CHAPER II

INDIAN JUDICIAL SYSTEM AND COMPARATIVE STUDY WITH OTHER LEGAL SYSTEMS

I

EVOLUTION OF JUDICIAL SYSTEM IN INDIA

India by virtue of its connection with Indus Valley Civilization has one of the most ancient civilized systems in the world. The concept of Nyaya can be traced back to the religious scriptures like Ramayan, Mahabharat, Smriti and Vedas.

The picture of modern Law will give a distorted and pervert picture if we begin with the perception that the legal system began today only or few centuries ago. The past traditions and development have led the foundation for present legal system. Without proper historical background it may be difficult to appreciate as to why particular system is as it is. Historical perspective throws a light on the remedies that exist. Law can not be understood properly when divorced from its historical background and spirit of the nation whose law it is. The lawyer without history is a mechanic, a mere working mason. **1

The development of Law in India can be broadly divided in 3 phases.

	PHASE	PERIOD
1	HINDU REGIME	PRIOR TO 1100 A. D.
2.	MUSLIM PERIOD	1200 TO 1600 A. D.
3.	BRITISH PERIOD	1600 TO 1947 A. D.
4.	POST INDEPENDENCE PERIOD.	1947 A. D. ONWARDS

**1 M. P. JAIN OUTLINE OF ANCIENT HISTORY 5TH EDITION PAGE 1.

The Concept of justice and judicial system originates from Dharma as perceived by Hindu Jurists. Since Law is the king of kings, far more powerful and rigid than them, nothing can be mightier than the law by whose aid, as by that of the monarch are, even the weak may prevail over the strong. **2

The development of Hindu Law during that period can be further divided in following phases.

1. Pre-Sutra period.
2. Era of Dharm Shastras
   Sutra Period.
   Smriti Period
3. Post Smriti Period

Ancient scriptures like Dharmshastra of Manu, Smriti of Narad, Dharmshastra by Bhrihaspati, Arthashastra by Kautilya gives enough of evidence that the coherent judicial system was existing in ancient India. The trade and commerce in ancient India was well developed. Loans were contracted, instruments of credit, Promissory Notes, hundies were regularly drawn of though there was no specific banks in the record but some equivalent institutions existed at that time. **3

The Smallest unit of the judicial system in those days was Panchayat - local court of each village. Village headman and other elder persons headed it. Emphasizing the importance of Panchayat's contribution one authority has

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**2 SHATAPATHA BRAHMNA XIV 4/2/26

**3 OUR JUDICIAL SYSTEM BY GOPALDAS KHOSLA AT PAGE 14.

observed "They are the best judges of the merits of the case who live in the place where the subject matter of the dispute has arisen. **4

Next in the hierarchy were the town courts or district courts located in larger terms. Their role was more important and status more dignified. The presiding officer was appointed by the king and was assisted by persons well versed with laws. They used to deal with important Civil and Criminal cases and also appeals from village courts. If picture description given by shudraka is relied upon, the court used to sit in large room and the presiding officers attended the court assisted by the clerk. The clerk was known as "Kayasth". Petitions were called in turn by turn and strictly in order with an exception in favour of persons from Royal families and Brahmins. The judge first considered the allegations in the petition. The defendant was than asked to explain if required protector of the town was to investigate in the matter. If capital punishment was to be imposed drum was beaten and person was sentenced to death.

The final court in the system was the king's court, which sat at state Capital and was presided over in theory by the king but in practice by the Chief Justice who also was a minister of Justice. Kautilya mentions his salary was 48,000 silver coins annually. He was called "Pradvivaka".

The court acted mainly as a court of appeal and also had original jurisdiction in respect of causes, which arise in the capital.

Arbitration was seen as best method to sort out civil disputes and petty crimes. As Narada observes, in disputes among merchants, artisans, agriculturists etc., it is impossible for outsiders to pass a sentence and passing of sentence should be left in hands of persons acquainted with their matter..

**4 SUKRANITI VOL.4 PAGE 24

The courthouse was seen as sacred place. The code of conduct for judges also was very strict and if the judge himself misbehaves the punishment was double than the ordinary person. If judge passes sentence without inquiring into necessary circumstances he was punishable. If he repeats the offence he shall be punished double and dismissed of the judge. If he falsifies, the punishment was 8 times more. **5

Doctrine of Independence of judiciary was recognised though Chief Justice was a part of king's cabinet.

Various stages through which law suits passed and decided were as given below :-

STAGE		PARTICULARS
1. Purnapaksha	-	Statement of case by plaintiff/complainant
2. Uttarpaksha	-	Reply by defendant/accused
3. Kriya	-	Actual trial including evidence, cross examination and arguments.
4. Nirnaya	-	Judgement stage.

The administration of oath before deposition was also prevalent. As per manusmruti, a witness who speaks the truth gain after death the most excellent regions of bliss and on earth unsurpassable fame.

The capital punishment was imposed in form of trial by ordeal and several forms were prevailing. It will be relevant to refer to Hiuen-T sang,

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**5 KAUTILYA'S ARTHASHASHTRA PAGE 224

When the ordeal is by water than the accused is placed in a sack connection with stone vested and thrown into deep water. If the man sinks and stones floats he is guilty. In case of ordeal by fire the man has to sit on hot iron sheet place his feet, hands, palms and tough on it and if no scar results he is not guilty. In ordeal by weight, man and stone are placed evenly balanced and the guilty is decided if the balance rises in favour of man. In ordeal by poison, if the person is guilty the poison takes effect, if he is innocent it does not. The aforesaid arbitrary versions can not be applied in any civilised system of justice. The decrees of civil courts were satisfied by restitution of the property or recovery of fine. The death punishment was resorted very frequently and was executed in public by persons called chandals who used to pronounce as under:-

"Listen, Good people Listen. This is so and so who has been found guilty of murder of so and so. Therefore will be under the orders of the king to execute him and if any other commits such a crime accursed in this world and the next, him to the king will condemn in like punishment."

II

VEDIC PERIOD

Vedic and ancient period has witnessed tremendous growth in terms of development of well-knit legal system. One version of Narada Smriti deals with "Vyavahar" and it deals with subject of inheritance, ownership, property, gifts and partnerships. It also deals with shares of widow and unmarried sisters on partition and also recognises the concept of remarriage of woman. The system also had comprehensive system of procedures dealing with rules relating to pleading, evidence of witnesses and procedure. Plaint is the essence of a lawsuit and Narada stresses the rule that it must disclose proper cause of action. The defendant's reply has to come immediately after becoming acquainted with tenure of the plaint and defendant must submit such answer. The answer may be in following forms:-

A) DENIAL

B) CONFESSION

C) SPECIAL PLEA

D) FORMER JUDGEMENT

The plaintiff has right to amend the plaint. Onus of proving what is alleged in plaint is on the plaintiff. The victorious party shall receive a document recording his success in appropriate language. The outstanding feature of Narada Smriti is that it is the first of the Dharmashashtra, which accepts, and record the principle that, king made laws could override any rule of law laid down in Smriti. **6

The work of Narada is further supplemented by Brahaspati who has further elaborated the scope of procedural laws. Brahaspati has stressed that pleading must be precise in words, reasonable, brief, rich in content, unambiguous, free from confusion and devoid of improper arguments. The written statement or reply should contain specific denials. Disposal of suit exparte was not very desirable. The work is further improvised by katyayana. He dealt with probative value of evidence and that positive oral testimony should carry more weight than mere inference and documentary evidence speaks louder than oral testimony. The advanced concepts like adverse possession, limitation, de facto and ostensible possession etc, which are well explained in the work speaks of its quality. The lawsuits were broadly divided in 18 different titles depending on different subjects.

The progress of justice administration can be further traced during Kautilya's time. The hierarchy of courts during that period as described in Arthashashtra is as under:

TYPE OF COURT/ADMINISTRATIVE UNIT	DETAILS
- SANGHRAVA	10 VILLAGES
- DRO NAMUKHA	400 VILLAGES
- STHANIYA	800 VILLAGES
- KING'S COURT	STATE

**6 MULLA HINDU LAW 16TH EDITION PAGE 25

The traditional advantage of providing justice at doorstep was achieved through Panchayat and there was institutional continuity though king's courts were the apex courts in terms of hierarchy. The law applied in all the court was basically the traditional law and the customary law and the judgements were arrived after proper rules of conduct and practices in the relevant context.

III

MOGHUL PERIOD AND JUDICIAL SYSTEM

The Moghuls were Sunni Muslims and they ruled India virtually for 300 years. During their period in particular in 16th century the Muslim population of India developed substantially by immigration and conversion and military and civil services were dominated by them.

The Moghuls had good experience of administration and they also gave judicial system units primitive form. The system was not as collaborate, as the one introduced by British later. Criminals in towns were dealt with by Muslim Kazis and administering the Muslim code. Each community had its own personal law and it was interpreted and administered through its own agents. There were Kazis for Muslims and Pundits or village panchayats for the Hindus. In the countryside Government post existed only at district headquarters or small towns. The imperial officers were concerned with large-scale crime such as robbery. In village order was largely maintained by village elders themselves whose arrangements were fascinating and intricate. Sometimes it was left to the local landholder, Government was merely seen as revenue collector. **7

**7 PERCIVAL SPEAR – HISTORY OF INDIA, PAGE NO.43

Judged by the modern standards the judicial system of Moghuls was rather imperfect. It had its own merits as well and one of them was quick administration of justice. Judicial official had great discretionary power. The organised form of judicial administration can be traced back upto the regime of Akbar. He regulated administration of justice on fairly liberal lines without any bias towards the Muslims which otherwise was an undesirable feature of the Moghuls. Shershah during his short period attempted to establish justice in every place. Civil Law was same for all. The drawback of Moguls was that they paid little attention for prevention and detection of crimes in rural areas. Headman of the village and his subordinate watchman were responsible for policing the village. Villagers collectively were bound to compensate, if the offenders could not be traced out. There was an officer called fojdar whose role it was to suppress the disorder. The positive feature was that fojdar was bound to compensate the losses in the event of highway robberies. **8

As far as the legislation is concerned there were no written codes or laws. Two exceptions were the ordinances of Jahangir and Fatwa-E-Alamgiri digest of Muslim law by Aurangzeb. The judges followed Quranic injunction or precepts. Fatwas are the holy law by eminent jurists and Qandn are the ordinances of the emperors. Customary laws and principles of equity also were relied upon. Emperor's interpretation prevailed provided it did not run counter to the sacred laws. **9

SPEEDY ADMINISTRATION OF JUSTICE and JUSTICE COMMON FOR ALL,were seen as important duties by Moghuls.

