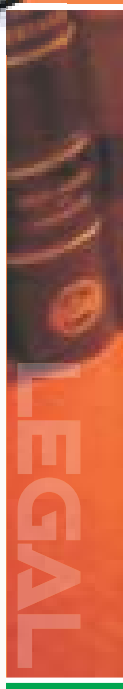
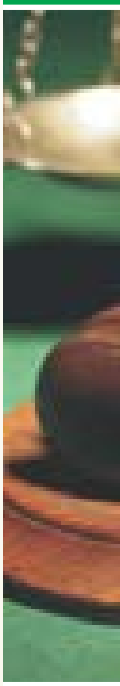
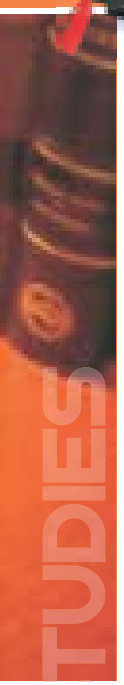


LEGAL STUDIES



UNIT III

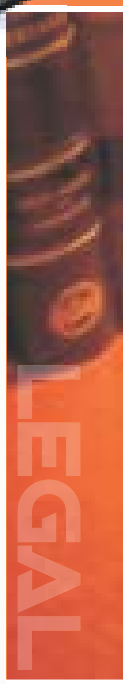
HISTORICAL EVOLUTION OF THE INDIAN LEGAL SYSTEM

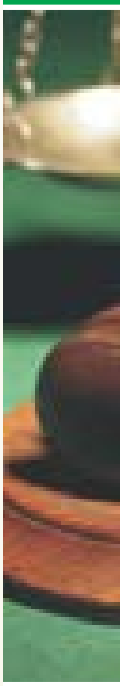


LEGAL STUDIES

Content

Chapter 3: Making of the Indian Constitution





UNIT 03: CHAPTER 1

Ancient Indian Law

Read the following passage carefully and discuss in the class the significance of 'justice'.

One day Emperor Akbar asked Birbal what he would choose if he were given a choice between justice and a gold coin.

"The gold coin," said Birbal. Akbar was taken aback.

"You would prefer a gold coin to justice?" he asked, incredulously.

"Yes," said Birbal.

The other courtiers were amazed by Birbal's display of idiocy.

For years they had been trying to discredit Birbal in the emperor's eyes but without success and now the man had gone and done it himself!

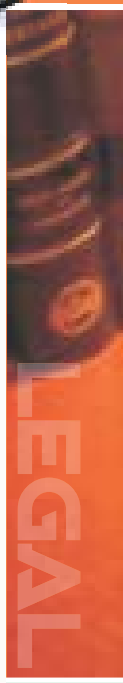
They could not believe their good fortune.

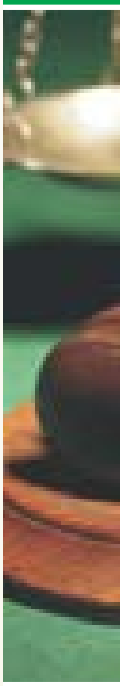
"I would have been dismayed if even the lowliest of my servants had said this," continued the emperor. "But coming from you it's . . . it's shocking - and sad. I did not know you were so debased!"

"One asks for what one does not have, Your Majesty!" said Birbal, quietly. "You have seen to it that in our country justice is available to everybody. So as justice is already available to me and as I'm always short of money I said I would choose the gold coin."

The emperor was so pleased with Birbal's reply that he gave him not one but a thousand gold coins.

Law in India has primarily evolved from customs and religious prescription to the current constitutional and legal system we have today, thereby traversing through secular legal systems and the common law. This chapter briefly describes the evolution of Ancient Indian Law.





India has a recorded legal history starting from the Vedic ages. It is believed that ancient India had some sort of legal system in place even during the Bronze Age and the Indus Valley civilization. Law as a matter of religious prescriptions and philosophical discourse has an illustrious history in India. Emanating from the Vedas, the Upanishads and other religious texts, it was a fertile field enriched by practitioners from different Hindu philosophical schools and later by the Jains and Buddhists.

Secular law in India varied widely from region to region and from ruler to ruler. Court systems for civil and criminal matters were essential features of many ruling dynasties of ancient India. Excellent secular court systems existed under the Mauryas (321-185 BCE) and the Mughals (16th - 19th centuries) which preceded the current scheme of common law in India.

This section begins with the idea of Hindu law and traces its origin through the ancient legal literature. The section also describes the evolution of Hindu law during the British rule as well as the modern times, to conceptualize ancient Indian law in relation with modern law. Islamic law became relevant in India only during the medieval period or the middle ages, especially with the advent of the Mughal Empire in the mid-16th century CE. Since the focus of this section is on the ancient Indian law, a brief subsection has been provided that describes the introduction of the Islamic law in India. However, the next section will deal with how British courts replaced the Mughal court systems that were largely prevalent in India.

1. Hindu Law

The word “Hindu” used to be an ethnic label and not a religious one. First the Persians and then the Greeks used the expression “Hindu” to refer to the ethnic group of people or Indians and, in the thirteenth century, the word “Hindu” was more widely used to distinguish them from the Islamic kingdoms within India. Later on, the expression “Hinduism” was used during the British Rule in the nineteenth century to refer to the Hindu religious culture group as distinct from Christianity and Islam. Ever since, “Hinduism” has largely developed as a *term that embraces the varied beliefs, practices and religious traditions among the Hindus that have common historical formations including philosophical basis.*

Given the historical bases of the term 'Hindu', Hindu law has had varied understandings. In the ethnic Indian context, some have understood Hindu law to include the diverse laws prevalent in India from the ancient Vedic times until 1772 when the British adopted rules for administration of justice in Bengal. Some have used it to distinguish this system from the Islamic legal system that existed in parts of India annexed by the Muslim Mughal Empires between thirteenth and sixteenth centuries, as well as the British legal system from 1772 onwards. Others have categorized Hindu law as being applicable only to those communities that were subjected to it while others followed their own diverse customary laws.

Hindu law can primarily be divided into three categories: the 'Classical Hindu Law', the 'Anglo-Hindu Law', and the 'Modern Hindu Law'. These three divisions also have an historic context.

The Classical Hindu Law includes the *diverse legal practices connected with the Vedic traditionsin some ways and existing from the Vedic times until 1772* when the British adopted rules for administration of justice in Bengal. **The Anglo-Hindu Law** was evolved from the classical Hindu law during the British rule in India from 1772 to 1947. *The British adopted the modern law or the English legal system and replaced the existing Indian laws except for family or personal laws* in matters such as marriage, inheritance and succession of property. *Family law or the personal law applicable to Hindus* is the **Modern Hindu Law.**

2. Classical Hindu Law

To understand the Classical Hindu law, it will be helpful to relate it to 'law' as we understand it today. The basic arrangement of the present day modern law in a democratic country like India is that elected representatives in the Parliament create laws, which are enforced and put into practice by the state through its agencies, such as the executive (e.g. police or other law enforcement agencies) and the judiciary. When lawmakers create laws, they are based on a certain scheme of values of morality, politics, history, society and so on. In comparison with the modern law, the Classical Hindu law was a peculiar legal system as it followed a unique arrangement of law and polity with a unique scheme of values. Although the Classical Hindu law was based on religion with the scholars of the Vedas playing a central role, in reality, it was decentralized and diverse in practice and differed between communities, based on locations, vocational groups (like merchant groups, military groups, and temple groups) and castes. The features of the Classical Hindu law are discussed in this section.

(i) Dharma

'*Dharma*' in Sanskrit means righteousness, duty and law. *Dharma* is wider in meaning than what we understand as law today. *Dharma* consists of both legal duties and religious duties. It not only includes laws and court procedures, but also a wide range of human activities like ritual purification, personal hygiene regimes, and modes of dress. *Dharma* provided the principal guidance by which one endeavored to lead his life.

(ii) Sources of Hindu Law or Dharma

There are three sources of *Dharma* or Hindu law. The **first source** is the *Veda* or *Vedas*. The four primary Vedas are the *Ṛigveda, Yajurveda, Samaveda, and Atharvaveda*. They are collections of oral texts of hymns, praises, and ritual instructions. Veda literally means revelation.

