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Barrister and Senior Advocate in Comparative Perspective

HIMANSHU SOROUT[1]

ABSTRACT

This paper traces the development of the legal profession in British India and since the departure of the British to analyze comparatively, the post of Barrister or as it was known in India the Advocate, and the Senior advocate in the contemporary Quasi-Federal Democratic Republic of India. The Barrister had entered India as an aristocratic lawyer with imperial patronage. However, the paper argues that the Senior Advocate is, in fact, despite the long-standing protestations of contemporary Indian Vakils, the echo or retention of the erstwhile post of the Barrister. Particularly the position as obtained in the last days of the empire after the reforms of the late 19th century, wherefrom the English Barrister had materially converged with the native Vakil as an officer of the Court but specialized in pleading. Whereas for most of the early 19th century the Vakil had been a junior practitioner of law in the lower courts, by the end of the era he had transmogrified into a more fully-fledged lawyer led by eminent Indian vakils elevated to the post of Advocate (Barrister). The Barrister at once in danger of merging and disappearing altogether with the unified single practitioner under the newly emerging all India bar instead reappears as the Senior Advocate along with the Advocate as a junior practitioner and the Advocate on record as a specialist in acting, much like the erstwhile solicitor, as was considered beneficent to the Indian legal profession by the 14th Law Commission.

Keywords: Barrister, Solicitor, Advocate, Senior Advocate, Advocates Act, 1961

I. INTRODUCTION

The legal system in India has evolved through the centuries from a relatively simpler and deeply historical Hindu monarchical kingly dispensation of justice to eventually a modern Anglo-Saxon adversarial western-styled justice machinery. As the system has evolved and the machinery has undergone changes the participants in the system have also seen radical change. The subject of this paper is two modalities of participation or agents – that of the barrister and the advocate.

[1] Author is a student at Centre for Post Graduate Legal Studies, Jindal Global Law School, Jindal Global University, India.

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These designations and posts of practice as participants in the legal system of the time - which form the subject matter of this paper – are peculiarly fit for comparison since they represent the apex of the hierarchy of legal participants in their respective systems and epochs. The system may not necessarily even evince a formal hierarchy from a strictly systemic legal standpoint especially as we approach the modern era and the creeping inroads of "equality" in all walks of life – particularly the lives of public officials or officers of the court.

It is necessary to keep in mind that any comparison of the posts aforesaid would only be fully fructified when viewed in the deeply historic and richly organic context within whose parameters and under whose ambit they emerged and the associated needs and roles they fulfilled. Given India's unique historical experience as a colony formerly administered by empires emanating from central Asian nomads to European seafaring traders – that very same experience richly informs and forms the substance of much of the current investigation. The inquiry is further fulfilled by examination of India's path as an independent nation after the dissolution of the last empire which held sway over her – namely the British Empire. In some sense, this paper is investigating one of the narrow aspects of legal life under the British raj in contradistinction to its legacy as it is playing out in a free nation of free peoples.

II. Methodology

The paper shall adopt a descriptive and analytical framework to bring out the salient points of distinction between the two posts of barristers and Senior advocates. For this purpose, a set of criteria with which to make the comparison is imposed upon the historical primary and secondary sources and the rule of reason highlights the points of departure as also similarities.

The criteria are extracted from the objective of advocacy as a component of a broader system to render pure and impartial justice in society as well as an "action-oriented" definition of phenomena in a sociological context i.e. that "task" and the defined objective or purpose is the source of meaning and how the forms and essences of phenomena are to be defined and thus is the proper method to identify and compare social facts.

Therefore, the conclusion follows naturally that the objectives of an advocate as a skilled legal professional would form the basis of comparison - society needs a well-organized system of law and courts as also a cadre of suitable legal professionals which are indispensable to the court's task in interpreting and applying the law according to the high standards of justice and fairness. These legal professionals have come to be recognized through historical development as the officers of the court – it is a noble profession and a branch of the administration of justice as opposed to any ordinary trade or business.

III. The courts

The position of the legal professionals relates heavily to the hierarchy or system of courts instituted at the time. The administration of Justice in India emerged in the classical period where it's largely a matter of kingly duty to administer the religious law for the society. The system in its very beginnings does not evince much separation and specialization of functions. Instead, the monarchical concentration of power was the order of the day.

