Origin and Nature of Courts

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What is a 'Court'? COURT (Curia)[1] formerly signified the King's palaceor mansion, a place where he remained with his ordinary retinue and often sat in person to transact the judicial business of his kingdom. The style of the Court in England in the eleventh and twelfth centuries was *curia regis, aula regia, aula regir,* or *coram ipso rege*, as it was also movable with the King's Household. The 'Court' thus gradually came to be associated with the place where, or the authority by which, justice was administered; and now, it is more especially the place wherein justice is judicially administered.[2] The 'Court' is an assembly of Judges or other persons legally appointed and acting as a tribunal to hear and determine any cause, civil, criminal, ecclesiastical, military or naval.[3] The judge alone is, however, "not the whole Court. He is only a component though important part of the wider concept which constitutes a 'Court'. The individuality of the Presiding Officer is essentially different from the impersonal entity of a Court."[4] This is the reason why jurisdiction, territorial, or with reference to subject-matter, is conferred, by law, on court and not on judge.

Courts are created by the authority of the Sovereign as the; fountain of justice. This authority is usually exercised by the Constitution of a country or by Statute, Act, Charter, Letters Patent, or Order-in-Council. An Act of Parliament or other Legislature is necessary to create a Court.[5] A Court, in the strict sense, is a tribunal which is a part of the ordinary hierarchy of tribunals established and maintained by a State by or under its Constitution to exercise its judicial power. The Courts perform all the judicial functions of the State, except those that are excluded by law from their jurisdiction.[6]

A 'Court' is distinguished from a mere advisory or a fact-finding body, in that it has the power to pronounce a binding judgment and to adjudicate upon the rights and liabilities. It also differs from many Tribunals which have a judicial or quasi-judicial character. The following *characteristics* distinguish a 'Court' from analogous bodies:

(i) A Court must exercise jurisdiction over persons by reason of the sanction of law, and not merely by the voluntary submission to its jurisdiction, e. g. , arbitration.

(ii) It must be, expressly or impliedly, 'recognised by law as a Court. The mere judicial manner of the exercise of funotions. is not enough. Thus, the statutory bodies exercising quasi-judicial functions are not Courts.

(iii) A Court must generally be open to the public.[7] The publicity of judicial proceedings is regarded as a guarantee of public security that justice will be properly administered,[8] and promotes confidence of the public in the impartial administration of justice.

There are also the following essential characteristics of Courts; though these may be necessary adjuncts of other judicial or quasi judicial bodies:

(i) A Court must be impartial and free from bias and prejudice; and its Presiding Officer should 'regulate the proceedings of the Court and maintain its decorum' 'in consonance with the prestige of the Court and not in an angry, abusive and ignoble form, which may undermine the very foundation on which exists the edifice of the administration of justice.'[9]

(ii) A Court must be independent of and immune from outside influence.[10]

(iii)A Court must not enter into questions of social ideology or party politics.[11]

(iv) In most countries, a Court is generally bound by its own precedents and invariably by the precedents of superior courts. The scale of justice must be kept "even and steady, and not liable to waiver with every new judge's opinion."[12]

(v) The power to punish for contempt of itself belongs only to a Court.[13]

Ordinarily, certain courts have a special status by being recognized as Courts of Record. A *Court of Record* originally meant one whose acts and proceedings were enrolled in parchment. Record is a writing in Parchment, wherein are enrolled Pleas of Land or Common Pleas, Deeds, or Criminal Proceedings in

