasistha says, "Let the King or his ministers (or the King taking counsel with *Brahmins*) transact the business on the Bench".[39] The King sitting in his council heard the cases and administered justice.

(*ii*) *Institution of Lawyers.*—*Smritis* do not refer to the existence of any separate institution of lawyers in the ancient Hindu judicial system. According to Kane[40], "This does not preclude the idea that persons well-versed in the law of the *Smritis*

36. P.V. Kane : *History of Dharmasastra*, Vol. II, p. 65 ; *See* also K.P. Jayaswal, *Hindu Polity*, Ch. XIII.
37. Dr. Radhakumud Mukerji, *Local Government in Ancient India*, pp. 29-34, 132-142. *See* also Dr. P.N. Sen, *Hindu Jurisprudence*, p. 363.
38. न एकाकी निर्णयं कुर्यात् ।
Cited by S. Varadachariar, *The Hindu Judicial System*, (1946), p. 64.
39. राजमन्त्रासद: कार्याणि कुर्यात् ।
See, ibid., p. 65. *See* also K.P. Jayaswal, *Hindu Polity*, p. 313.
40. P.V. Kane, *History of Dharmasastra*, Vol. III, Ch. XI, pp. 288-289. *See* also A.L. Basham, *The Wonder that was India*, p. 117, R.N. Mehta, *Crime and Punishment in the Jatakas*, I.H.O., Vol. XII, No. 3, p. 438.

and the procedure of the courts were appointed to represent a party and place his case before the court. The procedure prescribed by *Narada-smriti, Smriti of Brihaspati* and *Smriti of Katyayana* reaches a very high level of technicalities and skilled help must often have been required in litigation.'' After considering Kane's observations and other historical material it becomes quite clear that the organisation of the Lawyers as it exists today was not in existence in the ancient Hindu period.

(*iii*) *Judicial Procedure.*—Judicial procedure was very elaborate. According to Brihaspati a suit or trial (*Vyavahara*) consisted of four parts: (*i*) the plaint (*poorvapaksha*) ; (*ii*) the reply (*uttar*) ; (*iii*) the trial and investigation of dispute by the court (*kriyaa*), and (*iv*) the verdict or decision (*nirnaya*).[41] Filing of plaint before the court meant that the plaintiff submitted himself to the jurisdiction of the court. The court was then entitled to issue an order to the defendant to submit his reply on the basis of allegations made in the plaint. If the defendant admitted the allegations levelled against him in the plaint, the business of the court was to decide the case. Where the defendant contested the case before the court, it was the duty of the court to provide full opportunity to both the parties to prove their cases. After the trial was over final decision was given by the court. During the course of proceedings both parties were required to prove their case by producing evidence. Ordinarily, evidence was based on any or all the three sources, namely, documents, witnesses[42] and the possession of incriminating objects.

This aspect of the subject has been discussed in detail by Rama Jois[43], showing that this subject was given utmost importance under the ancient Indian legal system. The provisions made gave the description of the highest court to be located at the capital city, of lower courts under royal authority, and of people's courts recognised as having power to decide cases. The qualifications of judges and other officers of the court were prescribed. Appointment of experts as assessors to assist the Court on technical questions, whenever necessary, was provided for; laws of procedure and of evidence were laid down. A code of conduct for judges and others concerned in the administration of justice and provisions for punishment of officers committing offences in the course of the administration of justice, had also been provided. A detailed survey[44] in this connection is made by Sir S. Vardachariar which goes to

41. P.V. Kane, *History of Dharmasastra*, Vol. III, Ch. XV, pp. 379-410. S.C. Banerjee, *Dharma Sutras: A Study in their Origin and Development*, pp. 99-108.
42. P.V. Kane, *History of Dharmasastra*, Vol. III, Ch. XIII, pp. 330-360. *See* also *The Sacred Book of the East*, edited by F. Max Muller, Vol. XXXIII, pp. 79, 244.
43. Rama Jois : *Seeds of Modern Public Law in Ancient Indian Jurisprudence*, 1990 Edn., Ch. 3, pp. 121-166.
44. The following topics are elaborated :
(*i*) Gradation of Courts, (*ii*) The People's Courts, (*iii*) Jurisdiction, (*iv*) Appellate Jurisdiction, (*v*) Right to Appeal to the King in all cases, (*vi*) The King's Court, (*vii*) Appointment of Judges and their qualifications, (*viii*) Responsibility of the King as the Highest Court, (*ix*) The Chief Justice to preside in the absence of King, (*x*) Unanimous decision recommended, (*xi*) Assistance by Experts, (*xii*) Personal responsibility of the King in deciding cases, (*xiii*) Requirements of a judicial proceeding, (*xiv*) Cause of action for a suit or complaint, (*xv*) Institution of the suit or complaint, (*xvi*) How to write a plaint (*Pratigna*), (*xvii*) Contents of a plaint, (*xviii*) Grounds of rejection of plaint or complaint in limine, (*xix*) Amendment of declaration by additional statement, (*xx*) Adjournments, (*xxi*) Consequence of undue delay by litigant, (*xxii*) Both plaintiff and dependant to furnish security, (*xxiii*) Rule regarding burden of proof, (*xxiv*) Court to decide on whom the burden of proof lies, (*xxv*) Trial to begin with the party on whom burden of proof lay, (*xxvi*) Rules regarding examination of witnesses, (*xxvii*) Rules regarding oral and documentary evidence, (*xxviii*) Ordeal excluded where human evidence is possible, (*xxix*) Presumption in favour of Royal documents, (*xxx*) Open and fair trial, (*xxxi*) Examination of

show that a fairly well developed system of administration of justice existed at that time.

In civil cases, the social status and qualification of the witness was always enquired into by the court.

In criminal cases, sometimes circumstantial evidence was sufficient to punish the criminal or to acquit him. The accused was allowed to produce any witness in his defence before the court, to prove his innocence. Witnesses were required to take an oath before the court. Ordeal as a means of proof was not only permitted but frequently used. In criminal cases, the courts were enjoined to convict only according to the procedure established by law. False witnesses were very severely fined by the courts. Narada says that they were condemned to go to a horrible hell and stay there for a *Kalpa*.[45]

(*iv*) *Trial by Ordeal.*—Trial by ordeal[46] was a method to determine the guilt of a person. The ancient Indian society,[47] which was largely dominated by religion and faith in God, considered the trial by ordeal as a valid method of proof. It was very common to swear "by my troth" or to call upon the Gods to witness the truth of a statement, as is clear from various illustrations of the ordeal given in the Epics.[48] *Smriti* writers generally limited its application to cases where any concrete evidence on either side was not available. Its greatest drawback was that sometimes a person proved his innocence by death as the ordeal was very painful and dangerous.

A detailed account of ordeals, as they existed in ancient India, is given in *Agni Purana*.[49] It points out that only in cases of high treason or very serious offences the trial by ordeal was used. In other petty matters, it was sufficient to prove the truth by taking an oath. Some important types of ordeal, which were commonly adopted, may be stated as follows:

These ordeals were : (*a*) Ordeal of Balance[50], (*b*) Ordeal of Fire[51], (*c*) Ordeal by Water[52], (*d*) Ordeal of Poison, (*e*) Ordeal of Lot,[53] (*f*) Ordeal of Rice-Grains, and (*g*) Ordeal of Fountain-cheese[54].

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witnesses to be in open Court and its exceptions, (*xxxii*) Judgment, (*xxxiii*) Review of Judgment, (*xxxiv*) *Punarnyaya* (Review of judgment or de novo trial), (*xxxv*) Fresh evidence not announced earlier could be adduced at retrial or review, (*xxxvi*) Caution regarding accepting circumstantial evidence, (*xxxvii*) Historical reference to *Jayapatra* (judgment).

45. Narada, *Quotations*, Vol. V, p. 10.

46. In England, the trial by ordeal was also very common during the early period. *See* V.D. Kulshreshtha, *English Legal History*, (2nd Edn.), p. 5. For History of Ordeals in India, *see* P.V. Kane, *History of Dharmasastra*, Vol. III, Ch. XIV, pp. 361-378.

47. As far back as *Atharva Veda* and the *Upanishads*, ordeal was adopted as a special feature of Indian law. *Atharva Veda* passim *Chhandogya Upanishad*, Vol. VI, p. 16. *See* also L.D. Barnett, *Antiquities of India* (Reprint 1964), p. 155 ; John W. Spellman, *Political Theory of Ancient India*, pp. 119-121 ; S. Varadachariar, *The Hindu Judicial System*, pp. 164-166.

48. F.W. Hopkins, *Journal of the American Oriental Society*, Vol. XIII, p. 133. *See* also Vepa P. Sarathi, *Law of Evidence in India*, pp. 7-8.

49. *Agni Purana*, CCLV, p. 28 ; *Manusmriti*, Ch. VII, pp. 114-115. *According to Dharma Sutra*, ordeal was classified into five, namely (*i*) *Dhata* (Balance), (*ii*) *Agni*, (*iii*) *Udaka* (Water), (*iv*) *Visa* (Poison), (*v*) *Kosa* (Water of deities). *See* Dr. S.C. Banerjee, *Dharm Sutras: A Study in their Origin and Development*, pp. 108-109 ; *The Sacred Book of the East* edited by F. Max Muller, Vol. XXXIII, Part I, Narada, pp. 100-120, Brihaspati, pp. 315-318.

50. *Agni Purana*, Vol. CCLV pp. 32-37 ; John W. Spellman, *Political Theory of Ancient India*, p. 120. In ordeal of balance the accused was made to sit in a balance and weighed. He was then made to pray to God. If his part of balance was lowered after prayer he was deemed guilty.

51. There is a reference to this order in the Ramayana where Sita had to prove her chastity of her captivity

(v) *Trial by Jury.*—In the ancient judicial system of India trial by jury existed but not in the same form as we understand the term now.[55] In the court scene of the *Mrichchhakatika,* which according to Jayaswal is a product of the third century, the jury is mentioned. Sukraniti, Brihaspati and Narada defined the functions of the jury. This shows that the members of the community assisted in the administration of justice.

(vi) *Appointment of Judges and Judicial Standard.*—Caste considerations played an important role in the appointment of the chief judge and other judges. Almost all the law books dealing with the ancient judicial system mention that preferably a *Brahmin* must be appointed a chief judge or judge.[56] In order of preference next came *Kshatriyas,* and *Vaisyas.* But in no case was a *Sudra* appointed a judge. Regarding the qualifications of judge, it is stated that persons who are ignorant of the customs of the country, non-believers in the caste system and God, despisers of sacred books, insane, irate or distressed will not be appointed judges.[57] The law books insisted on the appointment of persons, who were highly qualified and learned in law, for the post of a judge. Women were not allowed to hold the office of a judge.[58]

The standards laid down for judges and magistrates were very high. Judges were required to take the oath of impartiality when deciding disputes between citizens.[59] Integrity was the first qualification. Referring to the integrity of a judge, Brihaspati states, "A judge should decide cases without consideration of personal gain or prejudice or any kind of bias (nowadays the term used is "without fear or favour") and his decision should be in accordance with the procedure prescribed by the texts. A judge who performs his judicial duties in this manner achieves the same spiritual merit as a person performing a Yajna".[60] Dishonesty in a judge was regarded as the most reprehensible crime.

(vii) *Crimes and Punishments.*—In ancient Hindu period punishment was considered to be a sort of expiation which removed impurities from the man of sinful promptings and reformed his character. Manu[61] states that men who are guilty of

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by Ravana by walking through fire. Accused was made to walk through fire. If he suffered no harm, he was held innocent. Instance of Sita walking through fire to prove her chastity is well known (see Ramayan) ; See I.D. Barnett : *Antiquities of India* (Reprint 1964), p. 155.

52. John W. Spellman, *Political Theory of Ancient India*, p. 120. Here the accused was made to drink water used in bathing the idol. If within next 14 days he had no harmful effect he was considered innocent.
53. L.D. Barnett, *Antiquities of India* (Reprint 1964), p. 155. In Ordeal of poison the accused was to drink poison. If no harm came to him, he was held innocent. In ordeal of lot he was to draw from two lots. If he drew the lot of Dharma, he was held innocent.
54. J.W. McCrindle, *Ancient India as Described by Ktesias*, pp. 17-18. In ordeal of Rice-Grains if the accused chewed unhusked rice and if no blood appeared in his mouth he was held innocent. In ordeal of Fountain-cheese the accused was to drink some special type of water. If he becomes delirious and confesses his misdeeds, he was held guilty.
55. *See* V.R. Dikshitar, *Hindu Administrative Institutions*, pp. 246-247 ; K.P. Jayaswal, *Hindu Polity*, Part I, p. 54.
56. P.V. Kane, *History of Dharmasastra*, Vol. III, Ch. XI, pp. 272-275.
57. *Brihaspati*, I, p. 33.
58. *Angutara Nikaya*, IV, VIII, p. 80.
59. *Narada*, p. 1-3, *Vratam Narada*, pp. 1-34.
60. *See* Justice S.S. Dhavan, *Indian Jurisprudence* (1963), Vol. 8, Journal of the National Academy of Administration, p. 22.
61. *Manusmriti* VIII, 318.

crimes and have been punished by the King go to heaven, becoming pure like those who perform meritorious deeds. Ancient *Smriti* writers were also fully aware of various purposes served by punishing the criminals.[62] The punishments served four main purposes, namely, to meet the urge of the person who suffered, for revenge or retaliation, as deterrent and preventive measures, and for reformation or redemption of the evil-doer.[63]

Manu[64], Yajnavalkya[65] and Brihaspati[66] state that there were four methods of punishment, namely, by gentle admonition, by severe reproof, by fine and by corporal punishment; and declare that these punishments may be inflicted separately or together according to the nature of offence.

Kautilya[67] lays down that the awarding of punishment must be regulated by a consideration of the motive and nature of the offence, time and place, strength, age, conduct (or duties), learning and monetary position of the offender, and by the fact, whether the offence is repeated. This means judges always considered the relevant circumstances before deciding the actual punishment. The *Dandaviveka*[68] quotes a verse in which the considerations that should weigh in awarding punishment are brought together, namely, the offender's caste,[69] the value of the thing, the extent or measure, use or usefulness of the thing with regard to which an offence is committed, the person against whom an offence is committed (such as an idol or temple or King or *Brahmin*), age, ability (to pay), qualities, time, place, the nature of the offence (whether it was repeated or was a first offence).[70] The severity of punishment depended on caste also.[71]

Certain classes of persons were exempted from punishment under the ancient criminal law in India. Angiras quoted by the *Mitakshara*[72] states that an old man over eighty, a boy below sixteen, women and persons suffering from diseases are to be given half *Prayaschitta* and *Sankha;* a child less than five commits no crime nor sin by any act and is not to suffer any punishment nor to undergo any *Prayaschitta.*[73]

Certain *Smriti* writers[74] prescribe that as a general rule a *Brahmin* offender was not to be sentenced to death or corporal punishment for any offence deserving a

62. Harty Elmer Barnes in his book, *The Study of Punishment* (1930, New York), refers to the horrible and revolting methods for punishing criminals which were used in the Western countries. But in Ancient India a comparatively human treatment was given to the criminals.
63. P.V. Kane, *History of Dharmasastra*, Vol. III, pp. 388-390. Where there is no conflict between *Dharmasastra* and *Arthasastra*, both should be followed. In the case of conflict whatever is stated in *Dharmasastra* should be followed. This was the rule of interpretation adopted by the Courts in ancient India.
64. *Manusmriti*, VIII, p. 129.
65. *Yajnavalkyasmriti*, I, p. 367.
66. *Brihaspatismriti*, see *Sacred Books of the East*, Edited by Max Muller, Vol. XXXIII, p. 387.
67. *Kautilya's Arthasastra*, Vol. IV, p. 10.
68. *Dandaviveka of Vardhamana* (Gaikwad Oriental Series), p. 36.
69. *Manusmriti*, VIII, pp. 337-338 (for theft).
70. *Ibid.*, p. 320.
71. *Ibid.*, p. 285.
72. *Yajnavalkyasmriti*, III, p. 243.
73. *Naradasmriti*, Vol. IV, p. 85. Section 82 of *The Indian Penal Code* provides that nothing is an offence which is done by a child under seven years of age.
74. *Gautama-dharmasutra*, Vol. XII, p. 43 ; *Kautilya's Arthasastra*, Vol. IV, p. 8 ; *Manusmriti*, Vol. VIII, pp. 125, 380-381 ; *Yajnavalkyasmriti*, Vol. II, p. 270.

death sentence, but in such cases other punishments were substituted. *Katyayana*[75] and *Kautilya*[76] were against exempting *Brahmins*.

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

Gautama[77] and Manu[78] prescribe the details of penalty to be paid by *Sudras, Vaishyas, Kshatriyas, Brahmins* and upper class persons. On a large scale serious thefts were punished with death. In certain cases the whole village was held responsible for theft or lost property. The villagers were held liable to make restitution of lost property if they were unable to prove that the lost property was taken away from their village. The King or his local representative was held liable to pay for the missing property or theft, as they were responsible for the police and maintaining law and order.

In adultery and rape, punishment was awarded on the basis of the caste considerations of the offender and of the woman. Yajnavalkya[79] prescribes the amercement.[80]

In abuse or contempt cases, every care was taken to see that each higher caste got due respect from persons of the lower caste. Gautama[81], Manu[82], Yajnavalkya[83], prescribe that a *Kshatriya* or a *Vaisya* abusing or defaming a *Brahmin* was to be punished respectively with a fine of 100 panas and 150 panas. A *Sudra* was punished by corporal punishment (cutting off the tongue). While a *Brahmin* defaming a *Kshatriya* or *Vaisya* was to be fined 50, 25 or 12 panas respectively. According to Gautama[84], a *Brahmin* could flout a *Sudra* with impunity. If a person of a lower caste sat on the same bench with a man of a higher caste, the man of the lower caste was branded on the breech.

For committing murder, early *Sutras* prescribe that the murderer should pay fine according to the caste of the person murdered. Mostly the penalties were based upon caste-considerations as informed by Baudhayana. Other ancient law books lay down that punishment for murder was death with confiscation of the murderer's property. The *Arthasastra* prescribes death penalty for the murder, even if it occurred in a quarrel or duel. Capital punishment was given in varied forms, namely, roasting alive, drowning, trampling by elephants, devouring by dogs, cutting into pieces, impalement, *etc.* Mutilation, torture and imprisonment were common penalties for many other crimes.[85]

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75. *Katyayana's Smriti*, p. 806.
76. *Kautilya's Arthasastra*, IV, p. 11.
77. *Gautama-dharmasutra*, XII, pp. 15-16.
78. *Manusmriti*, VIII, pp. 338-39.
79. *Yajnavalkyasmriti* II, p. 286.
80. According to *Sanka-Likhita*, the first amercement is fine from 24 *panas* (a copper coin) to 91, the middling one is from 200 to 500 *panas* and the highest is from 600 to 1000 in proportion of the value of the matter in dispute or the injury caused.
81. *Gautama-dharmasutra*, XII, pp. 1, 8-12.
82. *Manusmriti*, VIII, pp. 267-268.
83. *Yajnavalkyasmriti*, II, pp. 206-207.
84. *Gautama-dharmasutra*, XII, p. 13.
85. *See* P.V. Kane, *History of Dharma Sastra*, Vol. III, pp. 391-410.

Henry Maine[86], made the generalisation that "Penal law of ancient communities is not the law of crimes, it is the law of wrongs or to use the English technical word, of Torts....." But Dr. Priya Nath Sen[87] has proved that this generalisation is not true for Ancient Hindu Law.

Kane points out, "It will be seen from the early *Sutras* like that of *Gautama* and from the *Manusmriti* that the more ancient criminal law in India was very severe and drastic, but that from the times of Yajnavalkya, Narada and Brihaspati the rigour of punishments was lessened and softened and fines came to be the ordinary punishments for many crimes.....".[88]

Sir S. Varadachariar, Judge, Federal Court of India, in his *Radhakumud Mookerjee Endowment Lectures on the Ancient Hindu Judicial System*[89], quoted Lee[90] who observed that there were guild Courts or popular Courts and the villagers had a system of their own. It was only in grave crimes or when the condemned party refused to obey the local judgment that the King was concerned with litigation.

But according to Varadachariar this cannot be said to be quite a correct description of the position of the King as stated by the *Sutras* and the *Smritis*. He points out, "...the administration of justice seems largely to have been the work of village assemblies or other popular or communal bodies, whether with or without the authority of the King and whether with or without his presence, or the presence of some public officer....There is no trace of an organised criminal justice vested either in the King or in the people. There seems to have prevailed the system of Wergild (*Vaira*) which indicates 'that criminal justice remained in the hands of those who were wronged'. In the *Sutras*, on the other hand, 'the King's peace is recognised as infringed by crime'."

From this it can be inferred that the King's power and jurisdiction gradually increased and extended throughout his Kingdom.

B. THE MUSLIM PERIOD : JUDICIAL SYSTEM IN MEDIAEVAL INDIA

Muslim period marks the beginning of a new era in the legal history of India. Arabs were the first Muslims who came to India. They came in the eighth century and settled down in the Malabar Coast and in Sind but never penetrated further. This was most unfortunate, for, if they had done so as they did in Europe, Indian culture and civilization would not have stagnated.[91] The synthesis between Islamic and Hindu cultures would have blossomed and Indians would have taken the palm in scientific advancement instead of the Europeans who had the benefit of Arabic culture. As it is, the Arabs conquered the Persians, Afghans and Turks, and converted them to Islam; and it was the Afghans and Turks who were let loose on India. Though the Prophet prohibited unprovoked attacks, the Ghaznis and Ghoris who were animated by the lust for gold and pretended zeal for Islam had an easy victory over the Hindus who were enfeebled by their comforts, luxuries and internal

86. Henry Maine, *Ancient Law* (1866, 3rd Edn.), Ch. X, p. 370.
87. Dr. Priya Nath Sen, *Tagore Law Lectures on Hindu Jurisprudence* (1918), Lecture XII, at pp. 264-266.
88. P.V. Kane, *History of Dharmasastra*, Vol. III, p. 390.
89. S. Varadachariar, *Ancient Hindu Judicial System* (Lucknow, 1946) ; pp. 62-63.
90. Lee, *Historical Jurisprudence*, p. 141.
91. See *India on the Eve of Muslim Contract*, by K.M. Panikkar in *A Survey of Indian History* (1974), Ch. XII. *See* also Dr. A.B.M. Habibullah, *The Foundation of Muslim Rule in India* (1945).

dissensions. Just as the Roman Empire collapsed before the German barbarians—the Huns and Goths—so too the Hindu Kingdoms fell before the Asian barbarians—the Afghans and Turks.

