

Common Law system and Institutions in India

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Common Law system in India:

The term common Law can refer to two things. *The* common law is the body of law formed through court decisions, as opposed to law formed through **statutes** or written **legislation**. A common law system is the system of **jurisprudence** that is based on the **doctrine of judicial precedent**, the principle under which the lower courts must follow the decisions of the higher courts, rather than on statutory laws. The Common law refers to law and the corresponding legal system developed through decisions of courts and similar tribunals, rather than through legislative statutes or executive action. The common law is created and refined by judges; a decision in the case currently pending depends on the decisions in previous cases and affects the law to be applied in future cases. When there is no authoritative statement of the law judges have the authority and duty to make law by creating precedent. The body of precedent is called common law and it binds future decisions. If a similar disputes has been resolved in the past the court is bound to follow the reasoning used in the prior decision. If however the court finds that the current dispute is fundamentally distinct from all previous cases, it will decide as a matter of first inspiration. Thereafter the new decision become precedent, and will bind future courts.

The common law legal system originated in England, was later adopted in the United States and Canada and is in place in most **Commonwealth** countries. While

the English common law system has its roots in the 11th century, the present system has evolved over the past 350 years, with judges basing their decisions.

Common law has no basis in statute, and is established and developed through written **opinions** of judges **delivered** at the end of a **trial**. These opinions are **binding** on future decisions of lower courts in the same jurisdiction. However, that is not to say that common law systems **derive** all of their laws from case law. Democratic countries that have **adopted** the common law system have **legislative bodies** at the centre of their democracies, and these bodies regularly pass new legislation. This legislation is then **interpreted** and **applied** by the **judiciary** during trials. Large bodies of law, for example those relating to property, contracts and **torts**, are traditionally part of the common law. More modern areas of law such as employment law, intellectual property law and health and safety tend to be based on statute rather than on common law.

As with any system, the common law system has its advantages and disadvantages. The three main arguments in favour of such a system is that it is fair, **useful** and efficient. It is seen as being fair as the strict following of precedents in all cases means that all people are treated equally. Finally, the existence of precedents means that the judicial process can be relatively fast as there is already a framework in place in which to base a ruling.

The disadvantages include the bad rulings and the difficulties raised when there is no precedent for the case before the court. Once a bad decision has been made by a higher court, that decision will remain law until the same court, or a higher court, overrules the bad decision. so bad decisions can be upheld for a long time. That is true of bad precedents. However, a total lack of precedent can lead to many problems, especially where a court essentially has to make new law where no previous law existed.

The development of Judicial Institution

The legal system adopted by India is undoubtedly based on the English legal system. The development of Indian judicial Institutions created during British India but found its roots in Hindu period and also has been developed during the Mughal period but on the other hand it is true that systematic constitution of judicial institutions have given shape during the British India. Some of the important development of judicial institutions.

1.Development of Judicial Institutions before English Laws:

The origin of Judicial institutions found its roots from the very beginning of society. During Hindu period, the society was divided into four varnas further varnas were divided into caste

and than sub-castes. In the beginning of the society the wrongdoers were punished by family head and with the development of higher issue cases were decided by the head of the caste/villages. Each caste panchayat were regarded as a supreme authority for the particular caste in each village.

(i) Ancient India (Hindu Period):

In ancient India, the king was regarded as the fountainhead of the justice. His foremost duty was to protect his subjects. He was respected as a Lord of Dharma and was entrusted with the supreme authority of the administration of justice in his kingdom. The king's court was the highest court of appeal as well as an original court in cases of vital importance to the state. In the King's court the king was advised by learned Brahmin, the chief justice and other judges, ministers, elders, and representatives of the trading community. Next to the king was the court of justice. Apart from the chief justice, the court consists of board of judges to assist him. All the judges from three upper caste preferably Brahmins.

(ii) Muslim or Mughal Period:

During Mughal period the sultan (King), being head of the state, was the supreme authority to administer justice in his kingdom. The administration of justice was one of the important functions in his Sultan, which was actually done in his name in three capacities, Diwan-e-quaza (arbitrator), Diwan-e-Mazalim (as head of Bureaucracy) and Diwan-e-Siyasat (as commander in chief of force). The judicial system under the sultan was organized on the basis of administrative division of the kingdom. The systematic classification and gradation of the courts exists at the seat of the capital (Central), Provinces (State), Districts, Parganas (Tahaseels or Talukas) and villages.