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1 *Curia* (Lat.): *cour* (Fr.): *koert* (Dutch): *gericht* (Ger.).
2 *Blackstone's Commentaries*, Vol. III, p. 14.
3 Shorter Oxford English Dictionary, Vol. I, p. 410.
4 1966 A.W.R. 197 (201), *per* Gyanendra Kumar, J. (All. H. C.).
5 See *Halsbury's* Laws of England; Simond's III-Ed., Vol. 9. p. 344.
6 A.I.R. 1961 S.C. 1669 (1681), Hidayatulla, .J.
7 Scoltt *v*. Scott, 1913 A.C. 427.
8 McPherson *v*. McPherson, 1936 A.C. 177 (P.C.)
9 1966 A.W.R. 197, *per* Gyanendra Kumar, J. (All. H. C.).
10 According to *Shastras*, a Judge should keep in subjection to himself his lust, anger, avarice, folly, drunkenness and pride; neither he should be seduced by the pleasllres of the chess, nor be addicted to play, nor be always engaged in dancing, singing, and playing On musical instruments, nor he must sleep in daytime, nor practise the drinking of wine, nor he should take, nor long for, the property of another, nor should envy another person's superior merit, nor criticise and abuse any person. Providence created. the Judge, who must not be considered a mere man, but be looked upon as '*Dewata*' in a human form. Providence also created punishment; and if the judge inflicts it according to *Shastras*, the subjects become obedient to law; if he omits to do so, the Kingdom and property become ruined. (See *Halhed's* Code of Gentoo Laws, (1776-ed., Lond.), pp. 1/52-53, 50).
11 A.I.R. 1951 All. 257 (F.B.), *per* Sapru, J.
12 *Blackstone's Commentaries*, Vol. I, p. 69.
13 A.I.R. 1956 S.C. 66, Bhagwati, J.

any Court of Record.[14] In other words, the proceedings of a Court of Record, preserved in its archives, are called records, and are conclusive evidence of that which is recorded therein.

A Court of Record is. in recent days, a Court whose acts and proceedings are enrolled for a perpetual memorial and testimony. These records are of such high authority that their truth . cannot be called in question;[15] though the Court of Record itself may amend the clerical slips and errors. This is a privilege they share in common with a supreme legislature. The accuracy of the records of either cannot be challenged by any other authority.[16]

All superior Courts in India are considered Courts of Record. The High Courts, Courts of Judicial Commissioners and the Supreme Court are recognized as Courts of Record by the Constitution itself.[17] The Courts of Record in England are divided into Superior and Inferior Courts of Record; the latter so called because their proceedings are subject to the supervision of the High Court of Justice, exercised by means of writs of mandamus, certiorari and prohibition.[18]

Certain Courts are expressly declared by Statutes to be Courts of Record. In case of a Court not expressly declared to be so, it will be deemed to be a Court of Record, if it is empowered by Statutes or otherwise to fine or imprison for contempt of itself.[19]

Generally speaking, there must be, in every Court, at least three constituent parts: the *actor* (or plaintiff, who complains of an injury done), the *reus* (or defendant, who is called upon to answer the action), and the *judex* (or judge to examine and ascertain the truth and facts).[20]

In general, all matters, both Civil and Criminal, must be heard in open Court; but, in certain exceptional cases, the Court may sit *in camera*, either throughout the whole or part of the hearing, as for instance-

(a) where it is necessary for the public safety, or

(b) where the subject-matter of dispute would otherwise be destroyed, for example, by the disclosure of a secret process or of a secret document, or

(c) where the Court is of opinion that witnesses are hindered in, or prevented fronl, giving evidence by the presence of the public,[21] or

(d) where Courts are enjoined by Statute to exclude the public in particular proceedings, such as in matrimonial matters, or

(e) where the presence of the public would make the administration of justice impracticable, e. g. , where a child is testifying as 'to indecent offences', and in guardianship and lunacy proceedings where the judges are supposed to act not strictly as Courts but as representing the Sovereign as *parens patriae*.[22]

All tribunals are not Courts, though all Courts are tribunals. By 'Courts' is meant Courts of judicature and by 'Tribunals', those bodies of men who are appointed to decide controversies arising under certain special laws. The word' Courts' is used to designate those tribunals which are set up in an organized State for the administration of justice. By administration of justice is meant the exercise of judicial power of the State to maintain and uphold rights and to punish wrongs.[23] There are tribunals with many of the trappings of a Court, which I, nevertheless, are not Courts in the strict sense of exercising judicial power.[24] A Judicial Officer, for instance, of a Court, acting as an Arbitrator appointed by the State Government under a Special or Local law, though he has some of the trappings of the Court, is really not a 'Court' in the true sense of the word, inasmuch as, under that law, he is not constituted a permanent tribunal for the administration of justice and his pronouncement is not of a decisive and binding nature[25]. According to Lord Stamp, the real distinction between the Courts and the tribunals is that the' former have 'an air of detachment'.[26]

The power and authority to reach a conclusion, the necessity of the application of a judicial, that is an impartial, mind. to the process of reaching a conclusion is a necessary adjunct even of executive and administrative functions. In fact, in all the departments of human activity, the necessity of distinguishing between the relevant and the irrelevant is ever present. But, when the judicial process combines itself; with the power to decide on individual and social rights and obligations, and that power is clothed with the special status. of being the Sovereign's representative for the dispensation of justice, a 'Court' is born and established.

