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European and Indian Legal Education-A Comparative Study

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ABSTRACT

The modern age is the age of specialist. Specialization in education is an imperative phenomenon that needs to be disseminated lavishly and promoted effectively all around. One such category of late is often discussed as it has captured the imagination of millions of young students is legal education that falls within the territory of specialized subjects. Legal education is popularly taken to mean education that is imparted in law schools, colleges and universities. It is a kind of education that prepares an individual to be able to comprehend the principles of law, practice and its application. Its fundamental need is the possession of a distinctive attitude to life based on an intellectual level. There is no denying the fact that our world is getting ever more complex and lawyers have to specialize in particular fields of law. This paper explores to find out answers to some essential questions like how intellectual level affects the self-image of the legal profession. Whether there is a "common core" of attributes and abilities every lawyer most possess. Whether it is possible and desirable to agree to a pan-European core curricula, how lawyers are perceived by the public. Whether these are perceptions shared by people all over the world, and what people expect in dealing with lawyers as clients or colleagues. A sound understanding of law and the ability to carefully apply law are essential features of a successful lawyer. How are these abilities taught and examined in law school? Is there a specific culture of legal education? What is the impact on framing the legal mind and habits? Through this paper the writer makes a humble attempt to bring out some comparisons pertaining to legal system with special emphasis on legal education in Europe and India. A special effort is put to look for new international perspectives in academic legal education in Europe.

KEY WORDS:

legal education, essential features of lawyers, legal profession, Indian legal system, criminal and civil courts, role of judiciary, hierarch of courts, European courts

INTRODUCTION

To make a successful career lawyer, knowledge of law alone has never been enough. Their needs "extra skills" These additional skills ought to supplement your knowledge that you have acquired during the course. Can they be learned in moot courts, legal clinics, and debating societies, do we need other forms of teaching, or can they only be acquired on the job? Can "soft skills" ultimately serve to resolve or avoid conflicts and ease the strain on the judicial system?

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A major issue is whether the 'Bologna Process'[i] two-cycle degree structure is suitable to accommodate the specific needs and international demands of professional legal education and training in the 21st century. Reforming legal education and the need for accommodating respective state guidelines are issues of intensive and controversial debates, not only in Germany, but in many countries. Thus, the decision should take into consideration the rich experience in all European countries[ii] especially since many internal controversies have been triggered in the context of implementing the Bologna Process. The confederation will discuss whether a national design of law study programmes are helpful, especially in the long term, as it tends to pose obstacles to students' mobility and mutual recognition in the common European Higher Education Area. Selected examples of good practice from Bologna countries will, however, serve to provide more transparency and comparability, increase awareness for possible and desirable changes and promote the feasibility of reforming legal education.

The distribution of responsibilities between university education and professional training varies enormously across Europe. In most countries besides Germany, Austria or Spain, professional training is organized completely independent from university education. In the UK and Ireland, it does not even require a university degree. Therefore, a key question is which minimum education is needed to qualify for professional training to become a judge, solicitor or barrister. However, Bologna is more than just restructuring curricula into Bachelor and Master. Rather, it is an occasion to rethink legal education and how to prepare lawyers for the future that is more and more framed by the European law.

It is an opportunity to critically review state guidelines and law curricula, to introduce new teaching and learning formats, or to strengthen competencies in research. Bologna also encompasses the establishment of efficient quality assurance systems, the improvement of international mobility and recognition, and, in the context of legal education, discussion on labor market opportunities for employing Bachelors of Law (LL.B) all over Europe and the world. Target groups for the paper include teachers, researches, academics, students, representatives of European law faculty and legal associations, research organizations, national and regional law and education ministries, EU Commission, representatives of state and private employers, lawyers and other legal professions, firms and companies, and the interested places.

HOW TO ENHANCE RESEARCH COMPETENCES?

How to enhance research competences? Is legal education per se scientific because it takes place at a university? Or is the scientific quality perhaps more dependent on the methods and jurisprudence applied in the legal education programme within the legal and higher education culture of the particular system of education? What an academic, scientific education should entail varies significantly from system to system. Accordingly, this research paper will address understandings of "scientific quality" and various possibilities to integrate them into the law curriculum.

FEATURES OF LEGAL EDUCATION IN INDIA

The Advocates' Act, enacted in 1961, became the focal point of the legal education system presently in existence. The Bar Council of India Rules, inducted under The Advocates' Act

1961, lays down the curriculum for imparting legal education throughout India and these said Bar Council of India Rules have been governing the procedural aspects of legal education, including, but not restricted to, the subjects to be taught, mode of examination to be conducted, the various Degrees to be conferred on successful students and the like. It was only in 1967 that it became the onerous task of the three year law colleges to include the procedural subjects into the curriculum of their law school. The monologue lecture scheme adopted in law schools, where practical training is either totally neglected or marginally implemented at the level of Moot Courts, Court visits and legal research will not make good lawyers in today's scheme of legal education.