The officers did not enjoy any special protection, immunities or privileges for any of their acts and were fully accountable.

**8 ADVANCE HISTORY OF INDIA BY NILKANTASASTRI AND SRINIVASACHARI.

**9 ADVANCE HISTORY OF INDIA BY R. C. MAJMUDAR PAGE 552 MACMILAN PUBLICATION.

Akbar has been quoted by historians saying "If I were guilty of unjust act, I would rise in judgement against myself."

British historians observed....

"As to the administration of justice he (Akbar) is the most zealous and watchful. Some contemporary U. S. Traveler has testified the love for justice of the other emperors, like Jahangir and Aurangzeb. Though approach to the Emperor through all kinds of obstructions was not very easy, at least two Moghul Emperors, Akbar and Jahangir granted to their subjects the right of direct petitioning which was won even in England after hard fight. Jahangir allowed a chain with bells to be hung outside palace to enable petitioners to bring their grievances". How many persons actually benefited from it? **10

The judicial hierarchy of Mogul period was broadly in following pattern: -

FORUM	LOCATED AT	FUNCTIONS
	I	
KHALIF OF AGE (EMPEROR)	STATE HEAD QUARTERS	ABOVE ALL PROVINCIAL COURTS IT WAS FINAL COURT OF APPEAL
	II	
QUZI-UL-QAZAT (CHIEF KAZI)	STATE HEAD QUARTER	- APPOINT OTHER KAZI'S -ADVICE THE EMPEROR ON JUDICIAL MATTERS.
	III	
QUZIS	PROVINCIAL CAPITAL	INVESTIGATE AND TRY CIVIL AND CRIMINAL CASES OF BOTH HINDUS AND MUSLIMS.

**10 MONSERATE QUOTED IN ADVANCED HISTORY OF INDIA IBID.

	IV	
MUFTIS	PROVINCIAL CAPITAL AND TOWNS	TO EXPOUND MUSLIM LAW
	V	
MIR ADILS	PROVINCIAL CAPITAL AND TOWNS	DRAW AND PRONOUNCE JUDGEMENTS
	VI	
PANCHAYATS AND SALIS	VILLAGES	DISPUTES IN VILLAGE
	VII	
SADR	FOR LANDS GIVEN FOR PIOUS PURPOSES	TO DECIDE SUCH DISPUTES

DRAWBACKS OF THE SYSTEM

The Kazis were expected to be just, honest and impartial and to hold trial in presence of parties at courthouse and not to accept presents from the parties or attend entertainment given by anybody. Poverty was to be their glory. In practice however Kazi's department became a byword and reproach in Mughal times. Large-scale corruption was prevalent. The villages virtually had no system to get justice. Despite Jahangir's celebrated system of justice it is not actually known how many persons really approached for that purpose. The Moghul system of justice was weakest branch of their administration. It did not conceive gradewise hierarchy of courts controlled by dept. of Central govt. It did not have on lawyer code for all people and no separate court of judicature for the interpretation of the law.

SHERSHAH'S SYSTEM (SUR ADMINISTRATION)

Sharshah was known for his dedication to justice. The rule during his regime was that none could escape punishment on account of his status. Kazi and Mir Adil presided over the Civil Courts. Disputes of Hindus were decided by panchayats. In Criminal cases everybody was subject to the state law. Criminal law,was strict and punishments were severe. The object of punishment was not to reform but to set an example i.e. deterrent.

In case of Government Official and persons of High Status punishment was more severe. Function of Police was performed by Army and for each pargana there was Shiqdar.

As is observed by historians....

"So great was reputation of Shershah as just ruler that a merchant could travel and sleep in desert without fear of being robbed. **11

Shivaji's Regime

Shivaji governed his regime by principles covered in Dharmashashtra by Kautilya. There were 18 Dept. of public service including the dept. of justice. The kingdom was divided into 3 provinces each divided by Viceroy. Panchayats decided minor Civil disputes. Shivaji took great care to see that his commandants were not corrupt. People indulging in crimes were punished severely.

IV

BRITISHER'S RULE AND JUDICIAL SYSTEM

The East India Company acquired various powers and expanded their area of operations gradually. They also created territorial units known as moffusils. In large towns known as presidency towns separate courts were constituted. Warren Hastings deserves substantial credit for his efforts to streamline judicial system. He implemented judicial plan of 1772. The judicial plan was integrated with

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**11 UNIQUE QUINTESSENCE OF ANCIENT AND MEDICRAL INDIA UNIQUE PUBLISHERS PAGE 2.383

scheme of collection of taxes. Under the plan the following courts/Adalats were created.

1. Mofusil Diwani Adalat :- It was established in each district and collector was the judge. It had the jurisdiction to decide matters relating to real and personal property, inheritance, marriage, debts, disputed accounts, contracts, partnerships and rent demands. In the matter of personal laws, native law officers, Kazis and pundits were also associated. The decision in matter upto Rs.500 was final.
2. Small Cause Adalat : Cases upto Rs.10 were decided by Head Farmer of the Pargana and this saved trouble and expense involved in travelling long distance.
3. Mofusil Fojdari Adalat :- Mofusil Nizamat or Fojdari Adalat was to try all kinds of criminal cases. Collector was to exercise general supervision over the adalats. Adalat consisted of Muslim Law Officers, Kazi, Muffi and Moulwees and the law applied was Muslim law of crimes. At that time there was no uniform law dealing with offences and crimes.
4. Sadar Adalats : Sadar Nizam of Adalats were superior courts functioning at Calcutta. Sadar Diwani Adalat consisted of Governor and was to hear appeals from Mofussil Diwani Adalats in cases above Rs.500. Sadar Nizamat Adalat consisted of a judge called Daroga-e–Adalat and was assisted by Chief Kazi, Chief Mufti and 3 moulwees. The function of this adalat was to revive the proceedings of lower adalats and approve death penalty.

   All adalats were to maintain proper records and registers.

Supreme Court of judicature was created at Calcutta.**12 The effort was to provide an improved and more effective judicial tribunal. It was a court of record and enjoyed Civil, Criminal, admiralty and ecclesiastical jurisdiction. The judges of Supreme Court were lawyers appointed by Crown. It was court of law and equity.

**12 REGULATING ACT OF 1773

The courts were not very successful though they had the powers to issue writs like mandamus, certiorari, and habeas corpus. The main difficulty was that court was not in harmony with life, tradition, and manner of people. The court gave several controversial decisions including conviction of Nandkumar on forgery. He was given death punishment though Hindu or Muslim law recognised Forgery as offence for which capital punishment can be awarded.

The adalat system was re-organised under judicial plan of 1780 under this plan judicial and executive functions were separated and given to separate bodies. The adalats were to deliver themselves exclusively to Civil Justice and had nothing to do with collection of revenue. Appointment of judges like Sir Impey proved very beneficial to the healthy growth of the system. It was during this phase that process of certification of law began. Lord Cornwallis implemented further changes in the judicial system. The revenue functions were given to a court called Mal Adalat. The Diwani Adalats were empowered to decide all Civil Cases. In Criminal matters the collector was also given power to arrest for offence and award punishment, not exceeding 15 strokes or imprisonment exceeding 15 days.

Administration of Criminal Justice was left to Muslim law officers and there were rising complaints because the courts were degenerated in operation and chaos. There was no adequate control and supervision. By subsequent Act, High Courts were created in Presidency towns under Indian High Courts Act, 1861. The High Court was to have ordinary original Civil Jurisdiction in Calcutta. It also had extra ordinary Civil Jurisdiction and Appellate Civil Jurisdiction. The Supreme Court at Calcutta was abolished. Subsequently High Court at Allahabad, Bombay and Madras were also created. Under Indian High Courts Act 1901 few modifications were made and number of judges was raised to 20. More High Courts were created under this Act and Government of India Act 1935.

Maharshi Aurobindo has criticised the British system as under:

"The greatest fall of all has been the fall of belief in the imperturbable impartiality of British Justice. There are two kinds of strain which no empire,

however firmly bound in triple and quadruple bonds of steel, can long bear, the strain of burden of taxation which the people no longer fined bearable and the strain of the series of perversions of justice which destroy all the faith in the motives of governing authorities. Justice and protection between man and man, between community and community, between rulers and the ruled is the main object for which states exists, for which men submit tot he restrictions of the law and to an equitable assessment of the expenses of the machinery which provides for protection and justice.**12(A)

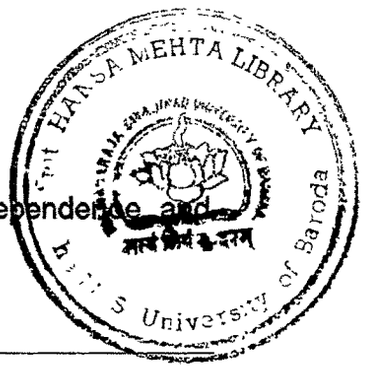
V

JUDICIAL SYSTEM AFTER INDEPENDENCE:

The independence of the country has brought many aspirations and expectations for the citizens. India is the largest democracy in the world and for maintaining and strengthening such democratic status, it is necessary that the rule of law be made to prevail.

The Preamble to the Constitution itself aims at securing social, economic and political justice for all the citizens. The goal of justice is to be achieved through the instrument of law and therefore Parliament and State Legislature have enacted the Laws, which aim at securing the broad objectives of the State. Another important development after independence is that tremendous increase in the delegated legislation, which includes laws, byelaws notifications etc. The level of education of citizens has gradually increased and literacy rate in the country is 52%. The education has brought more consciousness among the people about their rights and they look forward to the judicial system to enforce the remedies under the Law. In India at present there are about 2500 Central Acts and the State Legislatures also have enacted substantial laws which have vital influence on volume of litigation.