The **second source** is called *Smriti,* which literarily means 'as remembered' and it refers to tradition. They are the humanly authored written texts that contain the collected traditions. The *Dharmashastra* texts are religion and law textbooks and form an example of the *Smriti* tradition. Since only a few scholars had access to direct knowledge or

learning from the *Vedas*, *Smritis* are the written texts to teach others. These texts are considered to be authoritative because they are believed to include duties and practices that must have been sourced from the Vedas and they are accepted and transmitted by humans who know the Vedas. In this way, a connection is made between the Veda and *smriti*texts that make the latter authoritative.

The **third source** of dharma is called the *'āchāra'*, which means customary law. *Āchāras* are the norms of a particular community or group. Just like the *smriti*, *āchāra* finds its authority by virtue of its connection with the *Vedas*. Where both the *Vedas* and the *Smritis* are silent on an issue, a learned person who knows the *Vedas* can consider the norms of the community as *dharma* and perform it. This way, the Vedic connection is made between the Veda and the *āchāra*, and the *āchāra* becomes authoritative.

(iii) Dharmashastra

'*Dharmashastra*' is an example of Smriti. They are *Sanskrit written texts on religious and legal duties*. *Dharmashastras* are voluminous and there are hundreds of such texts. The two most important features of the *Dharmashastras* are that **they provide rules for the life of an ideal householder** and they **contain the Hindu knowledge about religion, law, ethics and so on.**

(a) ***Topics covered in the Dharmashastra:***

Dharmashastra contains *three categories* or topics. **The first** is the *āchāra*, which provides rules on daily rituals, life-cycle rites, as well as specific duties and proper conduct that each of the four castes or *varnas* have to follow. The *daily rituals* include practices about daily sacrifices, the kind of food to eat and how to obtain them, and who can give and who can accept religious gifts. The *life-cycle rites* are the rituals that are conducted on important events in one's life like birth, marriage, and tying of the sacred thread. *Acharas* also provide rules for duties for all the *ashrama*. *Ashrama* are the four stages of life that include:*Brahmacharya* (the student life),*Grahastha* (the householder), *Vanaprasht*a (the forest dweller), and *Sanyasa* (the renouncer).

The **second topic** enumerated in the *Dharmashastra* is the '*vyavāhara*'. *Vyavahara* are laws and legal procedures. They include the *'rajadharma'* or the duties and obligations of a king to organize court, listen and examine witnesses, decide and enforce punishment and pursue justice.

The **third category** is called the *'prāyaschitta'*, which lays down rules for punishments and penances for violating the laws of dharma. They are understood to remove the sin of committing something that is forbidden.

(b) *Textual Hermeneutics*

Traditional hermeneutics deals with the study of interpreting written texts in the areas of religion, law and literature. The *Dharmashastra* tradition uses the textual hermeneutics known as *'Purva-Mimamsa'* to interpret its texts. *Purva-Mimamsa* provides in detail the knowledge of how to interpret the Vedic texts, including the *Dharmashastra* text.

(c) *Important Dharmashastra Texts*

There are literally hundreds of texts that fall under the category of the *Dharmashastra* texts. *Dharmasutra* are the first four texts of the *Dharmashastra*. The Sanskrit meaning of *Dharma-sutra* is righteousness-thread or string. The written format of the *Dharmasutra* is the prose style. They deal with the subject matter of dharma and are like guidebooks on dharma with rules of conduct and rites. *Dharmasutra* discuss the rules for duties for all the *ashrama*: the student-hood, the *householdership*, the retirement or forest dwelling, and renunciation. Also, they provide the rites and duties of kings and court proceedings. Other issues that are *Dharmasutras* cover include rules about one's diet, crimes and punishments, daily sacrifices, and funeral practices. The most important *Dharmasutra* texts are the sutra of *Apastamba, Gautama, Baudhayana and Vaisistha*, and they come from various geographical locations in India and are composed at different times between 600 and 100 BC approximately.

Some of the most prominent *Dharmashastra* texts are *Manusmriti* (200BC-200CE); *Yajnavalkya Smriti* (200-500CE); *Naradasmriti* (100BC- 400CE); *Visnusmriti* (700-1000CE); *Brhaspatismriti* (200-400CE); and *Katyayanasmriti* (300-600CE). These texts were often used for legal judgments and opinion. It is not clear if single or multiple authors wrote these texts. They differ in format and structure from the *Dharmasutra* and are written in the verse form.

Commentaries and Digests: Commentaries were written by commentators to interpret and provide meaning to the *Dharmasutra* texts and *Smriti*, and each commentary devoted itself to one particular text. For example, there are commentaries exclusively on '*Manusmriti*' and on *'YajnavalkyaSmriti'* and so on. The digests were not restricted to one text, but were arranged by topic or theme or subject matter and drew upon many different *Dharmashastra*texts or *Smriti*to explain the topic. For example, there are digests on the topics of the role of king, inheritance of property, religious rites and rituals, adoption, litigation and judicial procedures.

Activity:

Note down all Sanskrit words mentioned in this section and find out their literal meaning.

3. Anglo-Hindu Law

Anglo-Hindu Law can be divided into two phases. The first phase is the period between 1772 and 1864. This phase starts in 1772 when the British adopted rules for administration of justice in Bengal. The second phase is the period between 1864 and 1947. After 1864, India was formally part of the British Empire, and in 1947, India became independent of the British. The important features of the Anglo-Hindu Law are discussed here.

(i) The First Phase (1772-1864)

In the first phase between 1772 and 1864, *three main developments* occurred with respect to the Anglo-Hindu Law. *First*, the important Dharmashastra texts were compiled and translated by various British administrator-scholars including William Jones, Henry Thomas Colebrooke, J.C.C. Sutherland, and Harry Borrodaile. The rules from these texts were applied to Hindus in order to expand British rule in India. *Second*, the court pandits were used in the British courts to aid the British judges with the interpretation of the Dharmashastra texts and implementation of the Classical Hindu Law. *Third*, the court pandits became redundant due to sufficient proliferation and development of established case laws of some precedent value.

(ii) The Second Phase (1864-1947)

Departure from the Dharmashastra tradition is the most significant development of the second phase of the Anglo-Hindu Law. The system of court pandits ended due to sufficient proliferation of, and establishment of, case laws during the first phase. Since there were problems with implementing the Classical Hindu Law, the British legislated and codified various laws or acts, largely in the form of the English Legal System or the modern form of law. The British felt that that there were diverse customary legal practices among various regions and communities in India, and they were not necessarily administratively or otherwise connected with the idealized legal system of Dharmashastra. The British administrators undertook studies and compiled the diverse customary rules practiced among different communities. These customary rules were consultative resources for the courts. Accordingly, the Dharmashastra tradition lost its relevance. By and large, the idea of the English legal system was well received by the Indian nationalist movement and was adopted after India's independence from the British.

4. Modern Hindu Law

The British adopted (especially during 1864 and 1947) the modern law or the English legal system and replaced the existing Indian laws, except for laws related to family or personal matters like marriage, inheritance and succession of property. *Family law* or *the personal law applicable to Hindus is the Modern Hindu Law.* The Indian Constitution of 1950 has adopted this

arrangement wherein in family or personal matters, customary laws of the relevant religious groups or traditional communities apply.

During the early 1950s, some parliamentarians and groups had suggested some kind of return to the classical Hindu law with one uniform family law for all the communities. However, there was no unanimous support to this proposal and it was turned down.In 1955-56, the Parliament adopted the four major legislations governing the family and personal matters of the Hindu community: Hindu Marriage Act (1955), Hindu Succession Act (1956), Hindu Minority and Guardianship Act (1956), and Hindu Adoptions and Maintenance Act (1956). These codified laws are the first points of reference for the modern Hindu law.

Constraints

Although the family and personal laws are different for various religious and traditional communities, the courts that adjudicate these matters are common, i.e. the state run family courts. The judges presiding over the matters are common for all the communities and they may not belong to those specific communities whose matters are presented. Also, the state judges have no formal religious legal training about various communities they adjudicate.

