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## NATIONAL REPORTS

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## I

ICELAND · INDIA · INDONESIA
IRAN · IRAQ · IRELAND · ISRAEL
ITALY · IVORY COAST


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Contents

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# Iceland

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Iceland (*Island*), an island in the North Atlantic, is an independent republic and a unitary state. Iceland was settled in the ninth and tenth centuries as a result of the Nordic Viking expansion. An independent republic was established about 930. In 1262–1264 the Icelanders swore allegiance to the King of Norway. Along with Norway, Iceland came under the Danish King in 1380. It was recognized as a sovereign state in personal union with Denmark in 1918 and subsequently became a republic in 1944.

## I. CONSTITUTIONAL SYSTEM

### 1. Nationality

Nationality is regulated by art. 68 of the Constitution ("No alien may acquire citizenship except by law") and the Icelandic Citizenship Act no. 100/-1952. The provisions of this statute are based on principles similar to those applicable in Denmark and Norway. An alien wishing to be naturalized must send an application to parliament, usually through the Ministry of Justice. As a rule, a three or five year residence in the country is a necessary requisite.

### 2. Territorial Division

For the purposes of state administration Iceland is divided into one city (*borg, i.e.*, Reykjavík, the capital), 13 boroughs (*kaupstadir*) and 16 rural districts (*sýslur*). Each of the rural districts is divided into counties (*hreppar*), 212 in all. The Keflavík Airport area has a special status, which makes it in fact a borough.

For the purpose of local government the division is much the same; one city, 13 boroughs and 212 counties. The rural districts are composed, in this respect, of a number of counties and number 23 in all, as 7 of the above mentioned are divided for local government. The Keflavík Airport constitutes a part of the surrounding counties in this connection.

### 3. State Organs

a. *The general structure* is laid down in the Constitution, which states in art. 1 that "Iceland is a republic with a parliamentary government". According to art. 2, the legislative power is vested in the parliament (*Althing*) and the president, the executive power in the president "and other governmental authorities in accordance with this Constitution and other laws of the land", and the judicial power in the courts. That this article reflects the formal rather than the actual situation is taken for granted.

b. *The Head of State* is the president, who is chosen for a period of four years by direct and general elections. According to art. 13 of the Constitution "the President exercises his authority through his Ministers". This means that his functions are mostly ceremonial.

c. *The parliament* (*Althing*), estabished in 930, now has 60 members, elected for a term of four years by Icelandic citizens who are 20 years or older. The government has unlimited power to dissolve the *Althing* and call new elections. After each election the *Althing* nominates 20 of its members to sit in the Upper Chamber (*efri deild*), the remaining 40 sitting in the Lower Chamber (*nedri deild*). Bills can be introduced in either chamber by individual members, by a standing committee of the chamber and by the government. A bill is first read three times in each chamber. If the second chamber amends it, the bill is read once again in the chamber where it was originally introduced. If it is amended there again, it goes to the second chamber once more and has a fourth reading there. If in these eight readings the chambers do not agree, the bill is read once in the United *Althing*. The budget as well as most motions for a resolution are dealt with in the United *Althing*. Accord-

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ing to art. 28 of the Constitution, the president of the republic may issue provisional laws between sessions of the *Althing*.

d. *The government*, nominally headed by the president of the republic, is led by the cabinet ministers, who act personally, not as a body. The Central Government Act no. 73/1969 regulates the organization of the central government, which consists of 13 ministries. Councils of state are held for formal decisions, and cabinet meetings, provided for in the Constitution, are held for discussions which are of political and not of legal importance. By statute or presidential decree it may be ordered that certain affairs be decided by the cabinet as a whole, and there are a few examples of this. The cabinet cannot remain in office if a motion of no confidence is passed by the *Althing*. While in office, the cabinet has in fact a leading position in parliament, where the ministers are political leaders and where the government takes the initiative in most legislation. The state administration is in principle subordinated to the ministers, but there are a number of semi-autonomous directorates, some of them headed by boards of directors elected by parliament.

e. *The territorial authorities* are of two types: those of the state administration and the local authorities. The latter are led by councils elected for terms of four years in the city, boroughs and counties. The division of power between the state administration and the local authorities is somewhat complicated, but the latter are in fact of considerable importance, especially in the larger municipalities.

4. Judiciary

(See the Supreme Court of Iceland Act no. 57/1962; General Act on Civil Procedure in First Instance no. 85/1936; Criminal Procedure Act no. 82/1961; and other legislation). In each of the 31 territorial divisions (*supra* 2) there are five types of courts of first instance: the Town Court or the "Special Session" in the rural districts, the Sheriff's Court (for execution of judgements in civil cases, seizures, injunctions, *etc.*), the Probate Court, the Court of Auctions and the Criminal Court. The same judge usually sits in all these courts outside the capital, Reykjavík. Among other courts of first instance are 14 Maritime and Commercial Courts, where the regular judge of the district sits with two lay judges who are specially qualified. Otherwise the judge, who is a lawyer and appointed for life, usually sits alone. On special occasions, when the case has technical points, he is required to appoint two specialists to sit with him. They can overrule the regular judge. There are no juries. – Practically all decisions of the lower courts can be appealed to the Supreme Court of Iceland, which can rule both on fact and law. It is composed of five judges who hear all cases in plenum. Outside the general court system are the High Court of State, which rules on impeachment of cabinet ministers, and the Labour Court, that deals with cases under the Act on Trade Unions and Labour Disputes no. 80/1938. There are no special administrative courts, but the general courts may judge the legality of administrative acts. – The public prosecution is with a few exceptions carried out by the State Prosecutor or his deputies.

