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## Evolution of the Indian Legal System with Reference Law and Social Order

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### Abstract

National policies and plans cannot be formulated on the basis of irrational acts by a few irrational people. Also it would not be right to blame the whole system or a society for their irresponsible acts. It is not desirable to pass on comments based on half cooked information, half a truth, partial or incomplete knowledge, which could be harmful for the whole society. Many a times, irresponsible acts of some irrational and cynic persons create misunderstandings. Quite often, caste system has been criticized as being highly discriminatory. The British rulers had condemned the Caste system strongly before the Independence. Now many political parties, many intellectuals Dalit activists and their leaders have joined them. They are born, educated and brought-up in an atmosphere, which is deeply influenced by rhymes and reasons of western societies.

**Keywords:** Discrimination, Caste system, Reservation Policy and Modern India

### Introduction

#### Ancient Indian Law

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, you're 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

#### 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 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

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beliefs, practices and religious traditions among the Hindus that have common historical formations including philosophical basis

### **Classical Hindu Law**

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 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.

### **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.

### **Sources of Hindu Law**

There are three sources of Dharma or Hindu law. The **first source** is the Veda or Vedas. The four primary Vedas are the Rig-Veda, 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 literally 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. **Third source** of dharma is called the 'âchâra', which means customary law. Âch ras are the norms of a particular community or group. Just like the smriti, ch ra 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 âchâra, and the âchâra become authoritative.

### **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, and ethics and so on.

### **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.

### **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.

### **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.

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.

### **Regulating Act of 1773**

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.

### **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 the time.

### 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.

### Charter of 1861

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.

### 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.

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.

### 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.

### 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.

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

### 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.

### 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.

### Some Important Terms

- **Enacted Law** – It means Law enacted by the Competent Legislature i.e. Central or State Legislature
- **Ad Law** - Means Law enacted by Executive wing of the Govt.
- **Precedent** – It means Judge made Law.
- **Ratio** – The binding principle evolved by the Supreme Court or High Court in deciding particular case.
- **Obiter Dicta** – The Statement made by the Judges of the Supreme Court or High Court in deciding a particular case which was not necessary.
- **State** - The State has four elements i.e. Population, Territory, Government and Sovereignty.
- **Executive** - It means Executive wing of the Govt.
- **Judiciary** - It means organ empowered to interpret the law made by the Legislature, the Executive and other agencies of the State.
- **Sovereign** - It means sovereign power to make laws, to execute the laws and to interpret the laws.
- **Government** - It means Legislature, Executive and other agencies of the State.
- **Fundamental Right** - It means the right conferred by the Constitution. The right which is given against the mighty power of the State.
- **Constitution** - The highest law of the land which decides the structures, powers and functions of legislature, executive and judiciary. The highest law of the land which decides Separation of Powers between L.E.J. and Division of Powers between Central and State Govts.
- **Amendment** - It means to change existing law or Constitutional Law.

### Conclusion

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

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