5. Islamic Law

The first Muslim settlers arrived in India in the early 7th century AD. Then, the Arab merchants came to the Malabar coast in South India. And in the 12th century AD, the Turkish invasion also brought Islam to India. Later, with the advent of the Mughal Empire in the mid-16th century AD, the Mughal judicial and administrative systems were introduced in India. The Mughal court systems were later replaced by the English legal system starting from 1772, when the British adopted rules for administration of justice in Bengal; the next section deals with the Mughal courts systems and the British justice system in India. Also, the last section on the Family Justice System covers the Islamic law in India in civil law matters of marriage, inheritance and other personal law issues.

6. Exercise

1. What is *Dharma*? How is it different than the modern understanding of 'law'?
2. What are the sources of Hindu law or *Dharma*?
3. What is *Dharmashastra*? What topics are covered in *Dharmashastra*?
4. What is *Purva-Mimamsa*?
5. How does *Dharmasutra* differ from the other forms of *Dharmashastra*? How do commentaries and digest differ from each other?
6. Briefly describe (in 2-3 sentences each) the classical Hindu law, Anglo-Hindu law, and the Modern Hindu law.

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UNIT 03: CHAPTER 2

Administration of Justice in British India

Read the following passage and debate on the impact of British laws in India.

During the Great War of 1914-18, the British had instituted censorship of the press and permitted detention without trial. On the recommendation of a committee chaired by Sir Sidney Rowlatt, these tough measures were continued. In response, Gandhiji called for a countrywide campaign against the 'Rowlatt Act'. In towns across North and West India, life came to a standstill, as shops shut down and schools closed in response to the bandh call. The protests were particularly intense in the Punjab, where many men had served on the British side in the War – expecting to be rewarded for their service. Instead they were given the Rowlatt Act. Gandhiji was detained while proceeding to the Punjab, even as prominent local Congressmen were arrested. The situation in the province grew progressively more tense, reaching a bloody climax in Amritsar in April 1919, when a British Brigadier ordered his troops to open fire on a nationalist meeting. More than four hundred people were killed in what is known as the Jallianwala Bagh massacre.

NCERT Textbook in History for Class XII
-Themes in Indian History -Part III

The British rule in India is responsible for the development of the Common Law based legal system in India. In this lesson we will learn more about the administration of justice and law reforms during the British period in India.

The development of the British Common Law based system can be traced to the arrival and expansion of the British East India Company in India in the 17th Century. The East India Company gained a foothold in India in 1612 after Mughal emperor Jahangir granted it the rights to establish a factory in the port of Surat. In 1640, the East India Company established a second factory in Madras (now Chennai) on the southeastern coast. Bombay Island, a former Portuguese outpost was gifted to England as dowry in the marriage of Catherine of Braganza to Charles II and was later leased to the East India Company in 1668.

In the early seventeenth century, the Crown, through a series of Charters, established a judicial system in the Indian towns of Bombay, Madras and Calcutta, basically for the purposes of administering justice within the establishments of the British East India Company. The Governor and the Council of these towns formulated these judicial systems independently. The Courts in Bombay and Madras were called Admiralty Courts, whereas the court in Calcutta was called Collector's Court. These courts had the authority to decide both civil and criminal matters. Interestingly, the courts did not derive their authority from the Crown, but from the East India Company.

The Charter issued by King George I on 24 September 1726 marks an important development in Indian

legal history. This Charter forms the basis for the establishment of Crown's courts in India. The British East India Company requested King George to issue a Charter by which special power could be granted to the Company. Accepting the Letters Patent of 1726 and the subsequent Charters, had, in effect, applied English law to British India as will be discussed here after.

1. Establishment of Mayor's Courts

The expansion of its establishments brought new challenges to the East India Company. The Company requested the King to issue a Charter by which special powers could be granted to it. The Company was granted Charter by King George I in 1726 to establish "Mayor's Courts" in Madras, Bombay and Calcutta (now Chennai, Mumbai and Kolkata respectively). Mayor's Courts were not courts of the Company, but courts of the King of England. Mayor's courts superseded all existing courts established in the above places. The Mayor's Courts were authorized *'to try, hear and determine all civil suits, actions and pleas'* that may arise within the three towns or within the factories of the Company. The Court consisted of a Mayor and nine Aldermen, seven of whom, including the Mayor, were required to be naturally born British subjects. Aldermen were elected from among the leading inhabitants of the settlement to hold the position for life. The Mayor was elected from the Aldermen.

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

The Charter of 1726 did not specify the law to be applied by the Mayor's Courts. The Charter merely stated that the Court was required to 'give judgment and sentence according to justice and right'. However, based on the past practice and in the light of the 1661 Charter, the then existing English law, or principles of English Common Law and Equity were applied. It is generally understood that the *Charter of 1726 indirectly brought into application the laws of England- both Common Law and statute law, into the three British Settlements in India*. This is one of the distinctive outcomes of the 1726 Charter.

Appeals from the Mayor's Court were made to the Court of Governor and the Council. The Governor and five members of the Council were appointed Justices of Peace and constituted a criminal court of *Oyer* and *Terminer* (a partial translation of the Anglo-French *oyeretterminer* which literally means 'to hear and determine'). The Court of Governor and Council were required to meet four times a year for the trial of all offences, except that of high treason. However, a second appeal in cases valued at 1,000 pagodas (see picture below) or more, was available to the King-in-council in England.

Source: http://www.chennaimuseum.org/draft/gallery/04/01/coin8.htm

Figure - 1: Pagodas in Circulation during the Rule of the British East India Company

The Mayor's Courts established under the Charter of 1726 had severe limitations. There was no clarity regarding the applicable law, although the Company made considerable efforts to apply the English Law. The jurisdiction of the Mayor's Court over natives was relatively uncertain. In several instances, the Mayor's Court annoyed the natives by applying the principles of English Law, completely disregarding their personal laws and customs.

In 1746, the French occupied Madras, after which the functioning of the Mayor's Court was suspended in that City. However, the French surrendered Madras to the British in 1749 after the conclusion of the peace treaty of Aix-La Chappelle. Using this opportunity, the Company requested the King to remove some difficulties related to the 1726 Charter. King George II issued another Charter on 8 January 1753, which by and large left the 1726 Charter intact.

By virtue of the 1753 Charter, the Mayor Courts were re-established in the three settlements with the same jurisdictions and powers as in the Charter of 1726. To avoid disputes between the Governor and Council, the Charter brought the Mayor's Court under the control of the Governor and the Council. The Mayor, instead of being selected by the Aldermen was to be selected by the Governor and Council. Furthermore, suits and other actions by natives were expressly excluded from the jurisdiction of the Mayor's Court unless both parties had submitted them to their determination. The jurisdiction of the Mayor's Court was restricted to suits of the value of over five (5) pagodas.

It is notable that Courts such as the Mayor's Courts were established for deciding mainly the disputes of the British natives or other foreigners. Therefore, *in all the three settlements, different types of courts existed to decide the cases of the natives*. In Madras, the Choultry courts existed to decide cases up to the value of 20 pagodas. In other words, Choultry courts heard, by and large, petty cases and continued up to the year 1800. In Calcutta, the natives were subject to the Zamindars' courts. The East India Company as the Zamindar, administered these courts. Zamindars' courts decided civil matters, viz, issues involving land, property and personal wrongs. It is also reported that the Zamindar's Courts and the Mayor's Court had disputes relating to jurisdiction on certain civil matters. *Justices of Peace were appointed*

in Calcutta to decide criminal matters. However, in Bombay no separate courts were established to decide disputes among the natives. The reason was that the Company claimed complete sovereignty over the island and did not want to treat the natives differently.