But having come to India as rulers, they were politic enough not to antagonise the Hindus completely though now and then they indulged in acts of mere vandalism and brutality. If things continued as they were, all would have been well, because in spite of some antagonism the two cultures would have become one in course of time. Rulers like Akbar the Great and Saints like Kabir strove hard for such unity, but unfortunately for Indians, the Britishers arrived on the scene. To advance themselves, to establish themselves as traders and acquire power and having acquired power to consolidate themselves as rulers and sit firmly in the Red Fort at Delhi, *they fanned into flames the dying embers of antagonism between Hindus and Muslims. As long as they stayed in India they kept it up, and even while quitting India they deliberately partitioned the country into India and Pakistan in order to politically weaken the sub-Continent. The process is being continued by similar so-called civilised countries.*

In this context, it is of some importance to determine briefly the main reasons for downfall of the Hindu Kingdom and study the Muslim social order, political theory and religious philosophy.

4. Causes of the Downfall of Early Hindu Kingdoms

Towards the end of the eleventh and the beginning of the twelfth century, began the downfall of the Hindu period.[92] Local Hindu Rajas were attacked and defeated by foreign invaders of Turkish race. Gradually, old Hindu Kingdoms began to disintegrate. Out of the various political, military, social and economic factors, some important causes of the downfall of the Hindu period may be stated as follows:

The political history of this period is full of constant struggles between a few powerful states for supremacy.[93] An atmosphere of great mutual distrust was created amongst the contending States which prevented their political unity against the common enemy.[94] It resulted in the frittering away of the economic and military resources of the country at a time when the country faced great danger from foreign invaders. A leadership capable of controlling and guiding the political and military talents and uniting Indians against the common foreign enemy was also lacking.[95] Indians failed to adopt their time-honoured system of warfare to meet the requirements of the new situation. The real weakness in Indian administration lay in the influence of the great feudatory families whose power and ambition constituted a perpetual threat to the stability of the central government. Hindu Kingdoms also suffered from the prevailing caste divisions.[96]

Among the contributory causes of the defeat may be mentioned the treachery of local individual chiefs or high officers for the sake of power and money. The enemy took full advantage of this weakness.

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92. U.N. Ghoshal, *Studies in Indian History and Culture*, Ch. XVII, pp. 353-373. *See also* Romesh Chunder Dutt, *A History of Civilization in Ancient India* (Calcutta, 1890), Vol. III, Book V, pp. 476-82, 487-88, 494-95.
93. V.A. Smith, *The Oxford History of India*, 4th Edn., p. 371.
94. Dr. A.L. Srivastava, *The Sultanate of Delhi* (2nd Edn., 1953). *See* Ch. III *"India on the Eve of Malmud of Ghazni's Invasion"*.
95. *See* Barthold, *Turkistan Down to the Mongol Invasion*, Eng. Tr. pp. 287-92.
96. Dr. R.C. Mazumdar, *Ancient India* (Varanasi, 1952), Ch. XXI.

One of the main secrets of the success of the Sultans of Ghazni and Ghor was the use of shock tactics,[1] *i.e.* the sudden raid followed by the equally swift victorious return home. Against this the Indian leadership was not vigilent, it was shambling, unpatriotic and politically disunited. Against the Hindus the Turks were militarily superior and religiously fanatic.

5. Muslim Social Order: Political Theory and Religion

The social system of Muslims was based on their religion, Islam, which may be described as a reformist version of current seventh-century Arabian practice.[2] The Muslims followed the principles of equality for men and they had no faith in the graded or sanctified inequality of caste system. Muslim religion places every man on an equal footing before God, overriding distinctions of class, nationality, race and colour. It was in a sense more patriarchal and of necessity, arbitrary *i.e.*, not bound by rigid rules. Polygamy was restricted by Islam to the taking of four wives. The main underlying idea of the Muslim rule in India was its own self-preservation and political domination over Hindus. In the early days, no doubt, the Muslims who came from Persia, Turkey and Afghanistan kept themselves aloof from the Indians, but in due course the old barriers were lifted and a process of Indianization began which reached its climax during the Mughal period. The Muslims adopted many habits, ways and manners of Hindus and *vice versa.*

The political theory of Muslims was governed by their religion, Islam.[3] It was based on the teachings of the *Quran,* their religious book, the traditions of the Prophet and precedent. The teachings laid down only the fundamental principles on which the Islamic policy was based. No well-defined political institution was specifically created by the *Quran.* The political institutions which were adopted and developed by the Muslims were based on the ideas given by the Greek Philosophers. Sovereignty in a Muslim State belonged to God. The Muslim Kings in India in general regarded themselves as God's humble servants (*Nyazmande-dargah-e-Ilahi*). The ruler was His delegate, duly elected by the people to perform certain functions according to the *Quran.* The Muslim polity was based on the conception of the legal sovereignty of the *Shara* or Islamic law. The political theory laid emphasis on the fact that all Muslims formed one congregation of the faithfuls and it was necessary for them to unite closely in the form of an organised community. Any attempt to break away from the organised community was condemned by the religion.[4] All the members of the community elected the Khalifa or Caliph as the Commander of the faithfuls. It was made obligatory on all Muslims to owe allegiance to the Caliph who was also their ruler. In India the Sultans of Delhi, though absolute regents, claimed to be the representatives of the Caliph.[5]

The *Quran* being of absolute authority, all controversy centred round its interpretation, from which arose the Muslim law or *Shariat.* But the Muslims also

1. Dr. A.L. Srivastava, *The Sultanate of Delhi,* pp. 394-98.
2. *"Islam and Mediaeval and Modern Societies"*, by S. Maqbul Ahmed in *Transactions of the Indian Institute of Advanced Study,* 1965, Vol. I, pp. 132-236.
3. Percival Spear, *India: A Modern History. See* Ch. VIII, pp. 94-101, "Islam in India". For "Islamic Political Theory", see *The History and Culture of the Indian People: The Delhi Sultanate,* Bharatiya Vidya Bhavan, Vol. VI, Ch. XIV, pp. 438-444.
4. Quran, III, 192 ; XLII, 38 ; V 2.
5. I.H.Qureshi, *Administration of the Sultanate of Delhi,* pp. 22-23.

proliferated into many sects. Two main sects were—the *Sunnis*, to which the Turks and Afghans in India adhered, and the *Shias* who became dominant in Persia. The Muslim religion, modified by its Turkish and Afghan influences, was further modified by the Persian culture by which all the invaders were more or less influenced. Kulkarni has pointed out, "The Turkish invaders of India presented a political and religious arrangement in the country, the essential injustice and inequity of which could not be wholly removed even by the most enlightened Muslim rulers. Religious intolerance and racism were the bed-rock of their policy."[6] The policy of intolerance inspired the Sultans to propagate strange doctrines. While Ala-ud-Din Khilji asserted that non-Muslims in the country could claim no rights, Firoz Shah declared with admirable finality that India was a *Musalman* country.[7]

6. Historical Introduction

In the late tenth and early eleventh centuries, Mahmud of Ghazni,[8] a Muslim of Turkish race, attacked India from the north-west. Subsequently, Mahmud led a series of raids on north-west India plundered, destroyed the temples and each time returned with huge wealth.[9] In 1191 Muhammad of Ghor attacked India, but he was defeated by Hindu Rajas led by Prithvi Raj, a Rajput hero. Next year in 1192, Muhammad of Ghor defeated Prithvi Raj at Thaneswar and marched to Delhi. Thus by the end of twelfth century he established a Muslim Sultanate at Delhi conquering most of northern India. A new political factor was introduced into the Indian sub-continent as the Sultans of Delhi initiated the rule of Turks and the Afghans. From 1206 till 1526 not less than thirty-three Turkish Kings, belonging to five dynasties,[10] occupied the throne of Delhi. In 1398, Tamurlane or Timur, a Mongol conqueror, captured Delhi and ended the Sultanate of Delhi. The Sultanate was revived in the middle of fifteenth century. The Delhi Sultnate was characterised by dynastic instability and the Sultans were mostly engaged in a series of dynastic blood feuds and Hindu persecution. They practised a military despotism, ruthlessly weeding out the incompetent in the perpetual struggle for succession to the throne. Earlier, the Sultans certainly envisaged establishing an empire embracing the whole of India. Though they conquered northern India, the Deccan proved to be an obstacle. In 1336, the Hindu Kingdom of Vijayanagar was founded in the South.[11] It protected Southern India from any further Muslim expansion and for the next two centuries it remained as a dominant power in the South.

Sultans of Bahaumani Dynasty ruled the southern parts of India from 1347 to 1587. Sultans of Bijapur ruled the vast territories in the south from 1490 to 1686. Nizams of Hyderabad ruled the State from 1730 to 1948. In the north, the Nawabs

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6. V.B. Kulkarni, *British Domination in India and After*, p. 6.
7. *The History and Culture of the Indian People: The Delhi Sultanate*, Bharatiya Vidya Bhawan, Vol. VI, p. 104.
8. Ghazni is located between Kabul and Kandhar in modern Afghanistan.
9. Mahmud of Ghazni destroyed the great temple of Somnath on the coast of Kathiawar (now Saurashtra) in 1024-1025 and plundered huge wealth.
10. Kings of the Slave Dynasty ruled from 1206 to 1290 ; The Khilji Dynasty ruled from 1290 to 1320 ; the Tughlaq Dynasty ruled from 1320 to 1399 ; the Saiyad Dynasty ruled from 1414 to 1444 ; the Lodi Dynasty ruled in 1444 and again from 1451 to 1526.
11. Hindu Kingdom of Vijyanagar was founded along the river Tungabhadra in 1336 by two brothers from Telengana (in modern Andhra Province). It represented a revival of Hinduism against Islam.

of Oudh ruled from 1722 to 1857 and in the east Nawabs of Bengal ruled from 1740 to 1770.

"The sixteenth century," says Romila Thapar, "brought two new factors into Indian history—the Mughals who came by land and began by establishing themselves in the North and the Portuguese who came by sea to establish themselves in the South and the West. Both these new factors were to shape the course of Indian history—the Portuguese by striving to win a monopoly of the overseas trade of India, the Mughals by founding an empire. Though the Portuguese failed, the Mughals succeeded and between them they carried India into a new age."[12]

In 1526, Babar, a descendant of Tamurlane and Chenghis Khan, defeated Ibrahim Lodi at Panipat and captured Delhi. Babar founded the Mughal Empire[13] in India and the old period of Delhi Sultanates came to an end. After Babar's death[14] his son Humayun ruled, but the constant fighting with rebels kept him engaged. From 1540 to 1545 Sher Shah ruled over North India. By introducing various reforms during his reign, it is said that he laid the foundation for Akbar's greatness. Akbar, son of Humayun, was the greatest Mughal ruler. He ruled over a large part of India from 1556 to 1605. He consolidated his empire by defeating his enemies and developing friendly relations with the non-Muslim martial races of India. He developed an administrative and judicial system in his empire. His successors Jehangir[15], Shah Jahan[16] and Aurangzeb[17] lacked the ability, integrity and statesmanship and foresight of Akbar. After the death of Aurangzeb in 1707, the Mughal empire began to disintegrate due to the rising power of Sikhs and the Marathas. Practically, the Mughal empire came to an end but continued theoretically under a series of puppet emperors up to 1862.

Thus the Mughal empire which was founded by Babar in 1526 lasted for nearly two centuries until the British took over. "The Mughal Empire," Vincent Smith observes, "like all Asian despotisms, had shallow roots. Its existence depended mainly on the personal character of the reigning autocrat and on the degree of his military power. It lacked popular support, the strength based on patriotic feeling, and on the stability founded upon ancient tradition."[18]

The judicial system of India during the Mediaeval Muslim period, may therefore be divided and studied under two separate periods—the Sultanate of Delhi and the Mughal period. The judicial reforms of Sher Shah formed a bridge between the two periods.

7. The Sultanate of Delhi: Civil Administration

In order to understand the set-up of the judicial machinery during the period covered by the Sultans of Delhi, *i.e.* from 1206 to 1526, it is necessary to have a brief account of the prevailing administrative units.

12. Romila Thapar, *A History of India*, p. 336.
13. They were really Chagati Turks.
14. Emperor Babar died in 1530.
15. Emperor Jehangir ruled from 1605 to 1627.
16. Emperor Shah Jahan ruled from 1627 to 1658.
17. Emperor Aurangzeb ruled from 1658 to 1707.
18. Vincent A. Smith, *The Oxford History of India* (2nd Edn., London, 1923), p. 465.

(1) ADMINISTRATIVE UNITS

The civil administration of the Sultanate[19] was headed by the Sultan and his Chief Minister (*Wazir*). The Sultanate was divided into administrative divisions from the province to the village level. The Sultanate was divided into Provinces (*Subahs*). The Province (*Subah*) was composed of Districts (*Sarkars*). Each District (*Sarkar*) was further divided into *Parganahs*. A group of villages constituted a *Parganah*.

(2) THE ADMINISTRATION OF JUSTICE : CONSTITUTION OF COURTS

In Mediaeval India the Sultan, being head of the State, was the supreme authority to administer justice in his kingdom. The administration of justice was one of the important functions of the Sultan, which was actually done in his name in three capacities. *Diwan-e-Qaza* (arbitrator); *Diwan-e-Mazalim* (as head of bureaucracy) and *Diwan-e-Siyasat* (as commander-in-chief of forces). The courts were required to seek his prior approval before awarding the capital punishment.

The judicial system under the Sultan was organised on the basis of administrative divisions of the kingdom. A systematic classification and gradation of the courts existed at the seat of the capital, in Provinces, Districts, *Parganahs* and villages.[20] The powers and jurisdiction of each court was clearly defined.

(i) Central Capital.—Six courts which were established at the capital of the Sultanate, may be stated as follows:—

The King's Court, *Diwan-e-Muzalim, Diwan-e-Risalat, Sadre Jehan's* Court, Chief Justice's Court and *Diwan-e-Siyasat.*

The King's Court, presided over by the Sultan, exercised both original and appellate jurisdiction on all kinds of cases. It was the highest Court of Appeal in the realm.[21] The Sultan was assisted by two reputed *Muftis* highly qualified in law.

The Court of *Diwan-e-Muzalim* was the highest Court of Criminal Appeal and the Court of *Diwan-e-Risalat* was the highest Court of Civil Appeal. Though the Sultan nominally presided over these two courts, he seldom sat in them. The Chief Justice (*Qazi-ul-Quzat*) was the highest judicial officer next to the Sultan. From 1206 to 1248 in the absence of the Sultan, the Chief Justice presided over these courts. In 1248 Sultan Nasir-ud-Din, being dissatisfied with the then Chief Justice, created a superior post of *Sadre Jahan* and appointed Qazi Minhaj Siraj to this post. Since then *Sadre Jahan* became *de facto* head of the judiciary. The Court of Ecclesiastical cases, which was under the Chief Justice up to 1248, was also transferred to the *Sadre Jahan* and later on became popular as *Sadre Jahan's* Court. *Sadre Jahan* became more powerful and occasionally presided over the King's Court.[22] The offices of the *Sadre Jahan* and Chief Justice remained separate for a long time. Ala-ud-Din amalgamated the two. They were again separated by Sultan Firoz Tughlaq. The Court of *Diwan-e-Siyasat* was constituted to deal with the case of rebels and those charged with high treason. Its main purpose was to deal with

19. *See* Bharatiya Vidya Bhavan, *The History and Culture of the Indian People: The Delhi Sultanate*, Vol. VI ; I.H. Qureshi, *Administration of the Sultanate of Delhi* ; Dr.A.L. Srivastava, *The Sultanate of Delhi*.
20. *See* M.B. Ahmad, *The Administration of Justice in Mediaeval India*, pp. 104-125.
21. H. Beveridge, *History of India*, Vol.1, p. 102.
22. Badaoni, *Muntakhab-ut-Tawarikh*, Bib Ind., p. 239.

criminal prosecutions. It was established by Muhammad Tughlaq and continued up to 1351.

The Chief Justice's Court was established in 1206. It was presided over by the Chief Justice (*Qazi-ul-Quzat*). It dealt with all kinds of cases. Earlier, Chief Justice or *Qazi-ul-Quzat* was the higher judicial officer but with the creation of a new post of *Sadre Jahan,* its importance was reduced for some time. The Chief Justice and Puisne Judges were men of ability (*Afazil-e-Razgar*) and were highly respected. Many Chief Justices were famous for their impartiality and independent character during the Sultanate period. Four officers, namely, *Mufti*[23], *Pandit*[24], *Mohtasib*[25] and *Dadbak*[26], were attached to the Court of Chief Justice.

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

Adalat Nazim Subah was the Governor's (*Subehdar*) Court. In the Provinces the Sultan was represented by him and like the Sultan he exercised original and appellate jurisdiction. In original cases he usually sat as a single Judge. From his judgment an appeal lay to the Central Appellate Court at Delhi.

While exercising his appellate jurisdiction, the Governor sat with the *Qazi-e-Subah* constituting a Bench to hear appeals. From the decision of this Bench, a final second appeal was allowed to be filed before the Central Court at Delhi.

Adalat Qazi-e-Subah was presided over by the Chief Provincial *Qazi.* He was empowered to try civil and criminal cases of any description and to hear appeals from the Courts of District *Qazis.* Appeals from this Court were allowed to be made to the *Adalat Nazim-e-Subah. Qazi-e-Subah* was also expected to supervise the administration of justice in his *Subah* and also to see that *Qazis* in districts were properly carrying out their functions. He was selected by the Chief Justice or by *Sadre Jahan* and was appointed by the Sultan. Four officers, namely, *Mufti, Pandit, Mohtasib* and *Dadbak,* were attached to this court also.

The Court of *Diwan-e-Subah* was the final authority in the Province in all cases concerning land revenue.

The *Sadre-e-Subah* was the Chief Ecclesiastical Officer in the Province. He represented *Sadre Jahan,* in *Subah* in matters relating to grant of stipend, lands, etc.

(iii) Districts.—In each District (*Sarkar*), at the District Headquarter, six courts were established, namely, *Qazi, Dadbaks* or *Mir Adils, Faujdars, Sadre, Amils, Kotwals.*

The Court of the District *Qazi*[27] was empowered to hear all original civil and criminal cases. Appeals were also filed before this Court from the judgments of the

23. Mufti was a lawyer of eminence attached to the Court to expound law and was appointed by the Chief Justice in the name of the Sultan. Law as expounded by Mufti was accepted by the Judge as authoritative. (Barni, p. 441).
24. A Brahmin lawyer, generally known as Pandit, was appointed to explain personal law of Hindus in civil cases. His status was the same as that of Mufti (Barni, p. 441).
25. He was in charge of prosecutions on original side and in appeal he answered for the prosecution (Barni, p. 441).
26. An Administrative Officer of the Court (Barni, p. 441).
27. Person selected as Qazi usually possessed a good knowledge of law . *See* M. Elphinstone, *History of India,* p. 421.

Parganah Qazis, Kotwals and Village *Panchayats*. The Court was presided over by the District *Qazi* who was appointed on the recommendation of the *Qazi-e-Subah* or directly by *Sadre Jahan*. The same four officers, namely, *Mufti, Pandit,* the *Mohtasib* and the *Dadbak,* were attached to the Court of District *Qazi*.

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

(iv) Parganah.—At each *Parganah* Headquarter two courts were established, namely, *Qazi-e-Parganah* and *Kotwal*. The Court of *Qazi-e-Parganah* had all the powers of a District *Qazi* in all civil and criminal cases except hearing appeals. Canon law cases were also filed before this court. Petty criminal cases were filed before the *Kotwal*. He was the principal Executive Officer in towns.

(v) Villages.—A *Parganah* was divided into a group of villages. For each group of villages there was a Village Assembly or *Panchayat,* a body of five leading men to look after the executive and judicial affairs. The *Sarpanch* or Chairman was appointed by the *Nazim* or the *Faujdar*. The Panchayats decided civil and criminal cases of a purely local character.[28] Though the decrees given by the *Panchayats* were based on local customs and were not strictly according to the law of the Kingdom still there was no interference in the working of the Panchayats. As a general rule, the decision of the Panchayat was binding upon the parties and no appeal was allowed from its decision.

(3) APPOINTMENT OF JUDGES AND JUDICIAL STANDARD

During the period of Sultans, Judges were impartially appointed by the Sultan, on the basis of their high standard of learning in law. From amongst the most virtuous of the learned men in his kingdom, the Sultan appointed the Chief Justice (*Qazi-ul-Quzat*). Judges were men of great ability (*Afazil-e-Razgar*) and were highly respected in society. Many Chief Justices of the Sultanate period were famous for their independence and impartiality in the administration of justice. Ibn Batuta[29] has stated that the *Qazis* were occasionally teachers of law who had the ability to give correct judgment. Whenever unpopular and corrupt persons were appointed *Qazis,* public resentment was often expressed.[30] Persons of doubtful character were removed from their judicial offices. Even a Chief Justice was liable to be dismissed or degraded to the post of a *Qazi* of lower rank where the Sultan found him incompetent and corrupt.[31] Incompetent and corrupt *Qazis* were ridiculed, condemned and dismissed from their offices.

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28. W.Briggs, *Rise of the Mahomedan Power in India,* Vol.III, p. 420.
29. Ibn Batuta, *Travels,* Elliot III, pp. 56, 71.
30. It happened during the reign of Sultan Ala-ud-din Khilji and Qutub-ud-Din Aibak. *See* Zia Uddin Barni, *Tarikh-e-Firoz Shahi,* Bib, Ind., p. 352.
31. Badaoni *Muntakhab-ut-Tawarikh,* Bib, Ind., Vol. 1, p. 234.