## II. SOURCES OF LAW

The Constitution came into force on 17 June 1944. It has been amended twice, in 1959 and 1968. Other statutes are mostly of recent origin, although the oldest in force is from 1275. The legal system is a branch of the Scandinavian or Nordic system, and forms together with the Norwegian and Danish systems the Western-Scandinavian legal system. There are no codes, but comprehensive statutes have been developed in certain areas. Statutes on very limited subjects also exist. - Delegated legislation is important (regulations, decrees, *etc*). It is as a rule issued by a minister, but often originates with local authorities.

Other sources of law generally recognized in Icelandic legal theory are custom, precedent, the general principles of law and the "nature of the case". Icelandic courts have much the same attitude towards these sources as Danish and Norwegian courts. Neither legal writings nor international law are regarded as sources of Icelandic law, although it is clear that they in fact influence court decisions.

The courts have on some occasions declined to enforce statutes on the ground that they are unconstitutional. Delegated legislation has often been declared void as not compatible with the statute on which it has been based.

All statutes in force are published approximately every tenth year by the Ministry of Justice in the *Lagasafn* (Law Collection). New legislation is, before entering into force, published in the *Stjórnartídindi* (Government Gazette). Part A contains mainly statutes passed by the *Althing*, part B delegated legislation. There is also a part C containing new international treaties.

The *Lögbirtingablad* (Official Gazette) prints some government regulations as well as other official announcements (appointments, bankruptcies, auctions, *etc.*). All judgements of the Supreme Court and the Labour Court are published in annual reports called respectively *Haestaréttardómar* and *Dómar Félagsdóms*.

## III. HISTORICAL EVOLUTION

Laws of the old Icelandic Republic are found in manuscripts that bear the common name *Grágás* (The Grey Goose). They are Germanic in origin and the most detailed old Germanic laws now known. New codes were enacted after Iceland came under the King of Norway: *Járnsída* in 1271, superseded already in 1281 by *Jónsbók*. This in turn was gradually replaced through the centuries by individual statutes and custom, although a few of its provisions are still in force. Iceland has always had its own national law, although it was mixed with Danish and Norwegian law to a considerable degree, especially from about 1700 up to the nineteenth century. The separate identity of Icelandic law was reinforced when the *Althing* regained legislative power in home affairs in 1874, when Iceland was given a special minister residing in Reykjavík in 1904, and when its own Law School was established in 1908. It became a faculty in the University of Iceland when this was founded in 1911.

## IV. PRIVATE LAW

Private law in Icelandic legal theory is one of the two categories of internal law, the other being public law. Commercial law is not a category by itself, but rules on commerce are an integral part of private law. As mentioned above, Icelandic law and jurisprudence are closely related to those of the other Nordic countries. Many important statutes on private law have been drafted by inter-Nordic committees and then enacted in the different countries, often with certain modifications.

### 1. Law of Persons

The main statute on the *law of persons* is the Legal Competence Act no. 95/1947 which, as amended in 1967, decrees that a person is a minor until the age of 20 or until marriage, if this occurs earlier. Ability to decide on domicile and work is acquired at 16. The statute does not deal with legal entities, but this concept is used as in Denmark and Norway. – Rules on names are a part of the law of persons. The Persons' Names Act no. 54/1925 states that every child shall be given one or two names and also called after his father or his mother (the latter is in practice never done). This is done by adding son or daughter (*son* or *dóttir*) to the name of the father. Family names can only be used in special circumstances. A woman does not take the name of her husband when they marry.

### 2. Family Law

Family law is to a large extent based on inter-Nordic legislative drafts. The main statutes are: Act on Marriage and Dissolution of Marriage no. 60/1972; Act on Duties and Rights of Spouses no. 20/1923; Act on Relations of Parents to Legitimate Children no. 57/1921; Act on Relations of Parents to Children Born out of Wedlock no. 87/1947; and the Adoption Act no. 19/1953. The main principles of this legislation, among them the special Nordic system of joint property, are dealt with in the chapters on Denmark and Norway. It may be noted that in Iceland both separation and divorce are almost always granted by administrative acts, but it is legally possible to obtain divorce by going to court. Separation is granted in practically all cases, even if only one of the spouses applies for it.

### 3. Inheritance

Inheritance is dealt with in the recent Inheritance Act no. 8/1962, which is Nordic in origin. Its main principles are the same as those of the Danish Statute of 1963. In Iceland, however, a testator can only dispose of one third of his estate if he has descendants or a spouse. A surviving spouse is entitled to one third of the estate of the deceased as against descendants. Where there are no descendants, the surviving spouse will be entitled to two thirds if parents, one or both, of the deceased are alive, but otherwise to the whole.

4. Law of Property and Obligations

The law of property and obligations in Iceland is in principle very similar to Danish and Norwegian law. Only a few divergencies will be mentioned.

a. *Property law.* – The Land Registration Act no. 30/1928 is much more limited in scope than the Danish Act of 1926, but the main principles of the Icelandic case law in this field are similar to the Danish and Norwegian rules. The Icelandic mortgage system has not developed in the same way as in Denmark. Public mortgage societies and pension funds are important lenders, but a state-directed Building Fund operated under the State Housing Directorate Act no. 30/1970 leads in this field. It grants mortgaged loans in respect of apartments built by the state, municipalities and individuals. Most apartments built by the state and municipalities are later sold to individuals on conditions that limit resale to a certain extent. – The Act on the Rights of Ownership and Use of Real Estate no. 19/1966 confines these rights to Icelandic citizens, to associations with personal liability, in which all personally liable members are Icelandic citizens, and to institutions and companies without personal liability which are domiciled in Iceland and in which all the members of the board of directors are Icelandic citizens. In marketable share companies, at least 80 per cent of the share capital also must be owned by Icelandic citizens. Exemptions from these rules can be granted by the Minister of Justice. Such an exemption is not necessary for a lease of real estate for a period shorter than three years or for a lease that can be terminated with up to one year's notice. The rules described here also apply to real estate acquired by inheritance. The utilization of relatively large parts of the country, especially highlands, that are not habitable, is dealt with by Statute no. 42/1969 on Mountain Grasslands and Herding of Domestic Animals.

b. *Law of obligations.* – The Icelandic Statute no. 7/1936 on Contracts, *etc.*, is practically verbatim the same as the Danish Statute of 1917. The same can be said of the Sale of Goods Act no. 39/1922 (Denmark 1906).

c. *Torts.* – The principles described in the reports on Denmark and Norway apply also to Iceland. Certain rules on liability of the owners of motorcars are an exception.