**12A BANDE MATARAM – BY SHRI AUROBINDO AT PAGE 431.



A brief resume of the important Laws enacted after independence and which affect large number of litigants are narrated below:

a) 1948 to 1960

(i) Central Excise Act, 1944
(ii) Central Sales Tax Act, 1956
(iii) Companies Act, 1956
(iv) Chartered Accountants Act, 1949
(v) Contract Act, 1872
(vi) Copyright Act, 1957
(vii) Cost and works Accountants Act, 1959
(viii) Court Fees Act, 1870
(ix) Designs Act, 1911
(x) Divorce Act, 1869
(xi) Easements Act, 1882
(xii) Emblems and Names (Prevention of Improper Use) Act, 1950
(xiii) Employees Provident Funds and Misc. Provisions Act, 1952
(xiv) Employees State Insurance Act, 1948
(xv) Employer's Liability acts. 1938
(xvi) Essential Commodities Act, 1955
(xvii) Factories Act, 1948
(xviii) General Clauses Act, 1897
(xix) Guardian and wards Act, 1890
(xx) Hindu Adoptions and maintenance Act, 1956
(xxi) Hindu Marriage At, 1955
(xxii) Hindu Minority and Guardianship Act, 1956
(xxiii) Hindu Succession Act, 1956
(xxiv) Industrial Disputes Act, 1947
(xxv) Employment (Standing orders) Act, 1946
(xxvi) Industrial (Development and Regulation) Act, 1951
(xxvii) Land Acquisition Act, 1894
(xxviii) Minimum Wage Act 1948

(xxix) Negotiable Instrument Act, 1881

(xxx) Partnership Act, 1932

(xxxi) Payment of Wages Act, 1936

(xxxii) Preference shares (Regulation of Dividends) Act, 1960

(xxxiii) Registration Act, 1908

(xxxiv) Reserve Bank of India Act, 1931

(xxxv) Sale of goods Act, 1930

(xxxvi) Securities Contracts (Regulation) Act, 1956

(xxxvii) Societies Registration Act, 1860

(xxxviii) Succession Act, 1925

(xxxix) Trade and merchandise Marks Act, 1958

(xl) Trade Union Act, 1926

(xli) Transfer of Property Act, 1882

(xlii) Trust Act 1882

(xliii) Weekly Holidays Act, 1942

(xliv) Workmen's Compensation Act 1923

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b) 1960 to 1970

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i) Advocates Act, 1961

ii) Apprentices Act, 1961

iii) Contract Labour (Regulation and Abolition) Act, 1970.

iv) Customs Act, 1962

v) Limitation Act, 1963

vi) Maternity Benefit Act, 1961

vii) Monopolies and Restrictive Trade Practices Act, 1969

viii) Patents Act, 1970

ix) Payment of Bonus, 1965

x) Specific Relief Act, 1963

xi) Income Tax Act, 1961

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c) 1970 to 1980

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i) Company Secretaries Act, 1980
ii) Conservation of Foreign Exchange and prevention of Smuggling Activities Act, 1974
iii) Contempt of Courts Act, 1971
iv) Economic Offences (Inapplicability of Limitations) Act, 1974
v) Equal Remuneration Act, 1976
vi) Foreign contribution (Regulation) Act, 1976
vii) Foreign Exchange Regulation Act, 1973
viii) Payment of Gratuity Act, 1972
ix) Standards of weights and measures Act, 1976
x) Water (Prevention and control of pollution) Act, 1974

d) 1980 to 1990

i) Administrative Tribunals Act, 1985
ii) Air (Prevention and control of Pollution) Act, 1981
iii) Consumer Protection Act, 1986
iv) Environment (Protection) Act, 1986
v) Family Courts Act, 1984
vi) Sick Industrial Companies (Special Provisions) Act, 1985

e) 1990 onwards

i) Arbitration and Conciliation Act, 1996
ii) Depositories Act, 1996
iii) Foreign Trade (Development and Regulation) Act, 1992
iv) Recovery of Debts Due to Banks and Financial Institutions Act, 1993
v) Securities and Exchange Board of India Act, 1994

In the province of social legislation new areas like prevention of untouchability and atrocities on schedule castes and tribes Act has added new dimensions to the litigation. Certain amendments brought to the traditional laws like Negotiable Instruments Act have brought added volume of litigation. The entire hierarchy of courts functioning in India has been discussed at various stages in this chapter. All the matters and disputes do not go to courts and some of them go to tribunals for which separate chapter is given in this research work.

VI

THE CONSTITUTIONAL PROVISIONS

The rights to Constitutional remedies have been recognised as fundamental right. The Constitution provides that the right to move that the Supreme Court by appropriate proceedings for the enforcement of fundamental right is guaranteed. The Supreme Court has power to issue directions or issue order or writs including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition, certiorari whichever may be appropriate for enforcement of any of the aforesaid rights. The Parliament can by law empower any other court to exercise within its local limits or any of powers exercisable by Supreme Court. This right can not be suspended except as otherwise provided by the Constitution. **13 Only fundamental rights can be enforced under this article, writ cannot lie for enforcement of Government policies or directive principle. **14 The provision also does not cover the question of legislative competence of impugned law or vires of a particular enactment. However if the law simultaneously violates one's fundamental rights, writ will lie. **15 A person who has entered into voluntary settlement can not challenge the constitutionality of the statute until the settlement is cancelled in appropriate proceedings. **16 Even if the administrative order is erroneous if constitutionality of the statute or order is not challenged the court will not interfere. The petition alleging malafides on the legislators or their being prompted by ulterior motives was also not entertained. **17

**13 ART. 32 CONSTITUTION OF INDIA

**14 HINDI HITRAKSTIAK V/s. UOI AIR 1990 SC 851.

**15 CHIRANJITLAL V/s. UOI 1950 SCR 809

**16 EXPRESS NEWSPAPERS V/s. UOI 1986 SCC 633

**17 NAGRAJ V/s. STATE OF AP AIR 1985 SC 551

Article 226 and 227 of the constitution are also important. Art.226 deals with the power to issue writs vested in the High Courts. It stipulates that notwithstanding anything contained in Art.32 every High Court has the power in relation to which it exercises jurisdiction to issue to any person or authority including in appropriate cases Government within those territories, by issuing directives, orders or writs. If the orders are obtained exparte the provisions of Art.226(3) have to be followed. **18 Under Art.227 the High Court is vested with general power over all courts and tribunals throughout the territory on which it exercises supervisory jurisdiction and the power includes the power to call for information and make and issue general rules and prescribe forms for regulating proceedings and practice of such court and also to prescribe forms for maintaining books entries etc.

Under this provision the High Court can interfere in following cases:

i) Erroneous exemption or excess of jurisdiction. **19
ii) Error of law apparent on face of record.
iii) Violation of principles of natural justice.**20
iv) Arbitrary or capricious exercise of discretion.
v) Arriving at finding which is perverse or based on no material.
vi) Patent or flagrant error in procedure.
vii) Order resulting in manifest injustice.

The power under Art. 227 may be exercised suo moto. **21 If the suit is filed before a Civil Court and it involves substantial question of law as to the interpretation of the Constitution or as to the validity of any statutory provisions then the Civil Court shall not proceed to determine the question until after notice has been given to the Attorney General of India if the question concerns Central Government and to the Advocate General if the question concerns the State Government. The Court may also add Government as a party. **22

**18 INSERTED BY CONSTITUTION 44TH AMENDMENT ACT 1978.

**19 GUJARAT STEEL V/s. MAJDOOR SABHA AIR 1980 SC 1896

**20 STATE OF GUJARAT V/s. VAKHATSINGH AIR 1968 SC 1481

**21 JAIN V/s. SBI AIR 1982 SC 673

**22 ORDER 27 A RULE 1 OF CPC

When the alternative effective remedy is available High Courts have refused to interfere in the matter. Some of such cases where High Courts refused to interfere were as under:

a) Statutory appeal under the Land Acquisition Act.
b) Specific alternative remedy provided under Criminal Procedure Code.
c) Directive to file a suit to enforce terms of contract. **23

However the High Court was bound to interfere in following cases:
(a) Infringement of Fundamental Rights.
(b) Law giving jurisdiction to tribunal itself was unconstitutional. **24
(c) Violation of Natural justice.

V

SUPREME COURT OF INDIA

The Supreme Court of India was established on 28/1/1950 under Constitution of India and it marks beginning of a new era. It is the highest court of the land and enjoys vast jurisdiction. It can be truly said that the jurisdiction and power of this court in their nature and extent are wider than those exercised by the highest court of any country in the Common Wealth or by Supreme Court of United States. On this court will fall the delicate and difficult task of ensuring to the citizens the enjoyment of his guaranteed rights consistently with the rights of the society and the State. No less onerous though far less spectacular will be the task of adjudging the private rights of citizens and administering the law of the land.**25

**23 DECCAN MERCHANTS CO-OP.BANK V/s. DULICHAND 1968 SC IN CA NO.358/67.

**24 CORL STEEL V/s. STATE OF BIHAR AIR 1961 SC 1615

**25 INAUGURAL ADDRESS BY SHRI M. C. SETALWAD FIRST ATTORNEY GENERAL OF INDIA

The jurisdiction conferred on the Supreme Court under various Articles of Constitution have been summarised below:

ARTICLE	PARTICULARS
ART.32	Guarantee of constitutional remedies and the power to issue direction, orders or writs like habeas corpus, mandamus, prohibition, certiorari, quo warranto, under this article Supreme Court has been made guardian of freedom and liberties of people of India.**26
ART.71	The Court has jurisdiction to decide dispute arising out of election of President and Vice President.
ART.131	Supreme Court has exclusive original jurisdiction to decide between Centre and State and States interse.
ART.317	Supreme Court has jurisdiction to report to President that member of Public Service Commission may be removed.
ART.132	In Constitutional case appeal lies to the Supreme Court from judgment of High Court if High Court certifies that case involves substantial question as to interpretation of Constitution.
ART.133	Appeal lies to the Supreme Court from any judgement of High Court if value of subject matter is more than Rs.20,000/-
ART.134	In Criminal Cases appeal lies to the Supreme Court if the sentence awarded was a death sentence or acquittal in such case was involved or high Court certifies that it is a fit case for appeal. If imprisonment is of more than 10 years then also the appeal shall lie.**27

**26 CONSTITUTION OF INDIA BY M. P. JAIN PAGE 703.

**27 SC (ENLARGEMENT OF CRIMINAL APPEALLANT JURISDICTION) ACT 1970

ART.136	It confers on Supreme Court special to exercise jurisdiction power of jurisdiction in respect of judgement, decree, determination, sentence or order in any cause or matter based or made by any court or tribunal in the territory of India. The petitioner has to establish exceptional, special, substantial and grave injustice suffered by him. **28
ART.139A	the Supreme Court has power to transfer to it, cases from the High Courts.
ART143	it confers advisory jurisdiction on Supreme Court and President of India can refer any question of law or fact, which is of public importance to the Supreme Court for opinion.
ART.138	Parliament is authorised to confer further jurisdiction on Supreme Court in respect of matters under Union list of seventh schedule in the Constitution of India. **29

With the expansion of economy, legislation and disputes, the workload of Supreme Court has increased tremendously. The pendency of cases before the Supreme Court is more than 1,00,000. The recent increase in volume of work inflow is because of Constitution of various tribunals and consequent invocation of Appellate Court. With several new legislations like FERA, MRTP Act and other provisions dealing with economic matters more and more litigation is pouring into Supreme Court. The emerging new concept of Public Interest Litigation (PIL) also has opened new area for inflow of litigation, because PIL is seen as an innovative strategy to seek justice for the person with legitimate claims but who could not seek redressal of their grievance in courts due to many reasons prevailing in court.**30

**28 BHARAT BANK V/s. EMPLOYEES OF BHARAT BANK. AIR 1950 SC 198

**29 FOR E.G.SECTION 55 OF MRTP ACT APPEAL LIKES TO SC FROM ORDER OF MRTP COMMISSION.

**30 PUBLIC INTEREST LITIGATION IN QUEST OF JUSTICE DR.SONIA HYRRA AT PAGE 89.

The Indian Law Institute has made detailed study on the problems of litigation explosion in Supreme Court.**31 Recently Indian Institute of Management has carried out research study on this subject at the request of Supreme Court. The detailed findings of the study were described confidential and were not made available for this research by Indian Institute of Management.