2. Regulating Act of 1773

Judicial functions of the East India Company expanded substantially after its victory in the Battle of Plassey (1757). The battle established the Company rule in Bengal, which expanded over much of India for the next hundred years. After this battle, the real authority of the Nawabs of Bengal passed on to the British. In the year 1765, Robert Clive secured in perpetuity for the East India Company, the Diwani of Bengal, Bihar and Orissa from the Mughal Emperor Shah Alam, who was still considered to be the Ruler of the Country, against a payment of Rs. 26 lakhs. By this grant, the Company claimed to have become the virtual sovereign and master of this territory. At that time, the Nawab, who was the Subedar of Bengal, represented the Mughal Emperor. While exercising his authority, the Nawab performed two main functions: (i) *Diwani*, *i.e.* collection of revenue and civil justice, and (ii) the *Nizamat*, i.e. the military power and criminal justice. The East India Company obtained *Diwani*rights from the Mughal Emperor and the Nawab gave it *Nizamat* work. However, the administration of criminal justice was left with the Nawab, who was responsible for maintaining law and order.

Despite its success in Bengal, the East India Company was debt-ridden at that time and had to pay significant sums of money to the British Government to maintain monopoly rights in India. The affairs of the company were poorly managed and the natives were unhappy. Even the Tea Act of 1773, which triggered the American War of Independence, was designed to rescue the near bankrupt company and to generate money from the colonies. In 1773, Lord North, the then Prime Minister of England, decided to introduce some form of legal government to manage the Indian possessions of the East India Company.

As the East India Company acquired formal political power over substantial areas in eastern India, the British Parliament grew more concerned about the need to regulate its activities. In 1773, the British Parliament passed the Regulating Act (13 Geo, III Ch.63). The Regulating Act of 1773 made some important changes in the structure of the Company, and appointed a Governor General and four councilors at Fort William in Calcutta. The Regulating Act of 1773 is widely considered as the first attempt by the British Parliament to construct a regular government for India and to intervene in the control of the Company's administration. The Regulating Act of 1773 also superseded the provisions of the 1753 Charter.

The Regulating Act of 1773 was the first attempt at creating a separate and somewhat independent judicial organ in India, under the direct control of the King. The Chief Justice and other *puisne* (junior) judges were appointed by the King. Section 13 of the Regulating Act empowered the Crown to establish by Charter, a Supreme Court of Judicature at fort William

in Calcutta. On 26 March 1774, Letters Patent was issued to establish the Supreme Court of Judicature. The Supreme Court was to consist of a Chief Justice and three *puisne* judges being barristers of not less than five (5) years of standing to be appointed by His Majesty. Sir Elijah Impey, a distinguished English Barrister, was appointed as the first Chief Justice of the Supreme Court of Calcutta,a post he held until 1787. The Supreme Court was set by 'Letters Patent'. Clause XVIII of the first Charter ordained that 'the Supreme Court should be a court of equity, and shall and may have the full power and authority to administer justice, in a summary manner, as nearly as may be, according to the rules and proceedings of our High Court of Chancery in Great Britain'. In other words, *the power to administer justice and equity,* (which was an important feature of the Crown Courts in Britain) *was also passed onto the Supreme Court and to subsequent Charter High Courts*. The legacy of this practice continues to have influence in India at least in areas of Hindu law.

The Supreme Court, under the Regulating Act of 1773, was a court of record and had the power and authority similar to that of the King's Bench in England. The Supreme Court of Calcutta had jurisdiction over civil, criminal, admiralty and ecclesiastical (laws governing the affairs of the Christian Church) matters. It had the power to issue writs such as *mandamus* and *certiorari,* similar to the jurisdiction of the present day High Courts and Supreme Court. It also had the power of *'Oyer and Terminer'* i.e. the power to try offences and imprisonment. The Court also had to frame separate rules of practice and procedure for governing its functioning. The Supreme Court had jurisdiction over all British subjects and those residing in Bengal, Bihar and Orissa and had the power to decide all complaints regarding crime, misdemeanors or oppressions. Appeals from this court were made to the King-in-Council in England.

The Charter of 1774, in pursuance of the Regulating Act, establishing the Supreme Court in Bengal, did not delineate the bounds of its jurisdiction. This omission led to a sharp conflict of opinion about the jurisdiction of the Supreme Court. Not infrequently, the Supreme Court, without drawing any light from the Regulating Act, overstepped the limits of its jurisdiction, and thus commenced in Bengal, an era of confusion, described by Macaulay in his essay as a 'reign of terror'. Edmund Burke notes, "... [no] rule was laid down either in the Act or the Charter by which the Court was to judge. No description of offenders or species of delinquency was properly ascertained according to the nature of the place or the prevalent mode of abuse." The power and jurisdiction of the Supreme Court in matters relating to natives was particularly controversial. The Act of Settlement of 1781 partly resolved these issues. Its effect was to take away the application of the English law to Hindus and Mohammedans in the matter of contracts and other matters enumerated in the statutes, and to provide that they were to be governed in these matters by their own laws and usages.

Defects of the Regulating Act of 1773

The Regulating Act of 1773 was one of the significant steps initiated to overhaul the functioning of the East India Company. However, one of its glaring defects was that it did not lay down any provision dealing with the relationship between the Company's Courts and the Supreme Court. The Regulating Act made the jurisdiction of the Supreme Court partially concurrent with that of the Adalats. In several instances, the Governor General and the Council supported the Adalats, which led to severe friction and conflicts between the Council and the Supreme Court. Furthermore, the system of checks and balances established by the Act, made the Governor General powerless before his own Council and the executive powerless before the Supreme Court.

The circumstances that prevailed at Bombay and Madras were not similar to those of Calcutta. For this reason, it was not considered necessary to establish a Supreme Court in these towns. An Act of the British Parliament made in 1797 also abolished the Mayor's Courts established at Bombay and Madras. The 1797 Act authorized the Crown to issue a Charter to establish Recorder's Courts at Madras. The Recorder's Court which was declared as a court of record, consisted of a Mayor, three Aldermen and a Recorder. The Recorder, who was the President of the Court, was appointed by His Majesty from among the lawyers with at least five (5) years of experience at the Bar.

Supreme Courts were soon established in Madras and Bombay during the reign of King George III. In 1800, the British Parliament passed an Act empowering the Crown to establish a Supreme Court at Madras in the place of the Recorder's Court. The powers of the Recorder's Court were transferred to the newly established Supreme Court, and it was directed to apply the same jurisdiction and be subject to the same restrictions as those applied to the Supreme Court of Judicature at Calcutta.

In the case of Bombay, the Recorder's Court continued to function until 1823. In 1823, an Act of the British Parliament abolished the Recorder's Court and established a Supreme Court in its place. The Supreme Court in the Presidency Town of Bombay was established by a Crown Charter and consisted of Chief Justice Sir E. West and two other *puisne* judges. The jurisdiction of the Supreme Court was strictly limited to the town and the Island of Bombay at that time.

3. Law Reforms in British India

During the late 18th and early 19th centuries, the Indian cities, much like British cities of the time, were poorly administered and policed. Crimes were widespread and corruption was rampant especially in the police. Lord Cornwallis realized that implementation of judicial reforms would not be complete without police reforms. Much of the criminal justice system in Bengal remained in the hands of the Nawab, the nominal local ruler of the company's

territory. Warren Hastings had attempted several times to make changes in policing and the administration of justice, but with limited success. William Jones, an expert on languages and legal system in Ancient India, translated the existing Hindu and Muslim penal codes into English. The limited objective was that the principles of the ancient texts could be evaluated and applied by English-speaking judges. In 1787, Lord Cornwallis gave limited criminal judicial powers to the company's revenue collectors, who had already served as civil magistrates. Most importantly, the collector was divested of judicial and magisterial powers and entrusted with the duty of administration of revenue. In 1790 the company took over the administration of justice from the Nawab, and Cornwallis introduced a system of circuit courts with a superior court that met in Calcutta and had the power of review over circuit court decisions. However, most of the judges were non-native. Lord Cornwallis had initiated efforts to harmonize different codes existing at that time. By the time of his departure in 1793, the harmonized code, known in India as the Cornwallis Code, was substantially complete.

Law against Child Marriage in India

Laws can be the catalyst for social change. There were a number of Indian legislators in the Central Legislative Assembly under British rule, who fought to make a law preventing child marriage. In 1929 the Child Marriage Restraint Act was passed without the kind of bitter debates and struggles that earlier laws had seen. According to the Act, no man below the age of 18 and woman below the age of 16 could marry. (Ref: NCERT class VIII text book – Our Past –III)

Activity:

Find out other examples of statutes enacted during the British rule for initiating social reforms in India. Make a presentation in the class on any one of the statutes.