## V. COMMERCIAL LAW

Commercial law is an integral part of the general rules of obligations, associations and procedure (as regards bankruptcy). – The main statutes on commerce are these: Marketable Share Companies Act no. 77/1921. Co-Operative Societies Act no. 46/1937, Insurance Act no. 20/1954, Bills of Exchange Act no. 93/1933, Cheques Act no. 94/1933, Accounting Act no. 51/1968, Shipping Act no. 66/1963 with important amendments in Statute no. 14/1968 and Bankruptcy Act no. 25/1929. – The establishment and operation of business enterprises in Iceland is generally subject to licence. In the field of commercial trade, governed by the Trade Act no. 41/1968, such a licence is freely available to persons who are Icelandic nationals and residents, are not legally incompetent, and who have a modicum of commercial education or training. Business associations with personal liability must be registered and domiciled in Iceland and all members who act for the association must fulfill the conditions of Icelandic nationality and residence. Associations without personal liability must be registered and domiciled in Iceland and their managers and at least one member of the board of directors must fulfill the conditions of Icelandic nationality and residence; and in marketable share companies, at least 50 per cent of the share capital must be owned by Icelandic residents. Similar rules apply in the field of industrial manufacturing, governed by the Industry and Handicrafts Act no. 18/1927, except that the condition of nationality is not a requisite. Artisans are subject to special requirements for professional education and training. In certain branches of industry, such as fish processing, licensing is more restrictive than noted above and the condition of nationality is rigorously applied. – Banking is regulated by statutes that give special concessions to each bank. – As can be seen from what has been said in this chapter, it has been a policy in Iceland to limit the operation of foreign risk capital in the country. This policy has been modified recently in connection with special concessions to set up an aluminium industry and certain other plants.

## VI. STATE DIRECTION OF THE NATIONAL ECONOMY

The Icelandic economy is in principle not regulated by state planning. On the other hand the state has considerable influence on the economic life through many channels, some of them provided for by legal rules, such as rules on foreign trade and prices. The Statutes on the Central Bank no. 10/1961 and the Economic Development Institute no. 93/1971 provide for measures that may be used to carry out, within fixed limits, the economic policy of the government.

## VII. INDUSTRIAL PROPERTY RIGHTS AND COPYRIGHT

Iceland has ratified the Paris Convention for the Protection of Industrial Property (the London text of 1934), the Berne Convention for the Protection of Literary and Artistic Works (the Paris text of 1971) and the Universal Copyright Convention of 1952. – The Act on Commercial Registers, Firms and Procurations no. 42/1903 states that registration of firms is necessary except when one person operates a business in his own name. The Patent Act no. 12/1923 provides for protection for 15 years. The Trade Marks Act no. 47/1968 is similar to such statutes in other Nordic countries. The same can be said of the Copyright Act no. 73/1972.

## VIII. PRINCIPLES OF JUDICIAL PROCEDURE IN CIVIL CASES

As stated before, the Icelandic court system has two instances. All cases are first decided in a court of first instance. The principles of procedure are the same as in Denmark and are laid down in the General Act on Civil Procedure in First Instance no. 85/1936 (*supra* I 4). The execution of judgements in civil cases is carried out by a special court (the Sheriff's Court).

## IX. PRIVATE INTERNATIONAL LAW

The principles are the same as in Denmark. It need only be mentioned, that Iceland has not ratified the Hague Convention on the Law Applicable to International Sales of Goods of 1955.

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2. Translations of Legislative Texts

*Chapter I:* Constitution of Iceland of 17 June 1944, as amended on 14 Aug. 1959: *Peaslee*, Constitutions III 449–458; Nationality Act of 23 Dec. 1952:Nationality Laws 226–229.

*Chapter V:* Shipping Registration Act no. 17 of 18 March 1948 [excerpts]: Nationality of Ships 79–81; The Central Bank of Iceland Law of 29 March 1961 as amended through 31 July, 1966: *Aufricht*, Central Banking II 345–354.

*Chapter VII:* Law no. 13 on Copyright and Printing Rights of 20 Oct. 1905, as amended up to 2 Feb. 1956, and other regulations concerning this matter: Copyright Laws [Iceland] Item 1–3.

(Completed in December 1972)

# India

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India is a republic comprising a union of 21 States. The States are *Andhra Pradesh, Assam, Bihar, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Kerala, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Mysore (Karnataka), Nagaland, Orissa, Punjab, Rajasthan, Tamil Nadu, Tripura, Uttar Pradesh,* and *West Bengal.* There are in addition nine Union territories which are administered by the Central (Union) Government. Except for *Jammu and Kashmir,* which is partly governed by its own Constitution and partly by the Constitution of India, the States and the Union have a common Constitution.

This report covers also *Sikkim,* a protectorate of
(Completed in December 1972)
India (*infra* X).

The Indian federation evolved through a process of decentralisation and has been described as quasi-federal as it can function in certain circumstances as a unitary system. Legislative and executive powers are divided between the Centre and the States with a common area in which both can function subject to Central action, whether prior or subsequent, always prevailing over that of the States. All powers not specifically allotted are reserved to the Central Government. All or some of the powers vested in the States can in certain circumstances be taken over by the Central Government (see Constitution of India art. 249, 250, 252, 356, 365).