The problem of litigation explosion if not sorted out, results in exploiters having an edge over the exploited and the legal system acting as a resource for repression of vulnerable people. The dominant interest will distort the channel and goals of distribution in their favour.**32

Supreme Court has made sincere effort during recent times to reduce pending backlog and time within which the matter should be disposed off. Justice Ahmedi while he was Chief Justice of India contributed substantially for reduction of arrears and reducing the time involved in disposal. Justice Krishna Iyer has suggested that Supreme Court should have research and development wing for a better access of justice, including facilities for filing cases at various centres and also organising benches of Supreme Court and decentralise the justice to make it really available to the common man. **33 Another important development is large-scale computerisation made in Supreme Court of India, which helps substantially in saving the time involved and also in compiles and generates various records. Latest technologies are being applied for developing user friendly programs.

**31 THE SC UNDER STRAIN – INDIAN LAW INSTITUTE PUBLICATION.

**32 PROF.UPENDRA BAXI THE CRISES OF INDIAN LEGAL SYSTEM AT PAGE 5.

**33 JUSTICE AT CROSSROADS BY JUSTICE KRISHNA IYER AT PAGE 124.

VIII

HIGH COURTS

Chapter 5 of Constitution of India provides for constitution of High Courts for each State. There can be common High Court for 2 or more States also. Various High Courts have been established on following dates/year.

	HIGH COURT	DATE/YEAR OF ESTABLISHMENT
1	Calcutta	14.05.1862
2	Bombay	14.08.1862**34
3	Madras	15.08.1862**35
4	Agra	17.03.1866
	(Shifted to Allahabad)	(In 1875)
5	Patna	22.03.1912
6	Lahore	21.03.1919
7	Nagpur	02.01.1936
8	Punjab	1947
	(Designated as Punjab & Haryana)	1996
9	Gauhati	1948
10	Orissa	1948
11	Andhra	01.01.1956
12	Delhi	1966
	(Has original jurisdiction for matters above Rs.1 lac.)	
13	Himachal Pradesh	25.01. 1971
14	Gujarat	1960
15	Kerala	1956
16	Karnataka	1956
17	Rajasthan	1956

**34 JUDICIAL HISTORY OF BOMBAY BY P. B. VACHA 64 BLJ 33

**35 A CENETERY COMPLETED HISTORY OF MADRAS HIGH COURT BY J. C. GOPALRA

Separate High Courts have been established for Jammu & Kashmir and Sikkim.

All the High Courts are of equal status. Every High Court shall be a Court of record and shall have all powers of such a Court. The incidences of it being the Court of record are as follows:

1. It has power to determine questions about its own jurisdiction.**36
2. It has inherent power to summarily punish for its contempt.**37

The High Court consists of Chief Justice and such other judges, as the President from time to time deems necessary. Fixation of strength of the High Court is an executive function to be exercised on advice of council of ministers and for that there can be no judicial standard. No Court can issue a writ of Mandamus commanding the Government to fix any number of judges for High Court or directing how many additional or permanent judges should be appointed. **38

The judges of High Courts are transferable to any other High Court. There is no requirement of obtaining consent of the concerned judge. The proposal can be initiated by Chief Justice alone.**39 Transfer is an obvious incident of judges' tenor and power may be exercised more than once. **40

The constitution has in-built provision for appointing additional judges to deal with temporary increase in business or additional workload. It provides that if by reason of any temporary increase in the business of the High Court or by rise of arrears therein, it appears to the President that the number of judges of that court

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**36 D. D. BASU SHORTER CONST. OF INDIA 12TH EDITION PG.513

**37 SUKHDEV V/s. CHIEF JUSTICE 1954 SCR 463

**38 GUPTA V/S UOI AIR 1982 SC 149 AT PARA 27.

**39 UOI V/s. SANKALCHAND AIR 1977 SC 2328

**40 SC ADVOCATES ASSOC.V/s. UOI 1993 4 SCC 441

shall be for the time being increased, President may appoint duly qualified person as the additional judge of the Court for period not exceeding two years as he may specify.**41 The Chief Justice of High Court may with the previous consent of the President request any person who has held any Office of judge of that Court or of any other High Court to sit and act as a judge in the High Court.**42 The High Court is vested with rule making power for conduct of its business. Such rules will have effect if appropriate legislature has not made any law on the subject.**43

Powers of the High Court:

The jurisdiction of High Court and their powers are varied and diverse. Some High Courts have original jurisdiction to decide suits were valuation of subject matter is above Rs.1 Lac. The Bombay & Delhi High Courts have such powers.**44 High Courts derive their jurisdiction from various statutes and provisions as under:

	STATUTE	TYPE OF JURISDICTION
1	Constitution of India	- Writ jurisdiction under article 226. -Power of superitendence over all courts under article 227. -Power to transfer the case under article 228 if it involves substantial question of law relating to constitution. -Provision for consultation in posting and promotion of District Judges under article 233.

**41 ART.224 CONST. OF INDIA

**42 ART. 224 A INSERTED BY CONST. 15TH AMENDMENAT ACT, 1953

**43 ST. OF UP V/s. BATOOK 1978 2 SCC 102

**44 79TH REPORT LAW COMM. OF INDIA PAGE 16

		Powers under the Letters Patent (provisions of various High Courts confer special jurisdiction).
2	Civil Procedure Code	- Under Section 115, the High Court has a power of revision against order from Senior Division Court, appeal lies to High Court under section 100 if substantial question of law is involved.
3	Criminal Procedure Code	- Appeal from aquittal under section 378. - Appeal against conviction under section 379. - Revision jurisdiction under section 397. - Special jurisdiction for bail under section 439. - Inherent power under section 482.
4	Acts constituting various Statutory Tribunals.	- High Court may interfere for cogent reasons
5	Companies' Act	- Powers of winding up etc.

Upon further study of the provisions of Gujarat High Court rules, a more exhaustive list of various matters dealt with by the High Court is as under. Such matters can be dealt with by the single judge of the High Court.

Civil Matters:

1 Appeal from Original decree in suits where value of subject matter does not exceed Rs.1 Lac or is incapable of valuation.

2 Appeal under special or local Acts where value of subject matter before them does not exist or is incapable of valuation.

3 Appeal in proceedings under guardians/Wards Act 1890 & Hindu Minority & Guardianship Act 1956.

4 Appeal under section 144 in respect of application for restitution.

5 Appeals under Hindu Marriage Act and other matrimonial enactments.

6 Appeals from appellate decrees.

7 Appeals from orders under section 104 (Appellate order) and order 43.

8 Appeals exclusively relating to costs or installments.

9 Appeals arising out of land references in case the value of subject matter including allied matters is not exceeding Rs.1 Lac.

10 Application under article 225 of Constitution of India except:

a) Where vires of any provision of any statute is challenged.

b) Issue of writ of habeas corpus and also for appropriate direction, order or writs in respect of orders of deportation.

c) Applications challenging reward concerning revision of wages under Industrial Disputes Act.

d) Application under the following Acts.

- Customs Act.
- Central Excise & Salt Act.
- Income Tax Act.
- Gift Tax Act.
- Wealth Tax Act.
- Gujarat Sales Tax Act etc.
- Land Acquisition Act.
- Import and Export Control Act.

11 Applications under article 227 of the constitution.

12 Applications for revisional jurisdiction under section 115 of Civil Procedure Code, 25 of Provincial Small Causes Court Act or any special or local law.

13 All applications & proceedings under Companies' Act. (original Jurisdiction).

14 Applications under local or special Acts not otherwise provided.

15 Applications under Guardians & Wards Act, Hindu, Guardian & Minority Act and other enactment.

16 Applications for transfer of suits, appeals or other proceedings pending for trial except under article 228.

17 Applications for consent decrees or orders under Order 23, which can be disposed off by, single judge.

18 All applications or proceedings incidental to or arising out of or relating to application for leave to appeal to the Supreme Court after grant of leave to appeal by High Court.

19 All matters pertaining to judgement and decree under the High Court Rules.

20 All references under section 113 of Civil Procedure Code where the case involves question of validity of any Act, Ordinance or Regulations.

21 Revisions of orders passed by Registrar, Joint Registrar, and Deputy Registrar of the High Court.

22 All civil proceedings transferred or withdrawn to High Court.

23 All matters pending registration where office objections are not removed within prescribed time.

Criminal Matters:-

1. Appeals against conviction involving sentence of fine or imprisonment for period not exceeding 7 years is involved.
2. Appeal or applications against order of acquittal in appellate powers.
3. Appeals against order relating to disposal of property and orders for compensation.
4. Appeals against order under section 360 Criminal Procedure Code (CrPC) (order to release on probation of good conduct) Section 93 Bombay Prohibition Act and Bombay Probation of Offenders Act 1938 etc.
5. Appeals under section 94 of Bombay Children Act and Section 93 of Saurashtra Act.
6. Appeal under Section 341 of Criminal Procedure Code (offences affecting administration of justice).