Later in the medieval period, with the advent of Islamic law in India, a more elaborate court system was drawn up where the court was empowered to decide who could appear as a *vakil,* a legal expert who would argue the suit on behalf of the parties in dispute. This system continued for some time in tandem with the British courts set up by the company soon after their successful conquests and consolidation.

For the purposes of this paper, the greatest attention must be paid to the arrangement of the court established by the British either directly or through empowering the company suitably.

A. Company Rule and British India

The court system emerged slowly across the centuries of the development of British rule over the Indian subcontinent. However, it may also be said that a long time elapsed between periods of heightened activity. The first such period of interest would be the charter of 1726 which established the Mayor's courts in the presidency towns and for the first time sought to apply English law in India. As became common practice the courts were granted full authority to decide for itself the rules as to admittance of pleaders and requisite qualifications.

The next pertinent development sequentially is the reforms ushered in by Lord Warren Hastings and Cornwallis near the tail end of the 18th century. The regulating act of 1773 established the Supreme Court at Calcutta and further the functions of the Mughal Diwan - the system of revenue collection and civil administration - was reconfigured and reformed under the Judicial Plan of 1772 utilizing the newly acquired powers of Diwani by the East India Company[2]. The regulation addressed the legal profession for the bifurcated set of courts – District Diwani Adalat and the District Fauzdari Adalat – presided over by the Sadar Diwani Adalat.[3]

Finally, the Indian High Courts act of 1861 established a high court in Calcutta, Madras, and Bombay replacing the Supreme court and the Sadar Adalat. Through further legislation more such high courts were established in Allahabad in 1875, Patna in 1912, and Lahore in 1865.

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[2] Dave SD, The Privy Council: the British Courts and the Personal Laws of India (2014)

[3] Development of Judicial system during British India, , https://www.jagranjosh.com/general-knowledge/development-of-judicial-system-during-british-india-1518441346-1 (last visited Oct 20, 2020).

These courts were the apex court within their provinces. The appeal lied with the Privy council.

B. Modern Court Hierarchy

In the words of one of its chief architects "one single integrated judiciary having jurisdiction and providing remedies in all cases arising under the Constitutional law, the Civil, or the criminal law, essential to maintain the unity of the country" – B.R. Ambedkar

The modern hierarchy is the product of the British past of India's legal system however it makes some key advances in that it fully integrates the judiciary as one over the whole territory of India going from the District courts to the High Courts in the states to the apex court of the country which replaced the federal court of 1935- the Supreme court of India. This has some very significant implications for legal practice as a legal professional or pleader.

IV. THE ENGLISH BARRISTER

To fully grasp the position of the barrister in the legal profession and the society more broadly same as with the Judiciary some explication of its origin and development is necessarily leading to its modern position both in England and India.

A. Historical Background

Traditionally the emergence of the legal profession in Britain is seen as having occurred in major phases marked by the reign of King Edward I from 1272 to 1307 and the centuries that followed. In brief, it can be said that the expertise and utility of the expertise of a group of no more than a thousand judges and legal practitioners as independent from the study of canonical and roman law in the universities were instrumental in the generation of English law and the peculiar post of Barrister as it eventually developed.

Before the 12th century, it is hard to say if specialized legal practitioners of any from yet exited – apart from the *justiciarii* who sat in the exchequer and the bench. During this time the king attempted to universalize and formalize the local institutions of justice as a law common to all. This system of common law as it became known later played host to the emergence of sophisticated and specialized legal practitioners as an intermediary between the professional judges and the litigants. [4]

The 13th century had already seen the rise of the informal rule which prohibited members outside the professional bar from elevation to Judgeship. This wouldn't be formalized until the next century, but it indicates the increasingly visible relations between the bench and the bar

[4] admin, *History Of Legal Profession In India*, ACADEMIKE (2014), https://www.lawctopus.com/academike/history-legal-profession-india/ (last visited Oct 20, 2020).

that parallel the more modern systems. Furthermore, during the reign of King Edward I, a bifurcated scheme of professional lawyers emerged which in function and duty largely persisted to the present day – that of the Serjeant and the Attorney. The former pleaded the case in court and made the argument whereas the latter catered to the client directly and handled the procedural and documentary matters. Thus, we see a very early and immediate separation of functions and division of labor in the legal system which has proven to be an enduring and persistent scheme. [5]