Prior to independence, India comprised British India, which was under the sovereignty of the United Kingdom, and Indian States, which were under British paramountcy. The Independence Act 1947 (10 & 11 Geo. 6, c.30) divested His Majesty's Government of responsibility for the government of British India as from 15 Aug. 1947, created two Dominions of India and Pakistan, made provisions for a constituent assembly in each Dominion and provided for the lapse of British paramountcy over the Indian States. These States ultimately merged with either India or Pakistan. The Constituent Assembly of India adopted a Constitution which came into force on 26 Jan. 1950, repealing the Independence Act and constituting India into a sovereign democratic republic.

## I. CONSTITUTIONAL SYSTEM

### 1. Nationality

Indian law recognises the status of citizenship but not that of nationality. The Supreme Court has held that the two concepts are distinct, that nationality is irrelevant for the purposes of municipal law and that only natural persons and not artificial persons can be citizens of India.[1] There is only the citizenship of the federation of India.

Prior to independence, all Indians were British subjects. The Constitution conferred Indian citizenship on the basis of domicile and either berth or residence in India. Citizenship was also conferred in certain circumstances on migrants from Pakistan. (See Const. Part II). The constitutional provisions were supplemented by the Citizenship Act (LVII of 1955), which applies to the period after 26 Jan. 1950. Citizenship is acquired by birth in India or birth outside India if the father is a citizen. Certain categories of persons can acquire citizenship by registration. Citizenship can also be acquired by naturalisation or by being an inhabitant of a territory which becomes part of India. Citizenship is lost by renunciation, acquisition of the citizenship of another country and, in the case of a registered or naturalised citizen, by deprivation in certain circumstances.

### 2. Territory

The territory of India comprises the States, the Union territories (see *supra*) and such other territories as may be acquired. Each State and Union territory is divided into districts, which are sub-

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[1] *State Trading Corporation of India, Ltd. v. Commercial Tax Officer,* [1963] 3 S.C.R. 792, A.I.R. 1963 S.C. 1811.

divided into blocks. The blocks are sub-divided into villages.

3. State Organs

a. *The general structure.* – India is a parliamentary democracy in that the Executive is a part of and is responsible to the Legislature, which consists of the representatives of the people. There are separate legislative and executive organs for the Union and the States but there is a single hierarchy of courts applying both Union and State laws. There is no rigid separation of powers between the various state organs.

There are separate Union and State civil services as well as all-India services common to the Union and the States. All India and Union civil servants hold office during the pleasure of the President and State civil servants during the pleasure of the Governor but they are granted certain protection by the Constitution in matters of dismissal, removal or reduction in rank. The Con titution also provides for Union and State public service commissions.

b. *The Head of State.* – The head of the Union is the President. He must be a citizen of India, have completed the age of 35 years and be qualified for election as a member of the House of the People. The President is elected by the members of an electoral college consisting of the elected members of both Houses of Parliament and the elected members of the Legislative Assemblies of the States. He holds office for a term of five years but is eligible for re-election. The executive power of the Union as well as the supreme command of the Defence Forces of the Union are vested in the President. He has the power to summon and prorogue Parliament and to dissolve the House of the People (the Council of States being a permanent body). His assent is necessary to Union laws and in certain cases to State laws as well. When Parliament is not in session, the President has the power to issue ordinances which have the force of law.

The President appoints ministers of the Union Government, Governors of States, Administrators of Union Territories and judges of the Supreme Court and of the High Courts. In the case of failure of constitutional machinery in a State, the President has the power to assume himself all or any of the functions of the Government of the State. He has the power to proclaim a state of emergency and to suspend the enforceability of fundamental rights during the period of emergency. In the exercise of all his functions the President is to be aided and advised by the Council of Ministers. Though the Constitution is silent on the question, it is generally accepted that the President is bound to follow ministerial advice. It is the duty of the Prime Minister to communicate to the President all decisions of the Council of Ministers, to furnish such information as the President may call for and, if the President so requires, to place before the Council for consideration any matter decided by an individual minister.

The head of state is the Governor. He is appointed by the President and holds office during the President's pleasure. His functions and powers are similar with respect to the State as those of the President except that in certain matters, of which he is the sole judge, he is required to act in his discretion, *i.e.*, without ministerial advice.

c. *The legislative body.* – The Union legislature is called Parliament and consists of the President and two Houses known as the Council of States (*Rajya Sabha*) and the House of the People (*Lok Sabha*). The Council of States (*Rajya Sabha*) has a maximum of 250 members of whom not more than 238 are elected by the States and the Union territories and 12 are nominated by the President to represent the arts and the sciences. The present membership of the Council of States is 240 of whom 228 are elected representatives and 12 are nominees. There are not more than 525 members in the House of the People (*Lok Sabha*) of whom not more than 500 represent the States and are elected on the basis of universal adult suffrage. Not more than 25 members represent the Union territories and are chosen in such manner as Parliament provides. In addition the President is empowered until 1980 to nominate two representatives of the Anglo-Indian community to sit in the House of the People. The present membership of this House is 521 of whom 500 represent the States, 19 represent the Union territories and 2 are Anglo-Indian nominees.