7. Appeal or revision against orders under chapter 8 of Criminal Procedure Code (Security for keeping peace and good behaviour).
8. Application for exercise of revisional jurisdiction under section 401 of Criminal Procedure Code.
9. Application under section 482 of Criminal Procedure Code (inherent powers of High Court).
10. Application for exercise of revisional jurisdiction under any other statute.
11. All applications for transfer of cases (except under article 228).
12. Applications under Article 227 of Constitution of India.
13. Application for bail not related to any appeal.
14. Application for condonation of delay for extension of time for deposit of transcript record in criminal appeals to Supreme Court.
15. Other miscellaneous applications including bail or stay.
16. All criminal proceedings.
17. All miscellaneous applications including bail.
18. All applications or proceedings incidental to leave for appeal to Supreme Court.

Thus the total volume of work of High Court is bound to increase not only because of the matters coming within its writs jurisdiction but also because of various appeals and revisions which come to the High Court under the aforesaid jurisdictions. It can also be appreciated that in most of such matters the litigating parties have high expectations from the Court..

As on 31.12.1996 total number of pending cases in High Courts were 31.12 lacs and it was showing tremendous increase as compared to the figures before one decade. During last 15 years number of pending cases have increased almost 4 times, from 8.45 lacs in 1981 to 31.12 lacs.**45

**45 JUDICIARY FUMES, FLAMES AND FIRE BY JUSTICE GUMANMAL LODHA AT PG.104 APPENDIX 3

CASES PENDING IN HIGH COURTS

AS ON 31ST DECEMBER 1996.

Name of the High Court	Number of cases		
	instituted	disposed	pending
Allahabad	163920	116977	865455
Andhra Pradesh	120997	134024	135621
Bombay	91621	74674	234058
Calcutta	68424	58481	264312
Delhi	57812	52487	153537
Gauhati	20958	19311	33018
Gujarat	N.A.	N.A.	139821
Himachal Pradesh	14599	16505	17166
J & K	21567	18853	96414
Karnataka	70739	81267	150965
Kerala	101492	80692	217823
Madhya Pradesh	N.A.	N.A.	75616
Madras	105442	97163	310640
Orissa	47666	32788	66820
Patna	76743	78878	93310
Punjab & Haryana	117304	105807	161562
Rajasthan*	40123	39975	95496
Sikkim	216	209	88

*As on 30.09.1996

Source: Ministry of Law and Justice.

IX

DISTRICT COURTS/ AND OTHER SUBORDINATE COURTS

The District Courts are next in hierarchy of the judicial system and chapter 6 of the Constitution of India deals with the same. The posting and promotion of District Judges in any state is to be made by the Governor of State in Consultation with High Court. A person to be eligible as District Judge has to be a practicing advocate for not less than 10 years and is to be recommended by the High Court. The Supreme Court has held that consultation with High Court is mandatory and the word High Court means the judges of all the courts.**46

The control over District Court and Court subordinate thereto including posting, promotion, leave to persons belonging to judicial service and holding post lesser than district judge is with the High Court. It also has a power for punishment of dismissal, removal or reduction in rank or recommend for punishment to the Governor in respect of district judges. In respect of promotions below district judges the High Court is the sole authority.**47

Various matters, which come before district courts can be broadly classified as under:

For the purpose of case study various matters pending before district court Baroda as per their filing records have been examined during the year 1998 position of various matters filed in Baroda are as under:

**46 CHANDRA MOHAN V/s. STATE OF UP AIR 1966 SC 1987

**47 HARI V/s. STATE OF HP AIR 1980 SC 1426

TABLE

(SHOWING COURTWISE MATTERS IN DISTRICT COURT BARODA AS ON 30/12/98)

Dist. I	Appeals under T P Act, Criminal Appeals under Indian Forest Act, Transfer Applications under CPC and CRPC.
Dist. II	Bail Application relating to offence under Narcotic, TADA and Communal Rioting, Prevention of Corruption Act.
III	MAC Cases, Regular Civil Appeals, Misc. Civil Appeal, Civil Revision Application arising from the orders of Small Causes Court and Junior and Senior Division Court under Bombay Rent Act and other specially assigned matters and other Civil Misc. Applications.
IV.	References under Land Acquisition Act and other specially assigned matters.
V.	Suits under Copyright Act, Bombay Public Trust Act, Special Act, Trade Mark Act, Suits for Dissolution of Marriage under Special Act suits under Companies Act. Suits under conjugal rights regarding marriage under Special Act i.e. under Section 10, 18, 23, 27, 32 and 34 of Indian Divorce Act.
VI	Criminal Misc. Application except under TADA, Narcotic Act, Communal Rioting, Essential Commodities Act (ECA) and any Private complaint except E.C.A and other specially assigned matter.
VII	Criminal Appeals except Indian Forest Act and other specially assigned matters.
VIII	Petitions under Guardians and Wards Act and Appeals against Election Petition, to send to High Court writs Civil and Criminal to the concerned courts/authorities/address and other specially assigned matters. Regular civil Appeals and Appeal under Gujarat Public Premises Act and other specially assigned matters.

IX Misc. Civil Appeal Under Order 43, CPC and other specially assigned matters.

X Criminal Revision application under Criminal Procedure Code and other specially assigned matters.

X

THE SENIOR DIVISION/JUNIOR DIVISION COURTS

These courts are constituted under the Bombay Civil Courts Act and have pecuniary jurisdiction. The pecuniary jurisdiction of the Junior Division Courts is upto Rs.50,000/-. All the matters where valuation is more than Rs.50,000/- goes to Senior Division Court and there is no ceiling limit. Appeal from junior division courts goes to the district courts and from senior division courts to the high Court. The summarised position of the entire judiciary for the State of Gujarat is given in the following table:

NAME /TYPE OF COURT	NO.COURT	NO.OF JUDGES SANCTIONED STRENGTH
High Court as on 31/12/98	21	29 45

XI

TRIBUNALISATION OF JUSTICE IN INDIA

Tribunals are constituted under Art.323 A and 323 B. The functions of various tribunals have been discussed in chapter 7 of this thesis. The term tribunal is used in juxta with the word court and refers to quasi-judicial tribunals, which though not equivalent of ordinary courts have trapping of ordinary courts. All Tribunals are not courts though all courts are tribunals.**48

**48 SAROJINI V/S. UOI AIR 1992 SC 2219

In context of Art.136 (1) of the Constitution of India the word tribunal includes any tribunal against whose decision the Supreme Court has the jurisdiction to issue writ of certiorari and prohibition. It includes Industrial Tribunal also.**49 The purpose of constitution of such tribunals was to expedite the proceedings in specified sphere of litigation. Several tribunals, constituted under various Acts are as under:

ACT	TRIBUNAL
Administrative Tribunal Act.	Administrative Tribunals
Railways Act.	Railway Claims Tribunal
Industrial Disputes Act.	Industrial Tribunal
Customs Act.	CEGAT
Recovery of debt due to banks and financial institution Act.	Debt Recovery Tribunal

XI

CRITICAL EVALUATION OF FUNCTIONING OF JUDICIAL SYSTEM

A. EMINENT JUDGES :-

(a) JUSTICE CHANDRACHUD

Justice Chandrachud expressed concern about night-mare of judiciary and virtually issued hard warning signal that unless something is done the judicial system on account of ever increasing cost, arrears and delay would crash under its own weight.

**49 ALEMBIC CHEMICALS V/s. WORKMAN AIR 1963 SC 647

Justice Chandrachud advocated harmony and balance between directive principles and fundamental rights.**50 He also advocated substantial reforms in Indian Legal System to achieve goal of social justice. He believed that unless people are assured of real, substantial, cheap, speedy and ready social justice which can help eradication of poverty and removing tears from the depressed labourer and poor, the administration of justice is ineffective. Deliverance of goods and not gimmicks being the fundamental requirement of the day, even the static and dogmatic judiciary requires to be made pragmatic and dynamic and is to be matched with the balance of felt necessities.

Justice Chandrachud emphasised for self introspection, mediation, exchange of notes and historic decisions to attend goal of speedy justice.**51 Discarding as academic and insignificant the matters like transfer of judges, he observed that teeming millions of India treat the above debates as idle, futile, luxurious and mental gymnasiums of academic jurists and the real need is to provide cheap and speedy justice.

(ii) JUSTICE BHAGWATI :

According to Justice Bhagwati, former Chief Justice of India and founder of the Lok Adalat and Public Interest Litigation the Justice should reach every one in the country and it can be done by a dynamic legal aid and education programme According to him, the legal system has become so costly and expensive and suffers from so much delay and poor people are priced out of it.**52 In his endeavor to achieve this goal Justice Bhagwati innovated new methods and strategies for the purpose of providing access to Justice to large masses of people who are denied their basic human rights and to them, the word freedom and liberty have no meaning.

**50 MINERVA MILLS V/s. UOI AIR 1980 SC 1789

**51 IN SEMINAR ON BHARTIYA NYAY PRANALI ON NEED FOR SAMPURNA KAYAKALPA ON 11/9/82.

**52 INDIAN EXPRESS DELHI EDITION DT.31/1/82

To Quote, : It must not be forgotten that the procedure is but a handmaid of Justice and the cause of Justice can never be allowed to be thwarted by any procedural technicalities. Court would therefore unhesitatingly and without slightest callous of consensus caste aside the technical rules of procedure in exercise of its powers to dispense justice."**53 Justice Bhagwati is of the opinion that courts may confine such exercise of jurisdiction to cases where legal wrong or legal injury is caused to determinate class or group of persons or their fundamental right is violated. The approach of Justice Bhagwati though non-conventional is quiet cautious in the same judges case he held that the courts must take care to see that it does not overstep the limits of judicial function and trespass into areas which are reserved for executive or legislature. Justice Bhagwati also deserves credit for judicial activism and he promoted this concept.**54

In a lively seminar at Chandigarh on the subject of "Judges commitment to whom" in his inaugural address Justice Bhagwati explained the position of Directive Principles and fundamental Rights. Justice Bhagwati advocated harmonious construction of both and has stated, "The fundamental rights are no doubt important in democracy but there is no real democracy without social and economic Justice to the common man."