Rules on Legal Education, which were incorporated into the pre-existing regulations, have been amended from time to time. There were demands for a consolidated latest version of the Rules under Part IV on standards of Legal Education and Recognition of Degrees in Law for admissions as Advocates from Universities and Colleges teaching Law in the Country. In the response to popular demand, the Bar Council of India published the Rules in its final shape as applicable from 30 November 1998.

The minimum qualification for being an advocate is an LL.B Degree, -generally a three year course, which can be obtained after graduation in other disciplines. A debate as to its efficacy in the recent past led to a proposal of a five year integrated course after an intermediate (10+2).The three year course itself came to be restructured into a semester system and several papers came to be included and excluded as per the Bar Council Guidelines. Hence, the Council today allows both the three year course and the five year course to continue.

COURT HIERARCHY OF TWO NATIONS

India is a sub continent of enormous weight and importance in the world context and represents a vivid example of peaceful to existence among people belonging to different religions and cultures. It is a country with well established rule of law having highest court of Supreme Court, High Courts, District courts etc. and a stable democracy, holding regular elections since 1947. India attracts attention with its renewed economic growth which is amongst the highest in the world. India has one of the oldest legal systems in the world in the world. Its law and jurisprudence stretches back into the centuries, forming a living tradition which has grown and evolved with the lives of its diverse people. India's commitment to law is created in the Constitution which constituted India into a Sovereign Democratic Republic, containing a federal system with Parliament form of Government in the Union and the States, an independent judiciary, guaranteed Fundamental Rights and Directive Principles of State Policy containing objectives which though not enforceable in law are fundamental to the governance of the nation.

The fountain source of law in India is the Constitution which, in turn, gives due recognition to statues, case law and customary law consistent with its dispensations. Statues are enacted by Parliament, State Legislatures and Union Territory Legislatures. One of the unique features of the Indian Constitution is that, notwithstanding the adoption of a federal system and existence of Central Acts and State Acts in their respective spheres, it has generally provided for a single integrated system of Courts to administer both Union and State laws.

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On the 28th January, 1950, two days later India became a Sovereign Democratic Republic, the Supreme Court came into being. The inauguration took place in the Chamber of Princes in the Parliament building which also housed India's Parliament, consisting of the Council of States and the House of People. It was here, in this Chamber of Princes that the Federal Court of India has sat for 12 years between 1937 and 1950. This was to be the home of the Supreme Court for years that were to follow until the Supreme Court acquired its own present premises.

At the same time Europe is area of prosperity and security, where human rights are represented and the rule of law prevails; an economically integrated zone which offers growth and prosperity and holds strong legal word of Federal Courts of Europe. The judiciary, the judges and the Court are independent. They are not controlled by the Federal Government or the State Governments. There are such laws which say what sort of cases the court can hear and pass judgment on and what type of punishment a court can give. But no law or minister can say that a person is guilty. Courts give protection to ordinary people from bad governments, they are also protected from bad governments themselves. The codes set out legal principles or basic ideas, and have to decide each case by comparing the facts of the case to those principles, not to what other judges decided earlier.

As out legal tradition and culture evolve, higher standards are being demanded. These standards can only be met if every element in the legal community is working together. World class infrastructure and cutting edge technology must be put at the service of a well informed, capable and professional bar and bench.

In the country that observes the rule of law either Europe or India, it naturally follows that justice has to be administered independently and impartially in accordance with law.Both the country's judiciary has been to render justice to whom it is due, regardless of the standing or political persuasion of its critics.

HIERARCHY OF EUROPEAN COURTS

The Draft Treaty establishing a Constitution for Europe presented preliminarily in October 2002 and adopted by the plenary of the European Conventions on 13 June 2003 is the most concrete documentary evidence of the constitutional debate underway in the European Union. While this debate is the first self-conscious attempt to reflect on the nature of the public authority that has been created over fifty years of first the Communities and then the Union, it does not start from scratch. This paper proposes that a specific, if not traditional, constitutionalism has evolved over the course of European integration since 1950, and in particular since 1992, when the Treaty on European Union was concluded at Maastricht. The document that will emerge at the end of the process set in motion at Nice in all probability will reflect this constitutionalism specific to the union of States. In this sense, the Union's constitutionalism is stable even if its positive "constitutional" manifestations are not.