Both Houses have equal powers in respect of non-financial matters, but the House of the People has exclusive power in respect of financial matters. Each House enjoys the same powers, privileges and immunities as the House of Commons of the United Kingdom enjoyed on 26 Jan. 1950 until the legislature itself provides otherwise. The exercise of legislative privilege is subject to judicial review.[2]

In the case of nine States, the Legislative con-

[2] See *In re Reference under art. 143 Constitution of India*, [1965] 1 S.C.R. 471, A.I.R. 1965 S.C. 745.

sists of the Governor and two Houses known as the Legislative Council and the Legislative Assembly and in the remaining States the Legislative consists of the Governor and the Legislative Assembly. The strength of the Legislative Assembly varies in different States from 60 to 500 members who are elected on the basis of universal adult suffrage. The Legislative Council consists of not more than one-third of the total number of members in the Assembly and its members are partly elected by local authorities, university graduates and teachers and are partly nominated by the Governor. The provisions regarding legislative procedure, privileges and other matters are the same for State legislatures as for Parliament.

d. *The government.* – Executive power in India is determined by the ambit of legislative power. Subject to certain restrictions, the executive power of the Union extends to the matters with respect to which Parliament has power to make laws and the executive power of a State extends to the matters with respect to which the legislature of the State has power to make laws. (See Const. art. 73, 162). The subjects of Union and State legislative power are set out in the Seventh Schedule to the Constitution. Broadly speaking, the functions of State Governments relate to public order, public health and other matters of local rather than national interest. The Union and the State Governments are authorised by the Constitution to carry on any trade or business, to acquire, hold and dispose of property, and to make contracts for any purpose. The executive power of every State must be so exercised as to ensure compliance with the laws made by Parliament and so as not to impede or prejudice the executive power of the Union, failing which the government of the State can be taken over by the Union. The Union and the States can delegate their executive powers to each other.

The Union Executive consists of the President and a Council of Ministers headed by a Prime Minister. A State Executive consists of the Governor and a Council of Ministers headed by a Chief Minister. Ministers must be members of the legislature.

The relations between the Executive and the Legislature in India are modelled on the British pattern. Ministers of the Central Government are collectively responsible to the House of the People and the Council of Ministers can be removed from office at any time by the House. In effect, therefore, it is always the political party in the majority in the House which forms the Government. The Government, on the other hand, can at any time advise the President to dissolve the House of the People and order fresh elections. The relations between a State Government and the Legislature are on the same footing as those for the Union.

e. *Local government* in urban areas is in the hands of municipal authorities. The local authorities at the district level are known as *zilla parishads*, at the block level as *panchayat samitis* and at the village level as *panchayats*. The State is enjoined by the Constitution to endow village *panchayats* with such powers and authority as may be necessary to enable them to function as units of self-government. The members of all local authorities are elected by the entire adult resident population of the area. Local government is a subject within the exclusive competence of the States. All local authorities derive their powers from statute.

4. Judiciary

a. *The subordinate judiciary.* – There is a unitary system of law courts in India, *i.e.*, all courts apply both Central and State laws. Separate courts for the trial of civil and criminal cases exist only at the lowest level. There are city civil and sessions courts in the major urban areas for the trial of both civil and criminal cases. In the districts there are district and sessions courts for the trial of civil and criminal cases and appeals. Appeals lie from the city and sessions courts and the district and sessions courts to the High Court which also has the power to revise the decision of any subordinate court in any case in which no appeal lies to itself. The Constitution provides that district and city civil and sessions judges are to be appointed by the Governor of the State in consultation with the High Court and the lower judicial officers are to be appointed by the Governor after consultation with the State Public Service Commission and the High Court.

Commercial cases are treated as civil cases and are tried by the civil courts. There are labour courts and tribunals for the trial of industrial claims and disputes and the decisions of these authorities are subject to appeal to the civil courts including direct appeal to the Supreme Court as well as to the writ jurisdiction of the High Courts.

b. *The superior judiciary.* – The Constitution provides for a Supreme Court and a High Court for each State. Parliament is empowered to constitute a High Court for a Union territory. There are at present 17 High Courts. The Supreme Court consists of a Chief Justice and presently not more than 13 other judges. A judge can be removed from office by the President for misbehaviour or incapacity on an address presented by Parliament.

The conduct of a judge of the Supreme Court cannot be discussed in Parliament (except on a motion for removal from office) or in State Legislature. The Supreme Court has original, appellate and advisory jurisdiction. (See Const. art. 131–136, 143). Its original jurisdiction covers the fundamental rights in the Constitution and disputes between the Union and a State or between two States. An appeal lies to the Supreme Court from any judgment of a High Court in a civil or criminal matter in certain circumstances. An appeal can be made to the Supreme Court, by special leave of the court, from the judgment or order of any court or tribunal in India in any cause or matter. The President may seek the opinion of the Supreme Court in certain circumstances. The law declared by the Supreme Court is binding on all courts in India.

A High Court consists of a Chief Justice and as many other judges as the President may from time to time deem it necessary to appoint. A judge can be removed from office in the same manner as a Supreme Court judge. His conduct is similarly immune from discussion in Parliament or a State Legislature. A High Court is the highest court of civil and criminal appeal in a State, and has the power of superintendence over all courts and tribunals within the State. It has the power to issue writs for the enforcement of the fundamental rights or for any other purpose.

c. There is no separate *administrative judiciary* in India. Cases involving the State are tried by the ordinary civil courts. There is a large number of administrative tribunals established under various statutes and the decisions of these tribunals are in some cases appealable to the civil courts and in all cases are subject to the writ jurisdiction of the High Courts and the special appellate jurisdiction of the Supreme Court.

d. *The prosecution* of criminal cases is regulated by the provisions of the Code of Criminal Procedure (V of 1898). In all prosecutions the State is the prosecutor, but the State may either prosecute itself or lend the sanction of its name to a private prosecution. Prosecutions are conducted by Public Prosecutors who are appointed by the State Governments either generally or for a specific class of cases or for a particular case. The function of a Public Prosecutor is not to be a protagonist for any party but to aid the court in discovering truth. A person other than the Public Prosecutor may be permitted by a court to conduct the prosecution.