Justice Bhagwati is of the view that all legal and judicial reforms in the Indian system should be aimed to achieve sacred and pious object of social justice and the judiciary should be independent to impart Justice without fear or favour, affection or ill-will. Justice Bhagwati is also of a firm view that if adequate sentence is not passed the Criminals will start thinking that it is not difficult to get scot-free after committing the crime. Occurrence of dacoities in banks, rapes in public places, increase in traffic accidents and various economic offences warrant that

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**53 S P GUPTA V/s. PRESIDENT OF INDIA AIR 1982 SC 149.(JUDGES CASE)

**54 HOW THE SC ENFORCES CITIZENS RIGHT TALKED TO JUSTICE BHAGWATI TO DINAVAKIL OF INDIAN EXPRESS 31/1/82.

the law breakers should be dealt with stern hands. Justice Bhagwati however on the point of death sentence was found leaning towards its abolition.**55 Justice Bhagawati initiated some steps to reduce the delay. Long and redundant arguments have been the main cause of delay. However when Justice Bhagwati suggested its abolition the move was opposed by the Bar Association and it could not be implemented. Justice Bhagwati has been described as controversial Head Priest of new and vigorous school of law giving. He attempted to transform the Supreme Court from the area of legal quibbling for man with long purses into a dynamic champion of India's under privileged poor.**56 Bhagwati admitted that in his zeal to transform an ombudsman, he may sometimes have pushed the limit of judicial freedom too far. Justice Bhagwati was also opposed to wasting of time of the court. In case of the matters decided by him he has observed that the case involving controversy of 25 Paise or 50 Paise result in pending battle at the bar costing thousands of Rupees and consumes precious time of courts which are having backlog of case of normally 10 years. **57

(iii) JUSTICE VENKATCHALLIAH :

Justice Vankatchalliah has pressed for judicial accountability and conducting the judicial proceedings in conformity with the standards of promptitude. Concept of public accountability of judicial system is indeed a matter of vital concern. The courts of law, in their day to day judicial work can not allow parties to oversee judicial performance and allow comments and criticism in individual cases. Comments and criticisms of judicial functioning on matters of principle are healthy aids for introspection and improvement and at the same time the dignity and authority of the court should be maintained.**58 Justice Venkatchalliah has emphasised on self introspection and gradual reformation of the system.

**55 RANGA V/s. UOI AIR 1981 SC 1572

**56 INDIA TODAY DEC.15, 1982 AT PT.118, ARTICLE ON JUDICIARY

**57 AIR 1983 SC 57

**58 SHILABOSE V/s. UOI 1988 4 SCC 242

(iv) JUSTICE ASHOK DESAI :

Justice Ashok Desai is of the view that democracy can not sustain its experiment in absence of an adjudicator. Differences and disputes in democracy are inevitable. To resolve such disputes is a democratic obligation of the State and it is to be discharged by judiciary. To govern the people through the laws adopted by them is democratic religion. In a democracy the role of judiciary is crucial but still vulnerable. Judiciary is the constant skipper of constitutional promises. In a democracy like India the judiciary has definite but still well defined role. Judges are not permitted to transmit their sentimentalized social justice under the guise of spirit of constitution. Justice Desai reminds a quote from Harlanstone "only check upon our own exercise of power our own sense of self restraint."**59

(v) JUSTICE CHAGLA :

Justice Chagla, former Chief Justice of Bombay High Court has given following views on the role of judges and judicial system:

"Today the Judge has to consider the social or economic policy of the state and to consider the law in light of that policy. It is absurd to suggest that the Judges must sit on the bench ignoring the social and economic needs of the people and the desire on part of the legislature to satisfy those needs. That is the standard of judicial detachment, which is both unattainable and in my opinion entirely undesirable.

In my opinion, the duty of the judge is to help the legislature to satisfy the need of time. He should not set himself as a brake against social progress, he should not justify the criticism that judiciary in India is a third force which exercises veto over the legislation passed by elected representatives of people. While resisting the unjustifiable encroachments of the executive upon freedom of individual, the Judge should not forget that he is also a citizen of the country as

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**59 JUSTICE V/s. JUSTICES TAXMANN PAGE 90.

**60 M. C. CHAGLA, QUOTED IN JUDICIARY AND ITS ROLE BY JUSTICE DESAI.

interested as anyone else in the great social and economic adventure upon which we are launched and it is not enough that he should do legal justice, which he must, but he must also try to do social and economic justice, if he can, without a hurt to his judicial conscience".**60 The above words of Justice Chagla exhort the judges to be visionaries and look at their role beyond the literal and legal interpretation. He stresses the need for judges to be reformist, within their judicial limitations.

(vi) JUSTICE H. R. KHANNA :

Justice H. R. Khanna was one of the very eminent judges of the Supreme Court of India. His views on the judicial system will hence indeed benefit this research work.

According to Justice Khanna..

"A judicial system normally represents the transformation of the ideal of rule of law and the yearning of justice intro concrete shape. **61 The destiny of each of us in the world of law, whether as lawyers or on bench is linked with judicial system.

Some of the questions which face us are :-

(i) Does our Judicial system satisfy the demand for justice?

(ii) Does it fulfill the expectations of people?

(iii) Are courts of law looked upon as temples of justice where it is administered without fear or favour, oblivious of the personalities of the litigants and without regard to their long purses or high status?

(iv) Does the common man have an abiding and unshaken faith in process of justice as administered by the Courts?"

Justice Khanna observes that it is upon the answers to these questions that our judicial system will be judged.**62

**61 KEY NOTE ADDRESS ON INAUGARATION OF GOLDEN JUBILEE CELEBRATION ON 26/7/1998.

**62 AIR 1998, DECEMBER, JOURNAL SECTION PAGE 191.

The image of the courts in the ultimate analysis depends not upon the architectural beauty and spaciousness of the Court building. It also does not depend upon the finely cut robes of the members of the bench and bar or other trapping of court. Likewise the image of courts does not depend upon the long arguments the number of authorities cited and erudition displayed in judgements. Important though they are, it depends essentially the way the cases are handled and upon the extent of confidence the courts inspire in the parties to the cases before them upon the promptness or absence of delay in the disposal of cases, upon the approximation of the judicial finding of fact with the realities of the matter.

We must remember that in the final analysis, the people are the judge of Judges and that every trial is a trial of our judicial system. Its strengths and weaknesses, its success and failure, its utility and credibility as a necessary organ of State has impact on civilised society.

The respect it would evoke and the confidence it would inspire would depend on the hopes and aspirations of the people, if the common man in quest of justice, in keeping the scales even in any legal combat between the rich and the poor, between state and citizen without fear or favour.

There is perhaps need today for change in our mental attitude. If weaknesses have crept in the system they can not be willfully brushed under the carpet nor can criticism be silenced by threats of contempt of court.

Reverence for the courts in order to be real and spontaneous has to be earned through the test of truth. If weaknesses and drawbacks have crept into the system they have to be set right". **63

**63 AIR 1998, JOURNAL SECTION 196.

The aforesaid thought provoking excerpts from Justice Khanna's speech clearly reveal, that the challenges before the judicial system are far more serious and there is a need for collective, continuous and committed effort by all concerned to make self introspection and workout lasting solutions, at times at cost of self interest.

(vii) JUSTICE MALIMATH :

Justice Malimath has extensively studied the problem of arrears in High Courts and related issues like appointment/strength of judges. He has also given in his report a very exhaustive list of the causes because of which the matters get delayed.

The entire report and views of Justice Malimath has been discussed in chapter III of this thesis which deals with various reports on problem of delays and arrears

(viii) JUSTICE LODHA

Justice Guman Mal Lodha, Judge, Rajasthan High Court who later became member of Parliament (Lok Sabha) has extensiveiy studied the problems and drawbacks of Indian Legal system. In his thought provoking book**64, Justice Lodha has observed that Indian Judiciary must face the fire and let people who are really "Judges of Judges" put the various facts of it on "test and trial" and have "Agni Parikha". The flames (Jyoti) is needed for teeming millions for their salvation and 'fumes' of clouds doubting these bonafides or attacking to eclipse them by conservation, traditionalism, conventionalism of anti redicalist, static, status-quo-walles, fatalists is to be countered and cleared by judicial dignified dynamism, pragmatism and people's Court approach".

**64 JUDICIARY, FUMES, FLAMES AND FIRE

In one of the judgements, justice Lodha conveyed that law is the king of kings. The respondent was Union of India. He held that State functionaries should atleast after 28 years of functioning of Constitution and rule of law, realise, undertstand and literally and faithfully implement the judicial pronouncement by showing respect to law."**65 Justice Lodha thus has advised to look at the judiciary from the point of view of layman and assess its performance by how best his needs and aspirations stand satisfied.

B.VIEWS OF STATESMAN/POLITICIANS.

(i) JAWAHARLAL NEHRU

Jawaharlal Nehru, the first Prime Minister of India was himself a lawyer by profession. Pandit Nehru was of the view that for legal profession to live upto its glory something more is required. He stated.**66

"My reputation in that large and very estimable community of lawyers in India is not best possible, because, estimable as they are, I do not admire their profession. It is not their fault of course. The defect really lies with the judicial structure that we have inherited from the British which entails inordinate delay and expense. However, efficacious the system may be, it really proves to be unjust in the end, because of the excessive delay and expense it involves."

On the point of Fundamental rights Nehru was of the view that there is an inherent contradiction between Fundamental Rights and Directive Principles of State policy. It is on Parliament to remove the contradiction and make the fundamental rights to sub serve the Directive Principles. People would have the fundamental rights but the Judges were expected to interpret those in a reasonable way.**67

**65 JUSTICE LODHA IN C. A. NO.2031/79 UNION OF INDIA V/s. SATISHCHANDRA 2222

**66 NEHRU AND THE CONSTITUTION. PAGE 73 INDIAN LAW INSTITUTE PUBLICATION.

**67 NEHRU AND CONSTITUTIONS, INDIAN LAW INSTITUTE PAGE 144

Pandit Nehru was an admirer of judicial activism. He believed that activism demands a Judge to imagine the passion of constitution. They have, by visualising to locate where the justice rests. This activism believes omnipotence of Judge. It asserts that the judge need not be guided by the law. In a most personified competence, he has to activate himself without any external aid. This can be tried out for a change provided judges among themselves maintain uniformity which is impossible.**68 Pandit Nehru's tenure of 17 years as Prime Minister of India has witnessed the growth of legal system in terms of several new enactments, establishment of various new High Courts etc. The concern expressed by him on delay and backlogs almost 4 decades ago, shows that he was a visionary of the trends and anticipated the troubles to be faced by legal system.