Despite the best intentions, the Cornwallis reforms resulted in institutionalizing discrimination through judicial reforms. One consequence of the Cornwallis Code was that it, in effect, institutionalized a discrimination against natives in the legal system. In 1791 Lord Cornwallis issued an order that '[no] person, the son of a Native Indian, shall henceforward be appointed by this Court to Employment in the Civil, Military, or Marine Service of the Company.' These policies led to the development of an elite class of English judges in India. English judges were appointed to various courts in India, including the High Courts and the Federal Court, until India became a Republic in 1950.

The Crown courts in India operated on the basis of 'law or equity and rule of good conscience'. According to Lord Hob house, the expression 'justice, equity and good conscience' could be interpreted to mean the rules of English law if found suitable to Indian society and circumstances. But the exact scope and meaning of this phrase was not and is not easily

ascertainable, particularly because it also carried a historical background. Within the Presidency towns, the English law was the *lex loci*(law of the place), the only exception being for Hindus and Mohammedans, who were allowed the benefit of their personal laws in certain spheres. Outside the Presidency towns, Regulation IV of 1793 had provided that in suits regarding succession, inheritance, marriage, caste and all religious usages, the Hindu and Mohammedan Laws were to be applied by the courts; but this provision was confined in its application to Hindus and Mohammedans only. For other categories of persons and other types of suits no specific rules of guidance was in force except that the judges were to act in accordance with "justice, equity and good conscience".

However, the application of the laws, as aforesaid, created difficulties. The population of India, even outside the Presidency towns, could no longer be regarded as consisting of Hindus and Mohammedans alone. Besides British subjects, aliens had settled down in India. A new class of Anglo-Indians had come up. The number of Indian Christians was also on the increase. On account of their mixed ancestry and the abandonment of their old moorings, the Anglo-Indians and the Christians could not rely upon their personal laws, and even if they could, in some cases, the difficulty of ascertaining their personal laws deterred the judges from applying them. The Courts had, out of necessity, to fall back upon "justice or equity and rule of good conscience". This flexibility gave the judges the opportunity to legislate and fill up the gaps while deciding cases. *In short, the rules of English law, by default, became the governing law of British India.*

4. Charter of 1861

Following the First War of Independence in 1857, the control of East India Company territories in India passed to the British Crown. The Government of India Act 1858 authorized the British Crown to take over the administration of all territories from the East India Company. The Act also vested the power to appoint the Governor-General in the British Crown.In 1861 the Indian High Courts Act and the Indian Councils Act were passed by the British Parliament, which empowered Her Majesty to issue Letters Patent establishing High Courts in three Presidency towns. The former provided for the abolition of the Supreme Courts of Judicature and the Sadar Diwani Adalats and the constitution of the High Courts of Judicature in their place in the three Presidency towns. The Chartered High Courts remained as the highest courts in India till the establishment of the Federal Court of India under the Government of India Act of 1935. By virtue of section 16 (a), power was reserved to Her Majesty to constitute similar High Courts in other territories, which were not within the local jurisdiction of any of the three proposed High Courts of Calcutta, Bombay and Madras. The Indian Councils Act empowered the Governor-General to create local legislatures in various provinces though the exercise of this power.

Figure - 2: Charter High Courts in India

Calcutta High Court (Sourced from http:\\www.calcuttahighcourt.nic.in

Bombay High Court (Sourced from http://bombayhighcourt.nic.in)

Madras High Court (Sourced from http://www.hcmadras.tn.nic.in)

The Charter High Courts initially administered their jurisdiction only within the Presidency towns. Subsequently, their jurisdiction got extended to the entire Presidency. The Charter High Courts, being established by the Act of the British Parliament, had the power to issue prerogative writs. The *'writs'* were the normal method of commencing a local action in King's Courts such as the High Courts. The power to issue writ in the nature of habeas corpus was curtailed by Section 491 of the Criminal Procedure Code, 1898. After the enactment of the

Government of India Act, 1935, the power to issue habeas corpus writ was restored. Subsequent to the enactment of the Constitution (1950), the High Courts were recognized by the Constitution and the power to issue writs, orders or directions was conferred on them under Article 226 of the Constitution.

During the British Period, the Privy Council acted as the highest court of appeal. Appeals came from the colonies and certain other locations over which Britain exercised jurisdiction. In 1833 a distinct Judicial Committee of the Privy Council was appointed with jurisdiction over colonial, ecclesiastical and sundry other matters. The Law Lords of the House of Lords adjudicated cases before the Council. The State sued and was sued in the name of the British sovereign in her capacity as Empress of India. The Privy Council served as a bridge between the Indian and the English legal systems. After India attained independence, the jurisdiction of the Privy Council was abolished by the Abolition of the Privy Council Jurisdiction Act, 1949.**The Privy Council served as the highest court of appeals from India for a period of nearly 200 years and has rendered several landmark decisions, which have influenced the evolution of law in India.**

Figure - 3: Sitting of Judicial Committee of Privy Council

5. Establishment of Federal Court

The Government of India Act, 1935 changed the structure of the Indian Government from "unitary" to that of "federal" type. The distribution of powers between the Centre and the Provinces required the balance to avoid disputes, which would have arisen between the constituent units and the Federation. The system of federation clearly demanded the creation of a Federal Court which would have jurisdiction over the States as well as the Provinces. The Original Jurisdiction was confined to disputes between Units of the Dominion or between the Dominion and any of the units. The private individuals had no right to sue any

Dominion before the Federal Court. The Federal Court also had appellate and advisory jurisdiction. Its appellate jurisdiction was extended to civil and criminal cases. The Supreme Court of India was also established (on the same principles and jurisdiction).

Section 200 of the Government of India Act, 1935 created the Federal Court at New Delhi.An appeal from any judgment, decree or final order of a High Court was entertained by the Federal Court, if the High Court certified that the case involved a substantial question of law in accordance with the interpretation of the Act of 1935 or any other Act and law. The certificate was a condition precedent to every appeal.

Advisory Jurisdiction

The Federal Court was empowered to give advisory opinion to the Governor-General, whenever a question of law arose or was likely to arise which was of such a nature and of such public importance that it was expedient to obtain the opinion of the Federal Court upon it. The Court, after such hearing, reported the matter to the Governor- General thereon.

Appeals on the decisions of the Federal Court had to be taken up with the Privy Council in London, which remained the final arbiter of all matters of the Indian Legal System. The Federal Court functioned only for 12 years and gave way to the Supreme Court of India in January 1950. However, it left a considerable impact on the Indian legal system. During its existence, the Federal Court decided 151 cases. Some of these cases involved issues of critical importance to federalism, its own advisory jurisdiction and, in some cases, issues such as preventive detention.

6. Establishment of Other High Courts and Supreme Court

After India attained independence in 1947, the Constitution of India came into being on 26 January 1950. The transition from the Federal Court to the Supreme Court of India(SCI) was seamless. Justice Kania became the first Chief Justice of India.

It is often said that the Supreme Court of India exercises jurisdiction far greater than that of any comparable court in the world. The original Indian Constitution envisaged a Supreme Court with a Chief Justice and seven *puisne* judges, while empowering the Parliament to increase the number of judges. Subsequently, the Parliament increased the number of judges to 12 in 1956, 14 in 1960, 18 in 1978, and 26 in 1986. The number of judges in the Supreme Court was increased to 30 by virtue of the Supreme Court (Number of Judges) Amendment Act, 2008. Judges generally sit in smaller benches of twos or threes and form larger benches of five or more only when required to do so, or to settle a difference of opinion or controversy.