The Serjeant was originally a recognized class of pleader in the common bench – noted as forespeakers of the bench as early as 1230. Later the fraternity was organized formally as the order of Serjeants. By the end of the 13th century, the Serjeants had surged in numbers and had become the main pleaders in the court of common pleas as well as the new royal courts. Serjeants were effectively aristocratic esteemed lawyers. Under the reign of Henry II, Attorney was appointed to represent the client in his absence as "responsalis". In some sense, the responsalis appointment was, in fact, a form of representation antecedent and relatively primitive to the attorney which fully emerged in the early 14th century. [6]

As one might suspect, the Serjeant is, in fact, the precursor to the modern barrister whereas the attorney is the antecedent to the modern solicitor. The profession in the ensuing centuries underwent a functional and cosmetic facelift with many ancillary roles also appearing but which did not endure for very long. The late 13th century saw the rise of the apprentices of the common bench – student Serjeants who began to engage in the practice of law in a restricted role as attorneys.

By the 17th century, the apprentice has emerged as the more important institutional post with the rise of the Inn of court – suburban living accommodation to the multitudes of apprentices primarily in London - Serjeants had declined in prestige and significance. These inns doubled as instructional and professional centers to the budding practitioners and eventually grew central to the picking and education of Serjeants. Attorneys were expelled from the Inns in the 16th century and only returned to professional association with the formation of the Law Society in 1729.

Over this time also many formal and informal regulatory bodies and edicts were witnessed which introduced further regimentation of the professional conduct and admittance which will

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[5] Frederic William Maitland, English Law and the Renaissance: With Some Notes (1901).

[6] *Id.*

be studied in greater detail as it pertains to the comparative thesis of the paper. [7]

B. The Barrister in India

The development of the legal profession in India in the vein of the Barrister is largely coincident with the expansion of the British and the establishment of the Common law in the country. As stated previously the British first began the development of a court hierarchy in India with the Mayor's courts in 1726 but the pace of reforms picked up in earnest with the appointment of Lord Warren Hastings and Cornwallis by the end of the century and their respective Judicial plans. [8]

With the establishment of the Supreme court at Calcutta by the Royal charter of 1774 and the power to regulate its own procedure and admission of pleaders by the regulating act of 1773, the barrister gained entry ssinto the Indian legal system. Two more supreme courts were established at Madras and Bombay in 1801 and 1823 respectively. As stated previously the supreme court could regulate their own procedure as well as the requirements as to the pleaders permitted to appear before it they were also given the authority to remove lawyers from the roll given reasonable cause and impose prohibitions against those who do not meet the laid out qualification criteria. The charters further required that the chief justice and three judges of each court be an English barrister of at least 5 years standing. [9]

V. FROM THE INDIAN VAKIL TO SENIOR ADVOCATE

Before the company's rule in India and the subsequent British Raj, the Indian Legal profession saw the emergence of the vakil during the reign of the Mughal empire. This acquires significance in the context of the present comparative framework because the historical development here continued and converged with the transformations brought on by the Raj.

Before the establishment of the Mayoral courts in the presidency towns and the Diwani being transferred to the British in Bengal, there existed a dual system of courts provided by the Mughals (largely patterned after the arrangement in the preceding sultanate) and local Hindu panchayats to look after the disputes among the regional Hindu communities. The Mughal courts were either secular or ecclesiastical. The latter was the court of the Qazi – an executive officer – who adjudged according to Quranic precepts. [10]

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[7] Catherine Elliott & Frances Quinn, English legal system (2008).
[8] A. Mervyn Davies, *Warren Hastings maker of British India* (1935).
[9] Brief history of legal education in the UK « The Bar Council of India, , http://www.barcouncilofindia.org/about/about-the-legal-profession/brief-history-of-legal-education-in-the-uk/ (last visited Oct 20, 2020).
[10] Mughal Administration: Key Features & Structure, , JAGRANJOSH.COM (2015), https://www.jagranjosh.com/general-knowledge/mughal-administration-key-features-structure-1445427511-1

The vakil was a legal professional hired by the litigants however the arrangement did not involve a professional institution or sophisticated client-attorney relations, with the effect that before the establishment of the mayor's courts in 1726 there were no legal practitioners properly so-called. Given the decadence and corruption of the Kazis, Mufti's and Maulavis witnessed by the British, it was decided that urgent reforms were needed to give the natives good administration of Justice. As noted previously after the British were empowered with the authority of Diwani (one of the two prongs of local Mughal governance – the Nawab and the Diwan) they set about introducing a new legal system into the provinces of Bengal, Bihar, and Orissa under the Judicial Plan of 1772. The reformed system combined revenue collection and Civil judicature into an integrated hierarchy of Adalats. [11]