Of late, a large number of administrative and domestic tribunals have sprung up all over the world. They too decide disputes between the parties but they cannot be termed as Courts; though many of them may be called quasi-judicial tribunals since they decide the controversies after hearing the parties and their evidence.

In countries, where administrative law is recognized as a separate branch, distinct from and independent of the ordinary law of the land, there is a dual system of courts for the administration of justice.

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14 *Termes de la Ley, s. v.* Record.
15 *Blackstone's Commentaries*, Vol. III, p. 25.
16 *Stephen's Commentaries*, Vol. III, p. 5.
17 Arts. 215, 129.
18 Odgers: Common Law of England, X Ed. (1911), Vol. II, p. 1,020
19 *Halsbury's Laws of England*: Simond's III-Ed., Vol. 9, p. 347.
20 *Blackstone's* Commentaries, III, p. 26.
21 *Halsbury's* Laws of England, Simond's III-ed., Vol. 9, pp. 344-45.
22 Scott *v*. Scott, (1913) A. C. 417.
23 A.I.R. 1961 S.C. 1669 (1680), Hidayatullah, J.
24 1931 A.C. 275 (296).
25 1966 A.L.J. 460 (470), per Gyanendra Kumar, J. (All. H. C.).
26 A.I.R. 1961 S.C. 1669 (1680).

Administrative Law in France (*droit administratif*) is that portion of French law, whether enacted and codified or built up upon court decisions, which, according to Dicey, determines (a) the position and liabilities of all State officials, (b) the civil rights and liabilities of private individuals in their dealings with the officials as representatives of the State, and (c) the procedure by which these rights and liabilities are enforced. Many of the countries of the world, it is true, have got their own system of administrative law; but, unlike France, Italy and Germany. the English-speaking countries, e. g. Great Britain, Canada, the United States, and even India, where judiciary is patterned upon the English judicial system, neither treat the administrative law as a separate body of law nor have a separate system of administrative Courts, to which alone, as in Frarnce and Italy, the public officials may be subjected for the exetcise of orbitrary governmental action or for their abuses and illegal administrative conduct. In France, such cases are handled only by special tribunals, known as *tribunaux administratif* (Administrative Courts), with the *Conseil d' Etat* (Council of State) at their head, and not by *tribunaux judiciaires* (Ordinary Courts) under the *Cour de Cassation* (Court of Cassation), which is the highest court of appeal in France for ordinary cases, civil and criminal. The Administrative Courts in that country belong to a quite different hierarchy of tribunals and are independent of and in no way inferior to the ordinary courts, even the *Cour de Cassation* having no power to review or revise the decisions of the *Conseil d' Etat*. The administrative law in West Germany is known as *Verwaltungsrecht;* and the powers and procedure of Administrative Courts in that country under the Federal Administrative Court (*Bundesverwaltungsgericbt*) are regulated by the Administrative Courts Act, 1960; and such Courts are in no way subordinate to *Bundesgericbtshof*, the Supreme Federal Court of West Germany. The Administrative Courts, in East Germany, have now been set up under Art. 138 of the new Constitution of 1949.[27]

There is yet *another system* of Courts, which is to be found, as for instance, in the federal Republic of the United States, as also in Australia and West Germany, whose Constitutions are modelled partly upon that of the United States. In these countries, the duality of judicial system consists in the existence of one set of Federal Courts and the other of the State Courts. Federal Courts are created by the Constitution or, under its authority, by an Act of federal or central legislature, and deal exclusively with the federal laws, civil and criminal. In the United States, the District Courts (the lowest rung in the federal judicial ladder), the Courts of Appeal and the National Supreme Court form the ascending hierarchy of Constitutional Courts in the federal judicial system; and Justices of the Peace or Magistrate's Courts, Courts of General Trial jurisdiction, Intermediate Appellate Court's and the State Supreme Court constitute another set of courts, called the State Courts. Established in each of the United States by the legislative measures of the State concerned, the State Courts deal exclusively with State laws, and are, in no way, subordinate to the federal judiciary. The competence of these courts does not extend to any of the federal laws, in the same way as the federal courts, except the national Supreme Court, cannot touch a State law. India, England, Canada and even the U.S.S.R., China and Japan, have only one judicial system with nothing like Administrative Courts and Ordinary Courts or Federal Courts and State Courts. All persons-private citizens or public officials-are equally amenable to the same laws and to the same courts in these countries.