Development of Judicial Institutions during British India:

English people came to India in 1601 as a "body of trading merchants" on 31st December, 1600 Queen Elizabeth granted charter to the company which incorporated the London East India company to trade into and from the East Indies. The same charter further granted legislative power to the company to make bye-laws, ordinance, etc for the good government of the company and its servants and to punish offences against them by fine or imprisonment according to laws, statutes and customs.

(i) **Company was empower to trial its servants in India:**

The English people came to India in the regime of Emperor Jehangir and settled at Surat in 1612. The Mughal Emperor granted the right of self-government to the English by issuing an order and this proved a turning point in the legal History of India as the English company secured various privileges from the Mughal Emperor.

- a) Disputes amongst the company's servants will be regulated by their own tribunals.
- b) English people will enjoy their own religion and laws in the administration of the company.
- c) Mughal Governor or Quazi of the relevant place will protect the English people from all sorts of oppression and injury.

1. Common law Legal System: The British rule in India brought about the **introduction** and development of the common law legal system, on which India has **based its** present judicial framework. In the early seventeenth century, the Crown, introduced a judicial system functioning under its authority in the **three "presidency"** towns (Bombay, Madras and Calcutta), i.e. the largest and most important towns under British rule.

2. Governor and Council: These judicial systems were **function** independently by the Governor and the Council of those towns, and had authority to decide both civil and criminal matters.

3. Authority: The courts did not derive their authority directly from the Crown, but from the East India Company. This system was making **unsystematic**.

4. Mayors Court: In the eighteenth century, a more **uniform pattern introduced**. All "presidency" towns now had a uniform judicial system (called a Mayor's Court). Soon thereafter, the courts derived their authority directly from the Crown.

5. Privy Council: A system of **appeals** to the Privy Council was initiated, and this marked a historic landmark in the development of the Indian Judicial system, because the Privy Council functioned as the **last court of appeal** in India for more than 200 years.

6. Supreme Court : However, the courts **functioned under the English law**, without any regard for local laws, which raised questions regarding their effectiveness. In the late eighteenth century, the Mayor's Court was replaced with a Supreme Court (in presidency towns).

7. Independent Judicial Organ: This was the first attempt to create a separate and independent judicial organ in India, under the direct **authority of the King**. The Chief Justice and Judges were appointed by the King. This court had jurisdiction over civil, criminal. and formulate rules of practice and procedure.

8. British subject: Appeals from this court lay to the Privy Council. In the beginning, the territorial jurisdiction of the court extended only to British subjects (all those in employment of the **East India Company** and those entering into a contract).

9. Adalat System : Local civil and criminal justice was left in the hands of the locals, functioning under a system known as the “adalat system”.

10. High Court: By the mid nineteenth century, The adalat system and Supreme Court were abolished, a High Court was established in each presidency town, and Appeals from them went to the Privy Council. Thus, this created a uniform judicial system in India, which, in substance, has largely continued till today.

11. Federal Court: The **precedence** of the present Supreme Court of India was the Federal Court (established in 1937), which heard appeals from the High Courts, and whose decisions were **appealable to the Privy Council**. The current Supreme Court of India enjoys the combined jurisdiction of the Privy Council and the Federal Court, which are no longer in existence.

Development of Personal Laws India

1. Non-interference with custom and personal laws: with different religions, and each religious community has its own personal laws that govern marriage, adoption, succession and the like. The British maintained a policy of non-interference with custom and personal laws, and so it was decided that Hindus were to **be governed by Hindu Law and Muslims, by Muslim laws**.

2. Influenced by Customs and Communities: The British administration attempted **to give a framework** to these laws by enacting specific legislations governing various religions. Few examples are the Indian Christian Marriage Act, 1872, Parsi Marriage and Divorce Act, 1936, Dissolution of Muslim Marriage Act, 1939, Hindu Marriage Act, 1955 and the like. The term ‘Hindu’ has been viewed flexibly to include Sikhs, Jains and Buddhists. The development of personal laws is largely influenced by customs and manners of communities.