## II. SOURCES OF LAW

### 1. Constitution

The fundamental law is the Constitution which came into force on 26 Jan. 1950. One of the main objectives of the Constitution is to ensure social, economic and political justice to all citizens. Apart from the provisions regarding the structure and working of the governmental organs, the Constitution contains a charter of fundamental rights as well as directive principles of state policy which latter, though unenforceable in a court of law, are declared to be fundamental in the governance of the country (see Const. Part. III, IV). Legislation declared to give effect to the particular directive principles which enjoin the state to ensure equitable distribution of the material resources of the community and to prevent concentration of wealth or resources (Const. art. 39 *lit.* b and c), cannot be held to be violative of the fundamental rights contained in Const. art. 14, 19 and 31 nor can the legislative declaration be questioned in any court (art. 31 *lit.* c). The Constitution continues in effect all the law in force in India immediately before its commencement until such law is altered, repealed or amended. The Constitution can be amended by a two-thirds majority of Parliament subject to the consent of at least half the States being necessary for the amendment of certain provisions (art. 368). The Supreme Court held that the Part containing the fundamental rights could not be amended so as to abolish or abridge these rights[3] but a recent constitutional amendment (Constitution (Twenty-fourth Amendment) Act, 1971) hass asserted Parliament's right to amend any provision of the Constitution.

### 2. Other Important Legislative Sources

The main sources of law in India are legislation including subordinate legislation and judicial pre-

[3] *Golaknath v. State of Punjab,* [1967] 2 S.C.R. 762, A.I.R. 1967 S.C. 1643.

cedents. The subsidiary sources are custom or usage having the force of law and rules of English Common Law adopted as part of Indian law before the Constitution.

A great deal of the legislation currently in force was enacted before independence. The most important individual enactments in chronological order are the Penal Code (XLV of 1860), the Evidence Act (I of 1872), the Contract Act (IX of 1872), the Negotiable Instruments Act (XXVI of 1881), the Transfer of Property Act (IV of 1882), the General Clauses Act (X of 1897), the Code of Criminal Procedure (V of 1898), the Code of Civil Procedure (V of 1908), the Succession Act (XXXIX of 1925), the Sale of Goods Act (III of 1930), the Arbitration Act (X of 1940), the Industrial Disputes Act (XIV of 1947), the Industries (Development and Regulation) Act (LXV of 1951), the Companies Act (I of 1956), the Specific Relief Act (XLVII fo 1963), the Monopolies and Restrictive Trade Practices Act (LIV of 1969) and the Patents Act (XXXIX of 1970). Certain Acts of the British Parliament had been extended to India before independence and these continued in force. The Supreme Court has held, however, that a British Act is no longer applicable to India if it is repugnant to the concept of a sovereign democratic republic.[4] The British Statutes (Application to India) Repeal Act (LVII of 1960) has repealed 258 British statutes in so far as they formed part of Indian law.

Judicial decisions in India have the force of precedent. Judgments of the Supreme Court are binding on all courts in India and judgments of the High Court are binding on all subordinate courts in the State. A High Court is bound by its own judgment but not so the Supreme Court. A judgment of one High Court does not bind another High Court. There is a conflict of opinion about the binding nature of judgments of the Privy Council delivered before 26 Jan. 1950, but they are regarded in any event as having great persuasive authority.

## 3. Custom

Custom played an important role in the early development of Indian law but is of little consequence today. During the British period, custom was given pride of place in the personal laws of the Hindus and the Mohammedans. Under Hindu law immemorial custom outweighs the written text of the law. However, much of Hindu law has now been codified and these codes provide that a rule of custom or usage will cease to have effect with respect to any matter for which provision is made in the codes. The *Sharī'a* Act (XXVI of 1937) excluded custom from many areas of Mohammedan law. The present position is that custom must give way to the written law unless otherwise expressly provided.

If the law is silent, Indian courts apply rules of "justice, equity and good conscience", which have been interpreted to mean the rules of English law if found applicable to Indian society and circumstances and otherwise rules of substantial justice.[5]

## 4. Collections of Laws

The official collection of Union laws is the India Code (8 vol.) (1955–1959) in which the laws are set out subject-wise. The official texts of Union laws are also published in the Gazette of India, which is a weekly publication. Most States have official Codes containing the State laws in chronological order and all States have weekly Gazettes in which these laws are published. Both Union and State laws are quoted by number and year of enactment. It is not usual to cite any source. The most popular unofficial collections of laws are the A.I.R. Manual (published by the All India Reporter, (16. vol.) (ed. 2, 1959–1962); (15 vol.) (ed. 3, 1969–1972) and the Civil Court Manual (7 vol.) (ed. 10, 1959–1963); (8 vol.) (ed. 11, 1969–1972) and Criminal Court Manual (4 vol.) (ed. 7, 1958–1961) which contain annotated texts of Union laws in alphabetical order. The official texts of Supreme Court judgments are published in the Supreme Court Reports (S.C.R.) and of High Court judgments in the Indian Law Reports (cited as I.L.R., *e.g.*, Madras). Among the unofficial law reports, the most popular is the All India Reporter (A.I.R.), which contains the texts of judgments of the Supreme Court and all the High Courts as well as of new Union laws.

[4] *State of Madras v. C. G. Menon*, [1955] 1 S.C.R. 280, A.I.R. 1954 S.C. 517.

[5] *Waghela Rajsanji v. Shekh Masludin* (1887), 14 I.A. 89, 96.

## III. A CONCISE HISTORICAL EVOLUTION

The Hindus and later the Mohammedans, who ruled India before the advent of the British, had highly developed systems of law based on religious precepts. In the beginning of the seventeenth century the East India Company commenced trading operations in India. The Company gradually acquired political control over a large part of India which it administered as trustee for the British Crown until 1858 when the Crown assumed sovereignty over British India. English law was applied exclusively in the territories under the control of the East India Company for a considerable period, but it was later provided that, in all suits regarding inheritance, marriage, caste and other religious usages and institutions, the law of the *Koran* should be applied to the Mohammedans and the laws of the *shastras* to the Hindus. In these matters, the other communities came to be governed by English law in the presidency towns of Calcutta, Madras and Bombay but by their customary laws in other areas. If there was no customary law, English law was applied on the basis of "justice, equity and good conscience" (*Supra II*). English law continued to apply to all other questions. There were thus created two systems of law, one territorial in scope and the other personal, *i.e.*, moving about with the person.