Also, the courts in every country do not wield the power of *judicial review*. In England, for instance, no tribunals, from County Courts to the House of Lords, exercise this power. One reason for this is that there being no written Constitution (of the type India or the United States has), and any other legislative organ, in England, the laws of Parliament are supreme and no question of unconstitutionality or repugnancy ever arises. The English Parliament, in the oft-quoted words of De Lolme, an early Parliamentarian, can do anything except make a man into a woman and a woman into a man. An English judge, therefore, about a century ago, categorically denying the power of judicial review, asked: 'Are we to act as regents over what is' done by Parliament with the consent of Queen, Lords and Commons. . . . ?'

The French Courts also, including the *Cour de Cassation*, do not possess the competence of judicial review; and the Courts in Italy, including the *Corte Supreme di Cassazione*, modelled upon the judicial system of France, also do not possess this power. The new 1947-Constitution of Italy has, however, conferred this authority on the *Corte Constituzionale* (the Constitutional Court), as the new 1946-Constitution of Japan. by its Article 81, vests that power in the Supreme Court of that island, though that Court also had no such power prior to the new Constitution, as the civil law -and the judiciary in Japan were patterned upon the legal system of France. The new pattern was imported to Japan from the United States, which had the main hand in giving the new Constitution to that country after her defeat at the Second World War in 1945. Likewise, in West Germany, the power of judicial review is not possessed by any of the Courts, except the Federal Constitutional Court, as reconstituted in September, 1951, under the Basic Law (Bonn Constitution) of 1949, Art. 94(2), and the law of March 12, 1951. In Soviet Russia and China, no courts whatever wield the power of judicial review; and the U.S.S.R. Supreme Court has, instead, been given the right to initiate legislation by the Statute of the U.S.S.R. Supreme Court, dated February 12, 1957, s.1(3).

The United States, since the nineteenth century, and India, since at least 1950, have been champions in the field of judicial review. The nature of the Constitutions of the two great countries, the clear division and definition of legislative powers conferred upon the Central and State legislatures, with an inviolable line of demarcation drawn in between their functions, necessitated the task of judicial review. This power, though it is not conferred, in express terms, by the Constitution of either of the countries, is exercised by the State Supreme Courts in relation to State laws and the National Supreme Court, to all laws, in the United States, and by the High Courts, and the Supreme Court of India in relation to an laws. 'This Constitution', ordains Art. VI, S. 2, of the U. S. Constitution, 'and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary, notwithstanding'. The primary duty of a Court to interpret the law, therefore, necessarily involves the power' to determine

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27 DICEY: Law of the Constitution, 1962-ed., p. 333.

whether an Act of Legislature conforms to the Constitution. Thus, the power of the Courts to rule on the constitutionality of laws and to invalidate the legislation violating the spirit of the Constitution, which is supreme, is of the very essence of the judicial function in both the countries.

In some of the countries, courts are *elective* and in others, *appointive*. In Soviet Russia, the judges and the people's assessors of all courts are chosen for fixed terms by direct popular election in the manner prescribed by the U.S.S.R. Constitution of 1936.[28] No educational or other qualifications are required; and any citizen (including a woman) of the Union, who has reached the age of 25 and has not only the formal but also moral right to administer justice, may be elected a judge or assessor. The judges report their activities periodically to their electorate in factories, offices, Kolkhoses I and farms are accountable only to their electors for their work and that of their Courts, and can be 'recalled' by them prior to the expiry of their term of office for their improper behaviour, laches or misconduct.[29]

The judges of the Supreme Court of Japan are appointive; but their retention in office, after their appointment' is 'reviewed' by the voters at the first general election of the House of Representatives (lower house of the Japanese Parliament, DIET) following their appointment; and the judges are dismissed in case the majority of voters favours the dismissal.[30] In East Germany also, the Attorney-General and the judges of the Supreme Court and some of the superior Courts are chosen by election, and can be recalled by their electors, in the manner prescribed by the Constitution of 1949[31].