Figure – 4: Supreme court of India
Source: *Website of the Supreme Court of India (last accessed May 19, 2013*

The Supreme Court has a **threefold jurisdiction.** As a *federal court*, it has exclusive original jurisdiction in any dispute arising between the Government of India and one or more states, between the Government of India and any state or states on one side and one or more states on the other or between two or more states. As an *appellate court,* the Supreme Court of India can hear appeals from the State High Courts on civil, criminal and constitutional matters. The Supreme Court has also a very wide appellate jurisdiction in as much as it has the discretion to grant special leave to appeal under Article 136 of the Constitution from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. In addition, the Supreme Court hears a number of statutory appeals provided under separate legislations. The Supreme Court has *special advisory jurisdiction* in matters, which may specifically be referred to it by the President of India under Article 143 of the Constitution. Furthermore, the Supreme Court has a concurrent original jurisdiction along with the High Courts, for the enforcement of fundamental rights under Article 32 of the Constitution of India.

The jurisdiction of the Supreme Court of India can be enlarged by the Parliament. The Supreme Court may also pass any decree or order as may be necessary for doing "complete justice". According to Article 141 of the Constitution of India, the law declared by the *Supreme Court shall be binding on all courts within the territory of India. More importantly, the Supreme Court of India exercises judicial review—the power to strike down or declare unconstitutional, both legislative and executive actions, which are contrary to the provisions of the Constitution of India, or violative of the fundamental rights guaranteed by the Constitution, and also on the distribution of powers between the Union and the States,*

The President appoints the Judges after consultation with the Judges of Supreme Court and High Courts of States. Article 124 (4) guarantees the President power to impeach the Judges if

a motion is passed by a special majority of each House of Parliament, on the basis of proved misbehavior or incapacity to discharge one's duties.

The Supreme Court of India has the special responsibility to render justice (social, economic and political) and to enforce equality, liberty, dignity and the ideals of democracy, socialism, secularism and such other values enshrined in the Constitution of India. Professor K.T.Shah, a member of the Constituent Assembly observed as follows: "[The judiciary] is the only authority that we are going to set up in the Constitution to give effect to whatever hopes and aspirations, ambitions and desires, we may have, in making these laws and in laying down this Constitution. Even constitutional and legislative amendments are not immune from judicial challenges. In the historic *Fundamental Rights* case (KesavanandaBharti case, 1973), the Supreme Court of India held that the power to amend the Constitution was subject to the limitation that the "basic structure" of the Constitution cannot be taken away. This decision means that even the sovereign power to change or alter the Constitution of India is subject to limitations.

After the President's Rule case (1994), the 'basic structure' doctrine was not just limited to challenges to constitutional validity, but was also extended to interpret the validity of exercise of power by the legislature and the executive.

The High Courts in various states are the apex judicial bodies of the States. ***There are currently 24 High Courts in India***, four High Courts in the Northeast part of India having been established in March 2013. The bulk of the work of the High Courts consists of appeals from lower courts and writ petitions under Article 226 and 227 of the Constitution of India. Apart from writ petitions, any civil or criminal case which does not fall within the purview or ambit of the subordinate courts of that State, due to lack of pecuniary or territorial jurisdiction, can be heard by the High Court of that State. Also certain other matters or issues may be heard by the High Court as part of its original jurisdiction, if the law laid down by the legislature provides to that effect. For example, the company law cases fall within the original jurisdiction of the High Court.

7. Legal Profession in India

The history of the legal profession in India can be traced to the establishment of the First British Court in Bombay in 1672 by Governor Aungier. The admission of attorneys was placed in the hands of the Governor-in-Council and not with the Court. Prior to the establishment of the Mayor's Courts in 1726 in Madras and Calcutta, there were no legal practitioners.

During the shift from Mughal legal system, the advocates under that regimen, *'vakils'*, too followed suit, although they mostly continued their earlier role as client representatives. The doors of the newly created Supreme Courts under the British were barred to Indian practitioners, as right of audience was limited to members of English, Irish and Scottish

professional bodies. However, enactment of the Legal Practitioners Act of 1846 opened up the profession regardless of nationality or religion.

The Advocates Act, 1961, governs the legal profession in India. Under the Advocates Act 1961, only advocates enrolled in India with a state Bar Council are entitled to 'practise the profession of law' -- which includes not only appearing before courts and giving legal advice as an attorney, but also drafting legal documents, advising clients on international standards and carrying out customary practices and transactions. The Advocates Act distinguishes between two types of advocates--senior advocates and advocates. A senior advocate is designated by the Supreme Court or any High Court based on his ability or special knowledge in an area of law. ASenior Advocate cannot file *Vakalatnama*before any Court or Tribunal in India. However, in order to 'file an appearance' before the Supreme Court of India, one must be an 'advocate-on-record' or be instructed by an advocate-on-record. To be eligible to qualify as an advocate-on-record, a oneyear training contract with an advocate-on-record needs to be completed, besides passing prescribed tests.

At the federal level, the Bar Council of India performs oversight functions and lays down standards of professional conduct, recognizes universities whose degrees qualify for enrollment etc. Typically, each state has its own Bar Council, which regulates the admission and removal of names of advocates from its rolls. Enrollment with a State Bar Council as an 'advocate' renders a lawyer eligible to practice before all courts and tribunals in India. Obtaining a BA.LL.B or LL.B. degree, followed by passing of the bar exam will qualify a person for enrollment. The Bar examination was introduced only in 2010. In order to be eligible for enrollment, a student should also have completed his or her studies in one of the institutions recognized by the Bar Council of India.

The dual-system of classification between solicitors and attorneys in India was abolished in 1970, but the Bombay Incorporated Law Society (an association) still conducts examinations for persons who wish to qualify as solicitors, upon the completion of a three year training period in a solicitor's office as an 'article clerk' and the passing of a solicitors' exam.

Careers in Law

Traditionally most law graduates in India join litigation or court room practice after enrolling as advocates. Although a lawyer is qualified enough to practice law immediately upon enrolment as an advocate, as a matter of fact, most *litigation lawyers* start their careers as junior advocates to more experienced or senior lawyers at the Bar. Associating with a more experienced lawyer is helpful in learning court room skills and procedural matters. Practicing lawyers are also selected to various judicial offices in India. Advocates practicing in courts such as the High Courts and

Supreme Court are directly appointed as judges in the High Courts and in some rare cases to the Supreme Court. For other judicial offices such as District and Sessions Judge and other subordinate judicial offices, the selection is made generally through a competitive examination in most states in India.

Litigation practice is not the only career option available to a lawyer in a globalized world. A number of fresh law graduates join law forms or other consulting firms especially in the field of corporate transaction law. Such *transaction lawyers* need not be arguing cases before courts or tribunals, but will be helping their clients in matters such as negotiation, drafting, counseling and in less informal forms of representation. Careers in corporate law firms have been increasingly attractive for fresh graduates in law. Generally lawyers start their careers as associates and can rise to become partners depending on the success of their practice.

Companies, businesses, trade associations and certain civil society organizations also require lawyers to routinely plan and strategize their activities and functions. The office of General Counsel is gaining popularity in India and it plays a key role in senior level management decisions. The office of the General Counsel or the Legal Departments of certain large companies employ several hundred lawyers for legal advice and related services. In addition, public sector undertakings, banks and other private companies also employ law officers to help them in their routine activities.

'Non-legal' professional services firms such as Legal Process Outsourcing (LPO) firms now offer quasi-legal services. The advent of the LPOs is a recent phenomenon associated with the globalization of legal profession.

Lawyers are required in international organizations and other institutions such as the United Nations, the IMF, the World Bank, the Asian Development Bank and the WTO. Familiarity with specialized streams of law is important to get a job in such institutions.

Lawyers can also play a crucial role by associating with civil society organizations and think tanks which work on areas as varied as environment, right to information, right to food, right to work, gender justice, etc.

8. Exercise

1. How was justice administered during the British rule?
2. What is the meaning of the term 'justice, equity and good conscience'?
3. How did the English Common Law influence the development of Indian legal system?
4. What are roles of the various Royal Charters in the administration of justice in British India?

5. Which are the Charter High Courts in India?

6. Explain the historical evolution of Indian courts.

7. Who can practice law in India?

9. Activity

A. Match the Following

1. One of the Charter High Courts	a. High Court of Delhi
2. Established in 1726	b. High Court of Bombay
3. Established 1774	c. Mayor Courts
4. Established in 1966	d. Supreme Court of Calcutta

A. Compare the functioning of the Supreme Court of India and the Supreme Court of the United States.

B. Conduct a study of the opportunities available to a fresh law graduate in India. What are the emerging areas of opportunity for a young lawyer?