The provinces aforesaid were divided into districts with each district appointed a company employee as the revenue collector. The judicial scheme for the district was an integrated hierarchy of Adalats with this newly instituted system of revenue collection – beginning with a small cause Adalat for petty disputes. Above this small cause Adalat sat the Mofussil Diwani Adalat, this court was vested with the authority to try civil cases and was presided over by the collector. The criminal cases were to be handled by a parallel Mofussil Fauzdari Adalat, which operated horizontally at the same level in the hierarchy. The Sadar Diwani Adalat sat on top as the court of appeals from the Diwani Adalat. [12]

This system of courts was affected profoundly by following reforms under subsequent Judicial plans but in respect to the legal profession of the native vakil, the most pertinent development was the Bengal Regulation VII of 1793[13] which sought to completely overhaul the procedure as to ethics and admission of pleaders in the company's adalats. The preamble of the regulation reads:

"*It is therefore indispensably necessary for enabling the courts duly to administer and the suitors to obtain justice, that the pleading of causes should be made a distinct profession and that no persons should be admitted to plead in the Courts but men of passed by the British Government, and that they should be subjected to rules and restrictions calculate to secure to their clients a diligent and faithful discharge of trusts. The pleaders therefore on either side whilst they will bring the merits of every case to light and collect into one point of view of the information necessary to enable the courts to form their opinion upon it, will be a check upon*

(last visited Oct 20, 2020).

[11] A. Mervyn Davies, *supra* note 7.

[12] A. Mervyn Davies, *supra* note 7.

[13] PAUL DAVID NELSON, BOOK REVIEW: CORNWALLIS: THE IMPERIAL YEARS, BY FRANKLIN AND MARY WICKWIRE (1981).

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them by exposing every deviation from the law in their judgments."[14]

Thus, the Regulation sought to introduce a distinct legal profession to enable sound pleading of causes in the Adalats so that its ends could be achieved.[15] *This legitimized and formalized the profession of the native vakil as also the professional fees that he could charge after the case was over and standards of ethics and procedure that should be expected of him. This brought some measure of order to the task as a regularized profession. Furthermore, parallel to the court system established under the power of Diwani, the developments in Supreme courts established under Royal Charters eventually were converged in the High court's act of 1861 where the Sadar Diwani Adalat and the Supreme Court were merged into a singular apex High Court in the province.* [16]

The other levels of the courts were also reorganized, but the rules of procedure and admittance and qualification of pleaders continued to be decided by the courts themselves. This is not to say great changes to the profession were not forthcoming, the legal practitioners act of 1846 as also 1853 and the pleaders, Mukhtars and revenue agents act of 1865 brought profound changes to the practice of the legal profession in the Mofussil courts. The legal practitioner's act of 1879 repealed the act of 1865 and finally obtained a singular hierarchy of the six grades of the legal profession under the authority of the high courts – the Advocate (English barristers for the most part), Attorneys (or solicitors) and the native Vakils practicing in the High courts and the pleaders, Mukhtars and the revenue agents in the lower courts.

In 1923 the Bar committee considered the question of an all-India bar council which would end the distinctions between the legal professionals and introduces a singular post of advocate for all. A limited version of the original hopes was enacted in the form of the Indian bar councils act,1926 where a select few bar councils were created for a few high courts and a limited rulemaking and disciplinary power was conferred onto them subject to the power of the concerned High Court. Finally, the All-India Bar committee of 1951 gave way eventually to the Advocates act of 1961 which ended the hierarchy of pleaders but introduced a new class distinction between the advocate and the senior advocate. Thus, the Vakil stood transformed into the advocate who could practice on an all-India basis and could be elevated to Senior advocate originally under section 16 "by virtue of his ability, standing at the Bar or special knowledge or experience in law he is deserving of such distinction."

[14] Prakash O, Lord Cornwallis: Administrative Reforms and British Policy (2002)
[15] 9 Mary Evelyn Monckton Jones, Warren Hastings in Bengal, 1772-1774 (1918).
[16] M. P. Jain, STUDIES IN JUDICIAL HISTORY OF BRITISH INDIA. (1973).