The judges of the State courts in most of the United States are elected for fixed terms; while those of the Constitutional Courts of the federal judiciary are appointed by the President with the advice and consent of the Senate,[32] and hold office 'during good behaviour'[33]. No qualification is prescribed either by the Constitution or Act of Congress for. appointment as judges; but, generally, men of legal experience and members of the Bar, belonging to the political party of the President, are appointed. Out of the new 62 federal District Judges, appointed during the first ten months of President Kennedy's regime, three were Republicans and all the rest came from the Democratic party. There is no system of recruitment by competitive examinations or appointment by promotion, even in case of the judges of the national Supreme Court.

In France and Italy, on the other hand, all the judicial appointments to the courts of first instance are made by recruitment by means of competitive examinations and to the higher courts, by promotion. In France, one may become judge soon after obtaining law diploma from the University, provided he is selected by means of prescribed examination. 'The result,' as remarked by David and Vries,[34] 'is that the Bench and the Bar are separated by a formidable barrier of differences in temperament, training and approach. The French judge feels a far closer kinship with the professor of law than with the *avocat* (advocate), whom he tends to regard as a mere rhetorician'.

In England, the judges of the County Courts are appointed from among the Barristers of at least seven years' standing and hold office up to the age of 72 ; while the Barristers of at least ten years' standing are appointed judges of the High Court of Justice, who hold office 'during good behaviour'.[35] Recently, however, an age-limit has been fixed at 75. The judges of the Court of Appeal and the House of Lords are, however, appointed by promotion from the High Court of Justice and the Court of Appeal, respectively.

In India, the judicial officers of the Courts of first instance are selected by competitive examinations, while those of superior courts, mostly by promotion. Judicial appointments to the High Courts and the Supreme Court are made partly by promotion and partly by direct appointments.

The *emolument* for performing the judicial functions of the Courts also varies from country to country. The judges of the United States are probably the highest paid judicial officers in the world. The annual salary of the Chief Justice of the U. S. Supreme Court is 40,000 dollars, and that of the Associate Justices, 39,500 dollars, each. The Judges of the federal Courts of Appeal receive 33,000 dollars a year, each, while those of the federal District Courts, 30,000 dollars, each. The annual salary of the Judges of the State Supreme Courts (which correspond to the Indian High Courts) varies from 14,000. dollars in North Dakota to 39,500 dollars in the State of New York, which pays its Chief Justice 42,000 dollars a year, and 37,000 dollars a year to each of the Judges of the Courts of General Trial jurisdiction (district or county courts).

The annual salary of the County Court judges in England is £2,800, each, and that of the Judges of the High Court of Justice is £10, 000, each; while the Judges of the higher courts receive £ 12, 000 a year, each.

Canada pays its Chief Justice 35,000 dollars a year; while each of the other Judges of the Canadian Supreme Court gets 30,000 dollars a year. The Chief Justice of a provincial Supreme Court in Canada is paid 25,000 dollars a year, while. other Judges of that Court receive 21,000 dollars a year; each. The President and each of the other Judges of the Exchequer Court also receive the same amount, viz. 25,000 dollars and 21, 000 dollars a year, respectively. The entire emolument received by a District or County Court Judge in Canada ranges between 18,000 dollars and 23,000 dollars a year and varies from province to province; while the salary of Magistrates, which also varies from province to province, ranges between 65,00 dollars and 12,600 dollars a year.

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28 U. S. S. R. Canst., Arts. 105-109.
29 Fundamentals of Legislation on Judicial System, Dec. 25, 1958, Arts. 33, 34, 35.
30 Jap. Const., Art. 79.
31 GDR Canst. of 1949, Arts. 130, 131, 132.
32 U. S. Canst., Art. II, s. 2(2).
33 *Ibid*., Art. III, s. 1.
34 The French Legal System, 1958-ed., p. 18.
35 An exception to this general rule is made in the case of Lord Chancellor, who is appointed for five years with every new ministry and goes out of office with the ministry.

The Judges of the Continental courts, including those in France, are, however, not so highly paid as their counterparts in English speaking countries; even though, as in India, so in France, most of the Judges are men of brilliant career and extraordinary ability possessing high degree of legal talents. The Bench, both in France and India, is highly respected by the people and the Judges enjoy high dignity, prestige and social standing.