(ii) INDIRA GANDHI

The regime of Indira Gandhi was in two phases and the enactments, ordinances and amendments of constitution (42nd Amendment), including her approach to the powers of judiciary, including Supreme Court, particularly during the emergency period divided the legal profession, be it bar or bench in either her staunch supporters or strong critics. Mrs. Indira Gandhi was of the view that the real test for law is, when it is asked to protect the lamb from the lions.**69 She also emphasised law's supremacy by citing Meharshi Manu's classical saying "Law is king of kings" Mrs. Indira Gandhi herself got best protection of law when she was actually out of power. Prosecution against her was quashed by Justice T.P.S. Chawla of Delhi High Court**70 Mrs. Gandhi also earlier suffered due to the judgement of Allahabad High Court declaring her election invalid.**71

**68 IBID PAGE 119

**69 SPEECH AT SILVER JUBILEE FUNCTION OF INDIAN LAW INSTITUTE.

**70 MRS.INDIRA GANDHI V/s. SHAH COMMISSION AIR 1979

**71 RAJSNARAIN V/s. MRS.INDIRA GANDHI AIR 1975, ALL P.141

(iii) P. V. NARASIMHA RAO

Shri P. V. Narasimha Rao during his five year tenure as Prime Minister emphasised for judicial reforms. The efforts and initiative by him for early recovery of public money involved in suits of banks and financial institutions deserves special mention. It was during his tenure that Recovery of Debts due to Banks and Financial Institutions Act was passed and Special Recovery Tribunals were constituted.**72

C. OTHERS

(i) N. A. PALKHIWALA

Shri N. A. Palkhiwala is an eminent and distinguished jurist. His views, in particular his concern for growing corruption even in judiciary speaks volumes about how courageous and committed he is to the cause of justice. According to Shri Palkhiwala:- "The issue affects not merely lawyers and litigants but the entire nation. All citizens are virtually interested in an unpolluted system of justice." **73

Disappointed but not discouraged with the hope that the system will revive, he says...

"Today we are at the nadar of moral values. The size of crime wave and organised violence, which is so huge as to baffle criminologists, is symptomatic of our ethical degradation. Criticising the Government for poisoning of well-spring of justice he observes that the Government expressly proclaimed that it wanted committed judges – committed to ideology of ruling party. That began an era of a judiciary made to measure. The Govt. looked out for committed judges, that is the judges who were committed to the economic, social and political philosophy of the concerned party.

**72 RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT. 1993.

**73 THE LAW, JUDGES AND LAWYERS. WE THE NATION THE LOST DECADES AT PAGE 220

A commercial recession can be quickly transformed into a buoyant economy, but a moral recession can not be shaken off for years.**74 Corruption in the upper reaches of judiciary is illustrative of the incredible debasement of our national character. It is a fact that conduct of some judicial officers in different courts is far from exemplary." The views, in particular on corruption in judiciary from eminent jurist like Shri Palkhiwala can be seen as warning signals. Corruption indeed is like a cancer, which can prove fatal to the very survival and credibility of the judicial system.

(ii) SHRI SOLI SORABJI

Shri Soli Sorabji, present Attorney General of India is a leading luminary on law. As attorney General Shri Sorabjee had on several occasions to represent the other (Government) aspects of the case before the Supreme Court and defend/justify the executive action. That however does not in any way reduce the importance of his objective approach and scholarly presentation. He has strongly defended the judiciary on the allegation that it is becoming political according to him...

"The cry that the court is becoming political is as old as its refutation. The constitution itself is a political instrument as it deals with the rights of citizens, Government, its power and limitations. **75

The judiciary should have bright pride place and should act as watchdogs and sentinels of the constitution and can uphold and exercise checks and balances between the Executive and Legislative wings of State. Whenever the importance of judiciary is undermined by the executive or at the hands of judiciary itself it is an alarm bell and Shri Sorabjee has voiced concern on such developments.**76.

**74 CRISIS OF PUBLIC FAITH IN JUDICIARY - THE TIMES OF INDIA 9/7/90 BY N A PALKHIWALA

**75 INDIAN EXPRESS, NEW DELHI, MARCH 13, 1982

**76 "THE JUDICIARY. ARTICLE IN ILLUSTRATED WEEKLY DT.11/11/77.

(iii) PROF.UPENDRA BAXI

Prof. Upendra Baxi, a leading academician, represents another vital segment of legal profession, other than the judiciary or the bar. His contribution to the research in field of law is significant. In his book, "The crisis of Indian Legal system", he has discussed the problem with its historical perspective.

"It should be clear that the notion of crisis is apposite to the Indian Legal System (ILS). Quite clearly the ILS, as a normative, cultural and social system has repeatedly shown that there are within it fewer possibilities for problem solving than that is necessary for continued legitimate existence of the system. Equally clearly, people feel that there is a critical need to transform the ILS but they themselves feel unable to initiate or attain such transformation. The ILS clearly shows the loss of our capacity to imagine, prepare and build for the future, it symbolises our incapacity to act. Pervasive incapacity whether the substantive domain is that of higher judiciary or problem of arrears. It is not easy to identify any single cluster of factors as responsible for crisis ILS. The fact remains that many factors have produced the result that we describe as crisis of Indian Legal System."**77

In the crucial area of delays, Prof. Baxi has identified state made delays, litigant made delays, lawyer made delays, system made delays and explained systematically how the problem can be controlled. The contribution of each of these factors in delay has been explained in chapter relating to causes for delay.

(iv) SHRI P. M. BAXI

Shri P. M. Baxi, former director of Indian Law Institute is another eminent scholar on the subject of law. As per Shri P. M. Baxi, Law is an instrument to achieve goal of justice and legal system is the ladder to achieve the goal. According to him...

**77 "THE CRISIS OF INDIAN LEGAL SYSTEM". PAGE 3

"Traditionally, the law is classified into Substantive Law and Procedural Law. The former defines the rights and liabilities while the latter regulates the way in which those rights and liabilities are enforced or defended in proceedings before the Court. The law of procedure regulates the steps that should be taken by parties from commencement to conclusion. The principal objective of procedural law is to give each party to a dispute an equal and fair opportunity to present his case before a non-prejudiced and convenient tribunal. If procedural rules are correctly drafted and effectively implemented, both parties to the dispute should feel that they have been treated fairly."78 Shri P. M. Baxi has thus emphasised for a fair and objective trial after following due procedure as laid-down under the law. Law can not be silent spectator and decide rights in abstract, the ultimate relief has to reach the litigant by laying down proper procedure.

XIII

JUDGES AS LAWMAKERS

There is an ongoing controversy on this aspect, which is seen by some critics as conflict between the Judiciary, Executive and Legislature.

Justice Krishna Iyer observes...

"Independence of Judiciary is not the pampered privilege of elite brethren but the people's dearest imperative in societies where imperiled human freedoms still matter. Justice, not justices, is the emphasis. The former is the common end, the latter but the constitutional tool. The universal fundamental is fearless and fair justice, and independent and humane justices are integral requirement to this social pledge of the legal order. If the right to justice is non negotiable so is the immunity of judiciary from intimidation by executive or other socio-economic mafia or, for that matter, from incurable vices and prejudices which strike at that

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**78 SHRI P. M. BAXI, PREFACE TO MULLA'S ELEVENTH EDITION OF CIVIL PROCEDURE CODE.

conscientious impartiality which is the essence of jurisprudence of independent justice" **79

The views expressed by justice Krishna Iyer, speak of the role of judiciary. While the function to enact the laws is that of legislature and in that sense, the judges are not perceived to be lawmakers. Nevertheless the role of judiciary extends beyond that. The judiciary can not confine itself to the literal and timid interpretation of laws. They were to judge at times "legality of law" when the constitutional validity of an Act or rules thereunder is being challenged. Historically laws originated as rules of decision and logically they may be taken to norms of conduct because the conduct will be judged by them.**80 However the scope of interpretation is confirmed to limited boundaries when the legislative intent is clear and unambiguous there is no scope for judiciary to substitute its version for the words of statute.**81

There is constitutional provision which stipulates that the law declared by the Supreme Court shall be binding on all the courts within territory of India.**82 While declaring the position of law on aforesaid terms the Supreme Court does not legislate. The law enacted by the legislature, which is in conformity with Constitution, always has supremacy over the judge made laws. There are several instances when, just to overcome the implications of unfavourable judgements the politicians have resorted to amendment of law.

Even on this aspect there are warning signals. As Justise Ashok Desai summarises:

**79 JUSTICE AT CROSS ROADS "BY JUSTICE V. R. KRISHNA IYER, Pg.57

**80 THE TASK OF LAW, PAGE – 50, RASCOE POUND.

**81 MAXWELLON INTERPRETATION OF STATUTES.

"One may sense creativity in interpretation of statute. But it has been more apparent than real. Interpretation has no doubt an important and attractive place in a process of justicing. However it is occasional. It has restrictive scope and well-defined bounds. Still the judiciary can not go beyond and beside what has been transmitted by the legislature. The judiciary can not afford to think of law as nonentity. The judiciary, as an invigilator, can check and annul, if the Act or Statute has traversed on a line contrary to the Constitutional mandate, the judiciary can check the prejudicial act or abuse of the Legislative Authority, BUT CAN NOT REWRITE THE STATUTE."

XIV

COMPARATIVE STUDY WITH GERMAN LEGAL SYSTEM

Federal Republic of Germany is having 16 States after its reunion in 1989. The states are known as Lander. The system of legal protection against action of public authority is quite comprehensive. In comparison to India the number of laws are less. There is Civil Procedure Code and Criminal Procedure Code like India. Independence of judiciary is guaranteed in article 97 in para 1 of the Basic law of Germany, which is on the same footing as Constitution of India.**82 The German judiciary regulates the status judges. The courts are divided in to following five categories:-

GERMAN COURTS

(a) Ordinary Courts.

(b) Labour Courts.

(c) Administrative Courts.

(d) Social Courts.

(e) Fiscal Courts.

**82 ARTICLE 141, CONSTITUTION OF INDIA.

These courts function in all the States. Apart from the aforesaid specialised courts, there is federal constitutional court, which is Supreme Court of the country. There are approximately 20,000 judges and 60,000 lawyers. There are 4,000 public prosecutors **83 The role of Public Prosecutor is wide. They have to decide whether proceedings should be discontinued or the person should be indicted. The German courts excel in terms of function, technology applications and effective computer network is there. The judges are classified into following categories:

1. Judges for life.
2. Judges for specific term.
3. Judges on probation.
4. Judges on commission.

The system also provides for appointment of Honorary Judges. The pendency of cases in German Courts compared to India is less, but the exact data is not available.