THE IDEA OF CONSTITUTIONALISM OF INVERSE HIERARCHY

The constitutionalism of inverse hierarchy of the EU establishes a connectivity between 'State', 'union of State' and 'constitution', and the Draft Constitutional Treaty reflects this: it is a system of Government that works through an inverse hierarchy. The constitutional nation State is placed

both at the lowest and at the highest level of this hierarchical system, with the Union taking the middle level.

The Centre

In the first process, the Union and the Member States (that is, the States acting at the "lowest" level) form a hierarchical centre, to the extent the Community enacts policies in areas such as the internet market and the Member States carry them out. At this "lowest" level, Member States act through their national executive organs and their courts.

The periphery

In the second process, the Member States acting at the "highest" level autonomously inspire and determine the actions of this centre. Thus the periphery inverts the centre's hierarchy. At the "highest" level of the hierarchy the Member States act through the heads of States and governments assembled in the European Council, the national constitutional courts and national parliaments in their treaty-making capacity.

The interaction between centre and periphery as the precondition for the institution of democracy, individual rights, Rule of law and federalism in the Union

These are thus two separate yet parallel constitutional processes operating. It is the specific interaction between centre and periphery in both processes that meet the demands of the institutions of a liberal democracy with respect to the concepts of democracy, the Rule of law, human rights and federalism. This interaction of centre and periphery transcends the constitutional nation State. The specific constitutionalism of the European Union is thus distinct from the relation between the federal and infra-federal level of government in a federal nation State. It is not process federalism since it is not limited to ensuring adequate peripheral representation in the centre's organs, nor is it about carving out domains of power or immunity for the infra-federal level of government. Rather the process at the centre depends on its being complemented by the process at the periphery. Within this process, the relative weight of influence between the more supranational and the more intergovernmental organs may change. But the inverse hierarchy as such will not be fundamentally changed by the constitutional treaty as currently discussed. This constitutionalism of inverse hierarchy is the autonomous constitutionalism of the European Union.

THE FUNDAMENTAL RIGHTS JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE

With no written bill of rights enshrined in the treaties, the Court of Justice was forced to develop fundamental rights jurisprudence. This brought the Court to the brink of moving from the legal into the political system, in the process threatening the legitimacy of its entire enterprise of judicial activism. In this process, the Court resorted to treating the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), drawn up in the international organization Council of Europe, as a bill of rights de facto binding on the Union. As to the scope of application, the Court of Justice has consistently ruled that Union fundamental rights are binding on Member States only when they are implementing Union law. Fundamental rights indicate areas of value judgments that the primarily economic rationality of the treaties

cannot adequately accommodate and which therefore prescribe areas of Member State competence. For example, the distribution of information in Ireland on the availability of abortion in British clinics was not covered as an EU protected service under art. 49 EC (Grogan) and was thus not an enforceable Union right. Similarly, the question whether an employer could deny certain compensatory employment benefits to employees' same-sex partners while at the same time allowing them for an unwed employee's (different sex) partner did not come under the prohibition of sex-based discrimination in art. 131 EC (Grant). In each of these cases the Court of Justice was acutely aware of the fundamental rights questions they raised, the right to an abortion and discrimination based on sexual orientation. Yet the ECJ expressly declined to these issues for lack of Community competence. Thus, the fundamental rights questions serve to highlight a bright line in the delimitation of competences between the Community and the Member State. The Community cannot decide contentious fundamental right questions involving social choices beyond the specific rationale underlying the limited Community competence in question. Seen from this angle, Grogan and Grant are correctly decided. The cases highlight the specific weakness of the ECJ's fundamental rights jurisprudence as opposed to that of any national constitutional court: the Court of Justice will not decide all the fundamental rights issues of the day. Again the limits to the centre's approach follow from a constitutional choice that Member States have made. There can be no consistent fundamental jurisprudence at the centre because the periphery does not come under its purview. Member States are bound by Union fundamental rights only insofar as they are implementing Community law. There is no equivalent to the equal protection clause of the 14th Amendment which allows the supreme court to create a more or less uniform standard of individual rights protection and under which the states' fundamental rights protection in the member states, and is constitutionally barred from homogenizing it, it has to rely on the periphery to guarantee those rights.

THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EU

The Charter of Fundamental Rights of The European Union spells out for the first time in a written document the fundamental rights binding on the organs of the Union. Even though the adoption as a "solemn proclamation precludes currently seeing the Charter as a legally binding instrument, the Charter has been shaping the fundamental rights jurisprudence of the court of justice. The Draft Constitutional Treaty envisages it as an integral part of the future constitution. The Charter is not just a restatement of the Court of justice's jurisprudence. Rather it amalgamates preferences and the structure of the Member States' fundamental rights orders, the European Convention on Human Rights and certain provisions of the treaties with fundamental rights aspects; the European Convention on Human Rights is declared the minimum standard. In several respects the Charter goes beyond the case law of the Court of Justice, e.g with respect to those "dignity rights that have a distinctly non economic context, certain freedoms and equality rights and the citizen's rights. With respect to article 18, right to asylum and art 19 protection in the event of removal , expulsion or extradition- the substance of the Charter provisions had been part of Union Treaty Law but the individual Rights status had not been clear. It will no doubt fall to the Court of Justice to sort out which parts of the Charter are actually judicially enforceable individual rights and which parts are merely or primarily exhortations to act directed at the political organs. The Member States, however, have sent a powerful signal to the court of justice that they are ready to consider the issues from the angle of individual rights protection

and expect the Court to follow suit. At the same time the Member States in the exercise of their treaty making power have reinforced a clearly limited understanding of the scope of application of Union Human Rights.

THE EUROPEAN COURT OF HUMAN RIGHTS

A separate challenge to the Court of Justice arises from the side of the European Convention on Human Rights and the institutional machinery set up by the council of Europe to implement the Convention. The Court of Justice went out of its way in opinion 2/94 to avoid being subjected to judicial control of its decision by the European Court of Human Rights on the basis of the ECHR. If the Union made use of this competence, the periphery would further be strengthened.

INDIAN LAW COURTS AND THE CONSTITUTION

India has one of the oldest legal systems in the world. Its law and jurisprudence stretches back into the centuries, forming a living tradition which has grown and evolved with the lives of its diverse people. India's commitment to law is created in the Constitution which constituted India into a Sovereign, Socialist, Secular, Democratic, Republic, containing a federal system with Parliamentary form The Constitution of India of 1950 is a written document which currently comprises over 450 Articles and 12 Schedules. It is the longest written constitution of any sovereign country in the world.

The Constitution of India was drafted and adopted by a constituent assembly of elected representatives of the people and came into effect on 26 January 1950. The Constitution of India is not the creation of parliament but of the people of India and is therefore supreme. India's constitutional supremacy is evidenced in the opening sentence of the Preamble to the Constitution of India: "We, The People of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic".

The Constitution of India is sometimes referred to as a cosmopolitan document because it derives several of its features from foreign sources, most notably:

- Parliamentary government, rule of law and bicameralism from the UK.
- Directive Principles of State Policy from Ireland.
- Fundamental rights, judicial independence and functions of the president from the US.
- Union list and state list from Canada.
- Concurrent list and freedom of trade from Australia.
- Fundamental duties from the former USSR.

Having features of both federal and unitary constitutions, the Constitution of India is neither purely federal nor purely unitary, and is widely considered as quasi-federal in nature.

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HEAD OF STATE

The President is the constitutional head of the Union of India, commander-in-chief of the Indian armed forces and head of the government. The "real" executive power is vested in the Prime Minister and the council of ministers (and the President must act on their "aid and advice"). A similar system is established at the state level. While the governors are the head of the states, the executive powers are exercised by the chief ministers (leader of the state government) and their council of ministers.

STRUCTURE

The Indian Constitution has adopted a bicameral legislature at the union level. The Indian Parliament comprises two Houses, the:

- *Lok Sabha* (House of the People). The political party or coalition of political parties with a majority in the *Lok Sabha* forms the government. The members of the *Lok Sabha* are directly elected by the people from their territorial constituencies.
- *Rajya Sabha* (Council of States). The members of the *Rajya Sabha* are indirectly elected from the state assemblies.

However, the legislative powers of these two Houses are quite similar. At the state level, there is the state legislature. All states have a legislative assembly (which is similar to the *Lok Sabha*) and some states may also have a second House (that is, a legislative council). Currently, only seven of the 28 states have a legislative council. The legislative assemblies have significantly more power than the legislative councils. The number of the state legislature members depends on the population of the specific state.The Constitution of India (unlike the US and the Australian constitutions) does not have an express provision for separation of powers. However, it still recognises and incorporates the doctrine of separation of powers between three branches (legislature, executive and judiciary). Therefore, while no formal lines have been drawn between them, it is widely considered that the doctrine of separation of powers "runs through" the Constitution of India.

There is often an overlap in the scope of the functions of the three branches. Because of the parliamentary form of government, the dividing line between the executive and the legislature is naturally rather a fine one. Under the Constitution, the executive can legislate using:

- The ordinance-making powers of the President and the governors.
- Delegated executive legislation.