C. Examine how and to what extent the British tradition has become part of the Indian legal system. Prepare a short presentation.

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UNIT 03: CHAPTER 3

Making of the Indian Constitution

> .....We are not going just to copy, I hope, a certain democratic procedure or an institution of a so-called democratic country. We may improve upon it. In any event whatever system of government we may establish here must fit in with the temper of our people and be acceptable to them. We stand for democracy. It will be for this House to determine what shape to give to that democracy, The fullest democracy, I hope. The House will notice that in this Resolution, although we have not used the word 'democratic' because we thought it is obvious that the word 'republic' contains that word and we did not want to use unnecessary words and redundant words, but we have done something much more than using the word. We have given the content of democracy in this Resolution and not only the content of democracy but the content, if I may say so, of economic democracy in this Resolution. Others might take objection to this Resolution on the ground that we have not said that it should be a Socialist State. Well, I stand for Socialism and, I hope, India will stand for Socialism and that India will go towards the constitution of a Socialist State and I do believe that the whole world will have to go that way.
>
> -Jawaharlal Nehru on framing the Constitution.
> CONSTITUENT ASSEMBLY DEBATES (CAD), VOL.I

The Indian Constitution, which came into effect on 26 January 1950, holds the distinction of being one of the lengthiest Constitutionsin the world.This lesson gives insights into various aspects of the Indian Constitution.

I. Constituent Assembly

After the World War II, which ended in 1945, India's independence from the British rule was around the corner. During the winter of 1945-46, general elections for India's provincial legislatures or assemblies were held. These legislatures elected the members of the Constituent Assembly that would draft the Constitution of India. Although, in December 1946, the Constituent Assembly was ready in place in New Delhi, the Muslim League's demand for a separate Pakistan delayed its work of creating the new Constitution. On August 15, 1947, after the last Viceroy of British-India Lord Louis Mountbatten declared India and Pakistan as two independent countries, the Constituent Assembly continued with its mandate to create the new Constitution for India.

Dr. B.R. Ambedkar is considered to be the principal architect of the Indian Constitution. (Photo sourced from http://c250.columbia.edu).

The Constituent Assembly had members mostly from the Congress Party with a few Communists and Independents. In 1885, Allan Octavian Hume, an Englishman had formed the Congress Party to enable Indian participation in the less popular British Government. In 1921, post World War I, Mohandas Karamchand Gandhi, (Mahatma Gandhi), assumed the leadership of the Congress Party and led the movement for India's independence. Although the Constituent Assembly was largely a one-party body, the Congress Party had arranged for a dozen of persons distinguished in law and public affairs to be elected to the Constituent Assembly to contribute to the making of the Constitution. India's first law minister, Bhimrao Ramji Ambedkar, was appointed the Chairman of the Constitution Drafting Committee. Therefore, Dr. Ambedkarhas been termed as the principal architect of the Indian Constitution. The Constituent Assembly had two roles to play- governance and the framing of the Constitution. In the mornings, it dealt with the governance matters and in the afternoons, it drafted the Constitution.

2. Sources of the Constitution

The framers of the Indian Constitution, i.e. the Constituent Assembly, drew upon *three sources* to draft the Constitution. *The first source* was the foundation document or the base text- the *Government of India Act of 1935,* which was passed by the Parliament in London. This Act was the basis for the government and was in force in India from 1935 until 1950 when the Indian Constitution was adopted.

The salient features of the 1935 Act were:

- it provided for a parliamentary system (but the ultimate power was kept with the British);
- it included a wide ranging administrative aspects for the structure of government;
- it created a centralized federal system; and it provided for elections to provincial legislatures or assemblies.

The *second source* was the *constitutions of other countries*. They were used mostly with respect to the two chapters of the Constitution namely, the Fundamental Rights and the Directive Principles of State Policy. As is described later in this section, fundamental rights largely deal with civil and political rights of citizens (for example: right to life, freedom of

speech and expression) and the directive principles deal largely with the economic, social and cultural rights of the citizens (for example: right to health, and livelihood).

The *third source* was the *Objectives Resolution* adopted in the December 1949 Assembly session. The Constitution derived its spirit from this source. The Objectives Resolution laid down the philosophy and the Constitution expressed it through its many lengthy and detailed provisions. Jawaharlal Nehru, the first Prime Minister of India, had drafted the Objectives Resolution drawing upon the Congress Party documents of the previous two decades. The Objectives Resolution called for the integrity of the Indian Union and that its authority and power were derived from the Indian people. It stated that all the people should be secured with regards to justice, social, economic and political- equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality. Furthermore, the Objectives Resolution provided for adequate safeguards for minorities, depressed and backward classes, and underdeveloped and tribal areas. The Objectives Resolution can be summarized to consist of *three interdependent salient features:*

1) protecting and enhancing national unity and integrity;

2) establishing the institutions and spirit of democracy; and

3) promoting a social revolution for the betterment of the citizens.

3. Description of the Indian Constitution

The Indian Constitution was adopted on January 26, 1950. It consists of a preamble, 395 articles and twelve schedules. The preamble is the introductory statement in the constitution. *Articles are the provisions or rules and the schedules are like the annexures providing details on specific issues.* The Constitution is detailed and lengthy and covers the entire nation and the central government and has uniform provisions for all the state governments. The provisions for both the central government and the state governments are consistent and based on the parliamentary systems. The President is the Head of the State of India. The President appoints Governors in each state.

Preamble

The Constitution begins with an introductory statement called the preamble. Based on the Objectives Resolution, it lays down the guiding principles and the philosophy for the Constitution. It provides for unity and integrity of the country.

THE CONSTITUTION OF INDIA

PREAMBLE

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

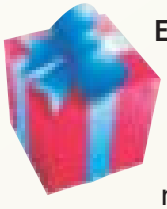
IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

India was established as an 'Union of States' with a highly centralized federal structure with a strong center in relation with the states. The original preamble provided that India shall be a 'sovereign democratic republic'. It was later, in 1976, that the words 'socialist' and 'secular' were added to the Preamble. The Constitution provides for adult suffrage to allow the citizens to vote and elect their representatives and the government. This ensures the common participation of all in a democratic fashion. Other features of the Constitution - like creation of democratic political institutions and processes of the parliamentary system, creating an independent judiciary, and stipulating for civil and political, and economic and social rights for people - fulfill the democratic essence and social transformation agenda of the Preamble. Some of these features are described later in this section.

Fundamental Rights and the Directive Principles of State Policy

In the Indian Constitution, the human rights provisions are set out in two chapters. Part III of the Constitution provides for Fundamental Rights, largely of political and civil nature, which are enforceable by a court of law. The rights in this chapter include (*equality before the law, the right not be discriminated against on grounds of religion, race, caste, sex or place of birth, equal opportunity in matters of public employment, the abolition of untouchability, freedom of speech and expression, the right to form associations and unions, freedom of movement throughout, and to reside in, any part of the country, the right to practice any profession or occupation, protection upon conviction for offences, right to life and personal liberty, protection at the time of arrest and detention, the prohibition of traffic in human beings and forced labor, the prohibition of employment of children in factories and other hazardous employment, freedom of conscience, profession, practice and propagation of religionand management of religious affairs, and the protection of cultural and educational rights of the minorities.)* This chapter was revolutionary as it broke the barriers of the Indian traditional and hierarchical society that did not recognize the principles of individual equality.