8. Judicial Reforms of Sher Shah

In 1540 Sher Shah laid the foundations of Sur Dynasty in India after defeating the Mughal Emperor Humayun, son of Babar. During the reign of the Sur Dynasty from 1540 to 1555, when Sher Shah and later on Islam Shah ruled over India, the Mughal Empire remained in abeyance. Sultan Sher Shah was famous not only for his heroic deeds in the battlefield but also for his administrative and judicial abilities. It was said by Sultan Sher Shah that "Stability of Government depended on Justice and that it could be his greatest care not to violate it either by oppressing the weak or permitting the strong to infringe the laws with impunity".[32] In spite of the fact that Sher Shah ruled only for five years, he introduced various remarkable reforms in the administrative and judicial system of his kingdom. His important judicial reforms, as summarised by M.B. Ahmad[33], may be stated as follows—

(*i*) Sher Shah introduced the system of having in the *Parganahs*, separate courts of first instance for civil and criminal cases. At each *Parganah* town he stationed a civil judge, called *Munsif*, a title which survives to this day, to hear civil disputes and to watch conduct of the *Amils and the Moqoddams*[34] (officers connected with revenue collections).

The *Shiqahdars* who had uptil now powers corresponding to those of *Kotwals* were given magisterial powers within the *Parganahs*. They continued to be in charge of the local police.[35]

(*ii*) Moqoddams or heads of the Village Councils were recognised and were ordered to prevent theft and robberies. In cases of robberies, they were made to pay for the loss sustained by the victim. Police regulations were now drawn up for the first time in India.

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

(*iv*) The judicial officers below the Chief Provincial *Qazi* were transferred after every two or three years. The practice continued in British India.

(*v*) The duties of Governors and their deputies regarding the preservation of law and order were emphasised.[36]

(*vi*) The Chief *Qazi* of the Province or the *Qazi-ul-Quzat* was in some cases authorised to report directly to the Emperor on the conduct of the Governor,[37] especially if the latter made any attempt to override the law.

9. The Mughal Period: Judicial System

In India the Mughal period begins with the victory of Babar in 1526 over the last Lodi Sultan of Delhi. His son, Humayun, though he lost his kingdom to Sher Shah in 1540, regained it after defeating the descendants of Sher Shah in July 1555. The Mughal empire continued from 1555 to 1750.

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32. Stewart, *History of Bengal*, p. 128. *See also* W.Briggs, *Rise of the Mahomedan Power in India*, Vol.II, p. 124.
33. M.B. Ahmad, *The Administration of Justice in Mediaeval India*, p. 129.
34. Henry Elliot and Dowson, *History of India*, Vol. IV, p. 414.
35. W.Erskine, *History of India*, Vol.II, p. 443.
36. Henry Elliot and Dowson, *History of India*, Vol. IV, p. 420.
37. Stewart, *History of Bengal*, p. 143.

(1) ADMINISTRATIVE DIVISIONS

The Mughal empire (*Sultanat-e-Mughaliah*) was administered on the basis of the same political divisions as existed during the reign of Sher Shah. For the purposes of civil administration the whole empire was divided into the Imperial Capital, Provinces (*Subahs*), Districts (*Sarkars*), *Parganahs* and Villages. Just like the Sultans of Delhi, the Mughal Emperors were also absolute monarchs. The Mughal Emperor was the Supreme authority and in him the entire executive, legislative, judicial and military power resided.

(2) THE ADMINISTRATION OF JUSTICE : CONSTITUTION OF COURTS

During the Mughal period, the Emperor was considered the "fountain of Justice". The Emperor created a separate department of Justice (*Mahukma-e-Adalat*) to regulate and see that justice was administered properly. On the basis of the administrative divisions, at the official headquarters in each Province, District, *Parganah* and Village, separate courts were established to decide civil, criminal and revenue cases.[38] At Delhi, the Imperial capital of India, highest courts of the Empire empowered with original and appellate jurisdictions were established. A systematic gradation of courts, with well defined powers of the presiding Judges, existed all over the empire.

(i) The Imperial Capital.—At Delhi, which was the capital (*Dural Sultanat*) of the Mughal Emperors in India, three important courts were established.

The Emperor's Court, presided over by the Emperor, was the highest court of the empire. The Court had jurisdiction to hear original civil and criminal cases. As a court of the first instance generally the Emperor was assisted by a *Darogha-e-Adalat*, a *Mufti and* a *Mir Adl*.[39] In criminal cases the *Mohtasib-e-Mumalik* or the Chief *Mohtasib*, like the Attorney-General of India today, also assisted the Emperor. In order to hear appeals, the Emperor presided over a Bench consisting of the Chief Justice (*Qazi-ul-Wazat*) and *Qazis* of the Chief Justice's Court. The Bench decided questions both of fact and law. Where the Emperor considered it necessary to obtain authoritative interpretation of law on a particular point, the same was referred to the Bench of the Chief Justice's Court for opinion. The public was allowed to make representations and appeals to the Emperor's court in order to obtain his impartial judgment.

The Chief Court of the Empire was the second important court at Delhi, the seat of the Capital. It was presided over by the Chief Justice (*Qazi-ul-Quzat*). The Court had the power to try original, civil and criminal cases, to hear appeals from the Provincial Courts. It was also required to supervise the working of the Provincial Courts. In administering justice, the Chief Justice was assisted by one or two *Qazis* of great eminence, who were attached to his court as Puisne judges. Four officers attached to the Court were—*Darogha-e-Adalat, Mufti, Mohtasib, Mir Adl*. The *Mufti* attached to the Chief Justice's Court was known as *Mufti-e-Azam*.

The Chief Justice was appointed by the Emperor. He was considered the next important person, after the Emperor, holding the highest office in the judiciary. Referring to the qualifications of a Chief Justice, Sir J. Sarkar has observed, "Men

38. B.Ahmad, *The Administration of Justice in Mediaeval India*, pp. 143-166.
39. *Alamgir Namah*, p. 1077.

of high scholarship and reputed sanctity of character wherever available were chosen.''[40]. Sometimes a Chief Provincial *Qazi* was promoted to the post of the Chief Justice.

The Chief Revenue Court was the third important court established at Delhi. It was the highest Court of Appeal to decide revenue cases. The Court was presided over by the *Diwan-e-Ala.*

Apart from the above-stated three important courts, there were also two lower courts at Delhi to decide local cases. The Court of *Qazi* of Delhi, who enjoyed the status of Chief *Qazi* of a Province, decided local civil and criminal cases. An appeal was allowed to the Court of Chief Justice. The Court of *Qazi-e-Askar* was specially constituted to decide cases of the military area in the capital. The Court moved from place to place with the troops.

In each court, as stated above, the four officers attached were—*Darogha-e-Adalat,* a *Mufti,* a *Mohtasib, Mir Adl.*

(ii) Provinces.—In each Province *(Subah)* there were three courts, namely, the Governor's own court and the Bench, the Chief Appellate Court, the Chief Revenue Court.

The Governor's own court (*Adalat-e-Nazim-e-Subah*) had original jurisdiction in all cases arising in the provincial capital. It was presided over by the Governor (*Nazim-e-Subah*).

The Provincial Chief Appellate Court was presided over by the *Qazi-e-Subah.* The Court had original civil and criminal jurisdiction.

Provincial Chief Revenue Court was presided over by *Diwan-e-Subah.* The Court was granted original and appellate jurisdiction in revenue cases.

(iii) Districts (Sarkars).—In each District (*Sarkar*) there were four courts, namely, the Chief, Civil and Criminal Court of the District, *Faujdari Adalat, Kotwali* and *Amalguzari Kachehri.*

The Chief Civil and Criminal Court of the District was presided over by the *Qazi-e-Sarkar.* The Court had original and appellate jurisdiction in all civil and criminal cases and in religious matters. *Qazi-e-Sarkar* was the principal judicial officer in a District. He was officially known as *''Shariyat Panah''.* Six officers attached to his Court were—*Darogha-e-Adalat, Mir Adl, Mufti, Pandit* or *Shastri, Mohtasib* and *Vakil-e-Sharayat.* Appeals from this court lay to *Qazi-e-Subah.*[41]

Faujdari Adalat dealt with criminal cases concerning riots and state security. It was presided by the *Faujdar.* Appeals lay to the Governor's Court.

Kotwali Court decided cases similar to those under modern Police Acts and had appellate jurisdiction. It was presided by *Kotwal-e-Shahar.* Appeals lay to the District *Qazi.*[42]

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

40. Sir Jadunath Sarkar, *Mughal Administration,* (1935), p. 29.
41. Henry Elliot and Dowson, *History of India,* Vol. III, pp. 172-173.
42. Alexander Dow, *History of Hindustan,* Vol. III, p. 752.

(iv) **Parganah.**—In each *Parganah* there were three courts namely, *Adalat-e-Parganah, Kotwali* and *Kachehri.*

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

Court of *Kotwali* was presided by *Kotwal-e-Parganah* to decide such cases as are found in the modern Police Act. Appeals were made to the Court of District *Qazi.*

Amin was the presiding officer in *Kachehri* which decided revenue cases. An appeal lay to the District *Amalguzar.*

(v) **Villages.**—The village was the smallest administrative unit. From ancient times the village council (*Panchayats*) were authorised to administer justice in all petty civil and criminal matters.[43] Generally, the *Panchayat* meetings were held in public places. It was presided by five *Panchs* elected by the villagers who were expected to give a patient hearing to both the parties and deliver their judgment in the *Panchayat* meeting. *Sarpanch* or Village-Headman was generally President of the *Panchayat.* No appeal was allowed from the decision of a *Panchayat.* Village *Panchayats* were mostly governed by their customary law.

(vi) **Institution of Lawyers.**—Litigants were represented before the Courts by professional legal experts. They were popularly known as *Vakils.* Thus the legal profession flourished during the Mediaeval Muslim period. Though there was no institution of lawyers like the "Bar Association" as it exists today, still the lawyers played a prominent role in the administration of justice. Two Muslim Indian Codes, namely, *Fiqh-e-Firoz Shahi* and *Fatwa-e-Alamgiri,* clearly state the duties of a *Vakil.* Ibn Batuta, who was working as a judge during the reign of Mohammad Tughlaq, mentions *Vakils* in his book.[44] Mawardi[45], referring to the legal profession, states that specialised knowledge of law was necessary both for acting as a *Qazi* and for the legal practice. Moreland[46] appears to be misinformed, where he expresses the view that the legal profession did not exist during the Muslim period in India. On the basis of other contemporary material[47] available in India it is clear that the legal profession existed at any rate in the Mughal period.

Government advocates were for the first time appointed in the reign of Shah Jahan to defend civil suits against the State. During Aurangzeb's reign, wholetime lawyers were appointed in every district, who were known as *Vakil-e-Sarkar* or *Vakil-e-Shara.* They were appointed either by the Chief *Qazi* of the Province or

43. Sir Charles Metcalfe in the *Report of the Select Committee of the House of Commons,* Vol. III, App. 84, p. 331:
"The village communities are little republics having nearly everything they want within themselves and almost independent of any foreign relations. They seem to last where nothing lasts. Dynasty after dynasty tumbles down; revolution succeeds revolution."
44. Ibn Batuta, *Travels,* p. 194.
45. Mawardi Al, *Akhamus Sultanyah* (J.R.A.S. 1910), p. 764.
46. W.H. Moreland, *India at the Death of Akbar,* p. 35.
47. For details, *see* Kalematut Tayyebat K.C.C. "Lawyers *who were employed by* Litigants". (Br. Mus. M.S. Add. 26238).

sometimes by the Chief Justice *(Qazi-ul-Quzat)*. Sometimes they were appointed to assist the poor litigants by giving them free legal advice. *Vakils* had a right of audience in the Court. It was expected that the *Vakils* should maintain a high standard of legal learning and behaviour.

(vii) Judicial Procedure.—A systematic judicial procedure was followed by the courts during the Muslim period.[48] It was mainly regulated by two Muslim Codes, namely, *Fiqh-e-Firoz Shahi* and *Fatwa-i-Alamgiri.* The status of the Court was determined by the political divisions of the kingdom.

In civil cases, the plaintiff or his duly authorised agent was required to file a plaint for his claim before a court of law having appropriate jurisdiction in the matter. The defendant, as stated in the plaint, was called upon by the court to accept or deny the claim.[49] Where the claim was denied by the defendant, the court framed the issues and the plaintiff was required to produce evidence supporting his claim. The defendant was also given an opportunity to prove his case with the assistance of his witnesses. Witnesses were cross-examined. After weighing all the evidence, the presiding authority delivered judgment in open court.

In criminal cases, a complaint was presented before the court either personally or through representative. To every criminal court was attached a public prosecutor known as *Mohtasib.*[50] He instituted prosecutions against the accused before the court. The court was empowered to call the accused at once and to begin hearing of the case. Sometimes the Court insisted on hearing the complainant's evidence before calling the accused person. Ordinarily, the judgment was given in open court. In exceptional cases, where either the public trial was against the interest of the State or the accused was dangerously influential, the judgment was not pronounced in the open court.

Evidence was classified by the *Hanafi* law into three categories: (*a*) *Tawatur i.e.*, full corroboration; (*b*) *Ehad i.e.*, testimony of a single individual ; (*c*) *Iqrar i.e.*, admission including confession. The Court always preferred *Tawatur* to other kinds of evidence. All those who believed in God were competent witnesses. The presumption was that believers in God could not be rejected as untruthful unless proved to be so. Oaths were administered to all witnesses. Women were also competent witnesses but at least two women witnesses were required to prove a fact for which the evidence of one man was sufficient. The testimony of one woman was recognised only in those cases where women alone were expected to have special knowledge. The principles of *Estoppel* and *Res judicata* were also recognised by the Muslim law.

(viii) Trial by Ordeal—The Muslim law prohibited the use of trial by ordeal to determine the guilt of a person. It was not favoured either by the Sultans or by the Mughal Rulers in India. As stated earlier,[51] the trial by ordeal was mostly used during the ancient Hindu period. In the non-Muslim States, which were under the protection of the Sultans and Mughals, however, the old system of trial by ordeal

48. *See* M.B.Ahmad, *The Administration of Justice in Mediaeval India*, pp. 176-188.
49. *Fatwa-e-Alamgiri*, Calcutta, Vol. IV, pp. 1, 84-87.
50. Badaoni, *Muntakhab-ut-Tawarikh*, Bib, Ind., Vol. 1, p. 187.
51. *See* Trial by Ordeal.

somehow continued. The Muslim Rulers neither adopted it nor interfered in the non-Muslim States to stop it.

Sultan Jalal-Ud-Din Khilji (1290-1296) made the earliest attempt during the Muslim period, to adopt the system of trial by ordeal in the case of Sidi Maula when the court declined to convict him for sedition. The *Sadre Jahan* and other Judges refused to allow Sultan Jalal-Ud-Din to test the truthfulness of Sidi Maula by Ordeal of Fire.[52] Emperor Akbar also tried to encourage the system of trial by ordeal, most probably in order to please the Rajputs.[53] The Muslim law experts strongly opposed this move to introduce the trial by ordeal and therefore Akbar gave up the idea. In his records, Hamilton,[54] who came to India during the reign of Aurangzeb, has mentioned a trial in South India where the accused person was required to put his hand in a pan of boiling oil.

It may, therefore, be concluded that though at times even the Muslim Rulers tried to encourage the trial, the system on the whole fell into disuse due to the impact of Muslim law in India.

(ix) Appointment of Judges and Judicial Standard—During the Mughal period, the Chief Justice (*Qazi-ul-Quzat*) and other judges of higher rank were appointed by the Emperor.[55] Sometimes, the Chief Justice and other judges were directly appointed from amongst the eminent lawyers. Jadunath Sarkar has pointed out, "Men of high scholarship and reputed sanctity of character wherever available were chosen."[56] A Chief Provincial *Qazi* having high judicial reputation was also promoted to the office of the Chief Justice.[57] Similarly, Provincial and District *Qazis* were also appointed from lawyers. The selection of a *Qazi* as a rule was made from amongst the lawyers practicing in the courts. Lawyers were also appointed as Chief *Mohtasib* of the Province. Corrupt judicial officers were punished and dismissed. Every possible effort was made to keep up the high standard of the judiciary.

Emperor Aurangzeb's order for the appointment of a judicial officer contained the following instructions:

"Be just, be honest, be impartial. Hold the trials in the presence of the parties and at the Court house and the seat of the Government. Do not accept presents from the people of the place where you serve, nor attend entertainments given by anybody and everybody...know poverty(*Faqr*) to be your glory(*Fakhr*)".[58]

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

52. Zia-Ud-Din Barni, *Tarikh-e-Firoz Shahi*, p. 211.
53. Vincent A. Smith, *The Oxford History of India*, p. 345.
54. Captain Hamilton, *A New Account of East Indies*, Vol. I, p. 315.
55. *Fatwa-e-Alamgiri*, (Calcutta), Vol. III, p. 387.
56. Sir Jadunath Sarkar, *Mughal Administration* (1935), p. 29.
57. Qazi Khan was promoted to the post of the Chief Justice.
58. Quotation cited by M.B. Ahmad, *The Administration of Justice in Mediaeval India*, p. 155.

Three forms of punishments, as recognised by the Muslim law, were—*"Hadd"*, *"Tazir"* and *"Qisas"*.

(*a*) *"Hadd"* provided a fixed punishment as laid down in *Shara*, the Islamic law, for crimes like theft, robbery, whoredom (*Zina*), apostasy (*Ijtidad*), defamation (*Itteham-e-Zina*) and drunkenness (*Shurb*). It was equally applicable to Muslims and non-Muslims. The State[59] was under a duty to prosecute all those persons who were guilty under *"Hadd"*. No compensation was granted under it.

(*b*) *"Tazir"* was another form of punishment which meant prohibition and it was applicable to all the crimes which were not classified under *"Hadd"*. It included crimes like counterfeiting coins, gambling, causing injury, minor theft, *etc.* Under *"Tazir"*, the courts exercised their discretion in awarding suitable punishment to the criminals. The courts were free to invent new methods of punishing the criminals *e.g.* cutting off the tongue, impalement, etc.[60]

(*c*) *"Qisas"* or blood-fine was imposed in cases relating to homicide. It was a sort of blood-money paid by the man who killed another man if the murderer was convicted but not sentenced to death for his offence. Muslim Jurists supported *Qisas* on the basis that "the right of God's creatures should prevail" and only when the aggrieved party had expressed his desire, the State should intervene. The court exercised its discretion to compound the homicide cases. *Qisas* may be compared with the *Weregild* of the contemporary English period. The State was authorised to punish the criminals for grave offences although the injured party might "waive his private claim to compensation or redress".[61]

The Muslim law considered "Treason" (*Ghadr*) as a crime against God and religion and, therefore, against the State. Persons held responsible for treason by the court were mostly punished with death. No consideration was shown for their rank, religion and caste. Only the ruler was empowered to consider a mercy petition.

Contempt of the court was considered a serious offence and was severely punished in the Muslim period.

10. Akbar's Policy of Tolerance

The Great Mughal Emperor Akbar by his foresight displayed a policy of tolerance repealing the discriminatory law regarding citizenship. He created one common citizenship and a unanimous system of justice for all. Besides he prohibited the making of war prisoners into slaves (1562 A.D.); abolished Hindu Pilgrims' tax and also *Jizya* (1564 A.D.); permitted Hindus and Christians to build temples and churches; permitted the forcible converts to Islam to revert to their original religion (1580 A.D.); prohibited slavery; repealed the death penalty clause for criticising Islam or Prophet Mohammad; prohibited the forcible practice of Sati; enjoined monogamy for Muslims unless the first wife was barren; prohibited child marriages and marriages between cousins and near relations.[62]

However his policies were allowed to lapse by his successors and the taxes were reimposed.

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59. *Mirat-e-Ahmedi*, Vol. I, pp. 282-283.
60. *See* M.B. Ahmad, *The Administration of Justice in Mediaeval India*, p. 225.
61. Dr. M.U.S. Jung, *Administration of Justice of Muslim Law*, p. 102.
62. *The History & Culture of the Indian People:* Bharatiya Vidya Bhavan, Vol. 7, pp. 539-542.

11. Citizenship : Position of

The non-Muslims had no right to full citizenship as noted by Majumdar[63] and Mishra.[64] (*i*) They were not treated as equal to Muslims in law and were called "Zimmis"; (*ii*) Their evidence was inadmissible in the courts against Muslims; (*iii*) They did not enjoy all rights and privileges which the Muslims did; and (*iv*) They had to pay an additional tax called Jizya; (*v*) Regarding other normal taxes they had to pay the taxes at double the rate than what a Muslim paid. However, when once the suzerainty of the ruler was accepted and the taxes paid they acquired right of protection of their mode of worship and enforcement of their personal laws.[65]

12. Next Phase

While the great Mughal was ruling in Delhi, there appeared on the Indian scene a phenomenon almost unparalleled in the history of the world. After a brief episode of Portuguese domination, a handful of adventurers from the distant island of England in the Atlantic, forming the English East India Company, came to India as a trading body which possessed some sovereign prerogatives for the purpose of trade and became transformed into a sovereign body, "the trade of which was auxiliary to its sovereignty". Some of those who were sent out from England to guide the destinies of India were actuated by the loftiest of motives, while others were definitely hostile to Indian interests. But disinterested as they were in the petty squabbles between individuals, they could evolve an efficient system of administration of justice in which fair play predominated and which we have inherited. But English Justice, as we shall see, was always pragmatic even in their own country and necessarily so in India. Some of the rules evolved to protect the ruler were certainly not conducive to a proper administration of justice. The British period, however, constituted a major and fundamental breakthrough from our past practices and traditions.

Additional Readings

Rama Jois : *Legal and Constitutional History*, Vol. 1, Part 1, Ch. 1 to 5 and Appendix 1 for concept of Dharma, its definition and Legal Literature and Jayapatra of a Hindu Court.

For Ancient & Mediaeval Period : Vol.1, Pts. I, II, IV, VII, VIII.

For Muslim Period: op. cit. Vol. 2, Pt. I, Ch. 1, 2, 3.

Rama Jois : *Seeds of Modern Public law in Ancient Indian Jurisprudence* (Eastern Book Company) 1990 Edn.

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63. *The History & Culture of the Indian People:* Bharatiya Vidya Bhavan, Vol. 7, pp. 538-539 and Vol. 6, pp. 445-447.
64. Misra, *The Judicial Administration of the East India Co. in Bengal*, pp. 50-51.
65. Rama Jois : *Legal & Constitutional History of India*, Vol. 2, 1984, p. 7.