The legislature exercises some form of control over the judiciary in that it can legislate on the constitution, jurisdiction and powers of the courts, and can also impeach judges. The judiciary has wide powers to review and strike down unconstitutional executive and legislative decisions and actions. The legislature can make such rulings ineffective by amending the law while staying within the constitutional limits (a concept known as "legislative overruling"). This is an example

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of the inherent checks and balances under the Constitution which further strengthen the separation of powers. Despite the fact that the three branches interconnect and have functional overlaps, the Indian judiciary has recognised the doctrine of separation of powers as a basic feature of the Constitution and an essential part of the rule of law. India's parliamentary system empowers legislating at the union level by the Indian Parliament, and at the state level by the state legislatures. Their subjects of legislation are clearly defined under two separate lists in the Constitution of India, the Union List and the State List. There is also a Concurrent List of subjects on which both Parliament and the state legislatures can legislate. If there is a conflict between a legislation of the union and a state, union legislation prevails (although there are some exceptions to this). The law-making procedure is generally similar at both levels. This section focuses more on the legislative process of the Indian Parliament and reference is made to the state legislatures only where there is a material difference.

PROPOSAL AND DRAFTING

Typically, the text of a proposed law (that is, a bill) is drafted by the relevant ministry of the government. The bill is circulated to other relevant ministries and sometimes even to the public, for their input. After revisions are made (asnecessary), the bill is presented for approval to the council of senior ministers, headed by the Prime Minister (this is known as the Union Cabinet). On approval, the bill is introduced in either House of the Parliament (either *Lok Sabha* or *Rajya Sabha*). The only exception to this is money bills (bills of a fiscal nature) which can be introduced only in the *Lok Sabha*.

SCRUTINY

In either House of the Parliament, a bill generally goes through three readings, that is:

- One for introduction.
- One for scrutiny.
- One for passing.

Once a bill is passed by a majority in one House, it is then introduced to the other House where the same stages are repeated. All bills (except money bills) need the approval of each House. This is different from the state legislatures where the legislative council only plays an advisory role and where the legislative assembly is the final authority. For money bills, the *Lok Sabha* has the final authority and the *Rajya Sabha* has only recommendatory powers.

After a Bill is passed by majority in both Houses, the bill is sent to the President for assent. The President can seek information or clarification about the bill and can return it to the Parliament for reconsideration (but only once). If both Houses pass the bill again (regardless of whether they implement the President's recommendation), the President must give his or her assent.

ENACTMENT

When Presidential assent is received, the Bill becomes an Act of Parliament and is notified in the official government gazette.

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The President can also legislate by passing an ordinance when the Parliament is not in session. Once the Parliament is in session again, the ordinance must be ratified by the Parliament for it to continue as a law (otherwise it will lapse). The governor has similar ordinance-making powers at the state level.

Under the Constitution, the superior judiciary has been said to offer one of the widest and most extensive scopes of judicial review in the world.

The power of judicial review of legislative and executive action is considered to be an essential tool for preserving the doctrine of separation of powers and the rule of law. The Supreme Court of India and the High Courts can review and invalidate legislative or executive actions if they are found to breach the Constitution. This power is not exercised *suo moto* (that is, on its own motion), but only when the validity of an action, law or rule is specifically challenged before the court. Judicial review must be exercised with judicial restraint. The courts must not encroach into the legislative or executive domain by rewriting legal provisions or by making policy decisions.

India is a signatory to the Universal Declaration of Human Rights. Most of the rights provided in it have been incorporated as Fundamental Rights in the Constitution of India. These rights include the following:

- Equality before the law.
- Right against discrimination.
- Equality of opportunity.
- Freedom of speech and expression, movement, religion, peaceful assembly and practicing any profession.
- Right to life and personal liberty.

These fundamental human rights differ from other constitutional rights as they are supreme and cannot be diminished by any law, ordinance, custom or administrative action. Any action that violates a fundamental right is void (whether legislative, executive or judicial). The right to approach the Supreme Court of India against such violation is itself a fundamental right under the Constitution. Amendments to the Constitution of India require a special majority of the Parliament (that is, more than half of the total membership and two-thirds majority of those present and voting). In a few cases relating to the federal structure of the Constitution, amendments require further ratification by at least half of the states (in addition to the special majority of the Parliament). There are also some changes which may be carried out by a simple majority of the Parliament (one-half majority of those present and voting). This last category of changes is, however, not formally considered to be an "amendment" to the Constitution.