This requirement stands extended, modified, and explicated by the Supreme court's decision in Writ Petition No. 454 of 2015 [(2017) 9SCC766], whereby a Permanent committee is constituted by the Chief Justice of India and the designation of senior advocates is to happen after the marking of points following an objective rationale and appraisal of skill and performance of the concerned advocates of good standing.

VI. THE BARRISTER VIS-À-VIS SENIOR ADVOCATE

Eventually, the Indian legal System moved fully into the modern age and obtained the Professional bar which is largely self-regulating and handles the responsibility of developing the professional and instilling discipline into the rank and file of the practitioners. However, as the product of the progressive installation of a British Judiciary in India, the role of the erstwhile Barrister casts a long shadow. The position at the top of the legal profession was in many ways a reflection of the ideology of the ruling elite, that of protective guardianship while sowing the seeds of future self-regulation. It was the hope of the British that the most hallowed halls remain exclusive to presumably the greatest of legal practitioners while the skill of the natives was still in doubt. This, however, was not an iron rule – many natives especially those educated in premier English institutes of law in England did receive the elevation from the high courts in India to the position of Barrister.

It was not unusual to find a graduate of for instance Oxbridge practicing as Barristers in Indian courts. So, it does appear that the English did encourage British education for Indians as also admittance to the highest designation if sufficient qualifications were achieved. However, only a few could obtain such education and training, and Indian Barristers remained small in numbers but ultimately whether or to what extent the British practice in this domain was justified is outside the ambit of this paper. The subject matter though has already been elucidated to some degree, to obtain more detail and pointed conclusions, the question of the relation of the Barrister to the modern Senior Advocate or if indeed there is any can be considered under the following heads.

A. Legal Education, Enrollment, and Appointment

The question of the education of the Barrister vis-à-vis is a significant one as the educational pathway constitutes a crucial component of the profession itself and the life of the professional as he engages in it. The barrister historically speaking is deeply intertwined with the mechanism whereby he came to be selected. Here we can say with some confidence that whereas the barrister does have a unique educational requirement and pathway as compared to other ancillary posts which co-existed at the time like the solicitor or attorney, for the Senior advocate

there is no such distinction. However, to the degree that the Barrister and the Senior advocate reflect the post of an advanced and elevated pleader the joining procedures reflect a certain similarity and are most distant in temporal development and not a qualitatively different conception of the entrance itself.

The senior advocate exists at a time of deep statutory reform of his tradition and the self-regulatory power of the bar instituting a regime of equality and open practice at all courts of the country. The principle of equality means he is to obtain his education in much the same way as the regular advocate, complying materially with the same provisions of the advocate's act, 1861 to be enrolled at the bar. This means a three- or five-year law degree recognized for the purpose by the bar council of India as specified in section 24 of the Advocates Act, 1961. The barrister, on the other hand, emerged as a distinct legal profession in the wake of the Serjeant at law whose development coincided with the emergence of the Inn of the court. These inns were lodges or dwelling places where the students and practitioners at the court resided when the courts were in session.[17]

They became instrumental in imparting education to the prospective barristers as also selecting competent barristers for enrollment to the bar. The only requirement formally speaking was spending twelve terms at the inn indicating participating in the moots called bolts which were frequently organized by the readers (the senior-most students as opposed to the outer barrister and the most junior - inner barristers) and generally reflecting the acquisition of some skill in courtcraft. The other source of education namely the university was not applicable at this time as it continued to be relatively siloed and taught roman and ecclesiastical canonical law.[18] Education in English common law did not make it to the university until Blackstone’s lectures in the 18th century and even then, they were general lectures aimed at the thinking academics of society and not particularly aimed at the generation of university-educated common law practitioners.[19] The inns themselves largely took the place of the third university of sorts alongside Cambridge and Oxford. [20]

In the case of the Barrister in India, the elevation or appointment as advocate depended on the discretion (given their rulemaking power and the procedure they adopted, whether purely discretionary or an examination) of the High courts established under the royal charter and the high court's act of 1861 under clauses 9 and 10 of the letters patent of the High court. Several

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[17] *Supra* note 8.
[18] John Baker, Introduction to English Legal History (2019).
[19] Theodore Frank Thomas Plucknett, A concise history of the common law (2001).
[20] *Supra* note 8.

prominent lawyers who graduated from eminent universities in England or were vakils of excellent standing and skill did receive the elevation to the post of Advocate most notably including Motilal Nehru, father of India's first Prime Minister Jawaharlal Nehru, as well as Jawaharlal Nehru himself. The Legal practitioner's act,1879 which brought the six grades of legal practitioners under a single system administered by the High Court and the letters patent of the High Court formed the basis of the governance of the legal profession.