Development of the Civil and Criminal Legal System:

Codified: Development of the Civil and Criminal Legal System Much of the **common law introduced** in India has been codified. The basic statutes governing civil and criminal justice are the Indian Penal Code, 1860, Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973 and the Code of Civil Procedure, 1908.

Lord Macaulay: The Indian Penal Code, 1860 was drafted by the First Law Commission, **established in 1835**, of which Lord Macaulay was the Chairman. This classic piece of legislation was reproduced in most other British colonies and even today, forms part of the laws of countries like Malaysia, Singapore and **Sri Lanka**. These legislations have undergone several amendments, which address the changing needs of society. This code is the basic governing statute for determining **criminal liability for offences**.

The Indian Evidence Act of 1872: Based on the work of Sir James Stephen, was a historical measure that consolidated the rules of evidence which were up till now based on **the traditional legal systems** of a social groups existing in India. They also varied, at times.

The Code of Criminal Procedure: The procedure that is to be followed by the prosecuting an accused. The present code dates to 1973, but was first enacted into **law in 1861**, after the second Law Commission presented the draft of the code 1973.

The Code of Civil Procedure, 1908: was first codified in **1859**, for legal and **administrative reforms**. Subsequently, the re-enacted code of 1908 was adopted and has again been amended in 1976. The Codes apply uniformly throughout the nation.

Functioning of the Supreme Court, High Courts and Subordinate Courts

Primary Court of Appeal: The Supreme Court is primarily a court of appeal and has wide appellate jurisdiction. Its primary function is to **interpret** the Constitution and declare whether any legislation or administrative action is constitutional or unconstitutional. The Supreme Court is the final authority in all constitutional controversies.

Contempt: The law declared by the Supreme Court is binding on all courts in India, and is the law of the land. The Court is a court of record and can also punish for its contempt.

High Court certifies: Any judgment of the High Court can be brought before it, if the High Court certifies that the matter of large question of interpretation of law or the Constitution. Appeal to the Supreme Court is not a matter of right.

Special Leave : In cases where a High Court does not issue certificate of appeal, and there exists an important legal question, alternative to “**Special Leave**” may be made, as per the Constitution of India. This provision (Article 136 of the Constitution) enables the Supreme Court to grant special leave to appeal from any judgment, decree, sentence or order in any cause or matter passed or made by any court or tribunal in India. This power is extremely wide and enables the Supreme Court to act as a **check against improper exercise** of jurisdiction by judicial or quasi judicial bodies as well as maintain a uniformity of legal approach.

Transfer of any case: In certain special circumstances, the Supreme Court can also transfer to itself any case from any of the High Courts. This usually takes place when cases are pending before the Supreme Court and High Court, or before two or more High Courts, involving same or similar questions of law and the Supreme Court is satisfied either **suo motu or** on an application made by the attorney general or any party to any case that such questions are of general importance.

Advisory jurisdiction: The Supreme Court also enjoys advisory jurisdiction, by which the **President of India** may refer any question of law or a question of public importance to the Court for its opinion. The court also has the power to **review its own decisions**.

High Court:

Contempt: The High Courts are courts of record and as such can punish for their contempt. The High Courts were meant to play essential role in the administration of justice not only in deciding civil and criminal matters but also by way of **protecting fundamental rights** guaranteed under the Constitution (for which High Courts are also conferred with Writ jurisdiction.).

Subordinate courts: Therefore, a high degree of judicial independence was given to the High Courts. They enjoy original as well as appellate jurisdiction. They also exercise supervisory jurisdiction over subordinate courts.

They are vested with the power to hear references for the confirmation of death sentences also be consulted in the matter of exercise of the prerogative of mercy by the President or Governor. Revisional powers are also granted to the High Courts.

The High Courts have jurisdiction and superintendence over all courts and tribunals within its territorial jurisdiction. The power of High Courts extends also to the other judicial or quasi judicial bodies within its territorial limits, in judicial and administrative matters.

The Subordinate Courts in each State function under the authority of the High Court and have fixed pecuniary, territorial and sentencing limits. There exists a hierarchical structure in the lower judiciary and these limits are fixed accordingly, in ascending order.