Amendments to the Constitution are not beyond the scope of judicial review. In one of the most remarkable constitutional judgments in India (also the lengthiest and with the largest ever bench of 13 presiding judges), the Supreme Court held that the legislature cannot amend, alter or destroy the basic structure of the Constitution (a term that originates from this judgment). The Constitution has no provision for holding referendums or plebiscites.

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COURT STRUCTURE AND HIERARCHY

The Indian judicial system is a single integrated system. The Constitution of India divides the Indian judiciary into superior judiciary (the Supreme Court and the High Courts) and the subordinate judiciary (the lower courts under the control of the High Courts).

The Supreme Court of India is the apex court of the country and sits in New Delhi. It is presided by the Chief Justice of India. There are twenty-four High Courts in the country. Each state has one High Court, although some High Courts have jurisdiction over multiple states and Union Territories. For example, the Guwahati High Court exercises jurisdiction over the states of Assam, Nagaland, Mizoram and Arunachal Pradesh, all of which are situated close to each other in the north-eastern part of India. For administrative convenience, states are further sub-divided into districts, each of which has its own District Court. Barring a few states, the original jurisdictions for both civil and criminal cases vest with the District Court. The judicial system also consists of tribunals and commissions which are established under, and to deal with, specific statutes. The judicial pronouncements by the Supreme Court of India are binding precedents on all courts, judicial authorities and tribunals in India. Similarly, High Court decisions are binding on all subordinate courts, authorities and tribunals in India, unless there is a contrary decision from another High Court. If there is a contrary decision from a different High Court, the decision from the court with the larger judge bench usually prevails. District Court decisions are not binding on any other court.

Under the Indian judicial system, certain traditional courts have been specifically tasked to deal with certain areas of law. District Courts usually have courts formed under specific statues, such as:

- Family courts to deal with issues relating to marriage, inheritance, guardianship of minors and maintenance.
- The Special Court of Central Bureau of Investigation to deal with cases of corruption and bribery.
- Some High Courts and District Courts, which house commercial courts which deal only with commercial matters of specified value, including matters relating to arbitration.

With the socialist aim of making legal remedies accessible and affordable to all, the Indian judicial system has constituted *Lok Adalats* and *Gram Panchayats* at the village level. These bodies apply traditional or customary laws and primarily work towards settling local disputes by using alternative dispute resolution mechanisms.

Apart from the courts, the Indian judicial system comprises tribunals, commissions and quasi-judicial authorities that derive their authority from specific statutes. These bodies include the:

- Central Administrative Tribunal, which adjudicates disputes that relate to the recruitment and conditions of service of public servants.
- National and State Human Rights Commissions for the protection of human rights.
- National Company Law Tribunal and National Company Law Appellate Tribunal, which adjudicate issues relating to company law, including insolvency and bankruptcy matters.

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- Consumer disputes forums at national, state and district level to deal with consumer disputes.
- Competition Commission of India to promote and protect market competition.
- Ombudsman for banking, Insurance, Income tax and electricity matters.
- Income Tax Appellate Tribunal, Central Excise and Service Tax Appellate Tribunal and Sales Tax Appellate Tribunal to hear tax and excise matters.

Most quasi-judicial bodies oversee administrative actions and impose restrictions on administrative agencies.

There are several provisions under the Constitution of India that ensure an independent judiciary. For example:

- The judges of the Supreme Court and the High Courts have secured tenure and cannot be removed from office (unless there is proven misconduct or incapacity).
- The Constitution empowers the Supreme Court and the High Courts to punish any person for its contempt.

Appointments and transfers of judges of the Supreme Court and the High Courts is made through a collegium system. The collegium comprises the Chief Justice of India and a forum of four of the most senior judges of the Supreme Court. Remarkably, this system is not expressly found in the Constitution and was created by the Supreme Court while deciding a matter in 1998. Facets of an independent judiciary are found even in the subordinate judiciary, where matters relating to removal and disciplinary actions fall under the control of the High Courts.

APPOINTMENT

Appointment of judges up-to the highest level in the subordinate judiciary are either made by the state Public Service Commissions or the High Courts. These appointments are usually made on the basis of performance in dedicated examinations (that is, the Lower Judicial Services Examination or Higher Judicial Services Examination). Judges from the subordinate judiciary are regularly promoted and some are even appointed as High Courts or Supreme Court judges.
The appointment procedure in the superior judiciary is slightly different as the appointments are not made through judicial service examinations. High Court judges are appointed either through promoting judges from the subordinate judiciary or by direct elevation of advocates. Supreme Court judges are appointed either through promotion or direct elevation of judges from the High Courts. Supreme Court and High Courts judges are appointed through a collegium system, comprising the Chief Justice of India and a forum of the four most senior judges of the Supreme Court.