By 1940, Vakils were required to pass a Vakil's examination in addition to being an LLB. Graduate and read in the chambers of a lawyer before the question of being appointed as an advocate (barrister) could arise. As stated, this could take the form of an examination for which pre-requisites in the form of several years' experience or tutelage under advocates could be specified. Some High courts simply ended the distinction between the Vakil and the advocate by letting the former practice on the original site of the High Court, therefore, serving the same purpose as elevation to the designation of advocate but in fact with even fewer restrictions on the terms of practice. This will be discussed further in the next section.

The enrollment, appointment, and education therefore materially resembles a more primitive and developmentally nascent form of the All India bar examination which forms the basis of the enrollment of the prospective Senior Advocate – whose enrollment itself does not differ it must be noted than any other advocate and occurs in compliance with the very same procedure and statutory compliance. It is only the case that under Section 16, the advocate can be elevated to the class of Senior Advocate after he already has been on the roll of any of the state bar councils by the High courts or the Supreme court and after the decision of the Supreme court in 2018 in the aforesaid case, the procedure for such elevation has been made more objective and transparent.

VII. LEGAL PRACTICE

A. Company's Adalats and the Crown's Supreme Courts

After the Bengal regulation of 1793, there obtained a dual system of legal professionals in British India as it developed. These were roughly the vertical hierarchy of native and English practitioners practicing in the newly instituted Mofussil courts and the Supreme Courts under the Royal charters respectively. Or the company's Adalat's and the Crown's courts at Calcutta, Bombay, and Madras.

Under the authority granted to the Supreme court at Calcutta by the regulating act of 1773, it could regulate its own procedure as to the administration of Justice. Further, under clause 11 of the royal charter of 1774, the court could approve, admit, and enroll the advocates and

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attorneys-at-law that were permitted to plead before the court. Thus, the charter envisaged the dual system of Barristers and solicitors as existed in England. However, it is important to note, that Advocates meant at this time, British, Irish, and Scottish (faculty of advocates) Barristers. Similarly, the Attorney's referred to British solicitors or attorneys. The Supreme Court of India has since observed and commented upon the position;[21]

"*Though the Supreme Court was given by the Charter Acts and the Letters Patent establishing them, the power to enroll advocates who could be authorized by the rules to act as well as to plead in the Supreme Courts, Rules were made empowering advocates only to appear and plead and not to act, while attorneys were enrolled and authorized to act and not to plead. In the Sudder courts and the courts subordinate thereto, pleaders who obtained a certificate from those courts were allowed both to act and plead."*[22]

This defacto implied that the Supreme Court was conceived and implemented as exclusively open to British Pleaders and solicitors. This harkens back to the British conception of their role in India as protective guardians and to first introduce enough skill and training in the native legal practitioners before throwing open the doors to the apex court to all. It is seen at the time that the British had a greater appetite for opening the scope of the practice of British practitioners downward into the lower courts than the vice versa. This again is pursuant to their general policy in India at this time. In the Mofussil courts following the Bengal regulation of 1793, the distinct legal profession of the Vakil had been established to produce a class of specialized pleader of causes for the swift and capable administration of justice in the Adalats.[23]

Originally under the regulation, the vakil was subject to a religious test of qualification i.e. he could either be Muslim or Hindu, this was only natural considering the people applying to the Mofussil civil or criminal Courts were to be subject to their respective personal laws. For this purpose, Hindu or Muslim practitioners trained in the specified institutions were sought as Vakils and such practice was barred to other persons. This prohibited the English Barristers at the Supreme court from practicing in the Mofussil courts which were the sole preserve of the Native Vakil and this arrangement continued until the legal Practitioners act of 1846[24] which significantly reorganized the scenario based on the felt needs over the decades and to renew and rejuvenate the quality of lawyering at the Mofussil level.