XV

JUDICIAL SYSTEM IN CANADA

Supreme Court of Canada, established in 1875 is the apex court of Canada. It comprises of 9 judges. The cases before Supreme Court earlier could be appealed to the Judicial Committee of Privy Council in England, but it is now abolished. The court sits at Ottawa and holds three sessions during the year. Below the Supreme Court are ten Provincial Courts, which are comparable to High Courts in India. Appeal division of Industrial Courts has specialised jurisdiction for example in tax matters etc. Below the Provincial Courts are the District Courts. On an average 120 cases are heard by courts in a year and the decisions are rendered immediately almost after conclusion of arguments by the Council. The

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**83 LEGAL AND JUDICIAL STRUCTURE OF GERMANY, ART. BY SHRI J. N. BHATT IN GUJARAT LAW REPORTER, SEPT.1998

Canadian Supreme Court has made substantially sound and significant contribution in evolution of law in Canada.**84

XVI

FRENCH LEGAL SYSTEM

Roman laws have considerable influence on all legal systems of Europe including France. In France for dispensation of Civil Justice the hierarchy of courts is as given below :-

1. TRIBUNAL D' INSTANCE

It is the smallest court for population of 5.8 crores of France. There are 468 such courts. The court exercises Administrative, Extra Judicial and judicial functions. In money suits and personal actions its jurisdiction is upto 2500 Francs in cases without right of appeal and 10000 Francs in cases with right of appeal.

2. TRIBUNAL DE GRANDE INSTANCE

It is principal court of original jurisdiction and has got full power in all civil matters. It decides matters upto 3500 francs without right of appeal and all cases with right to appeal. There are 181 such courts.

3. COUR D' APPEL

It decides appeals against all appellable decisions passed by the Tribunals referred above. There are 30 such courts of appeal.

4. COUR DE CASSATION

It is the apex court. It is not a court of second appeal. It deals only with law points. Only in following matters this court can be approached :-

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**84 MECHANISM OF THE APEX COURT OF CANADA, ARTICLE BY JUSTICE J N BHATT IN GUJARAT LAW REPORTER FEBRUARY 1998.

i) Violation of law (substantive or procedural)

ii) Absence of jurisdiction or excess of power

iii) Substantial formal defects which made the impunged judgement highly irregular.

iv) Contradiction of judgements.

v) Lack of legal basis.

vi) Dematuration of a deed. (Court going beyond clear and precise meaning of written document)

5. TRIBUNAL OF CONFLICTS

France has two sets of courts. Judicial Courts come under cour de cessation as apex court and other called administrative tribunals (conseil d'Elat) as apex court.

If there is any conflict as to which court should decide the matter should go to this Tribunal for such decision.

CRIMINAL LAW

The French criminal Law distinguishes the offences into 3 categories.

a) Violation

b) Misdemeanor

c) Felony

The courts which try various type of offences in France are as under :-

	COURT	TYPE OF OFFENCES
i)	Sessions Court (In each dist.)	Felony
ii)	Tribunal de Grande Instance	Misdemeanor
iii)	Tribunal de Police	Violation

Appeals in the matter lies to Tribunal de appeal

There can be more than one tribunal in large cities. In Paris there are 20 criminal benches.

There is division of police known as judicial police. The criminal courts can not suo motu take cognizance of offence. It should be initiated by prosecuting

agency or the victim. Usually Procureur de la Republic is informed of the offences and he investigates whether any triable offence is committed. **85 In France superior court of Justice deals with matters like high treason state security etc. Compared to Indian system, the time for filing appeal is less in France. The delay and backlog of cases also is less. The matters are decided in two years in France.

XVII

COMPARATIVE STUDY OF RUSSIAN SYSTEM

Like India, in Russia also courts are the organs of State that administers justice on basis of the laws made by the State. The system of courts is as under:

1. PEOPLE'S COURT

It is the lowest court. It tries both Civil and Criminal cases. They also protect electoral rights of citizens. Small cases are tried summarily.

2. TERRITORIAL/REGIONAL/AREA COURTS

These courts are upper courts and have jurisdiction on Criminal cases involving security of State, embezzlement of Government property and other serious offences. They also hear appeals from People's Courts.

3. SUPREME COURT OF AUTONOMOUS REPUBLIC

It is comparable to High Courts in India. It is charged with supervision of judicial activities of all courts of Republic. It tries the criminal and civil cases of which it has jurisdiction. It also hears appeals from lower courts.

**85 FRENCH LEGAL SYSTEM BY JUSTICE DAVID ANNOUSSAMY PAGE 45, 71.

4. SUPREME COURT OF UNION REPUBLIC

It hears appeals from all territorial, regional and other courts. Above them was the Supreme Court of U.S.S.R. before its disintegration.**86

XVIII

COMPARATIVE STUDY WITH AMERICAN SYSTEM

The Judicial system of U.S.A. consists of various layers as under:

US SUPREME COURT

|

COURT OF APPEALS

|

FEDERAL COURTS

|

DISTRICT COURTS

|

MEGISTRATE'S COURTS

The English Common Law is the law from which American Law is derived. As the 19th Century progressed American judges departed more and more from English traditions. All 50 States of USA have their own Constitution based on Federal model. Due to the guarantees given, actions ordered by U.S. President or Governor of State can be held by courts to be unconstitutional and therefore void, if it violates such guarantees. The system and legal practice in USA differs from France and Russia. It has more common elements with Germany.**87

**86 SOCIAL AND STATE STRUCTURE OF USSR BY V.V.KARPINSKY PAGE 135-136

**87 TALKS ON AMERICAN LAW LECTURE BY HEROLD BERMAN PAGE 27.

The appointment of district court judges invoives the President, Senators and Department of Justice. There is also standing committee of Federal Judiciary of American bar Association and political party leaders to be consulted. This involves active contribution from the bar also.**88 Federal district judges generally come from the district, which they serve. A case study made shows that the judges, in their decision making get influenced by certain factors. On the point of Negroes V/s Whites, the judges were found divided in 3 broad categories:- Segregationists, Moderates and Integrationists the third group had better record in favour of Negroes.**89

As observed by Glendon Schubert, certain judicial norms for some judges under certain circumstances may be crucial for decision making. There are ideological dimensions which matter for decisional behaviour, they are

(a) Liberaiisation V/s. Conservatism.

(b) Pragmatism V/s Dogmatism **90

This aspect is comparable with the ongoing debate on judicial activism in India. The same author concludes by saying that neither attitudes nor ideologies have any essence, such dimensions are strictly hypothetical constructs invoked to help explain the manifest observable regularities and discontinuities in behaviour of judges. Under the Rules Enabling Act, the Courts are authorised to prescribe general rules of practice and procedure and rules of evidence for cases in the United States District Courts including proceedings before magistrates.

**88 THE FEDERAL JUDICIAL SYSTEM THOMAS P. JAHNGIE AND SHELDON GOLDMAN PAGE 8.

**89 FEDERAL DIST. JUDGES NAD RACE RELATION CASES IN SOUTH BY KENNETH WIVES.

**90 JUDICIAL NORMS AND JUDICIAL ROLES, GLENDON SCHUBERT, PAGE 181.

The court however can not enact the rules that abridges, enlarge or modify any substantive right.**91

There are in-built provisions under the U.S. Procedural laws to reduce and avoid delays and they are scrupulously implemented which reduces backlog. Irrelevant and frivolous pleas are discouraged.

XIX

JUDICIAL SYSTEM OF UNITED KINGDOM

The UK system has been considered to be the fountainhead of all other legal systems because the Britishers at one stage ruled substantial part of the world. Britain does not have written constitution. The system has the following institutions:-

THE SUPREME COURT OF JUDICATURE

Originally established in 1873 under Supreme Court of Judicature Act. From 1972 consists of her Majesty's court of appeal, High Court of Justice and Crown's Court. **92

HOUSE OF LORDS

It is the Upper chamber of British Parliament. It comprises of the Lords spiritual and Lords temporal and certain number of Scottish bears. The House of Lords is court of final appeal in most civil cases and has jurisdiction over impeachment.**93

**91 FEDERAL RULES OF CIVIL PROCEDURE BY JONTHEN M. LANDERS. 1991 EDITION PAGE 404.

**92 BLACK'S LAW DICTIONARY, 6TH EDITION PAGE 739

KING'S (QUEEN'S BENCH)

It is one of the superior courts of Common Law in England, being so because king used to sit there in person. During queen's regime it is called Queen's Bench. It consisted of Chief Justice and 3 puisne judges. It had very wide jurisdiction in criminal and civil causes. Criminal was called crown side and civil was called plea side. By Judicature Act, 1873 the jurisdiction of this court was assigned to Queen's Bench Division of High Court of Justice.

PRIVY COUNCIL

The Judicial committee of Privy Council acts as a Court of Ultimate Appeal in various cases from Crown Colonies and Common Wealth. It is replaced to a great extent by cabinet. **94

HIGH COURT OF PARLIAMENT

Has the original and appellate jurisdiction.

COUNTRY COURTS:

In England Country Courts are the main Civil Courts. Their powers have been defined under Courts Act 1984, the Courts Act 1971 and Administration of Justice Act 1973.**95 They also have appellate jurisdiction. Their functions are strictly judicial or strictly administrative or combination of both, or only civil/criminal jurisdiction etc. The United Kingdom thus has a well-knit system of Courts. The jurisdiction to an extent seems overlapping but it is well regulated by precedents and conventions. The judicial system in India is, though not an exact prototype of UK model bears considerable common aspects with them.

**93 HALSBURY'S LAWS OF ENGLAND, 4TH EDITION, VOLUME 10, PAGE 394.

**94 BLACK'S LAW DICTIONARY 6TH EDITION PAGE 1260

XX

JUDICIAL SYSTEM – PAKISTAN

Pakistan's judicial system to an extent inherits the common wealth model as it prevailed prior to independence (1947). The hierarchy consists of :-

i) Supreme Court.

ii) High Courts at Provincial level

iii) District Courts.

iv) Mofussil courts.

The system of Civil Law administered is by and large similar to the Indian Laws except on the point when Islamic/Shariat law has different provisions. The Criminal Law system aims at retributive form of dispensing justice. The recent pronouncement by Pakistan to follow provisions of Shariat in Criminal Law and personal laws has evoked considerable anxiety and criticism. **96

Pakistan's system suffers from vices of delay, corruption and technicalities though some reforms have been implemented. The recent conflict between Chief Justice and Prime Minister of Pakistan has shaken people's faith in independence of judiciary. **97.

**95 HALSBURY'S LAWS OF ENGLAND, 4TH EDITION, VOL.10, PAGE 650

**96 NAWAZ SHARIF'S ANNOUNCEMENT TO APPLY SHARIAT LAWS. AUGUST 1998.

**97 NEWS REPORTS IN 1998

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