QUALIFICATIONS

For a person to be eligible to sit the Lower Judicial Services Examination, he or she:

- Must be a citizen of India.

- Must be graduate in law.
- Should have been enrolled or qualified to be enrolled as an advocate.

The age limit for candidates varies from state to state and is usually between 21 to 35 years.

For the Higher Judicial Services Examination, a candidate must:

- Be a graduate in law
- Have the prescribed minimum experience as an advocate (usually seven years) or as a judge.

For a person to be eligible for an appointment as a High Court judge, he or she must:

- Be an Indian citizen.
- Be of minimum 45 years of age.
- Have either held a judicial office in India for ten years or practised as an advocate of High Court(s) for ten years.

For a person to be eligible for an appointment as a Supreme Court judge, he or she must:

- Be an Indian citizen.
- Be under the age of 65 years.
- Have been a:
- judge of a High Court for at least five years;
- an advocate of a High Court for at least ten years; or
- a distinguished jurist in the opinion of the President of India.

LITIGATION (CIVIL AND CRIMINAL)

The Indian legal system is mainly adversarial. However, in certain aspects it is hybrid of adversarial and inquisitorial functions. Particularly the criminal justice system is not strictly adversarial, as some provisions in the criminal code require the judge to perform inquisitorial functions. For example, the judge will undertake active fact-finding exercises, such as:

- Directing further investigation.
- Assisting in the framing of charges.
- Calling any person as witness and procuring evidence.

Generally, the party seeking to establish a fact or allegation is responsible for gathering and producing evidence.In civil cases, the claimant is usually required to gather evidence, but assistance from the court is permitted for the discovery of documents and setting up commissions. Assistance from the civil courts to collect evidence may be available in ongoing arbitrations.

In criminal matters, the law enforcement agencies are responsible for investigating and gathering evidence. Therefore, police authorities and specialised investigating agencies have been given wide powers of summoning, search, seizure and examination. Criminal courts have wider powers to gather evidence than civil courts, as they can issue:

- Warrants of arrest
- Proclamations for enforcing a person's presence before the court (either for making a statement or for producing a document).

That said, the judges must usually play a neutral role in both civil and criminal matters.

Before a trial, the party bringing the action is responsible for examining evidence. In criminal cases, the responsibility is with the prosecution, and in civil cases, with the claimant.

In criminal cases, the prosecution (assisted by the law enforcement agencies) must examine the evidence collected during their investigation. This examination has a broad scope, and usually involves witness examinations and preparing written witness statements. When the investigation is concluded and based on the examination of the available evidence, the prosecution can decide whether it has sufficient cause to bring charges against the accused. If charges are brought and before moving to trial, the criminal court only needs to take a prima facie view that there is sufficient basis to proceed against the accused (rather than sufficient basis to convict).

In civil cases, the pre-trial evidence is usually examined by the claimant (without any assistance from law enforcementagencies). Therefore, the scope, form or threshold of the evidence is immaterial to the claimant's decision to make a claim before the court. However, before the court decides whether the civil action brought before it is admissible, the claimant must show that there is a prima facie case in its favour, based on the available evidence. Barring a few exceptional circumstances where trials or hearings are conducted *in camera*, all trials or hearings, whether civil or criminal, are open to public at large. The Constitution of India provides that the judgments of the Supreme Court of India must be delivered only in open court.

CIVIL LAW

All civil courts are open courts and generally accessible by the public. This is subject to the discretion of judge who may want to avoid public or any particular person from attending the court. Evidence of witnesses is also required to be taken in open court.

CRIMINAL LAW

Much like civil courts, all criminal courts are also open courts. The recognised exceptions to the principle of open court are private proceedings in certain sensitive matters at the discretion of the court. These are usually matters which call for anonymity of the victim, such as matters involving rape or matrimonial disputes. In such cases, proceedings are carried out in private through video conferencing, and the public and the press do not have access to them.

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The Constitution of India provides for the right of freedom of speech and expression as a fundamental right. There is no absolute ban on reporting pending trials by the media or the public. Discussion and reporting of ongoing trials is often held by the media and the public on television channels and social networks. For example, live tweeting is also gaining popularity in India, especially in matters before the Supreme Court and the High Courts or high-profile trials in lower courts. Lawyers appearing in ongoing matters also regularly give interviews to news channels. While reasonable restrictions can be imposed by the court if any such reporting will create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial, such restrictions are rare in practice. Court orders passed during or after a trial are public documents and are generally made available on the website of the concerned court. The judgment of the Supreme Court, the High Courts and various other courts and tribunals are reported by various online and print publishers, and law reporters.