Thus a system was obtained where the lower courts were administered in close coordination

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[21] History of the legal profession « The Bar Council of India, , http://www.barcouncilofindia.org/about/about-the-legal-profession/history-of-the-legal-profession/ (last visited Oct 20, 2020).
[22] Aswini Kumar Ghosh v Arbind Bose,AIR 1952 SC 369
[23] Mahabir Prashad Jain, Outlines of Indian legal history (2017).
[24] *Id.*

with the natives (the Mofussil Diwani and Fauzdari Adalat were assigned local law officer of skill and learning in Hindu and Muslim law to aid the Collector presiding over the court in understanding and comprehending the local laws and customs) whose rights and liabilities were to be adjudicated whereas the newly introduced Supreme courts at the top applied the British Common law and were the sole preserve of learned and experienced British Practitioners.[25]

Of course, the Senior advocate can practice at the Apex court as well as any other court or tribunal in India as a matter of right under section 30 of the advocates act,1961. Unlike the English barrister during the time of the Supreme Court who could not practice elsewhere, the Senior advocate is entitled by right to practice anywhere in the territory of India.

However, this is not an absolute or unrestricted right. First under article 145 of the constitution of India the Apex court has the authority to frame rules as to its own procedure and regulations to further the administration of Justice. Under this power, the supreme court has restricted the right to act and convey the client's case to advocates on record who are subject to the qualifications mentioned in the rules as framed by the court. Therefore, Senior advocates can only plead and not act on behalf of the client. However, there are further restrictions placed on the Senior advocate in the form of rules framed by the Bar Council of India under section 49 (1)(G) of the Advocates act prohibiting,

i. Filing a vakalatnama before any court or tribunal in India mentioned in section 30 of the act.

ii. Appearing in the Supreme court without being accompanied by an advocate on Record or in any of the other courts or tribunals mentioned in section 30 of the act without an advocate enrolled in the roll of that state.

iii. Conducting any work like drafting of pleadings or affidavits, offer advice as to evidence, or perform any work analogous to such drafting or conveyancing of any kind whatsoever in any of courts or tribunals mentioned in section 30.

iv. Providing undertaking in the court of an argument without the instruction of his Junior.

v. Accepting work or instructions from a client directly to appear in any court or tribunal mentioned in section 30 of the act.[26]

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[25] Anwar S, *supra* note 2.

[26] Senior advocates and Restrictions of Senior Advocates. - SRD Law Notes, , https://www.srdlawnotes.com/2016/02/senior-advocates-and-restrictions-of.html (last visited Oct 20, 2020).

Therefore, the combined restrictions as framed by the Supreme court and the Bar Council of India have the effect of maintaining the distinction between the Barrister and the Solicitor, where the Senior Advocate most visibly and blatantly fulfills the role of the erstwhile Supreme Court Advocate, who is allowed to plead but little else. Whereas the Advocate on record acts as the solicitor for the Senior advocate and in other tribunals the advocate fulfills the same where is empowered to directly solicit clients and engage in conveyancing and drafting, whereas the Senior may not.

So it appears whereas the Senior Advocate differs most clearly in that he can practice all over India as a matter of right and that he is an equal of the advocate despite belonging to a different class, the Advocate as obtains under clause 11 of the charter of 1774 and the rules framed under the regulating act of 1773 had a very limited practice in the Supreme court though to the degree that he was to be restricted to and specialized in his role as an advanced pleader in the court, he resembles the modern Senior Advocate.

B. Convergence in the High Court

After the passage of a few decades in the preceding arrangement, the British felt the need for reforms to raise the standard of practice in the Mofussil courts and eventually following the establishment of the direct rule of the British crown in India in the new British Raj, the Mofussil and the Supreme court were sought to be integrated into a convergent system which could leverage both the experience of the Civil servants working in the former and the common law being administered with the help of experienced and skilled British practitioners in the latter.

The Bengal regulation of 1833 prescribed the pleaders known as vakils could be from any nationality or religion, and that the pleaders could fix their own fees based on their contract with the litigant. This was a very wide-ranging reform which permitted all persons regardless of religion and nationality to practice in the lower courts and to decide their own fees which had hitherto been fixed by the court which had threatened to choke and suffocate the practice of law under strict regimentation. The legal practitioner's act of 1846 took these principles and applied them across India, allowing for barristers enrolled in any of her Majesty's courts in India to practice in the Mofussil courts, the Legal practitioner's act of 1856 extended the same right to the attorneys enrolled at the supreme courts in India. [27]

Further, the pleaders, Mukhtars, and revenue agents act of 1865 gave the power to the high courts to recognize and make rules for the admission of qualified persons to be appointed as such and to give them legal status as practitioners of law. These developments show that the

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[27] MAHABIR PRASHAD JAIN, *supra* note 22.

profession of the Advocate or Barrister in the Supreme court was in a top-down fashion beginning to resemble the modern arrangement. The progressive liberalization for British practitioners expanded the scope of their practice. Similarly, further reforms began to expand the scope of the native Vakil's practice which had hitherto been confined to Mofussil courts and the Sadar Diwani Adalat. As his role enlarges upwards, the distinction between the Barrister and the Vakil begins to blur and converges into more or less its modern equivalent with the post of Attorney fulfilling his role as the solicitor simultaneously.