The welter of laws and the difficulty of ascertaining the law pointed to the need for codification, but law-making machinery was lacking until the Charter Act of 1833 established a Legislative Council of India and a Law Commission to prepare draft codes. The First Law Commission, of which *Lord Macaulay* was the Chairman, was succeeded by three further Law Commissions and, as a result of the work of these Commissions, a number of codes were enacted. These enactments and others that followed were largely based on English law and continue to constitute the bulk of the private law in India. The dual system of territorial and personal laws continued and is still a feature of the Indian legal system.

Independence kept the body of law intact and the adoption of a Constitution pledged to secure social and economic justice gave an impetus to law-making. In 1955 a Law Commission, which is still functioning, was appointed to suggest means of improving the system of judicial administration and to recommend changes in Central Acts of general application and importance in order to bring them up-to-date. The Commission has submitted 46 reports up to now as a result of which several statutes have been amended and new ones enacted.

Unlike the civil and commercial laws, the law relating to state direction of trade is very largely new and has its roots in the Constitution. The State is obligated to secure economic justice and particularly to ensure equitable distribution of the material resources of the community. This has led to a policy of regulation of private trade, large scale participation by the State in commercial activities, planning for balanced economic growth and moulding society in a socialist pattern. Legislation has been enacted on a large scale (see *infra* VI) to provide the institutional mechanism to achieve these policy objectives.

## IV. PRIVATE (CIVIL) LAW

### 1. Civil Courts

There is no particular juristic concept of private (civil) law and the distinction between public law and private law is unknown in India. The nature or scope of civil law cannot be ascertained from any conceptual notion but, if at all, from the jurisdiction of civil courts. Subject to territorial, pecuniary or other jurisdictional limits, a civil court can try any suit or proceeding of a civil nature, *i.e.*, one in which the principal question relates to a civil right. It is immaterial whether the parties are persons or person and State. All the law applicable by civil courts may be loosely classified as civil law.

### 2. Legal Entities

Indian law recognises both natural and artificial *legal persons*. Any company or association or body of individuals, whether incorporated or not, is a person for legal purposes, but separate legal personality, independent of its members, is enjoyed only by incorporated bodies which may be either corporations sole or corporations aggregate. The *ultra-viries* doctrine is recognised in India in relation to incorporated bodies. In Hindu law a joint family, an idol (image of a deity) and a *math* (an institution for religious training) are regarded as legal persons.

3. Legal Capacity

Every person, except a minor and a person of unsound mind, has full capacity to possess legal rights and to perform legal acts. Marriage has no effect on legal capacity.

Under the Majority Act (IX of 1875) a person domiciled in India is deemed to have attained majority on the completion of 18 years of age, but, if he is under guardianship, the majority age is 21. The Act, however, does not apply in certain matters in which majority is governed by the particular personal law. A minor is absolutely incompetent to contract. He can, however, draw or indorse a negotiable instrument but so as to bind all parties except himself. He cannot sell his property, but he can acquire property and can also recover moneys paid or advanced by him. A minor can be admitted to the benefits of a partnership and be a beneficiary under a trust. He can only sue or be sued through a guardian. In most matters, the position of a person of unsound mind is the same as that of a minor. The Lunacy Act (IV of 1912) provides *inter alia* for the custody of lunatics and the management of their estate under the direction of a court.

4. Family Law

There is no uniform family law in India though the Constitution enjoins the State to secure a uniform Civil (*i.e.* Family) Code. Each community is governed by its own personal law in respect of family matters. The various personal laws are part of the ordinary civil law and are administered by the ordinary civil courts.

Hindu family law, which applies also to *Buddhists*, *Jains* and *Sikhs*, has in recent times been codified (except for the law governing the institution of the joint Hindu family). The Hindu Marriage Act (XXV of 1955) has made radical alterations in traditional Hindu law by abolishing polygamy, permitting inter-caste marriages and providing matrimonial reliefs. Capacity to contract a valid marriage is governed by the Act, but formal requirements are left to the customary rites and ceremonies of either party. Children of invalid marriages are expressly declared to be legitimate. The Hindu Minority and Guardianship Act (XXXII of 1956) fixes the age of majority at 18 and provides for three types of guardians, *viz.* natural, testamentary and court-appointed. The Hindu Adoptions and Maintenance Act (LXXVIII of 1956) prescribes the law relating to adoption and imposes a legal obligation on Hindus to maintain certain relatives and dependants.

The normal Hindu family is joint and undivided in estate, food and worship and consists of all persons lineally descended from a common ancestor including their wives and unmarried daughters. A joint family member can hold separate property provided the property was obtained by his own exertion and without the aid of the joint family property. The father and, in his absence, the eldest male member is the manager of the joint family and its property and business, if any, and is entitled to alienate family property for legal necessity or for the benefit of the estate as well as to make contracts and incur debts on behalf of the family. A joint family can be divided at any time either wholly or partially.

Unlike Hindu law, the personal laws of the other communities have not been altered since independence. In family matters, Mohammedans are governed by Islamic law (*sharī'a*) (see *Sharī'a* Act (XXVI of 1937) s. 2). A Mohammedan has an absolute right to take a maximum of four wives in marriage and to divorce a wife at his will without assigning any cause (*talak*). There are two other ways of dissolving a marriage, *viz.* by mutual consent of the parties and by a judicial decree at the instance of either party.[6] A wife is entitled to receive dower (*mahr*) from the husband in consideration of the marriage. In matters of marriage and divorce, the Christians and the Parsis are governed by statutory law which is largely based on English law. The Jews are governed by their own customary law. In the case of these communities, marriage does not confer any interest in the property of the spouse. The earnings of a wife form her separate property in respect of which she can sue and be sued in her own name.