The main parties to civil matters are the claimant and the defendant. In criminal matters, the main parties are the state prosecution and the accused. The main function of a trial is assessing the available evidence by the court, and weighing and balancing it before pronouncing the verdict. A trial usually includes examination and cross-examination of witnesses, interrogation of the accused (defendant) and scrutiny of the evidence. Re-examination of witnesses may also be allowed (with the permission of the court). In some cases, the court can also direct further investigation to collect evidence while the trial is ongoing.

ROLE OF JUDICIARY

In line with the adversarial system, the judge is a neutral arbiter. He or she facilitates the trial, weighs the facts of the case and considers the evidence collected against the standard of proof. However, judges have wide powers under both civil and criminal law not only to examine the parties or witnesses, but also to compel a person who is relevant to the hearing to attend court and give evidence.

ROLE OF LEGAL COUNSEL

Legal counsels in India are officers of the court. They must assist the court in properly adjudicating the dispute and in the administration of justice. The counsel must also advise the client, keep client information confidential (unless it is required to be disclosed by law) and represent them in legal proceedings in the best possible manner.
The evidence law of India has detailed provisions on admissibility or inadmissibility, and relevancy or irrelevancy of evidence. Broadly speaking, evidence can be primary or secondary. Secondary evidence can be given only if (under the “best evidence” rule):

- There is no better evidence (that is, primary evidence, which is required to be given first).
- A proper explanation is given for the absence of primary evidence.

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Both oral and documentary evidences (including electronic records) are admissible. Only direct oral evidence in personal knowledge and experience is admissible. Hearsay or derivative evidence is inadmissible, but this rule is not absolute. For example, a dying declaration can be admissible as hearsay evidence.

The burden of proof in both civil and criminal proceedings is either on:

- The party that would fail if no evidence were given on either side.
- The party asserting a claim or who intends to persuade the court of any fact.

If any fact is in the special knowledge of a person, the burden of proof is on that person to prove the fact. This rule applies in all situations unless an exception is created by law. However, if the statutory or legal threshold is met by one party, the burden of proof shifts to the other side. For example, in proving the existence of a document, if a party adduces a photocopy (if the original is unavailable) and the other party claims the document is forged, that other party has the burden to prove it is a forgery.

Civil law

In a civil suit, the standard of proof is "preponderance of probabilities" (that is, the occurrence of something in a certain manner was more likely than not).

CRIMINAL LAW

Generally, in criminal matters, the standard of proof is to establish guilt "beyond all reasonable doubt". However, departing from the general rule of evidence, in certain criminal or penal provisions (such as dowry death or customs evasion), the law requires meeting a bare minimal threshold by the prosecution to presume the guilt of the accused. The burden of proving otherwise then lies on the accused.

CIVIL LAW

In a civil suit, depending on the reliefs sought and the outcome of the case, the court can give a variety of verdicts. A verdict in favour of the claimant will typically be a money decree, a declaratory decree, or both. A verdict in favour of the defendant may result in the claimant being ordered to pay costs (if necessary).

On reaching a verdict, a civil court can grant all or any of the monetary or declaratory reliefs sought by the claimant in its claim before the court. A civil court will not usually grant any relief which is either not sought at all or is beyond what has been sought. Monetary reliefs can be general damages (whether liquidated or unliquidated) for a breach of contract, or special damages in special circumstances. A civil court can also grant incidental damages (such as reasonable expenses or costs). Indirect losses (for example, for reputational harm, or loss of business and opportunity) can also be granted, although the threshold of proving them is quite high. Only losses that have been proved can be compensated, as Indian law does not provide for windfall. Apart from monetary reliefs, declaratory reliefs (usually, permanent or mandatory

injunctions) can be granted.

CRIMINAL LAW

After a guilty verdict, depending on the nature of the crime and the statutory penalty prescribed, the criminal court can sentence the convict to simple or rigorous imprisonment (ranging from a few months to imprisonment for life), or the death penalty. A fine can also be imposed, if permitted under the statute. Upon conviction of corporate entities, Indian criminal law does not permit imposing punishment on their officers (unless specifically permitted by a statute).

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ENDNOTES

[i] The process seeks to bring more coherence to higher education systems across Europe. It established the European Higher Education area to facilitate student and staff mobility to make higher education more inclusive and accessible and make higher education in Europe more attractive and competitive.

[ii] 48 participating countries in Europe