2

Early Administration of Justice in Bombay, Madras & Calcutta

The Mughal Emperor granted the right of self-government to the English. It proved to be a turning point in the legal history of India... a little mistake in the form of commercial concession by Jehangir in 1612 cost his successors the Indian Empire... the same mistake was committed in 1639 by Raja of Chandragiri in the South and in 1698 by Prince Azim Ush-Shan in the East.

* * *

After 1660... the Company regained its prosperity and it changed its character from a purely trading concern into a territorial power.

* * *

In 1687, the Company declared its determination to "establish such a policy of civil and military power and create and secure such a large revenue as may be the foundation of a large, well-grounded, sure English dominion in India for all time to come."

V.B. Kulkarni: *British Dominion in India & After*, p. 37.

The Charter was a "transition of the Company from a trading association to a territorial sovereign invested with powers of civil and military government."

Courtney Ilbert: *Government of India*, 18 (1915)

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8. Administration of Justice in Calcutta
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   - (*vi*) Mayor of City of Lyons v. East India Co.
   - (*vii*) Other Cases

1. European Settlements in India

About the end of the fifteenth century some European nations came to India as trading merchants.[1] In 1498, Vasco de Gama, a Portuguese, discovered the passage to India round the Cape of Good Hope. He landed at Calicut on the Malabar Coast.[2] During the second half of the sixteenth century the Protestant nations of Western Europe got inspiration from the Reformation movement and defying the Papal allocation of the East to Portugal began to compete for trade with India. The Dutch[3] were the first in the field and English merchants followed them. The Danes came next but they were few in number.[4] Though French made earlier voyages to India, the foundations of French trade were laid by Colbert only in the middle of the seventeenth century.

The power of the Mughal Emperors was at its zenith when the trade centres were first established by the Europeans in India.[5] In the seventeenth century the purely commercial attitude of foreign traders was suited to the conditions then prevailing in India. But with the weakening of the Mughal power in the eighteenth century in India, nobles and chiefs were establishing separate kingdoms, and the English and French companies, on the basis of their increased strength, began to take sides in the wars amongst the local kingdoms. The English East India Company finally emerged victorious and developed its area of influence and finally established its empire in India.

2. The English East India Company : Development of Authority under Charters

English people came to India in 1601 as a "body of trading merchants"[6] On 31st December, 1600 Queen Elizabeth I granted a Charter to the Company which incorporated the London East India Company "to trade into and from the East Indies, in the countries and parts of Asia and Africa .... for a period of fifteen years... subject to a power of determination on two years' notice if trade was found unprofitable". Thus the Company became a juristic person with the exclusive privilege of trade with the East Indies. The same Charter further granted legislative power to the Company "to make bye-laws, ordinances, *etc.* for the good government of the Company and its servants and to punish offences against them by fine or imprisonment according to laws, statutes and customs of the realm."

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

1. For details, *see* V.B. Kulkarni, *British Dominion in India and After*, Vidya Bhavan, Bombay, (1964), pp. 1-17.
2. Vasco de Gama came to the coast of Cochin on the west coast of India on 20th May, 1498. *The Cambridge History of India*, Vol. V, Cambridge University Press (1929), p. 17. *See also* Dr. J.B. Trend, *Portugal*, Ernest Been, (1957), pp. 145-46; R.S. Whiteway, *The Rise of Portuguese Power in India*, Archibald Constable, (1899) p. 21.
3. J.A. Veraat, *Holland*, MacDonald & Co. (1945), pp. 41-45.
4. Trading Company of the Danes was established at Tranquebar on the east coast of India in 1620.
5. *See* W.H. Moreland, *From Akbar to Aurangzeb*, Macmillan, (1923).
6. The first Englishman to set foot on Indian soil was Thomas Stephens. He set sail for India from Lisbon on 4th April, 1579 and reached Goa in October 1579.

interpretation of these provisions to meet the requirements of controlling and administering territorial expansion of the Company in India, Ilbert stated it as "the germ out of which the Anglo-Indian Codes were ultimately developed".[7]

(b) Charter of 1609.—On 31st May, 1609, James I granted a fresh Charter to the Company which continued its privileges in perpetuity, subject to the proviso that they could be withdrawn after three years' notice. The Company was also authorised to continue the enjoyment of all its privileges, powers and rights which were earlier granted to it by Queen Elizabeth under the Charter of 1600.[8]

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

Under one such commission criminal trial of Gregory Lellington was held on 28th February, 1616, on board the ship Charles that was lying at Surat port. Lellington killed Henry Barton, an Englishman near Surat. He was convicted on his own confession and was sentenced to death. As reported by Kaye this is the earliest available account of a trial held on the shores of India during the Company's regime.

Entrusted with these powers, the English people came to India in the reign of Emperor Jehangir and settled at Surat in 1612. Surat was one of the most important centres of trade and commerce on the Western coast of India.[9] With a view to strengthening their power and to secure advantages, the Directors of the Company tried to contact the Mughal Emperor. In 1618, Sir Thomas Roe,[10] Ambassador of James I, succeeded in gaining the Emperor's favour and the English Company entered into a treaty with the Mughal Emperor. The Mughal Emperor granted the right of self-government to the English by issuing a *Firman* (Order) and *this proved a turning point in the legal history of India* as the English Company secured various privileges from the Mughal Emperor. It provided:

(*i*) That the disputes amongst the Company's servants will be regulated by their own tribunals.

(*ii*) That the English people will enjoy their own religion and laws in the administration of the Company.

(*iii*) That the local native authorities will settle such disputed cases in which Englishmen and Hindus or Muslims were the parties.

(*iv*) That the Mughal Governor or *Kazi* of the relevant place will protect the English people from all sorts of oppression and injury.

At this time, therefore, the Englishmen at the Surat factory were living under two different systems of law. In some cases they were under the provisions of Indian

7. Ilbert, *Government of India*, p. 10.
8. *See* J.W. Kaye, *History of Administration of the East India Company*, (1853), p. 66.
9. William Foster, *Introduction to English Factories in India*, (1906), pp. V & VII.
10. William Foster, *The Embassy of Sir Thomas Roe to the Court of the Great Mughal*, (1615-1619), Vol II, pp. 506-514. See also *English Factories in India*, (1618-21), Vol. I, p. 23.

law while in certain other cases they were governed by English law. The President and members of this Council at the Surat factory were working as executive officers of the Company. They were also having judicial authority over English people as the Indian Emperor allowed them to be governed by their own laws. As the presiding judicial authorities were laymen, they mostly applied their ideas of justice instead of the settled rules of the English law. The English people exploited the native judiciary to their own advantage due to the prevailing corrupt practices in local courts.

(c) Charter of 1635.—In 1635, Charles I permitted Sir William Courten to establish a new trading body for the purpose of trading with the East Indies under the name of *Courten's Association*. The old Company faced competition at the hands of the new Company and many other difficulties were created in England which continued up to 1657.

(d) Charter of 1657.—In 1657, Sir Oliver Cromwell granted a new Charter which amalgamated the various joint-stocks into one joint-stock. The Charter also ended the old rivalry between the Courten's Association and the old Company by uniting them into one. In fact the Charter of 1657 changed the very character of the Company. According to Hunter, the new joint Company was now "transformed from a feeble relic of the mediaeval trade guild into a vigorous forerunner of the modern joint-stock Company".

(e) Charter of 1661: Its provisions.—In the reign of Charles II, the Company entered into a period of unprecedented prosperity. After 1660, the year which proved another turning point in the history of the Company, the Company regained its prosperity and it changed its character from a purely trading-concern into a territorial power. On 3rd April, 1661, Charles II granted a new Charter to the Company. Besides extending the privileges of the Company on new territorial lines, the Charter reorganised its structure.

The Charter of 1661 reorganised the Company on a joint-stock principle and each member who had a share capital of £ 500 was given the right to one vote in the General Court of the Company. In order to meet the existing circumstances more effectively, the Company's power and command over its fortresses was strengthened. The Company was authorised to appoint Governors and other officers for proper administration. The Company's power to govern its employees and to punish their disobedience and misdemeanour was enhanced. The Charter further authorised the Company to empower the Governor and Council of each one of its factories or trading centres at Madras, Bombay and Calcutta to administer, with respect to the persons employed under them, both civil and criminal justice according to the English law. Where there was no Governor, the Chief Rector of a trading centre and his counsel was authorised to send a man for trial to a place where there was a Governor.

(f) Legislative Power of the Company.—By the first Charter of 1600 the Company's power to legislate was subjected to two conditions, that the provisions of its legislation should not contravene the English law whether statutory or customary and that it should be reasonable. This power though meagre it was, writes Jois,[11] constituted the starting point of a new legal system. As the activities of the

11. *Legal and Constitutional History of India*, 1984, Vol. II. p. 26.

Company increased, the Charter of 1661 was issued to the Company and for the first time the Laws of England were made applicable in the territory of India. These powers gradually started developing into a government for the locality.

If one compares the scope of these two charters the Charter of 1661 handed over a much extensive power to the Governor and Council of a factory. Whereas the power under the Charter of 1600 was with respect to persons i.e. applicable only to the Company's servants and Capital punishment under the Charter could not be awarded, the powers under the 1661 Charter was extended to all those who lived in the Company's settlements and all punishments including death penalty could be awarded. The former Charter was designed to maintain discipline among the servants of the Company while the latter's purpose was to develop into a government for the locality and give a judicial system to the Company's territorial possessions. The second important feature of the 1661 Charter was that it drew no distinction between the executive and the judiciary and justice was required to be administered according to English law. Both the Charters tenaciously guarded and protected the rights of Englishmen and put the Indians to a great disadvantage.

3. Subsequent Charters: Transition from a Trading Body to a Territorial power

(a) Charter of 1668.—The Charter of 1668 was a step which further assisted the transition of the trading body into a territorial power. Charles II transferred in 1669 the island of Bombay, which he got as a dowry from Portugal, to the East India Company for an annual rent of £ 10. The Charter of 1668 authorised the Company to make laws, orders, ordinances and constitutions for the good government of the island of Bombay. It was specifically provided that such laws and regulations should not be repugnant or contrary to, but be as near as possible to the laws of England. The same Charter also empowered the Company to establish Courts of judicatures similar to those established in England for the proper administration of justice.

(b) Charter of 1683.—The Charter of 1683, granted by Charles II, was the next step.[12] It authorised the Company to raise military forces. The Charter provided that a court of judicature should be established at such places as the Company might consider suitable, consisting of one person learned in civil laws and two merchants—all to be appointed by the Company—and decide according to equity, good conscience, laws and customs of merchants by such dates as the Crown from time to time directs. Thus, under this Charter the East India Company was authorised to establish Admiralty Courts at places of its own choice.

(c) Charter of 1686.—James II, by the Charter of 1686 further renewed and added to the various powers and privileges earlier granted to the East India Company. The Charter authorised the Company to appoint admirals and other sea-officers in any of their ships, with power for these naval officers to raise naval forces and exercise martial law over them in times of war, to coin money in their Forts and to establish Admiralty Courts. In 1687 the Company was authorised to establish a municipality and a Mayor's Court at Madras. Under the guidance of Sir Jasiah Child, Governor of the Company and Chairman of the Court of Directors, the Company

12. *See* Keith, *Constitutional History of First British Empire*, pp. 26-32.

considered it wise to declare in 1687 in one of its despatches, its determination to "establish such a polity of civil and military power and create and secure such a large revenue as may be the foundation of a large, well-grounded, sure English dominion in India for all time to come".[13] The constitutional government of the Company was thus further extended to the Company's territories in India.

(d) New Company of 1693: General Society.—The continued progress of the old Company created jealousy in England. When the Whigs came to power in England, a new Company was established in 1693 to break the monopoly of the old Company. This new Company received statutory recognition in 1698 under the name "General Society". Later it led to serious conflicts and competition between the two companies. Certain steps were taken to remove these conflicts. Lord Godolphin gave his famous award on 29th September, 1708 equalising the capital of the two companies and settling other related difficulties between them. Godolphin united both the companies in the name of "The United Company of Merchants Trading to the East Indies".

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

4. Organisational set-up of the English Company's Factories or Settlements in India

The English Company was growing in power and strength gradually during all these years. After the death of Emperor Aurangzeb in 1707, when the Mughal empire began to disintegrate, the English Company got an opportunity to lay its foundations very strong in England as well as in India. In India it was in possession of three factories and settlements at Bombay, Madras and Calcutta. Gradually, the Company exercised wider authority at Bombay, Madras and Calcutta, under the changing condtions.

English factories and settlements were governed by a President or Governor and Council at the three places. Members of the Council were generally taken from senior merchants of the Company. The Governor who was executive head with his Council was also looking after the administration of justice in his settlement. The Company derived the power and authority which it exercised in its settlements from two different sources—the Crown and the Parliament in England on the one hand and the Mughal Emperor and other native rulers in India on the other. At the three settlements of Bombay, Madras and Calcutta the Company had to deal with different local political powers.

At Bombay, the Company exercised its powers as the representative of the English Crown. The position at Madras was different. Madras was granted to the Company by the local Raja in 1639. The Company ruled over both Englishmen and Indians but its authority over the former was derived from the Royal Charters while

13. Quoted by V.B. Kulkarni in his book, *British Dominion in India and After*, p. 37.

its power over the latter was derived from the grant of the local Raja or Nawab. At Calcutta, the Company purchased the Zamindari of the three villages which later came to be known as Calcutta. There the Company exercised its authority under the Mughal Emperor's grant of Zamindari. The policy of the Company, therefore, varied according to the principle by which control was to be exercised in all these three settlements.

Thus by the end of the seventeenth century, the East India Company was firmly established in India at Surat, Madras, Bombay and Calcutta, though it still declared its mission purely as a trading Company. These activities of the Company in fact paved the way for the adoption of a new policy by the British Parliament in the beginning of the eighteenth century regarding its aims and relations with India. The gradual passing of various Charters for regulating the Company's acquisition of territory and administration of justice in India, from time to time, may be said to be the gradual but inevitable steps on the road that led up eventually to the settling up of the British Empire in India.

5. The Factory or Settlement at Surat

A factory consisted of warehouses for storage of goods and residential buildings for its employees. Out of this humble innocent looking beginning there grew an Empire subjugating practically the whole of India. *A little mistake in the form of commercial concession by Jehangir in 1612 cost his successors the Indian Empire.* As we shall see later on the same mistake was committed in 1639 by Raja of Chandragiri in the South and in 1698 by Prince Azim Ushan in the East.

Surat was a famous international port in those days and Muslims in thousands sailed every year from Surat to Arabia for Haj (*pilgrimage*) purposes. The place from where the ships sailed was called Makkai Darwajah (gate used for going to Macca for Haj). The factory was in a hired house. The *firman* of the Moghal Emperor granted these traders a veritable *Empire within an Empire* with an instruction that the Kazis should do speedy justice to Englishmen, protect them from all injuries or oppressions whatsoever and "aid and entreat them as friends with courtesy and honour." With this favour conferred on them the British routed their competitors, the Portuguese in the waters of Surat. In those days in India the law was personal and religious in character and the English did not like to be governed by that law and the local courts. It is rightly observed[14] therefore that:

> "There was no concept of territorial law. There was ~~no~~ uniform or common lex loci to regulate inheritance, succession and ~~other~~ subjects. Practically in all civil cases, justice was administered according to the personal laws of the Hindus or the Muslims. The criminal law was, however, entirely Muslim. The result of all this was that the Englishmen tried to secure from the Moghul Emperor the privilege of being governed in their factory by their own laws. The Moghul Emperor was hardly interested in interfering with the internal affairs of these people and bringing them under the local law in matters arising among them inter se. The Emperor, therefore, obliged the British people by acceding to their request for being governed by their own internal affairs through their own officers. Accordingly, the Moghul firman noted above, conceded the right of

14. Jain, *Indian Legal History*, 1972, pp. 11, 12.

self government to them. The affairs and relations among them inter se were to be regulated according to their own law and by their own authorities within the factory and to this extent, they were to be exempt from the authority of the local courts functioning at Surat.... Wherever the Englishmen settled in India, they sought to administer justice to themselves according to the English law and this proved to be a very important single factor which exerted a profound effect on the growth and development of the Indian legal system."

..."Justice was administered in a very summary manner and none seemed to care for even the elementary processes of law. Though the English law was required to be administered, yet, in practice hardly any law was administered."

In the words of Kaye "At first, all that we had to do was to govern ourselves, and this we did in a very loose manner rather according to the laws of power and impulses of passion, than to principles of justice and reason."[15]

As to why this was so, two reasons look plausible; one, those who administered justice were merely traders having no knowledge of law and, two, they did not belong to any high social strata. But the most valid and important reason seems to be that they did not have any moral values and were most pragmatic in their dealings.

The Englishmen, consequently often took law into their own hands, by-passed local courts and extracted "justice" themselves from the Indians without resorting to local courts. Malabari[16] quoting Anderson mentions the following episode : On one occasion, a party of dancing girls refused to appear before the Governor of Surat, as they had been ill-paid on a former occasion. The Governor administered to them justice. They were dragged into his presence and beheaded then and there.

It should be noted that the Surat Factory had no contribution whatsoever in the development of the administration of justice. Its importance was reduced because of the transfer of the establishment from Surat to Bombay in 1687, so much so that the Surat establishment was subordinated to Bombay.

6. Madras Settlement and Administration of Justice from 1639 to 1726

In 1639 on 22nd July, an Englishman, Francis Day, acquired a piece of land from a Hindu Raja of Chandragiri, for the East India Company. It was known as Madraspatnam. The consequence of this grant of land was that Francis Day built the Fort St. George in 1640 for the Company's factory and also for the residence of English people employed in the service of the Company. This Fort was later on known as "White Town", while the village nearby inhabited by native Indians was known as "Black Town". Thus the whole city of Madras was founded by Francis Day. The Raja empowered the Company to mint money and to govern the whole city of Madraspatnam. Due to the initiative of English traders, trade and commerce gradually developed. Certain villages in the neighbourhood also gained importance and progressed. The Hindu Raja further granted certain other privileges to the English Company.

A—FIRST PHASE: 1639-1678

(i) *The Charters and Courts.*—The Company's factory at Fort St. George was under the administration of an Englishman, who was called Agent. The agent and

15. Kaye, *Administration of East India Co.*, pp. 64, 65, 67.
16. Malbari, *Bombay in the Making* (1910), 60-61.

the Council were authorised to decide both civil and criminal cases of English people residing at Fort St. George.

Cases : The Agent and Council tried two English people, Thomas Paine and Thomas Morris, found them guilty of sedition and ordered them to receive severe lashes by way of punishment. A broad distinction appears to have been made between cases in which one or both parties were Indians and those in which both parties were Englishmen. Henry Davidson Love, in his great historical work, known as the *Vestiges of Old Madras*[17], has given a detailed account of the administration of justice at the beginning of the Company's administration at Madras.[18] Few interesting cases referred to by Love may be stated here. It is necessary to point out that the authority to punish offenders conferred by the Charter of Queen Elizabeth and later confirmed by King James I, was so vague that it was not clear whether the Agent and Council could exercise judicial authority over the native Indians. In 1641, a native Indian woman was murdered by another native man. A trial of some sort was held and the accused, who was an Indian, was found guilty. The English authorities immediately reported the matter to the local Naik, who ruled that justice should be done according to English law. The offender was found guilty and was duly hanged.[19] In 1642, a British soldier was murdered by Antonio Mirando, a Portuguese. The Agent and Council were hesitating to punish the offender on the ground that the foreigner was a European and subject of a foreign power. The local Naik ordered that they must not desist from their duty and accordingly the Portuguese offender was shot dead.[20] In 1644, a Sergeant Bradford caused the death of an Indian. The Agent and Council referred the matter to some principal Indian residents of Madras. The verdict of the jury was that the Indian died because of accident and Sergeant Bradford was acquitted.[21]

Though the Raja granted rights to administer justice to the English people, they thought it better to allow old traditional courts to continue to govern natives. According to the old native system, a Choultry Court was administering justice in the village area of Madraspatnam. This Court was presided over by the village headman known as "Adigar" or a Governor of the Town as he was called.[22] An Indian native Kannappa, a Brahmin by caste, was appointed first Adigar and Magistrate of the Town in 1644 to decide petty civil and criminal cases. Due to some charges of bribery and corruption against Kannappa, he was arrested and placed behind the bars.[23] His downfall encouraged his enemies and a petition was handed over to the higher authorities against him stating certain serious charges.[24] The agent and the Council made enquiry into these charges and held Kannappa guilty,[25] and dismissed him from the office dishonourably. One important consequence of this

17. Henry Davidson Love, *Vestiges of Old Madras*, published in four Volumes.
18. For detailed study, *see* V.C. Gopalratnam, *A Century Completed: A History of the Madras High Court. See also* V.N. Srinivasa Rao, *A Peep into the Past History of Madras Law Courts*, May, 1959, *Lawyer* 156.
19. Love, *Vestiges of Old Madras*, Vol. I, p. 272.
20. *Ibid.*, p. 273.
21. *Ibid.*, p. 273.
22. The term is derived from the term "Adhikari" i.e. an officer.
23. *Love, Vestiges of Old Madras*, Vol. I, p. 128.
24. India Office Records, *Original Correspondence*, Series No. 2542.
25. Love, *Vestiges of Old Madras*, Vol. I.

incident was that European persons were appointed judges to preside over the Choultry Court from 1648 onwards. Captain Martin and John Leigh were appointed to sit as magistrates.[26] Due to non-availability of the old records nothing more can be stated about the early period. Thus, during the period from 1639 to 1661, two separate bodies were administering justice at Madras. The Agent and Council were acting as supreme judicial authority for English people residing in the Fort St. George, known as White Town, and the native people, residing in so-called Black Town locality, were under the jurisdiction of the Choultry Court. It may be pointed out that in serious cases reference was made to the Raja, who always laid emphasis on the fact that the accused must be punished according to the provisions of English law. No fixed procedure was laid down to decide cases and each case was decided in its own way by the Court.