The High courts established under their Royal charter and according to the high court's act of 1861 now included the term vakil along with Advocate and Attorney. At once this appears to be the aforesaid upward expansion of the Vakil's legal station, however, this is simultaneously true and not so to a degree. The inclusion of the Vakil was necessary as the Charter established the high court as a successor to both the erstwhile Supreme court as well as the Sadar Adalat, the High courts were to be vested with the Former's Original Jurisdiction – which could still only be practiced by Advocates and attorneys as provided by the Legal practitioner's act of 1879 – and the Appellate jurisdiction of the Sadar Adalat where the Vakil was entitled to practice.

However, the language under the Charter and the letters patent of 1865 did allow for the High Court such authority to construct such rules as would not have been possible for the Supreme court to frame given that by Statutory language the Royal charters in the late 18th century had barred Indian Vakils from practice in the Supreme courts. Under the 1861 act, High Courts were established at Calcutta, Madras, and Bombay, clause 9 of the aforesaid letter's patent of 1865 empowered the High Courts to admit and enroll such advocates, vakils, and attorneys as it deemed fit. Clause 10 of the same instrument stated;[28]

"…the said High Court of Judicature at Fort William in Bengal shall have the power to make rules for the qualification and admission of proper persons to be advocates, Vakeels, and Attorneys-at-law of the said High Court and shall be empowered to remove or to suspend from practice, on reasonable cause, the said Advocates, Vakeels, or Attorneys-an-laws; and no person whatsoever, but such Advocates, Vakils or Attornies shall be allowed to act or to plead for on behalf of any suitor…"[29]

Therefore, statutory language permitted the vakil to theoretically practice at the High court given that there were now three categories of practitioners as compared to the two before. The

[28] *supra* note 3.
[29] MAHABIR PRASHAD JAIN, *supra* note 22.

Legal practitioner's act of 1879 did permit such practice on the appellate side out of the gate, however, on the original side, the question was more controversial. Of course, the right of the vakil to practice at higher courts had been a great and continuing demand of the Indian legal fraternity so there was no doubt as to the anxiety of the native professionals to be granted entry to the hallowed halls of the Apex courts.

Different High courts took different approaches to this desire for reform, but in general, there was a liberalizing tendency and the doors were progressively opened for the Vakil, and convergence was achieved with the Barrister. The Madras High Court altered its rules in 1866 permitting Vakils to practice in its Original Jurisdiction. Whereas the advocate had to be instructed by the Attorney the Vakil could appear, act, and plead independently. This decision was challenged in the High court of Madras itself as Ultra vires the charter of 1862 and 1865 in the matter of the petition of the Attorneys. The High court dismissed the petition and stated the rules were framed were well within the authority of the court granted under clause 9 and 10 of the letter patent of 1865. The court did comment on the bizarre arrangement whereby those without special qualifications have been given the largest privileges. [30]

The Bombay High Court instead opted to introduce an examination for non-barristers however unlike the Madras High court, Both the Vakil and the Advocate had to act on the instruction of the Attorney on the original side. Eventually, the Calcutta High Court as well changes its rules permitting Vakils to practice on the original Side however only with the instruction of the attorney thereby avoiding the anomaly in the rules of the Madras High Court. Outside of these High Courts, the others were not vested with original jurisdiction, so as regards them the distinction between the Vakil and the Barrister had already been effectively abolished. [31]

Therefore, in the mid to late 19th century, the convergence of the Advocate (Barrister) and the Vakil also meant the convergence of the Senior advocate with its historical counterpart. Much like the Senior Advocate the Barrister could now Practice at the high court at which he was enrolled and, in all courts, subordinate to that court however unlike the Senior advocate he could not practice in all high courts, only those which would grant such permission. Furthermore, whereas the Senior advocate cannot directly practice in any court mentioned in section 30 of the Advocates Act, 1961, the Barrister was only restricted in that manner in the High court.

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[30] Jain MP, Outlines of Indian Legal History (2005)
[31] *Id.*

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