The Directive Principles of State Policy are included in Chapter IV of the Constitution. These are the guiding principles governing state policies in the social sector. They are interpreted as economic and social rights and are classically socialist in nature and fulfill the social revolution agenda of the preamble. The provisions are not enforceable by any court of law, but provide guidance in carrying out and drafting laws regarding human and social development. The provisions laid in this part include- *right to an adequate means of livelihood; right to equal pay for equal work for both men and women; right to healthy working conditions for men, women and children; protection to children against exploitation and against moral and material abandonment; provision for equal justice and free legal aid; organization of village panchayats or local village bodies as units of self-governments; right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement; provision for just and humane conditions of work and maternity relief; provision for work and living wage for workers; provision for a uniform civil code for the citizens; promotion of educational and economic interests of weaker sections; provision to raise the level of nutrition and the standard of living and to improve public health; provision for preserving and improving the animal breeds; protection and improvement of environment and safeguarding of forests and wild life; protection of monuments and places and objects of national importance; provision for separation of judiciary from executive; and promotion of international peace and security.*



Enforcement of the Directive Principle of State Policy under the Indian Constitution In the case of *Randhir Singh v. Union of India & others*. The Hon'ble Supreme Court in its judgment enforced one of the directive principles of state policy. The relevant part of the Supreme Court judgment reads as follows :

"8. .....Article 39(d) of the Constitution proclaims 'equal pay for equal work for both men and women' as a directive principle of State Policy. 'Equal pay for equal work for both men and women' means equal pay for equal work for everyone and as between the sexes. Directive principles, as has been pointed out in some of the judgments of this Court, have to be read into the fundamental rights as a matter of interpretation. Article 14 of the Constitution enjoins the State not to deny any person equality before the law or the equal protection of the laws and Article 16 declares that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.....Construing Articles 14 and 16 in the light of the Preamble and Article 39(d) we are of the view that the principle 'Equal pay for Equal work' is 'deducible from those Article and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification, though these drawing the different scales of pay do identical work under the same employer."

Houses of the Parliament

The Parliament of India follows a bicameral legislative system and has two houses: the lower house is the Lok Sabha or the 'House of the People' and the upper house is called the Rajya Sabha or the 'Council of States'.

Figure – 5(a): Indian Parliament

Figure – 5(b): Rajya Sabha

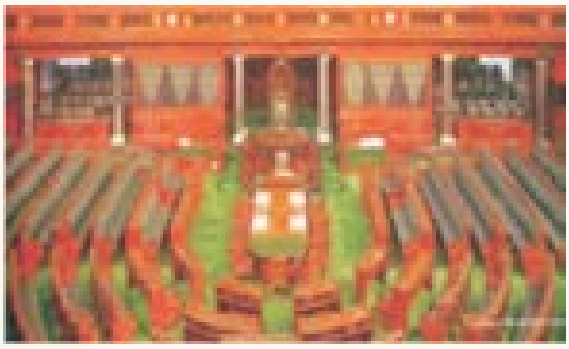


Figure – 5(c): Lok Sabha

Source: http://www.parliamentofindia.nic.in/

The Constituent Assembly adopted the bicameral legislature system, as it believed that a federal system, with a stronger central union in comparison to the states, was the most feasible form of government for a massive and greatly diverse country like India and a unicameral system would not be adequate to meet the country's challenges. The maximum strength of the LokSabha is **552** members. 550 members of the LokSabha are elected directly by adult suffrage where citizens who are eighteen years of age and above can vote. The remaining two are the *nominated members from the Anglo-Indian community.* The RajyaSabha has 250 members, of which 238 members are elected indirectly by state legislatures and the President nominates the remaining 12 members.

Center-State Relations

Various articles and schedules of the Constitution lay down rules about the powers of the central and the state governments as well as the relations between them. The Seventh Schedule contains three legislative lists: *Union list*, *State list*, and the *Concurrent list*. These three lists define the legislative jurisdictions. The central government has the exclusive legislative authority to frame laws over matters listed in the Union list. There are 99 items in the Union list that include foreign affairs, defense, armed forces, communications, posts and telegraph, foreign trade etc. The state governments ordinarily have the authority on matters stated in the State list. There are exceptional situations however, such as emergency, national interest, and international trade when the Centre can legislate on matters of the State list. There are 61 subjects in the State list that include public order, police, administration of justice, prison, local governments, agriculture and so on. Both Parliament and State legislatures have powers over matters enumerated in the Concurrent list. However, the Parliament has supremacy in this list. It comprises of 52 items and includes criminal and civil procedure, marriage and divorce, economic and special planning, trade unions, electricity, newspapers, books, education, population control and family planning and so on. Residuary items rest with the center.

Emergency

The 'Emergency Provisions' are provided in Part XVIII of the Constitution. These provide that during emergency the central government may supersede the state government(s) and rule the country, or one or more states, in a unitary fashion. The President, who is advised by the Cabinet of ministers at the center, proclaims the state of emergency. The grounds for emergency are:-*threats to the nations from internal or external sources, failure of the constitutional machinery of the state and situations of financial crisis*. Accordingly, the President is concerned to declare three types of emergencies:-*national emergency, state emergency, and financial emergency*. During the period of emergency, the President may override many provisions of the Constitution, including the fundamental rights.

Judicial System

The judicial system includes the Supreme Court, the High Courts, and the Subordinate Courts. The Supreme Court is the highest court or the apex court in India. It has original, appellate and advisory jurisdiction. Under its original jurisdiction, it takes up disputes involving Government of India and State Governments; individuals or groups may approach the Supreme Court for enforcement of their fundamental rights or human rights as enumerated in the fundamental rights chapter. The Supreme Court is the final court of appeal (appellate jurisdiction) for cases from all courts and tribunals in India. In its advisory jurisdiction, the Supreme Court provides its opinions to the President of India, when the latter specifically

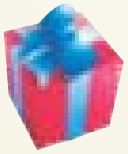
requests for such opinions on questions of law or of public importance. High Courts exist in most states, but some high courts have jurisdiction over more than one state. High Courts have original jurisdiction over matters of fundamental rights and appellate jurisdiction over decisions of its subordinate courts and tribunals. A number of subordinate courts exist in every state and fall under complete control and supervision of the respective high courts. The prominent subordinate courts are *civil and criminal courts* and exist at district levels and below. Other special subordinate courts include *family courts, labour courts, land revenue courts*, and so on. Tribunals are the various bodies that act judicially in a specific area, or a seat of judgement for arbitration , e.g., income tax tribunals.

Miscellaneous

There are various other matters on which the Constitution provides rules. To name a few rules are made for: provisions on the national civil service, language, elections, finance, and trade and commerce. Unlike some other countries, in India, citizenship is based on nationality and not state. Further, the Constitution provides for one citizenship, i.e. Indian.

Amendments to the Constitution

Since its adoption in 1950, the Indian Constitution has been amended more than ninety-seven times. Since the Constitution was adopted with full of administrative detail, most of the amendments relate to administrative matters. Other amendments relate to debates about the ideals stated in the Preamble. Here, Right to Education is an example, which was included in the fundamental rights chapter through an amendment to fulfill the social revolution or transformation agenda. The Constitution has gone through so many changes with respect to amendments as well as interpretations, in the rapidly changing Indian society, that it has been termed as a *living document*.



Doctrine of 'Basic Structure': Limitations on the Amending Power of Parliament

In *Keshvananda Bharti v. State of Kerala* , the Supreme court has evolved a concept known as 'basic structure'. This concept aims at restraining the amending powers of the Parliament. It states that Parliament can amend each and every provision of the constitution but cannot alter the basic structure. This doctrine applies only to constitutional amendments.

The term *basic structure includes* several principles like *democracy, federalism, secularism, free and fair elections, etc.*

- Discuss the significance of the doctrine of Basic Structure.

4. Exercise

a. How was the Constituent Assembly formed? What was its purpose?

b. What are the three sources that the framers of the Constitution referred to draft the Indian Constitution? Briefly describe them.

c. Briefly describe the theme, philosophy and the spirit on which the Indian Constitution was drafted?

d. How are the fundamental rights different from the directive principles of state policy?

e. What is bicameral legislature? How is the Indian parliament bicameral?

f. How is the legislative authority divided between the center and the state?

g. When can the President of India proclaim a state of emergency? What happens during such a situation?

h. How are the jurisdictions of Supreme Court, High Courts, and Subordinate Courts similar or different from each other?

I. Why would one term the Indian Constitution a 'living document'?

5.

Activity

Divide the classroom into various political, social and economical, and other groups to create a mock Constituent Assembly. Discuss whether the constitution should have provisions to make the directive principles of state policy enforceable by court of law, just like the fundamental rights. How would different groups respond? What are the differences among the groups? How would the assembly come to common understanding when there are differences?

6. References

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