Charter of 1661 : Charles II granted a very important Charter in 1661. It played an important historical role by considerably improving the existing judicial system of the Company's settlement at Madras. The Charter empowered the Company to appoint a Governor and Council in each of its settlements in India. The Governor and Council were authorised to judge all persons belonging to the Company or living under them in all causes, civil and criminal, according to the laws of England, and to execute judgment in the respective settlements. In other words, even the Indian inhabitants who were residing in the Company's settlements were also included in the Jurisdiction of the Governor and Council. Thus the Charter expressly provided for the application of English law and empowered the Governor and Council to exercise control over both the judiciary and the executive. It was later on realised as a defective provision because the Governor and Council were not legal experts. Under the Charter of 1661, the Company appointed Foxcroft as the first Governor of Madras. The Company's order stated, "We have thought fit to constitute you Governor of our town and fort... as well as agent, and to appoint you a Council under our Seal."[27] Foxcroft came into conflict with Sir Edward Winter and finally emerged out victorious against his rivals.[28] In 1665 Foxcroft wrote a strong letter to the Company complaining against two magistrates appointed by Sir Edward Winter, his rival. Foxcroft utilised this opportunity and appointed William Dawes as magistrate. In order to gain favour of the natives as well as English people, Foxcroft invited certain chiefs of the inhabitants to a ceremony and in their presence advised William Dawes, the magistrate "to be careful without partiality to administer equal justice to all men without oppression or arbitrary will". Further, he declared that "if any person should have just occasion of grievance, I would myself hear the case and give such relief as should be right."[29]

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26. Love, *Vestiges of Old Madras*, Vol. I. p. 273.
27. India Office Records, *Letter Book*, Vol. IV.
28. Before the appointment letter reached Foxcroft, one Sir Edward Winter, a Royalist, seized power and reverted to the judicial system of 1644 and appointed Timmanna and Veeranna as the Magistrates for Madras. These were two important inhabitiants of the town of Madras. Foxcroft was a Cromwellian who emerged victorious against a Royalist, Sir Edward Winter. *See* Love, *Vestiges of Old Madras*, Vol. I., p. 231.
29. Assuring the Company about judicial administration, Foxcroft wrote to the Company, "These things being new and strange to these enthralled people, did marvellously please them". *See* India Office Records, *Original Correspondence*, Series No. 3098.

(ii) *The Trial of Mrs. Dawes.*—In 1665, the trial of Mrs. Ascentia Dawes gained historical importance in the judicial history of Madras. It was the first trial by jury in Madras during the Governorship of Foxcroft. In this case, one Mrs. Ascentia Dawes murdered an Indian slave girl named Chequa *alias* Francisca. She was charged with the commission of a capital crime. The indictment was drawn out in accordance with a form prescribed by the Company and a Grand Jury was summoned to return to indictment *billa vera.* The Jury found her guilty of the offence of murder of the slave girl, but not in the manner and form as stated by the prosecution. The members of the Jury asked the Court for further directions. In its answer the Court stated that the members of the Jury were bound to bring in a verdict of guilty or not guilty without any reservation or limitation. The most surprising part of the whole trial was that the foreman of the Jury, Mr. Reade, gave the verdict not guilty, contrary to all expectations. Due to this reason, the court acquitted Mrs. Ascentia Dawes. It is not surprising to note that this typical situation arose because the Court had no person well qualified in law to guide its working. The letter from the establishment at Fort St. George to the Company expresses its grief, "We found ourselves at a loss in several things for want of instructions, having no man understanding the laws and formalities of them to instruct us as... whether anything more had to be said to the Jury when they brought in such an unexpected verdict. We proceeded in those and other particulars according to the best of our judgments... but if any like case shall occur we shall need the direction and assistance of a person better skilled in the law and formalities of it than any of your servants here are."[30]

As a consequence of this trial, the ignorance of the Court was ludicrously exposed. Necessity of suitable legal assistance to assist the Court was greatly felt. The President and Council at Madras realised great difficulty in administering justice. As a result of this trial, the Agency at Madras was raised to the status of Presidency of Madras. The Agent became Governor of Madras. Though the Charter of 1661 stipulated administration of justice according to English law, steps were not taken to appoint any legal expert to assist the Court in the administration of justice. Surveying the period from 1639 to 1665, it may be stated that the machinery to administer justice was at a very rudimentary stage. The Charters of Charles II issued in 1669 and 1674 made it further plain that the King of England actually favoured the establishment of Courts of Judicature to be administered by the East India Company.

In this first phase due to elementary judicial methods regular and systematic administration of justice was absent. Two bodies were administering justice: the President and his Council for the White Town and the Choultry Court for the Black Town; the former, as Dr. Jain writes, "inefficient as it was a very hesitating sort of court not sure of its power, while the latter could decide only petty cases".[31]

B—SECOND PHASE: 1678-1683

(i) *Reorganisation of Judicial system.*—With the appointment of Streynsham Master as Governor in 1678, began the next phase in the early judicial history of Madras. He was Governor of Madras from 1677 to 1681. The whole judicial system was reorganized under his guidance. The Court of Governor and Council was

30. India Office Records, *Original Correspondence*, Series No. 3171.
31. Jain: *Indian Legal History*, 1972, p. 16.

designated as the High Court of Judicature. Proper arrangements were made for regular meetings of the Court of Governor and Council. It was clearly stated that the Court will meet twice a week and will be authorised to decide all civil and criminal cases with the help of a jury of 12 men. The Court of Judicature sat for the first time on April 10, 1678 to try and decide a case between John Tivil (plaintiff) and William Jearsey (defendant).[32] Another important step of the Governor was to reorganise the old Choultry Court. According to his scheme the Indian officers of the Court were replaced by the English Officers of the Company's service. The number of judges was increased to three out of which not less than two were required to preside over the trial of cases and registration of bills of sale of land and other property.[33] Justices were directed to sit in the Court for two days in each week, i.e. every Tuesday and Friday. The Judges of the Choultry Court were required to take care that the copyist clerk of the Choultry was duly registering all sentences in Portuguese as before and that proper account was maintained of all alienation or sale of slaves, houses, gardens *etc.* in a separate register.[34] The Court was empowered to try civil cases up to 50 Pagodas,[35] and petty criminal cases. The High Court of Judicature consisting of the Governor and Council were authorised to hear appeals from the Choultry Court. Thus a judicial system based on a hierarchy of Courts with well-defined jurisdiction, came into existence in Madras.

(ii) English as Court language.—The Governor of Madras, Streynsham Master, made a very important declaration in 1680 by which the English language was recognised as the only official language in Madras. Till 1680 three languages were used in the Court, namely Portuguese, Tamil and Malyalam. On December 9, 1680 an official order from Fort St. George at Madras stated: "Whereas it has been hitherto customary at this place to make sale and alienations of houses in writing in the Portuguese, Gentoo and Malabar languages, from which some inconveniences have arisen, it is, therefore, ordered that... all sales and alienations of house and grounds shall be written in English, and the Choultry Justices shall not license nor register... the sale or alienation of any ground unless the seller or conveyor thereof can prove his title to the same under the Hon'ble Company's seal."[36] Thus the English language was firmly planted initially as Court language in Madras and played an important role in moulding the local population of Madras in favour of political leadership controlled by English people employed by the Company.

(iii) Trial of Gilbert and De Lima[37].—William Gilbert was an Englishman. He was alleged to have committed murder of one John Hartley. Manoell Brandon De Lima a Portuguese inhabitant of Madras was alleged to have committed the murder of a black Christian. The Governor and Council sought instructions from the Company in connection with their trial. As a result the trial was delayed and the accused had to remain in jail as undertrial for a long period.

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32. V.C. Gopalratnam, *A Century Completed: A History of the Madras High Court*, p. 82.
33. Love, *Vestiges of Old Madras*, Vol. I, p. 404.
34. Fort St. George Records, *Public Consultations*, Vol. II.
35. A Pagoda was a gold coin equivalent to three Rupees. Fifty Pagodas were equal to Rupees one hundred and fifty.
36. India Office Records, *Factory Records: Fort St. George*, Vol. II, p. 1680.
37. Rama Jois: *Legal and Constitutional History of India*, (1984), Vol. II, pp. 105-106; Love, *Vestiges of Old Madras*, Vol. I, pp. 406-07.

Gilbert presented a petition to the Council indicating that he acted in self-defence and he was in prison for 31 months awaiting trial. In that petition after narrating as to how the incident took place, he said:

> "... whereupon your petitioner was committed close prisoner, and hath continued so for 31 months contrary to the known practice of the laws of England, where no prisoner, for any fact (unless in case of Treason), is detained more than six months before he receives a legal trial."

The Company by its direction dated 5th December 1677 directed the holding of trial against both the accused. The plea of Gilbert that he killed Hartley in self-defence was accepted. De Lima was found guilty of the charge, but on appeal he was sent home.

During the second phase also the working of the Court was irregular and inefficient. As observed by Love, prisoners were rotting in prison without trial and much time was lost in consultations and demand from the Company for more power. However a serious study of 1661 Charter would show that it was not the lack of power but hesitation and apathy to use it that was responsible for the sorry state of affairs prevailing at that time.

C—THIRD PHASE: 1683-1726

Gradually the Company realised that its monopoly of trade was being infringed by other foreign and independent traders who were not authorised to trade with India.[38]

(*i*) *Admiralty Court.*—In order to curb the unauthorised activities of these interlopers and to safeguard the trading interests, the Company obtained a Letters Patent from King Charles II in 1683. The Charter of 1683 marks the beginning of the third phase. It empowered the Company to establish Courts of Admiralty in India. Its main purpose was to try all traders committing 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 authorised to deal with all cases of forfeiture of ships, piracy, trespass, injuries and wrongs. It was specifically stated that in its difficult task of administering justice, the Court will be guided by the laws and customs of merchants as well as the rules of equity and good conscience.

The provisions of the Charter of 1683 were repeated by James II in a Charter issued on April 12, 1686. On 10th July, 1686 the Court of Admiralty was established at Madras. John Grey was appointed Judge of the Court of Admiralty and to assist him two other English people—John Lyttleton and Nethanial Higginson, were also appointed as his assistants. Seven months later John Hill was appointed Attorney-General of the Admiralty Court.[39] On 22nd July, 1687 Sir John Biggs, who was Recorder of Plymouth and a learned lawyer in civil law, was appointed "Judge-Advocate", i.e., the Chief Judge of the Court of Admiralty at Madras. His first duty was to preside at the Quarter Sessions. He tried four criminals and convicted them for robbery. All of them were sentenced to death.[40] The decision created terror

38. *Cambridge History of India*, Vol. V, p. 102.
39. Love, *Vestiges of Old Madras*, Vol. I, p. 492. *See also* V.C. Gopalratnam, *A Century Completed: A History of the Madras High Court*, p. 83.
40. The relevant Fort St. George Consultation giving details proceeds to state, "But the Court considering that justice inclined to mercy and that these were the first crimes they were charged with and probably

amongst the inhabitants and converted the criminals into assets of the company by transforming them into slaves of the Company. It also assisted in tackling the difficult task of restoring law and order. Sir John Biggs with his professional background and legal expertise contributed to the administration of justice. During his tenure the Court became famous as "General Court" of the town of Madras. Unfortunately, the sudden death of Sir John Biggs in 1689 checked the future progress of the Admiralty Court.

A year before the death of Sir John Biggs, the Mayor's Court had come into existence. It was realised in 1690 that the powers of the Mayor's Court were limited and therefore the Government considered it suitable to revive the old Court of Judicature established by a previous Governor of Madras, Streynsham Master. Earlier, the Court of Judicature was superseded by the Judge-Advocate and thus the Court suffered a temporary eclipse.[41] The Governor, Judge-Advocate, himself became one of the five Judges of the new Court.[42] It is a matter of gratification and interest that the list of Judges of this Court included the name of an Indian, Allingall Pillai. Daniel Du Bois was appointed Attorney General. *Allingall Pillai was the earliest Indian judicial officer appointed to the Bench at Madras.*

In 1692, John Dolben, an Englishman well-versed in law, was appointed Judge-Advocate in the vacancy caused by the death of Sir John Biggs. He was independent in his decisions and refused to decide cases under any pressure or be influenced by favouritism. He even gave judgment against his employers, the Company, when they sued the ex-Governor Elihu Yale. The Company officials were not happy at this event and waited for an opportunity to remove him. Shortly afterwards Dolben was made the victim of a bribe-giver and the order of dismissal followed. Though in 1694 the Company again offered him appointment, he declined it.[43] In place of Dolben, William Frazer was appointed Judge-Advocate. In 1696 the members of the Council were directed to serve in succession as the Judge-Advocate. Accordingly, John Styleman, a senior member of the Council, replaced William Frazer in 1696. The Court of Admiralty was functioning regularly up to 1704. After 1704 it appears that the Company paid more attention to the Mayor's Court and the Court of Admiralty ceased to have its regular sittings which ultimately resulted in its gradual disappearance from the judicial scene. Its jurisdiction, including hearing of appeals from the Mayor's Court was transferred to the Governor and Council. It may be concluded that the Governor and Council gradually replaced the Admiralty Court at Madras.

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instigated thereto by youth, the temptation of a notorious rogue their ring leader... upon which consideration it is agreed that the principal and bold offender, Mannangatti Thambi do suffer death on Thursday... to deter others from the like crimes; and that the other criminals Pandaram, Veeraraghava and Thannappa, be burnt on the shoulder and banished... to Sumatra where they were to remain slaves to the ... Company during life, and never to return hither upon pain of death." *See* Fort St. George Records, *Public Consultations*, Vol. XIII.

41. V.N. Srinivasa Rao, *"Peeping into the Past History of Madras Law Courts"*, May 1959, *Lawyer*, at p. 160.

42. Apart from the Judge-Advocate four other members of the Bench included two merchants, an Armenian and a Hindu.

43. After his dismissal, Dolben showed his interest in trade and became a free merchant of the town. He became prosperous and earned goodwill. He was again offered an appointment in 1694 but he refused to accept it on the ground of his being engaged on a voyage to China. *See* Dalton, *The Life of Thomas Pitt*, p. 142.

The Admiralty Court exercised a wide jurisdiction in all cases: Civil, Criminal, maritime and mercantile. It has to be noted that it was in 1687 that a professional lawyer was appointed to administer justice and it was again in 1687 that the executive gave up judicial functions in favour of Admiralty Court. That the Court used jury in Criminal cases was evident from the case of Elihu Yale, ex-Governor of Madras against whom the Company filed a suit to recover Rs 50,000.[44]

(ii) Establishment of Corporation of Madras & The Mayor's Court.—The Company issued a Charter in December 1687 which authorised it to create a Corporation of Madras and establish a Mayor's Court. The Mayor's Court was a part of the Corporation of Madras. It was empowered to carry out judicial functions. The Company preferred to establish the Court under its own authority, as it was not willing to invite English officers who were working in the judiciary of England under the Crown. These officers, because they were appointed under a Royal Commission, it made them arrogant and haughty as the wind of extraordinary honour entered their minds. The Company officials were afraid of interference by the British Parliament in the Company's matters and, therefore, were not inclined to invite superior officials to its settlements in India. In 1688 the Company created a Corporation of Madras consisting of a Mayor, twelve Aldermen and sixty or more Burgesses. In the first instance, the Company's Charter nominated the persons who would occupy these positions in the Corporation. It provided that an Englishman would be elected every year as Mayor by the Aldermen. Aldermen were appointed for their life or during their residence in Madras. Out of twelve Aldermen,three were required to be Englishmen compulsorily. The quorum fixed for sitting of the Court was a Mayor and two Aldermen. The Mayor and Aldermen were to elect Burgesses from amongst the people who were in the Company's service. The Company's Charter also created a Mayor's Court consisting of a Mayor and two Aldermen, which formed its quorum. It was a Court of Record for the town of Madras. The Mayor's Court exercised its jurisdiction in civil cases where the value of the cases exceeded 3 Pagodas, and in criminal cases with the assistance of juries. An appeal was allowed to go to the Court of Admiralty from the decisions of the Mayor's Court in all civil cases exceeding three Pagodas, and in criminal cases where the accused was given death sentence. The Charter also provided for the appointment of an expert in law as Recorder, to assist the Mayor's Court in deciding cases. Sir John Biggs, the Chief Judge of the Court of Admiralty was also appointed first Recorder of the Mayor's Court.

The procedure of the Court was not any definite procedure of law. As noted by Love[45] its proceedings were conducted in a summary way according to justice, equity and good conscience and the laws framed by the Company. Its decisions were on ad hoc basis and lacked uniformity. It imposed death sentence in several cases against the natives.

(iii) Drawbacks of the Court.—The Court had no reputation for impartiality and incorruptibility. Love[46], quoting Alexander Hamilton remarks that ".....the City had

44. Fawcett, *First Century of British Justice in India,* p. 212; Jain, *Indian Legal History,* 1984, p. 20.
45. Love, *Vestiges of Old Madras,* Vol. II, pp. 174-175; R. Jois: *Legal and Constitutional History of India,* 1984, Vol. II, p. 107.
46. Love, *Vestiges of Old Madras,* Vol. II, p. 87.

Laws and Ordinances for its own preservation, and a Court kept in Form, the Mayor and Aldermen in their gowns, with Maces on the table, a clerk to keep a register of transactions and cases, and Attornies and Solicitors to plead in form before the Mayor and Aldermen; but after all it is but a farce for by experience I found that a few *Pagodas* rightly placed could turn the scales of Justice to which side the Governor pleased, without respect to Equity or Reputation."[47]

It should be noted that the court was subservient to the Executive as the power of removal of the Mayor and Aldermen from their office was vested in the Governor and Council.[48]

(iv) *The Choultry Court.*—As stated above, the creation of the Mayor's Court at Madras left only petty cases to be decided by the Choultry Court. The Choultry Court, therefore, decided only petty criminal cases and civil cases amounting to two Pagodas. Two Aldermen constituted the quorum of the Choultry Court, who were to sit for two days in every week, to decide petty civil and criminal cases. The Choultry Court continued its work in the Madras Presidency till 1726.

Before passing to the eighteenth century it will be worthwhile to state briefly the types of punishment given to the criminals in the seventeenth century at Madras. Love has given a detailed and interesting account of the Madras Courts. He refers to an execution of a criminal whose body was hung in chains on a gibbet near the high road leading to Poonamalli; a standing in the Pillory by a merchant who was driving the trade of stealing children; whipping of peons found asleep at their posts of duty and the branding of the letter "P" on the foreheads of convicted pirates.[49] In fact there was no clarity as to what the law was and what were the jurisdictions of the various Courts. It may very well be stated that there was only one type of "crime which could be tried at Madras without legal uncertainty" and that was "piracy".[50]

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

(v) *Standard of Justice.*—Describing the state of justice in those days it has been said[51] that the quality of administration of justice was crude. No principle of substantive or procedural law governed the judicial proceedings. Judgment-debtors and criminals were sent to prison for indefinite periods. Englishmen guilty of serious offences were being sent to England. The Governor could pardon death sentence. Pirates and interlopers were awarded death penalty. Robbery was punishable with death. For stealing, punishment was slavery.

47. R. Jois: *Legal and Constitutional History of India*, 1984, Vol. II, p. 107.
48. Love: *Vestiges of Old Madras*, Vol. II, p. 80.
49. *Ibid.*, Vol. I, pp. 494, 496.
50. Henry Dodwell: *The Nababs of Madras*, p. 149.
51. Love: *Vestiges of Old Madras*, Vol. I, p. 496, 497.

Thus there was no standard or criteria for imposing penalties or methods of execution. Conditions of imprisonment were horrible. The cases were decided, and the quantum of punishment which had absolutely no relation to the gravity of the offence was being imposed according to whims and fancies and prejudices of the judges. The modes of punishment were generally inhuman and barbarous and were being used against those who were caught to deter others.[52]

7. Administration of Justice in Bombay : The Bombay Settlement

(*i*) *Political position of Bombay.*—The political position of Bombay[53] was quite different from that of Madras. The Portuguese acquired the island of Bombay from Sultan Bahadurshah, the King of Gujarat, in 1534 and from that time onwards it was under the political control of the Portuguese. The King of Portugal, Alfonsus VI, gave Bombay in dowry to the King of England, Charles II, when the English King married his sister Princess Catherine in 1668. Charles II thought that Bombay being a very backward place, was economically not profitable and as it was difficult to exercise control from England, he transferred Bombay to the Company in 1668 for a very nominal annual rent of £10. The position of Bombay was completely changed with this transfer by the new Charter of 1668. The Charter authorised the Company 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 as 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.[54]

The President of Surat, Sir George Oxenden, received the Company's orders in September 1668 to visit the Island of Bombay and establish the executive government under a Deputy Governor and Council. Though Oxenden visited Bombay in January 1669, it was only after the death of Oxenden in July 1669 that the laws enacted by the Company under the Charter of 1668, actually came into force for the government of Bombay.[55] Thomas Papillon drafted these laws which were subsequently revised by the Court of Committees and the Solicitor-General. Finally, these laws were brought to Bombay by Gerald Aungier, the Governor of Surat, in 1670.

(*ii*) *The Charter of 1668.*—The Charter of 1668 conferred full powers, privileges and jurisdiction on the Company so that it could make laws, ordinances and constitutions for the good governance of the island and could impose appropriate and suitable pains, penalties and punishments by way of fine, imprisonment and even death. Thus the power of administration including power of legislation and administration of justice was granted (Keith, pp. 9-10). There were two conditions prescribed for the purpose that the laws were to be consonant to reason and not repugnant but as near as may be, agreeable to the laws of England. The Company thus came to establish courts to judge all persons and all actions. As expressed by Perry J. in *Peerozeboye* v. *Ardeshir Cursetjee*[56], "the Charter contained the fullest

52. R. Jois: *Legal and Constitutional History of India,* 1984, Vol. II, p. 108.
53. *See* for details, B.M. Malabari, *Bombay in the Making* (1661-1726).
54. Keith, *Constitutional History of First British Empire,* pp. 127-131.
55. Fawcett: *First Century of British Justice in India,* pp. 18-28.
56. *Indian Decisions* (Old Series), Vol. IV, p. 53: Jain, 1972, p. 27.

power for governing the island, which any form of words could convey; it concedes *imperium* and *jurisdictio* and although it indicates the model on which the legal establishments and the law should be framed, it does not fetter the grantees with any technical rules derived from English Judicature—which might prove wholly unsuitable to a mixed community in the East." As Ilbert[57] puts it the Charter was "a transition of the Company from a trading association to a territorial sovereign invested with powers of civil and military government."

(*iii*) *Judicial Reforms of 1670.*—The first important legislative work of the Company was done by Gerald Aungier in 1670.[58] He reorganised the old judicial set-up of Bombay. Old laws which were initiated by Oxenden were given a final shape and were classified into six sections. First section related to the freedom of worship and religious beliefs granted to all inhabitants. The laws prohibited the use of abusive and contemptuous language in respect of the religion of other persons. The defaulters were liable to pay fine or imprisonment. The second section dealt with the impartial administration of justice. The existing rights of persons were confirmed and the principle of fair trial and convictions was recognised. It provided for a trial by a jury of twelve persons in cases concerning deprivation of rights, *etc.* The third section provided for the establishment of a Court of Judicature to decide all criminal cases. The Governor and Council were authorised to appoint a judge. All trials were required to be by a jury of twelve Englishmen. Where a party to the suit was not English, only six persons were required to be Englishmen and the remaining six were chosen from Indians. Right of appeal from the Court to the Governor and Council was also granted. It provided for the appointment of Justices of the Peace and Constables to maintain peace and order and to arrest criminals, *etc.* The fourth section dealt with the registration of transactions concerning sale of land and houses. The fifth section contained miscellaneous provisions dealing with penalties for different crimes. In many cases the severity of English law was reduced. The last section dealt with military discipline and prevention of disorder and revolt. Death penalty was given for mutiny, sedition, insurrection or rebellion.

Aungier introduced certain reforms in the old set up of the judicial machinery at Bombay. He improved the judicial system gradually, as he was aware that it would not be possible and wise to supersede immediately the old system of the administration of Portuguese law. According to the reforms of 1670, the Island of Bombay was divided into two divisions — one division consisted of Bombay, Mazagaon and Girgaon; the other comprised of Mahim, Parel, 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. 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 authorised to hear, try and determine cases of small thefts and all civil actions up to 200 Xeraphins[59] in value. An appeal from the Court of each division was allowed to the Court of

57. *Government of India*, 18(1915) Jain, 1972, p. 27.
58. B.M. Malabari, *Bombay in the Making*, Ch. V, pp. 146-182.
59. It was a Portuguese Coin. 20 Xeraphins were equal to nearly Rs. 150.

Deputy-Governor and Council. Apart from the appellate jurisdiction, the Court also had original jurisdiction in important felonies, which were to be tried with the help of jury and the laws of the Company. Englishmen were under the jurisdiction of this Court. Further appeal to the President and Council at Surat was discouraged except in rare cases.

It was realised within the next two years that the judicial system of 1670 was defective in various respects. Aungier, 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 merely traders. The judicial and executive powers were exercised by the same persons. As a consequence, the abuse of power created various new problems. In order to remove these defects Aungier requested the Company authorities to provide persons who were experts in law. Initially, the Company paid no attention to it. After some insistence the Company asked Aungier, the Governor, to select any such experts in law from the existing persons who were in the employment of the Company in India. After some time, Aungier selected George Wilcox with whose advice he prepared a new plan in 1672 for the administration of justice in Bombay.

(*iv*) *New Judicial Plan of 1672.*—According to the new plan the Government issued a proclamation on 1st August, 1672 declaring the introduction of English Law into Bombay. It may be recalled that in the judicial plan of 1670, the Portuguese laws and customs were left untouched. They were totally abolished under the new plan, and with this change, the old confusing state of laws also came to an end in Bombay. The judicial machinery was again organised. A new central court known as the Court of Judicature was established. The Court was inaugurated on 8th August, 1672 by the then Governor of Bombay, Gerald Aungier, with pomp and ceremony, after a colourful procession which included four attorneys or pleaders had marched through the main thoroughfares of the city of Bombay. In his inaugural address the Governor Aungier enunciated the principles which subsequently set the pattern for the administration of justice not only in Bombay but all over the country. He emphasised that all the inhabitants of this island, irrespective of cast or creed had an equal title and right to justice.[60] Thus he laid special emphasis on the principles of independence, impartiality and equality for the future guidance of the judiciary. Aungier is rightly remembered as the "true founder" of Bombay. He was a man of liberal ideas and he believed in a sound and impartial administration of justice without fear or favour. He projected basic principles of ethics for judiciary too. Dr. Jain[61] in regard to Aungier's speech observes that "No one could have kept before him a higher ideal of justice than did Aungier. It was a good augury for the judicial system, but unfortunately the later Governors did not follow Aungier's traditions."

The Court of Judicature was empowered to exercise its jurisdiction over all civil, criminal and testamentary cases. George Wilcox was appointed its Judge, assisted by other Justices. The Court sat once a week to try civil cases with the help of the jury. The Court charged a fee of five per cent of valuation of the suit from

60. Governor Aungier said, "Laws though in themselves never so wise and pious are but a dead letter and of a little force except there be a due and impartial execution of them". Fawcett, *The First Century of the British Justice in India*, pp. 52-55. *See* also, M.C. Setalvad, *The Common Law in India*, p. 10.
61. Jain: *Indian Legal History*, 1972, p. 30. *See also* P.B. Vachha: *Famous Judges, Lawyers and Cases of Bombay*, 1962, pp. 3, 5, 7.

the litigants. The Judge was prohibited from carrying on private trade or business, and instead he was granted a salary of Rs. 2,000/- per year to meet his expenses. An appeal from the Court of Judicature was allowed to the Deputy Governor and Council. Juries were duly 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 statute law was made applicable. In framing the new scheme, Aungier was primarily concerned with the speedy and impartial administration of justice.

Justices of the Peace were 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 Englishman, was appointed. They acted as committing magistrates to arrest the accused and to examine the witnesses. The record was then placed before the Court of Judicature which met once a month to decide criminal cases with the assistance of all the Justices 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 civil cases under twenty Xeraphins[62]. The decision of the Court was final and no further appeal was allowed. No court-fee was charged from poor persons and, as such, the Court became famous as, "Poorman'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 Wilcox, the first Judge of the Court of Judicature died in 1674.[63] 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 on various charges. As noted by Malabari and Fawcett there is a view that Niccolls was punished for his judicial courage and independence which the executive did not relish.[64] Regarding "injudicious interference with the Court by the Council" Keith says, "It seems probable that the chief weakness of the Court lay in the fact that the Judge was dependent on the goodwill of the Council, as was seen in the dismissal of Niccolls in 1677, but there is no clear proof...."[65] Gary succeeded Niccolls as Judge and remained in the office up to 1683. During his tenure, the salary and rank of a Judge was reduced and the Council became superior in power and position. In 1679 the Council reversed a decision of Judge Gary regarding the grant of administration in respect of a widow's piece of land, who died intestate without relatives.[66] Keignwin's rebellion, which began in December, 1683, and continued up to November, 1684, gave a death-blow to Aungier's judicial system in the Island of Bombay.

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62. A Portuguese coin equal to about 1 Sh. 6 d.
63. Judge Wilcox died without drawing even a rupee by way of salary and his poor widow was left destitute in Bombay. Later on the widow requested the Government for the amount of her deceased husband's salary. *See* Malabari, *Bombay in the Making*, p. 150.
64. Malabari, 153; Fawcett, 97-98.
65. Keith, Arthur Berridale, *A Constitutional History of India*, p. 88.
66. cf. *Joanna Fernandez* v. *De Silva, (1817); Morley, Digest, i*, p. 214.

(v) *Admiralty Court conflicts with Council: 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 an earlier Charter of 1683 granted by Charles II. The authorities at Bombay were also aware of the judiciary which was set-up at Madras under the Charter of 1683.[67] 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 the 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[68], a person learned in civil law, was selected by the Company at England to be appointed as Judge-Advocate of the Admiralty Court. Dr. St. John also succeeded in getting authority from the Governor 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 interpreted by the Governor John Child as insubordination towards himself. In 1685 the Governor got an opportunity, and the powers of Dr. St. John to act as Chief Justice of the Court of Judicature were withdrawn. Vaux, a member of the Bombay Council was also appointed 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 criticised the transferring of his powers to Vaux, a new judge, who according to him was ignorant of civil laws. In due course the Governor and Dr. St. John further came into serious conflict and their relationship became strained which ultimately resulted in the dismissal of Dr. St. John in 1687 from the Court of Admiralty.[69] The incident made the Company all the more reluctant to appoint professional lawyers as judges in India. In words of Keith[70] this "is suggestive of the period of prerogative run mad." Persons were appointed as judges not for their legal knowledge but for their pliability to the executive.[71] After Dr. St. John's dismissal, Sir J. Wyborne, Deputy Governor of Bombay, was appointed Judge of the Admiralty Court. In 1688 Vaux succeeded Sir J. Wyborne and remained in the office up to 1690.[72] The Court practically ceased to function independently due to the strong position of the Governor and the President of the Board of Directors in London.

67. 3rd August, 1683. Charter of 1683 authorised the establishment of a Maritime and Mercantile Court.
68. Despatch from the Court of Directors to the President at Surat on April 7, 1684 refers in detail to the appointment of Dr. St. John. Campbell's *Bombay Gazetteer Materials*, xxvi, Pt. I, pp. 83-84.
69. For details, *see* Fawcett, *First Century of British Justice in India*, pp. 124-142. In 1687 the seat of the Governor-in-Council was transferred from Surat to Bombay.
70. Keith: *Constitutional History of India*, 1936, p. 39.
71. Jain: *Indian Legal History*, 1972, p. 32.
72. Anderson's *English in Western India*, p. 257.

(vi) Siddi Yakub's invasion and set back to Judicial Administration.—Due to the invasion of Siddi Yakub, Admiral of the Mughal Emperor in 1690, the judicial system of Bombay also came to an end. Judge Vaux, who was also in the Company's military service and a member of the Council, was sent back to England in order to gain Aurangzeb's forgiveness. After 1690 for a few years the practice of appointing a separate judge was not adopted and the administration of justice was also entrusted to the Governor and his Council. From 1690 to 1702 *i.e.*, for a period of twelve years there were no Courts. Whenever the Governor and Council wrote to the Directors of the Company to send a qualified lawyer, the Directors expressed their inability to get an honest and qualified lawyer. As Vachha remarked, "It was probably the difficulty of getting the right sort of man from the Company's standpoint, which resulted in no judge being sent out."[73] Such a state of affairs continued up to 1718 and the machinery to administer justice was almost paralysed in Bombay. Thus the period from 1690 to 1718 is a dark period in Bombay's Legal History.

(vii) Revival of Judicial Machinery: Period 1718 to 1728.—A new period in the Judicial history of Bombay began with the revival and inauguration of a Court of Judicature on 25th March, 1718 by Governor Charles Boone. It was established by the order of the Governor and Council which was later on approved by the Company authorities. It differed from the earlier Court of Judicature which was established under Aungier's judicial plan of 1672, as it was constituted according to the laws of the Company and not by the Governor and Council. 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 English. The remaining four were required to be Indians representing four different communities, namely, Hindus, Mohammedans, Portuguese-Christians and Parsis.[74] All English judges were also members of the Governor's Council and enjoyed a 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 Justices", 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.[75]

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 ordinances 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 authorised 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 be given within forty-eight hours after the judgment was delivered to the Chief Justice of the Court of Judicature. Moderate fees were

73. Vachha, P.B., *Famous Judges, Lawyers and Cases of Bombay*, p. 10.
74. For details, *see*, Fawcett: *The First Century of British Justice in India*, pp. 171-174; Keith: *A Constitutional History of India*, p. 41.
75. Malabari: *Bombay in the Making*, p. 453.

prescribed by the Court for different purposes. For filing an appeal a fee of Rs. 5 was to be paid.

As regards the working of the Court, earlier studies of Fawcett[76] and Malabari[77] state, that in spite of the fact that the Court met only once a week it was famous for its impartiality, speedy justice and also for the cheapness of its process. Most of the civil litigation was concerned with the recovery of debts. In order to recover debts the Courts generally adopted English practice. Where a person was not having any property, he was kept in prison so long as the debt due was not paid. In criminal cases, whipping in a public place was the most common punishment given by the Court. Banishment from the Island, imprisonment for a period at the Court's discretion were other common ways of punishing the criminals. For perjury and malicious complaints there were summary trials. Laws applied were very vague and mostly uncertain as we find neither any reference to any proper code nor any law report nor law books in the old records.

Fawcett has pointed out certain cases where the Court applied English law and even international law which was vague and underdeveloped at that time. This vagueness and uncertainty was bound to lead to injustice and lack of uniformity in punishing the criminals. Fawcett has described the famous trial of *Rama Kamti*, who was made the target of a plot based on lies and forgeries in which even the Governor Boone himself was involved. Thus grave injustice was done to *Rama Kamti* by the Court.[78]

(*viii*) *Rama Kamti case*[79] :*The Dark Justice at Bombay.*—*Rama Kamti* was a rich and influential person. He was the supporter of the Company. On a charge that he was corresponding with one Angria, a pirate chief, Kamti was arrested. Angria was troubling the Company. The trial was held before Governor Boone and his Council.

There was no conclusive evidence whatsoever against Kamti but a round about gossip story by a witness. The witness had been told by one dancing girl that the pirate chief Angria had told her that Kamti had written to him. His servant was tortured by cutting off his thumb to extract evidence and a statement implicating Kamti. Some letter making it appear to have been written to Angria were manufactured by forgery. Kamti was found guilty and was sentenced to an indefinite period of imprisonment. His property was confiscated and auctioned.

The charges against Kamti were drawn by Governor Boone and his Council. His trial was held before an ad hoc tribunal which was presided over by Governor Boone and consisted of members of the Council and Parker, the Chief Justice of the Court.

During the trial Parker objected to the torture of Kamti's servant which was inflicted at the instance of Boone. The result of showing this judicial independence was his dismissal from office, by the Governor. After auctioning of Kamti's property, claims against him were being considered by the Governor and the Council. The

76. Fawcett, *The First Century of British Justice in India.*
77. Malabari: *Bombay in the Making* (1901).
78. Fawcett: *The First Century of British Justice in India*, p. 179; Vachha, *Famous Judges, Lawyers and Cases of Bombay*, pp. 235-239; Malabari, *Bombay in the Making*, pp. 328-345; Jain: *Indian Legal History*, 1972, pp. 36-37: R. Jois, 1984, *Legal & Constitutional History of India*, Vol. 2, p. 112.
79. Rama Jois: *Legal & Constitutional History of India*, 1984, Vol. 2, pp. 111-112; Jain: *Indian Legal History*, 1972, pp. 36-37; Malabari: *Bombay in the Making*, pp. 328-345.

Governor made a claim for about Rs. 32,000 and got it accepted. He thus got his booty. After Kamti's death the truth was out that he was innocent. The whole trial was a plot, evidence was concocted and Governor Boone was behind the misuse of power and such an inhuman and atrocious act.

The trial and conviction in this case throws light on the methods and standards of administration of justice prevailing in those days and also the moral attitude of the judges.

There is no other case on record, writes Prof. Jain[80] where a more profound injustice was ever committed. Never were perjury and forgery used with so much unscrupulousness as in Kamti's case. This trial conclusively proves that justice was rough and ready in those days and at times there was miscarriage of justice. There were no codes for the Court to bother whether the definition of a crime was satisfied by the circumstances coming to light in a particular case or whether correct procedure was being followed or not. Kamti's case shows the dark side of the system of law and justice in Bombay : The system has been criticised scathingly by Prof. Jain.[81]

There was thus, as Rama Jois[82] puts it, "no substantive law to be enforced and no procedural law to be followed. The whole system was capricious and arbitrary." The Court even sanctioned torture to extract confession and extort evidence.

This case shows the poor state of judicial and executive affairs. However, there appears to be sufficient truth in Fawcett's concluding remarks: "The Court though its administration of justice was rough and ready and though it fell short of the ideals that attended its establishment in Aungier's time clearly served a useful purpose during the ten years of its renewed existence.[83]

The Court of 1726 by providing for trial by jury, introduced in India a very important English ideal. The Court of 1718 abolished the use of the old practice of jury trial in deciding cases. Another important factor was that all the members of the court of 1718 were also members of the Governor's Council. In appeals the members of the Council constituted the appellate court with the Governor. Naturally, the executive was bound to play a vital role in influencing the judges while deciding important cases. It appears that the Company's authorities were not interested in granting independence to the judiciary and, therefore, the executive always controlled the independence of the judiciary. This is also clear from the fact that during the tenure of Governor Boone, two Chief Justices, namely, Parker in 1720 and John Braddy in 1721 were dismissed from their offices. This state of affairs continued up to 1728. Under the Charter of 1726 the Mayor's Court was established at Bombay in 1728 which replaced the old Court of 1718.[84]

8. Administration of Justice in Calcutta

(a) *Grant of Zamindari Rights to the Company.*—The English Company's settlement at Calcutta was quite different from that of Madras and Bombay. As early

80. Jain: *Indian Legal History*, 1972 p. 36; Fawcett: *The First Century of British Justice in India*, op. cit. 179; Malbari: *Bombay in the Making*, 1901, op. cit. 328-345.
81. Jain: *Indian Legal History* at pp. 36-37.
82. R. Jois: *Legal & Constitutional History of India*, 1984, Vol. 2, pp. 111-112.
83. Fawcett: *The First Century of British Justice in India*, p. 200.
84. For details about Reforms during 1718 to 1726; *See* Rama Jois: *Legal & Constitutional History of India*, 1984, Vol. 2, pp. 111-112.

as 24th August, 1690 the English East India Company constructed Fort William for its factory, by the side of the river Hoogly in Bengal. In 1698, Prince Azim-Ush-Shan, Subedar of Bengal and grandson of the Emperor Aurangzeb, granted Zamindari rights of three villages—Calcutta, Sutanati and Govindpur—to the English Company.[85] This proved a historical event as the grant of Zamindari rights empowered a foreign company to exercise all those powers which the native Zamindars were authorized to have under the Mughal administrative and judicial system. The Company took full advantage of this authority and appointed a Collector to control the administration of all the three villages.[86] The Collector began regularly to hold Zamindari court for both civil and criminal cases. The local council was required in 1698 to send all prisoners to Madras for trial, as the Emperor kept in abeyance certain privileges of the English Company.

In 1699, the status of Calcutta was raised to that of a Presidency and its Governor and Council were entrusted with all the necessary administrative and judicial powers. The Collector who was the company's officer, was also appointed a member of the Governor's Council at Calcutta. The Company thus secured for itself a legal and constitutional status which made it as good as Zamindar exercising full rights of Zamindari. *This again was a blunder by the Moghul King who trusted blindly these merchants. This was political shortsightedness.*

(*ii*) *Justice in criminal cases.*—In order to administer justice in criminal cases, the Company decided to adopt the existing Mughal pattern. As such a Faujdaree court, presided by an English Collector, was established to decide criminal cases of the natives of three villages, Sutanati, Govindpur and Calcutta. The Collector was empowered to decide the criminal cases summarily.[88] As the records show, generally the criminals were punished by whipping, imposing fines, imprisonment, banishment or work on roads. Capital punishment was not inflicted unless the sentence was confirmed by the Governor or President and Council of Calcutta. In those days, death sentence was executed by whipping to death and not by hanging to death as was done later on.[87] Apart from its jurisdiction on Indians, the Court also took cognizance of petty crimes committed by English people. For serious crimes the Governor and Council were authorised to try by the Charter of 1661.[88]

(*iii*) *Justice in civil cases.*—To deal with civil litigation, the Collector presided over a civil court or the court of Cutchery.[89] Ordinarily, the civil cases were referred to arbitrators by the Collector. The Collector decided cases in a summary way on the basis of the prevailing customs and usages of the country. In the absence of such native customs, the case was decided according to natural justice and equity. In rare important cases only appeals were allowed to the Governor and Council.

The Collector in the capacity of a Zamindar was also responsible for the collection of land revenue from natives of three villages. Whipping was the most

85. W.K. Firminger: *Affairs of the East India Company*, Report V, Vol. I, Ch. IV. *See also*, Wilson: *Old Fort William in Bengal*, Vol. I, pp. 40-48.
86. Wilson, *The Early Annals of the English in Bengal*. Vol. I. p. 163.
87. Long, *Selections from Unpublished Records of Government*, Vol. I, pp. 224, 298; William Bolt's, *Considerations and etc.* (1771), Vol. I. p. 81.
88. W.K. Firminger, *Affairs of the East India Company*, Report V, Vol. I, p. 70.
89. W.K. Firminger: *Ibid.*, p. 71.

common punishment given by the Collector for the defaulters of revenue. Appeals were made to the Governor and Council.[90]

(*iv*) *Concentration of power in Collector.*—In the judicial system of Calcutta, the office of Collector became a very important office. It was dealing with civil, criminal and revenue matters. It was also authorized to decide petty civil and criminal cases concerning Europeans in India. The Governor and Council were also empowered to decide serious criminal cases and important civil cases. All judicial and executive powers were exercised by the Collector and the Governor and Council. It created conflict and confusion resulting in dissatisfaction.

As regards the Judicial system at Calcutta it may also be mentioned that before the acquisition of Diwani by the Company the Moghul judicial system was in shambles. Unscrupulous and ignorant people came to occupy the offices of *Kazi* and extortion and corruption was rampant. Justice could be purchased in those times. General confusion prevailed in the field of law and its enforcement. The Company officers due to acquisition of Zamindari had the chance of filling this power vacuum and they did so by asserting themselves and snatching more powers from the feeble and corrupt administrators. Dr. Jain's[91] observations on this peculiar position are eye openers. Within the precincts of their Zamindari, the English without seeking confirmation of Nawab "sought confirmation of death sentences from the Governor and Council without making any reference to the Nawab, and appeals from the Collector's court in all cases went to the Governor and Council and not to the Nawab's courts.... Thus from the very outset the Company sought to act as a territorial sovereign *vis-a-vis* Calcutta and tried to exclude any semblance of the Nawab's authority from the governance and administration of Calcutta even though the Company at the time was merely a Zamindar and nothing more."

Such a concentration of power in a single person, the Collector, was "too great a trust for one single individual". This state of affairs continued up to 1726 and the 1726 Charter improved the situation and laid down the foundation of an important era in the history of the evolution of the judicial system in Calcutta.

(*v*) *Effective Introduction of English laws.*—Charters of 1668 and 1726 made it possible for the Company to introduce for the first time English laws side by side the personal laws of Hindus and Muslims and the subsequent Charters accelerated this process. *Mayor of City of Lyons* v. *East India Co.*[92], and other cases explain the above proposition.

(*vi*) *Mayor of City of Lyons* v. *East India Co.*—In *Mayor of City of Lyons*[93], one Martin, a native of France, had left behind landed properties in Calcutta and Oudh. A question arose as to (a will made by Martin) whether the English law which prohibited aliens holding land in England applied in India also. The Calcutta Supreme Court applied the English law and declared that the property escheated to the Crown. The Privy Council on appeal overruled the Supreme Court's judgment and held that the principle of English law regarding the incapacity of an alien, to

90. Holwell, *Indian Tracts*, p. 120; William Bolt's: *Considerations and etc.*, Vol. I, p. 80.
91. Jain: *Indian Legal History*, 1972, p. 42.
92. Moores Indian Appeals, pp. 29-30.
93. Moores Indian Appeals, pp. 29-30.

hold landed property in England had no application to a presidency town like Calcutta which was acquired in a different country and had a different government. The Privy Council was of the view that application of such a law would cause great hardship and inconvenience to the settlers in Calcutta.

(*vii*) *Other Cases.*—Similarly in *A.G. of Bengal* v. *Ranee Surnomoyee*[1] the property of a person committing suicide could not be forfeited to the government because the English law was held inapplicable to Calcutta. In *Bhoomi Money Dassee* v. *Natobar Biswas*[2], however, the English Common law was applied and right to recover damages for slander was allowed. In *Naoroji* v. *Rogers*[3] the Bombay High Court held that the English law of immovable property applied in Bombay. In regard to Law of Limitation the Supreme Court once made it applicable[4] but later on the view was reversed and it was made inapplicable[5] to Hindus and Muslims. In *Param Shookdoss* v. *Rasheed*[6] it was held that the English law regarding prohibition of arrest on Sunday was inapplicable to a Mohammedan, India not being a Christian country. Statutes of Frauds requiring three witnesses to a will was held to have been extended to India[7] while law relating to prohibited degrees for marriage was held inapplicable to India. It was suggested that the matter be decided on the basis of customary law. In matters of Contract, Law of Champerty and Maintenance was not made applicable but the matter, it was held, should be decided either according to the personal law or according to the law and usages of the defendant. Thus a contract violating the principles of Champerty and Maintenance could not be declared void.[8]

The resultant position, as Jois[9] puts it, was the application of English law through the 1726 Charter which was a subject of controversy in each case until the court decided one way or the other. But as far as statutes passed by British Parliament after 1726 were concerned, they did not automatically extend to India unless expressly done so.

1. 91 MIA 391.
2. ILR 28 Cal 452.
3. 4 Bom HCR 1.
4. *Kissenchurn Tagore* v. *Rampria Debee* — Ind. Dec. (O.S.) I, 1100.
5. *R. Sircar* v. *Nundy* Ind. Dec. (O.S.) I, 1102.
6. 7 Mad HCR 285.
7. *Savage* v. *Bancharam*, Mor. Dig. 1, 70(1785).
8. *Picha Kutty Chetty* v. *Kamala Nayakkan*, 1 Mad HCR 153.
9. Rama Jois: *Legal and Constitutional History of India*. 1984, Vol. II, p. 30.

3

The Mayor's Courts & the Courts of Requests in Presidency Towns

The Charter of 1726 for the first time created a subordinate legislative authority in each of the three presidency towns of India.... It made the beginning of importing English ideas, technical forms and procedure of criminal justice into India.

"Justice gained little by establishment of the Mayor's Courts".

J.W. Kaye : *The Administration of East India Co.*, p. 321

"*...it resulted in the distinct progress in the administration of justice according to the principles and practice of the English Courts of law.*"

Fawcett : *First Century of British Justice in India*, p. 223

"*...thus was established a bridge between the English and the Indian legal systems... a new leaf in the evolution of judicial institutions*".

Jain : *Outlines of Indian Legal History*, 1972, Ch. 6

SYNOPSIS

1. Early Mayor's Court at Madras

(i) Charter of 1687.—The Company issued a Charter in 1687 which provided for the creation of a Mayor's Court at Fort St. George in Madras.[1] The Mayor's

1. Charles II granted a Charter to the Company on August 9, 1683. It authorised the Company to establish one or more courts at such place or places as it might direct. James II on April 12, 1686, repealed the same provisions in the new Charter. The Company issued a Charter dated December 30, 1687, under

Court was a part of the Corporation of Madras established in 1688 by the Company's Charter, the Company preferred to issue a Charter under its own authority rather than that of the Crown. It did so as it was afraid that persons appointed under the King's Charter may create trouble by violating the Company's orders due to their appointment by higher authority. The Corporation of Madras consisted of a Mayor, twelve Aldermen and sixty or more Burgesses. The Mayor and Aldermen were to elect Burgesses who were not to exceed 120 in number. The Mayor was elected by Aldermen annually. In the first instance, the Charter nominated the Mayor and Aldermen of the Corporation. Any vacancy for the post of Alderman was to be filled in by the remaining Aldermen and the Mayor from amongst the Burgesses. One Mayor and two Aldermen formed the quorum of the Mayor's Court. It was a Court of Record for the town of Madras. It exercised its jurisdiction in civil and criminal cases. In civil cases where the value exceeded 3 Pagodas and in criminal cases where the accused was given death sentence, appeals from the decision of the Mayor's Court were allowed to go to the Admiralty Court at Madras. A provision was made for the appointment of a Recorder to the Mayor's Court as the judges of the Mayor's Court were not fully equipped with legal knowledge. The Charter appointed Sir John Biggs, the Judge-Advocate, as the first Recorder of the Mayor's Court.

(ii) Admiralty Court at Madras.—Under the Charter of James II, granted on April 12, 1686, the Company was authorised to establish one or more courts at such place or places as it considered suitable. The Company established a Court of Admiralty at Madras on July 10, 1686. John Grey was appointed its first judge to preside with the help of his two assistants. He was succeeded by Sir John Biggs the former Recorder of Plymouth[2]. He paved the way for introducing English Law into India. After the death of Sir John Biggs[3], John Dolben was appointed to preside over the Court. He was removed from office for corruption[4]. Thereafter William Fraser and after him John Styleman were appointed to serve. The Admiralty Court continued to work up to 1704 at Madras.

(iii) The Four Courts.—In Madras, therefore, the machinery to administer justice consisted of four courts.[5] First, the Court of Admiralty presided over by the Judge-Advocate; second, the Mayor's Court presided over by the Mayor; third, for small causes of less than two pagodas, two Aldermen presided over the Choultry Court; and fourth, the Court of the President or Governor-in-Council to hear appeals from the decisions of the Admiralty Court and the Mayor's Court. As regards the working of the Mayor's Court at Madras, it is said that the cases were decided on the basis of justice and good conscience and not on any fixed legal rules of law. In later times it was realised that the process was very slow and the result was very uncertain. The presiding authority's notions of justice were hardly based on any principles of law and equity. As the Mayor's Court and Choultry Courts were presided over by non-professional persons, personal prejudices and whims were

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its authority and not under the Crown.

2. Wheeler, *Madras in the Olden Times*, (1882), p. 31.
3. Indian Office Records: *Original Correspondence* Series No. 5666.
4. John Dolben fearlessly gave judgment against his employers when they sued ex-Governor Elihu Yale. *See*, Dalton, *The Life of Thomas Pitt*, p. 142.
5. Love, *Vestiges of Old Madras*, Vol. I, p. 498: Vol.II, pp. 31, 173.

bound to creep into the administration of justice. It resulted in the lack of uniformity and consistency in the decisions.

(iv) Drawbacks.—The judicial system at Calcutta and Bombay differed greatly and the state of the administration of justice was at its lowest ebb. Maintenance of law and order even amongst Englishmen, employed by the Company at these presidency towns, became a serious problem. Decisions of the Courts in India were not recognised by the Courts in England and its consequence was that in many cases English people were again tried in England for causes which arose in India and settled by the Indian Courts. The Directors of the Company realised the growing discontent and weakness of the Company's state of affairs and efforts were made to find out some suitable means to tackle this problem.

2. Origination of new Charter

Political and commercial activities of the Company were increasing day by day and the Company wished to avoid litigation.[6] However, there was no suitable machinery for administering justice in three presidency towns which the Courts in England could recognise. No such machinery was set up at Bombay and Calcutta. The Company at the same time was unwilling to submit to the jurisdiction of native Indian Courts. The Directors of the Company, therefore, presented a petition to George I stating, "That there was a great want at Madras, Fort William and Bombay of proper and competent power and authority for speedy and effectual administration of justice in civil cases and for trying and punishing of capital and other offences."

While considering the reasons which encouraged the Company to have a new Charter from the King in England, it is interesting to note that historians have stated different reasons. Fawcett has stated, "...one of the main reasons for the Company's change of attitude was to avoid civil litigation against it in England, due to executive intermeddling with private property." On the whole, it may be concluded that after long experience the Company realised the necessity of properly constituted Courts in all the three presidency towns having not only civil and testamentary jurisdiction but also under such authority as was recognised by all the Courts in England. As stated above, the Mayor's Court at Madras, which was established in 1687, had the inherent defect of emanating not from the Crown but from the Company itself.

3. Provisions of Charter of 1726

(i) Establishment of Corporations.—The Charter of 1726 provided for the establishment of a Corporation in each presidency town *i.e.* Bombay, Calcutta, Madras.[7] Each consisted of a Mayor and nine Aldermen. It provided that the Mayor would be elected every year by nine Aldermen and the retiring Mayor, from amongst the Aldermen. 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. The Governor-in-Council of each presidency town was entrusted with the power to make by-laws, rules,

6. Fawcett has pointed out the case of Mr. Woolaston who brought several suits against the Company after the death of his son in India and the Courts in England awarded him £ 300 as damages. Fawcett, *First Century of British Justice in India*, pp. 215-16.

7. *The Cambridge History of India*, Vol. V, Ch. IV, p. 113. In Madras, the provisions of the Charter were implemented on August 17, 1727. *See* Wheeler, *Madras in the Olden Times*, (1882), p. 466. Letters Patent of September 24, 1726, the 13th year of the reign of George I.

ordinances to regulate the working of the Corporations 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 towns of India.*

(ii) Mayor's Court.—The Charter of 1726 also constituted a Mayor's Court for each of the presidency towns consisting of a Mayor and nine Aldermen.[8] Three of them *i.e.*, the Mayor or senior Alderman together with two other 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 authorised to try, hear and determine all civil actions and pleas between party and party. The Court was also granted testamentary jurisdiction and power to issue letters of administration to the legal heir of the deceased person. It was authorised to exercise its jurisdiction over all persons living in the presidency town and working in the Company's subordinate factories.

(iii) Procedure.—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 authorised to arrest and imprison the defendant. The whole procedure of the Court was based on the procedure as adopted by Courts in England.

(iv) Right of Appeal.—By virtue of the same Charter for the first time 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 either 1000 Pagodas or more, a further appeal was allowed to be filed to the King-in-Council (His Majesty's Privy Council) from the decision of the Governor-in-Council.[9] *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.*

(v) Justices 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 Courts in England. Regarding procedure, manner and form to be adopted

8. For Mayor's Court at Madras. *See* V.C. Gopalaratnam, *A Century Completed : A History of Madras High Court*, pp. 84-85. See also, *The Cambridge History of India*, Vol. V, Ch. IV, p. 113; M.C. Setalvad, *The Common law in India*, pp. 12-18.
9. The First Indian appeal to the Privy Council in pursuance of the Charter of 1726 appears to have been made as early as 1732 in a case from Madras.

by these Courts, the Charter clearly stated that the English pattern would be followed, "...in the like manner and form as near as the circumstances and condition of the place and inhabitants will admit...." It may, therefore, be concluded that *the Charter of 1726 made the beginning of importing English ideas, technical forms and procedure of criminal justice into India.*

(iv) **Legislation.**—It should also be noted that the Charter empowered the Governor and the Council of each Presidency town to make by-laws, rules and ordinances and to prescribe punishments for its breach which should not be contrary to English law but agreeable to reason.[10]

4. Consequences of the Charter of 1726

King George I issued a Charter to the Company on the 24th September, 1726. *The Charter became an important landmark in the legal history of India due to its various vital provisions having far-reaching consequences.* The year 1726 saw the abolition of the Court of Admiralty at Madras and the enlargement of the powers of the Mayor's Court. By establishing the Mayor's Courts at the three presidency towns 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, gave rise to the introduction of a new system of appeals from Indian Courts to the Privy Council in England. The common allegiance to the King, in the field of judicial set-up, paved the way for importing English ideas of law and justice, into India. It was through the Privy Council that the principles of English law were gradually applied in deciding Indian cases wherever Indian law was silent or defective according to English judges. Apart form this, the deep-rooted English tradition of showing respect to the decisions of the highest judiciary was also adopted in India. *With the adoption 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 Statute law in India. An important stage in the evolution of British Courts of Justice was reached with this Charter. There appears to be great truth and farsightedness in Fawcett's remark, "...it meant the authoritative introduction of English law in the presidency towns and foreshadowed the parliamentary interference that first took shape in the Regulating Act of 1773," which laid the foundations of codification of the Indian law. In the words of Dr. Jain[11] "thus was established a bridge between the English and the Indian legal systems," turning "a new leaf" in the evolution of judicial institutions. Due to its tremendous significance the Charter is usually characterised as the *"Judicial Charter."*

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10. Auber: *Analysis of the Constitution of East India Co.*,23, quoted in Jain: *Indian Legal History*, 1972, p. 48-49, fn. 4.
11. Jain: *Indian Legal History*, 1972, Ch .6.

5. Distinction between the Madras Charter of 1687 and the Charter of 1726

(i) Scope of Application.— The Charter of 1687 applied to Madras only whereas the 1726 Charter applied to all presidency towns.

(ii) Creation.—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 recognised by the Courts in England.

(iii) Jurisdiction.—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 Courts 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 sum of 1000 pagodas or more.

(iv) Law and Procedure.—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 law and practice. Thus the former can be said to be governed more by principles of equity whereas the latter was governed by English Law.

(v) Recorder.—A lawyer known as Recorder was attached to the old Mayor's Court at Madras in order to advise the Court, while no such officer was attached to the three new Mayors' Courts.

(vi) Participation of Indians.—In the old Mayor's Court at Madras some Indians were authorised to sit as judges together with English Aldermen. The Charter of 1726 specifically provided for this purpose but it may be stated that the representation of Indians under the Charter of 1726 was practically negligible. In fact no Indian was ever appointed.

(vii) Position of Executive.—The Charter Act 1726 entrusted judicial powers to the Governor-in-Council who had all the executive powers. This was not so under the provisions of the Charter of 1687. The Charter of 1687 is considered to be superior than the Charter of 1726 as the modern progressive ideas of separation of judiciary from the executive were deeply rooted in it.

6. Critical estimate of the working of the Mayor's Courts from 1726 to 1753

(a) Application of English law.—After the Charter of 1726 was actually implemented and the Mayors' Courts began their functioning, gradually the defects and lacunae in the provisions of the Charter came into limelight. It was realised 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. Referring to the working of the Mayor's Court at Bombay, Vachha states, "The cumbrous, costly and intricate law, bristling with technicalities, fictions and formalities of all sorts was wholly unsuited to speedy and simple disposal of disputes; and the difference between English and Indian conditions, and the legal atmospheres of Bombay and of Westminster,were apt to be overlooked."[12] *For the first time,*

12. P.B. Vachha, *Famous Judges, Lawyers and Cases of Bombay*, p. 12.

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 statute 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 Court decided that it was empowered to exercise its jurisdiction even in such cases where both parties were native Indians. All these excesses and peculiarities in the name of justice enforced by the English people 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 the 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. At times, on the basis of major policy matters, the executive tried to dictate its terms to the judiciary. On refusing to carry out the wishes of the executive heads, 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.

(b) Conflict about Jurisdiction.—The following few cases, as pointed out by Fawcett,[13] will reveal the growing conflict and reflect on the extent to which the relations between the Governor-in-Council and the Mayor's Courts at Bombay, Madras and Calcutta became strained.

(*i*) *Shimpy's case (Bombay).*—As early as 1730, Governor Cowan and the Mayor's Court at Bombay came into conflict on the Court's Jurisdiction over natives in matters concerning their caste and religion. This situation arose in a case where a Hindu woman of Shimpy caste changed her religion and became Roman Catholic. She had a son of twelve years of age. After the mother changed her religion, the son left her and decided to stay with his Hindu relatives. The mother filed a suit in the Mayor's Court against her Hindu relatives on the ground of unlawfully detaining some jewels and the boy. As a consequence of it, the Court ordered the relatives to hand over the boy to his mother. The heads of the caste filed a complaint to Governor Cowan and the matter was duly considered by the Governor and Council. They held that the Mayor's Court was not authorised to exercise its jurisdiction over "causes of religious nature or dispute concerning caste among the natives" and a separate warning was issued to the Mayor's Court stating that in future the Court should not interfere in such cases. The court strongly protested against the stand taken by the Governor-in-Council on the ground that the matter in dispute was not at all religious and the Court was empowered to decide such cases under the authority of the Charter of 1726. The Mayor retorted by declaring that so long as he presided over the Court, he would take every step to safeguard the prerogatives of the Court

13. Fawcett, *First Century of British Justice in India*, pp. 218-20.

and he would even go to England to file an appeal to the King-in-Council. The Governor removed the Mayor from the post of "Secretary to the Council", a post which the Mayor occupied together with his main work of the Mayor's Court. Ultimately, the conflict was reported to the Court of Directors of the Company. The Directors of the Company denounced the rash and extreme attitude of the Bombay Council and issued general orders to prevent repetition of such a conflict.

(*ii*) *Arab Merchant's case.*—In the same year, in *Arab Merchant's case*, the Council and the Mayor's Court again came into serious conflict. An Arab merchant sued a person in the Mayor's Court for recovery of the value of his pearls. The merchant stated that the defendant extorted the pearls from him while he was rescued near the coast of Gujarat from a burning boat. The Governor-in-Council suggested to the Mayor's Court that the claim suit filed by the Arab merchant was invalid as the defendant was tried for piracy earlier and was acquitted. But the Mayor's Court paid no attention to the Governor's suggestion and decreed the suit in favour of the merchant. On appeal before the Governor-in-Council, the decision was reversed by the casting vote of Governor Cowan. Due to the casting vote of the Governor, the Mayor's Court expressed great doubt and challenged the legality of the reversal order. This added fuel to fire and the existing tense relations between the Mayor's Court and the Governor further became strained.

(*iii*) *At Madras.*—In Madras, a study of the working of the Mayor's Court during this period reveals that the relations between the Mayor's Court and the Governor-in-Council were not cordial.On many occasions they came into conflict with one another. Whenever any decision was made either by the Council or the Court asserting independence and superiority of one over the other, conflict arose between the two. Whenever the Mayor and Aldermen while acting as grand jury at the quarter sessions failed to show due consideration and respect to the authority of the Governor-in-Council, there was a clash between them involving a question of prestige. The Mayor's Court expressed its indignation when the Corporation tried to utilise money, collected by the Court as fines for the purpose of public works. The Court always insisted on its independent authority and original jurisdiction in administering justice and made it clear that the Governor and the Council had no power to dictate or interfere in its working. After a detailed study of the official records from 1729 onwards Love in his book "Vestiges of Old Madras", has pointed out many instances when the Mayor's Court at Madras came into conflict with the Governor-in-Council. It will be worthwhile to quote and discuss some of them.

(*iv*) *Torriano's case.*—In a case where Torriano, Secretary to the Government, filed a civil suit against Naish,[14] the Mayor, the Mayor's Court held that the Mayor was immune from legal action in the Court.[15] Sometime later it was also revealed that the relations between Naish, the Mayor, and the Governor became tense due to their personal rivalry, jealousy and personal hatred against each other. In 1734, when Naish was re-elected as Mayor, the Governor of Madras refused to allow him to take the oath of office on the plea that the re-election of the Mayor was not permitted

14. Torriano and Naish both attended a dinner. Heated by the wines they imbibed, they bet against each other on a trivial matter. Torriano, the Secretary, won and the Mayor, Naish, lost the bet. Torriano filed a suit against Naish for the recovery of the bet amount.

15. Love, *Vestiges of Old Madras*, Vol.II, p. 264.

by the provisions of the Charter. As a result of this a new Mayor was elected by the Corporation. Though a new Mayor occupied the office, the relations with the Governor did not improve. It shows that the causes of conflict between the two were deep-rooted.

(*v*) *Sunku Rama's case.*—In 1735, the executive filed a suit against a person, Sunku Rama, for a breach of contract before the Mayor's Court. The Court of Appeal *i.e.*, the Council directed the Mayor's Court to issue a warrant of execution. The Mayor's Court displayed a difference towards Sunku Rama.[16] At this, the Council felt insulted and it issued orders to its solicitor to file a complaint to the Council against the Mayor and each of the Aldermen for not obeying the directions of the Court of Appeal. The Mayor's Court raised legal objection to the relevance of the Council's step which was itself a party to the suit. As the Court's records are silent on what happened later in this case, perhaps at that stage, the Directors of the Company intervened and advised both the litigants not to proceed further in that issue. It was surprising to note that both the parties, the Mayor's Court and the Governor-in-Council, justified their claims on the basis of the Charter of 1726.

(*vi*) *Pagoda Oath case.*—The Mayor's Court also came into conflict with the local inhabitants of Madras. The Court insisted that the Hindu witnesses must take *"Pagoda"* oath instead of *"Geeta"* oath. The *"Geeta"* or *"Gita"* is a holy book of Hindus. A Gujarati merchant was fined by the Court for refusing to take *"Pagoda"* oath. When the matter came before the Governor-in-Council, they remitted the fine. Sometime later in 1736 two Hindus were even imprisoned, at the instance of the Mayor's Court, on their refusal to take *"Pagoda"* oath. This incident excited the Hindus emotionally and their expression of great dissatisfaction posed a problem of law and order. The Governor, therefore, intervened and released them on parole under his orders. This incident and the role of the Governor further added to the already tense relations with the Mayor's Court. Sometimes intricate questions of law were also referred to England.[17]

In financial matters also, the steps taken by the Mayor's Court at Madras were not beyond doubt. In January 1744, the Court represented to the Government through its Registrar that as its income was not sufficient to meet its expenditure, it appropriated the money belonging to the Estates which was deposited in the Court.[18]

(*vii*) *At Calcutta.*—At Calcutta, the Mayor's Court was established in 1728 under the Charter of 1726. In its actual working and dealing with the Governor-in-Council, the condition was in no way better at Calcutta than Bombay and Madras. Similar conflicts arose between the Mayor's Court and the Governor-in-Council.

(c) The Result.—In all these clashes and conflicts, even English people were divided into two camps and were working against each other. The inhabitants of

16. Fort St. George Records, *Public Consultations*, Vol. LXV.

17. A typical opinion forwarded by the Company to Fort St. George is one dated December 31.1741. It was given by the Attorney-General and Solicitor-General of England. "...can the senior of Council preside and hear the appeal? *Answer:* In the case of real incapacity the next senior Councillor cannot preside..... Can the Court of Appeal hear a case which cannot be heard before the Mayor's Court because the Aldermen are interested? *Answer* : No, the Court of Appeal has no original jurisdiction What should be done with the estates of intestate persons? *Answer:* The only method is for the Company's servants not to intermeddle with such business." Dodwell, *A Calendar of the Madras Records*, (1740-1744), p. 283-85.

18. Love, *Vestiges of Old Madras*, Vol. II, p. 276.

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, therefore, sent to the Court of Directors of the Company on behalf of the inhabitants of all the three presidency towns. In their reply to the petition, the Directors of the Company made it quite clear that regarding conflicts and litigation between the natives in which the King's subjects were not involved, "this may and should be decided among themselves according to their own customs or by justices or referees to be appointed by themselves... but if they request and choose them to be decided by English laws, those and those only must be pursued, and pursued according to the directions of the Charter; and this likewise must be the case when differences happen between the natives and subjects of England where either party is obstinate and determined to go to law."

According to Kaye[19] "*Justice gained little by establishment of Mayor's Court*" while according to Fawcett, "*It resulted in the distinct progress in the administration of justice according to the principles and practice of the English Courts of law*".[20] Whatever it may be, but in result, as Dr. Jain expresses, "The Company soon lost its patience as it could no longer brook strife between the judiciary and the executive. In 1753 it took steps to weaken the judiciary. This was unfortunate but easy comparatively".[21]

7. Political Changes in Madras (Sept. 1746 to Aug. 1749)

On September 14, 1746, the French captured the city of Madras. The victory of the French brought Madras under the temporary rule of Pondicherry.[22] It gave a death blow to the Mayor's Court at Madras. In 1749 the city of Madras was recaptured by the English from the French. The English Company realised the necessity of a suitable judicial machinery at Madras. It was considered reasonable to revive the Mayor's Court under a new Charter.

The Mayor's Court was re-established at Madras by a Charter of George II in 1753.[23] The existing defective state of judicial affairs was quite clear before the Directors of the Company. A petition, stating the difficulties and hardships faced by the inhabitants of the presidency towns of Bombay and Calcutta, was already lying with the Directors of the Company for serious consideration. The Directors considered it suitable to utilise this opportunity to remove the defects of the Charter of 1726. The Charter of 1753, Royal Charter, was therefore issued by King George II.

8. Charter of 1753 : Reforms Introduced

The new Charter re-established the Mayor's Courts at Madras, Calcutta and Bombay. It also introduced some reforms in the Charter of 1726 to tackle the conflicting situation and also to gain favour of the local men residing in the presidency towns by removing their hardships. It excluded from the jurisdiction of the Court all suits and actions between natives only, and directed that these suits

19. J.W. Kaye, *The Administration of the East India Company*, p. 321.
20. Fawcett, *First Century of British Justice in India*, p. 223.
21. Jain: *Indian Legal History*, 1972, Ch. 6.
22. French occupied Madras in 1746 and administered it until the Peace of Aix-la-Chappele in 1848.
23. Dodwell, *The Nababs of Madras*, p. 156.

and actions should be determined amongst themselves unless both parties submitted them to the determination of the Mayor's Court. It was an important restriction imposed on the jurisdiction of the courts in the presidency towns.

It made the Mayor's Courts subordinate to the Government of the Company by making certain important changes in its constitution which made the Mayor the Government's nominee. Consequently the Mayor's Court lost its independence. It appears that the underlying policy was to strengthen the hand of the executive Government and its political power.

Regarding "taking of oath", the Charter made it clear that the main purpose was to oblige the witness to speak the truth before a court. It provided a particular oath for Christians. For Hindus, it was stated that the oath must be taken in a manner which is considered most binding on their conscience according to their own castes. It was also provided that the Mayor's Court was empowered to hear suits against the Mayor and Aldermen. But in such cases the interested person was not allowed to preside over the Court. The Mayor's Court was authorised to hear and decide cases against the Company. In such cases the Government was required to defend its case with the aid of its legal experts.

The Charter also created a Court of Request[24] at each presidency town of Bombay, Calcutta and Madras to decide civil cases involving a sum not exceeding 5 Pagodas *i.e.* Rs. 15. Its chief aim was to give cheap and quick justice to the poor. It consisted of Commissioners numbering from 8 to 24. These Commissioners were required to sit in a quorum of three in rotation once a week.

(i) Courts established by the Charter.—Thus the Courts established by the Charter of 1753 may be briefly stated as follows :

(*i*) *The Court of Requests*, to hear civil suits up to 5 Pagodas, one for each presidency town.

(*ii*) *The Mayor's Court* to hear civil suits for more than 5 Pagodas, one for each presidency town.

(*iii*) *The Courts of the President and Council.* It was empowered to act as Justices of the Peace and the Court of Quarter Sessions to hear and decide criminal cases. It was also empowered to act as civil appellate Court and in that capacity to hear civil appeals from the Mayor's Courts in the respective presidency towns.

(*iv*) *The King-in-Council* (the Privy Council), as the highest Court of Appeal, heard appeals from the Court of the President and Council in all civil cases involving a sum of 1,000 Pagodas (Rs. 3000) or more.

(ii) Conflict continues.—The new Mayor's Court at Madras found it difficult to escape from its own tradition of conflicts. In 1754 one Ephraim Issac accused one of the Aldermen of the Mayor's Court of giving dinners to two others in order to make them support him.[25]

24. Love, *Vestiges of Old Madras*, Vol. II, p. 440.
25. Dodwell, *A Calendar of the Madras Despatches*: 1744-1755, Introduction, p. 13.

9. Criticism of the Charter

(i) Executive's upperhand.—The Charter of 1753 made the judicial machinery more or less a branch of the Company's executive government and it failed to provide for the due administration of justice. The Mayor's Court was presided over by persons who were selected from the junior servants of the Company. They were inexperienced, ignorant of law and untrained in the art of administering justice. There appears to be sufficient truth in V.K. Ferminger's observation : "The weakness of judicatures of 1726 and 1753 arose from the fact that they tended to be in fact but various branches of the Company's executive Government and therefore afforded imperfect means of resistance to the class interests of the Company's servants at a time when the Company's servants were bidding fair to monopolise the trade of the country."[26]

(ii) Judges ignorant of law.—Similarly, the Governor-in-Council were quite ignorant about the technicalities of the English criminal law, on the basis of which they were expected to decide cases in India. This made them to misuse their position for private interests.

(iii) Indefinite jurisdiction.—Only the presidency towns were under the jurisdiction of the Mayor's Courts, but the position was not made quite clear about the cases arising beyond such area.

(iv) Expensive appeals.—Provision was there for appeals to the King-in-Council, but on the basis of the records it can be very well said that for a long period of time hardly any appeal was taken to England as it was a highly expensive task to go to London for an appeal.

(v) Exclusion of Indians.—The Mayor's Courts practically excluded Indians from having any share in the administration of justice in India. They were not appointed to the Bench. Under the Charters of 1726 and 1753 the only capacity in which Indians were allowed to participate in the administration of justice, was as jurors in the Sessions Court. The privilege was restricted to those only who accepted the Christian religion.

10. Abolition of the Mayor's Court and Constitution of new Courts

(i) At Calcutta.—At Calcutta the defective state of judicial affairs continued for some time till the House of Commons appointed a Committee of Secrecy in 1772. Apart from certain inherent defects in the recruitment of persons to preside over the Mayor's Court, the Court also came into conflict on the one hand with the President and Council, and on the other, with the native Zamindar's Court. Persons presiding the Mayor's Court were mostly ignorant and inexperienced in legal work.[27] The Mayor's Court always considered the Zamindar's Court as an encroachment on its jurisdiction. Though because of the provisions of the Charter of 1753. The Mayor's Court was helpless in attracting native litigants, still it came into conflict with the Zamindar's Court on the issue of jurisdiction.[28] The Committee of Secrecy

26. V.K. Ferminger, *Fifth Report of Select Committee*, p. 79.
27. William H. Morley, *Analytical Digest*, 1850, Vol. I, p. 12.
28. Holwell, a Zamindar imprisoned Soodasibdas and refused to release him though the Mayor's Court asked the Zamindar to do so. The Court represented the matter to the Company after referring it to the Governor-in-Council. Letter from the Mayor's Court at Calcutta to the Company, dated March 1, 1754:

reported that many of His Majesty's subjects residing in Bengal, were "neither unde the protection or control of the Laws of England, nor amenable to the crimin judicatures of the country.[29] In its Seventh report, the Committee of Secrecy severel criticised the working executive and judicial system in Calcutta and submitted i report to the British Parliament. It recommended that immediate steps should b taken to introduce reforms in the judicial system. The British Parliament intervene and passed a new Act, known as "The Regulating Act, 1773". The Act of 17 abolished the Mayor's Court at Calcutta and in its place a Supreme Court w established in 1774. These changes were made at Calcutta only and not at oth presidency towns. It appears that the British Parliament considered it suitable introduce the reforms on an experimental basis at Calcutta and assess its worki so that if it proved successful, the same may be introduced at Bombay and Madr also at a later stage.

(ii) **At Madras**.—At Madras, the Mayor's Court continued to function someh or other until 1797. The Charter of 1753 provided that in matters between nativ the jurisdiction of the Mayor's Court depended on their submission. In practice made very little change since the natives of Madras had no effective substitutes f the Mayor's Court as was the case at Calcutta. Dealing with the working of t Mayor's Court, a despatch was sent to the Company from Fort St. George on Ap 15, 1791.[30] It stated one defect which required immediate rectification, *viz.*, that t judges of the Mayor's Court were not skilled in law and this disqualification rea produced grave injustice in particular cases. It was also reported that due to increa in jurisdiction of the Courts its work also increased. Professional judges w therefore required to be appointed. Consequently the Company decided to abol the Mayor's Court at Madras and under the Charter of 1798 the Recorder's Co was established in its place. The constitution of the Recorder's Court at Madras w the same as at Bombay. The Recorder was an expert in English law. Apart fr improving the judicial system, its object was to bring the administration of just in Madras into line with the machinery of justice in Calcutta.

(iii) **At Bombay**.—At Bombay, the Mayor's Court was abolished in 1798 a in the same year the Recorder's Court was established in its place. The Mayo Court functioned for nearly 70 years with its inherent defects of principle a personnel. The Recorder's Court at Bombay consisted of a Mayor, three Alderm and a Recorder appointed by the Crown. It was provided by the Charter that Recorder must be a Barrister of not less than 5 years' standing. In fact *the Recor was the real judicial authority to enlighten the court with legal provisions applica in each case*. In 1798, Sir William Syer was appointed as the first Recorde Bombay.

As noted[31], with all their shortcomings the Mayor's Courts were much be than the Courts existing prior to them and they did constitute important links in chain of the evolutionary process of the Indian judiciary. With their end, also c

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Bengal, Past and Present, Vol. VIII, p. 34.

29. *Seventh Report of the Committee of Secrecy*, p. 333.
30. Cited in G. Gopalaratnam, *A Century Completed : A History of the Madras High Court*, p. 87.
31. Jain: *Indian Legal History*, Ch. 6, p. 67.

to an end the system of entrusting administration of justice to non-lawyer servants of the Company.

11. Appraisal of the Mayor's Court under the Charters of 1726 and 1753

It may be stated briefly that the Charter of 1753 made the Mayor's Court more or less a branch of the Company's executive Government. Persons presiding over the Courts were selected from amongst the junior servants of the Company whose appointment and dismissal depended on the sweet will of the Governor-in-Council. Judges became tools in the hands of the executive. Judges of the Mayor's Court were primarily experts in trade and commerce. They were lacking in professional legal training and in legal knowledge. It appears that the Court of Directors, as a matter of policy, never stated clearly that they were interested in maintaining independence of judiciary. In fact the Company was more interested in safeguarding its trade and commerce and the machinery to administer justice was mainly to deal with English litigants in India. The Judges of the Mayor's Court were always interested in expanding their jurisdiction over natives on some pretext or the other. But the persons administering the law did not have any judicial training nor did they know what law was to be applied to the litigants. Such a state of affairs was bound to lead to confusion. Under such conditions, therefore, a very important question arises — How far had justice gained by the creation of the Mayor's Court ?

Before answering the question, posed above, it will be worthwhile to consider certain observations made by eminent historians which may assist in properly assessing the entire situation.

Referring to the working of the Mayor's Court, William Bolt has observed, "The Mayor's Court has become rather a scourge in the hands of the Governor-in-Council than an instrument of relief to the injured, and justice in Bengal is made so much a political farce that no one concerned in the administration of it does so much as to hazard the giving offence to any gentleman in power."[32] According to him the Governor-in-Council got the "unconstitutional" power of "making and unmaking" the judges.

Alan Gledhill appreciated the working of the Court and the Judges. The popularity of the Courts with Indian litigants was presumably due in past to the efficiency of their executive proceedings.[33]

Alan Gledhill's observations have been much criticised by Dodwell, an eminent historian, who said, "A system that could hardly be mastered by the study of a life-time had then to be put into force by persons scarcely acquainted with its elements there was thus fine opening for those who could persuade others that they had any legal knowledge — you had to put up with make shift justice...."[34]

Regarding "popularity of the courts with Indian litigants" as stated by Gledhill, there is enough material on record to prove that at Calcutta the native litigants preferred Zamindar's Courts than to go to the Company's Court after 1753. On the other hand, the Mayor's Court was making constant efforts and taking undue steps

32. William Bolt, *Considerations of Indian Affairs*, Vol. 1, p. 87.
33. Alan Gledhill, *The Republic of India : The Development of its Laws and Constitution*, Edn. 2nd (1964), p. 214.
34. Dodwell, *Nababs of Madras*, pp. 148-57.

to bring natives before it. It can be supported by Cowell's observation that within the bounds of the Company's factories natives also built houses and when "the Nawab on that account was about to send a Kaji or Judge to administer justice to the natives, the Company's servants bribed him to abstain from the proceeding."[35] Referring to the litigant at Bombay, Vachha has pointed out another reason, "... that in the absence of any other regular law court, the Indian litigant had hardly any alternative but to resort to the Mayor's Court. Its justice, rough and ready, was none the worse for being free from legal forms and technicalities.[36]

The Mayor's Court failed to exercise its control and administer justice according to English law on all English people though the Charter of 1753 clearly provided that the primary task of the Mayor's Court was to administer justice over His Majesty's subjects. This fact can be supported by the observation of the Committee of Secrecy in its Seventh Report, "... many of His Majesty's subjects residing in Bengal, were neither under the protection or control of the Laws of England, nor amenable to the criminal jurisdiction of the country."[37]

Long, a historian, has pointed out the state of the Mayor's Court in his abbreviated remarks, "Their system has much of Justinian's justice, off-hand according to dictates of equity more than law."[38]

Another eminent historian Archbold, has stated, "... neither Parliament nor the Charters nor the Company in the early days ever took the trouble to make matters at all definite. We know that there was a good deal of difference between the position as it was *de jure* and what it was in reality and this pretence, if so we may call it, is reflected in the legal situation. Speaking generally, the Company's officers not being lawyers but traders had no wish to pose as judges. They were gradually forced to do so and they formed some sort of system which was improved as time went on by Charters and Acts of Parliaments. They were always conscious of their own imperfections in the matter and they were obviously anxious that English law should not be given too wide an application."[39]

There is great truth in J.W. Kaye's assessment, "*Justice gained little by the establishment of the Mayor's Courts....*"[40] It will also be in the fitness of things to conclude that howsoever ignorant, incompetent, inefficient and influenced by the executive were the judges of the Mayor's Courts, it is quite clear that by establishing the Mayor's Courts under the Charters of 1726 and 1753, a good beginning was made to set up a suitable uniform machinery for the administration of justice in India on the basis of English ideas and pattern.

12. The Courts of Requests (Small Cause Courts)

The Court of Requests was established for the first time by the Charter of 1753 at Calcutta, Madras and Bombay. It was established to decide civil suits of small pecuniary amounts.[41] The same Charter re-established the Mayor's Courts in all the

35. Cowell: *History and Constitution of Courts and Legislative Authorities of India*, p. 16.
36. P.B. Vachha, *Famous Judges, Lawyers and Cases of Bombay : A Judicial History of Bombay*, p. 14.
37. *Committee of Secrecy, Seventh Report*, p. 333.
38. Long: *Selections from Unpublished Records*, Vol. I, p. 31.
39. W.A.J. Archbold, *Outlines of Indian Constitutional History*, p. 30.
40. J.W. Kaye, *The Administration of East India Company*, p. 321.
41. "The Court of Requests is, in fact, the only court in Calcutta which ...is of real and essential service

three presidency towns. The Court of Requests was authorised to hear all civil suits involving a sum up to 5 Pagodas. Where the sum involved was more than 5 Pagodas, the Mayor's Court exercised its jurisdiction. The President and Council were empowered to appoint the first Commissioner to preside over the Court of Requests in each presidency town. Subsequent appointments were made by the Commissioners themselves.

The Charter of 1774 provided for the continuance of the Court of Requests and made it subordinate to the Supreme Court at Calcutta. Referring to the effectiveness of the Court of Requests, in his letter to the Earl of Rochford, Impey observed that the jurisdiction of the Court of Requests should be extended to Rs. 100. "This is a sum for which the Supreme Court cannot take bail and in this country is esteemed very inconsiderable. Indeed small suits take up a great part of that time which ought to be employed on more important causes."[42]

The Act of 1797 enlarged the monetary jurisdiction of the Court of Requests to Rs. 80 and in 1802 it was enlarged to Rs. 100 and by another Proclamation dated October 29, 1819 its jurisdiction was further extended and the maximum limit was fixed at Rs. 400.

As stated earlier, after the abolition of the Mayor's Courts and the Recorder's Courts the Courts of Requests were made subordinate to the Supreme Courts in each presidency town. The Supreme Court was authorised to supervise these Courts in the same manner as the inferior courts in England were made subject to the order and control of the Court of Queen's Bench.

In 1850, the Courts of Requests were abolished in the three presidency towns and in its place Small Cause Courts were established. The Governor-in-Council in each presidency was authorised to appoint judges in these Courts. These new Courts were given the status of the Court of Record. Their jurisdiction was further extended to Rs. 500. It was within the powers of the Small Cause Courts to reserve any question of law or equity for the Supreme Court's opinion. The Supreme Court was empowered to call for any cause involving a sum exceeding one hundred rupees which was already lying before the Small Cause Court. Practically, the Supreme Court always discharged litigants from coming to it for petty civil cases for which the Small Cause Courts were authorised to administer justice. All suits brought before the Small Cause Courts were heard and decided in a summary way. The creation of Courts with exclusive jurisdiction over petty causes with power to give a final decision in respect of such causes saved a good deal of public time as well as enabled the higher courts to devote more time for cases involving complicated questions of law and fact.

In 1864, the Presidency Towns Small Cause Courts Act was passed. It extended the jurisdiction of these courts to cases concerning the recovery of any debt, damage or reward involving even more than Rs. 500 but not exceeding Rs. 1000, provided that the cause of action had arisen or the defendant at the time of bringing the action was dwelling or carrying on business or personally working for gain within the local limits of the Court's jurisdiction. In cases exceeding Rs. 500 in value, the judges

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to the poor inhabitants.....", said Bolt in his book, *Considerations on Indian Affairs*, p. 86.

42. Impey's letter to the Earl of Rochford, dated March 25, 1775, *General Appendix No. 82, Touchet Report.*

were directed to reserve doubtful questions of law for the opinion of the High Court and to deliver judgment on the basis of that opinion.

In order to suitably adjust the working of the Small Causes Courts in the then existing judicial system of India, and also to remove certain defects which came into limelight in its actual working, a new Presidency Small Cause Courts Act was passed in 1882. The Act of 1882 repealed all prior enactments and constituted the Small Cause Courts at the presidency towns of Bombay, Calcutta and Madras, subject to various exceptions as specified in the Act. They were subordinate to the respective High Courts and exercised jurisdiction over such areas as was under the original civil jurisdiction of the High Court.

Mofussil Small Cause Courts or Provincial Small Cause Courts were established in 1860. The law relating to them was amended in 1865. The Provincial Small Cause Courts Act was passed in 1887. It reconstituted the Courts of Small Causes established beyond the local limits of the ordinary original civil jurisdiction of High Courts of judicature at Bengal, Madras and Bombay. The object of the Act of 1887 was to ensure the speedy administration of justice in small suits of pecuniary nature and comparatively simple in character. These Courts were entrusted with the power to try in a summary manner simple money suits not exceeding Rs. 500 in value. The Small Cause Courts are courts of summary jurisdiction from which no appeal is allowed except in certain case, as specified in the Act, to the High Court. Since 1887, the Provincial Small Cause Courts Act has received attention of the legislature both Provincial and Central from time to time and has been amended or repealed to meet the growing requirements.[43] The value of the contribution of a Court of Small Causes lies in the fact that justice is administered without much delay and the parties get an early decision on the disputed matter with the result that a petty litigation is saved from unduly and unnecessary procrastination.

43. The Provincial Small Cause Courts Act of 1877 was amended by Central Acts VI of 1914, XI of 1915, II of 1922, I of 1926 and IX of 1935. This Act has been amended in its application to the Bombay Presidency by Bombay Act VI of 1930 and Bombay Act IX of 1932. The Act has been amended in its application to U.P. by the U.P. Criminal Law (Reforms and Amendment) Act, 1954 and U.P. Act No. XVII of 1957.