There are two statutes of general application. The Special Marriage Act (XLIII of 1954) provides for a civil marriage between persons of the same or different religions and also for registration of a marriage celebrated in religious form which is then deemed to have been performed under the Act. There are liberal matrimonial reliefs largely based on English law, but a novel feature is the provision for divorce by mutual consent. The Guardians and Wards Act (VIII of 1890), contains the law relating to guardianship. The Act preserves the personal laws of the Hindus and the Mohammedans.

[6] Divorce at suit of wife is governed by the Dissolution of Muslim Marriages Act (VIII of 1939).

## 5. Ownership

There are two forms of ownership, *viz.* State ownership and private ownership. The power of the State to acquire, hold and dispose of property is derived from the Constitution. Private ownership is individual, joint or co-operative. It may be acquired by transfer *inter vivos*, succession or adverse possession. The Constitution protects the right of every citizen to acquire, hold and dispose of property but allows the State to impose reasonable restrictions on the exercise of this right in the public interest. The Constitution also allows the State to acquire the property of citizens and non-citizens provided the acquisition is by authority of law, for a public purpose and on payment of an amount to be fixed by the legislature, the adequacy of which cannot be questioned in any wust (Const. art. 31).

The law makes a distinction between immovable property, which means land and things connected with land, and movable property which is property of every other description. Transfers *inter vivos* of immovable property are regulated by the Transfer of Property Act (IV of 1882) and of movable property for sale by the Sale of Goods Act. (III of 1930). A transfer of movable property is effected by delivery of the property, but of immovable property by a registered instrument except where the property has nominal value.

Ownership may be vested or contingent on the happening of some event. Indian law does not recognise equitable ownership. Property may be transferred in favour of an unborn person provided the whole of the transferor's interest in the property is transferred. The English rule against perpetuities applies in India. The Easements Act (V of 1882) imposes certain restrictions on the enjoyment of ownership rights in land.

## 6. Contracts

The basic law relating to contracts is contained in the Contract Act (IX of 1872) which includes the general law and the law dealing with the specific contracts of indemnity, guarantee, bailment and agency. The Act originally also dealt with the specific contracts of sale of goods and partnership but these were later separately provided for by the Sale of Goods Act (III of 1930) and the Partnership Act (IX of 1932). The Contract Act (IX of 1872) which is largely based on English law, does not affect any usage or custom of trade.

A contract presupposes an agreement, *i.e.*, an offer and an acceptance. Any agreement is a contract if it is made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and is not expressly declared to be void. An agreement made without consideration is a contract in certain circumstances. Agreements in restraint of marriage, trade or legal proceedings, agreements whose meaning is uncertain and agreements by way of wager are expressly declared to be void. Any advantage received under a void agreement must be restored or compensated for. The English law against maintenance and champerty does not apply in India, where the test is that of public policy. Certain relationships are treated as quasi-contracts in order to prevent unjust enrichment (see Contract Act s. 68–72).

In the event of breach of contract, the injured party has the option of suing for specific performance of the contract under the Specific Relief Act (XLVII of 1963) or for damages under the Contract Act (IX of 1872). A contract for the non-performance of which compensation in money is an adequate relief or whose performance is dependent on the personal qualifications or volition of the parties cannot be specifically enforced. The rules for the measure of damages are the same as in English law. A contract may be rescinded under the Specific Relief Act(XLVII of 1963) in certain circumstances.

## 7. Torts

Tort actions are rare in India. The law of torts applicable in India is the English law of torts modified in a few minor respects by statute. The State is liable for the tortious act of a servant in the exercise of a non-sovereign but not a sovereign function.[7]

## 8. Inheritance

The Hindus and the Mohammedans are governed by their own personal laws in matters of inheritance and succession. All the other communities are governed by the Succession Act (XXXIX of 1925). Certain procedural provisions of the Act apply also to Hindus and Mohammedans.

The Hindu law of inheritance has been codified in the Hindu Succession Act (XXX of 1956). Succession to the property of a Hindu, who had contracted a civil marriage, or to the property of the issue of such marriage is regulated by the Succession Act (XXXIX of 1925) and not by the Hindu

[7] *Kasturi Lal v. State of Uttar Pradesh,* [1965] 1 S.C.R. 634, A.I.R. 1965 S.C. 1039.

Act (XXX of 1956). A Hindu may dispose of any property by will. The interest of a male Hindu intestate in joint family property devolves on the surviving members of the family and not on his heirs. The Act confers absolute ownership on a female Hindu, who formerly had only a limited interest in any property possessed by her. Heirs are divided into classes for the purpose of intestate succession.

A Mohammedan cannot dispose of more than one-third of his property by will. The remaining two-thirds go to his heirs as on intestacy unless they consent to a bequest in excess of the legal third. A will may be made either verbally or in writing. A bequest must convey absolute dominion over the property, but a limited interest in the usufruct of property may be bequeathed. In the matter of intestate succession, Mohammedans in India are governed by either the *Hanafi* or the *Shia* law of inheritance according to the school to which they belong.

The Succession Act (XXXIX of 1925) governs both testamentary and intestate succession. Wills are of two kinds, *viz.* privileged and unprivileged. A privileged will can be made only by a soldier or airman employed in an expedition or engaged in actual warfare or by a mariner at sea. It may be verbal or written and if it is holograph does not require any signature or attestation. An unprivileged will must be in writing and must be signed by the testator or by some other person in his presence and by his direction and must be attested by two or more witnesses, who need not be present when the will is signed. A will is revoked by the marriage of the maker except, in certain circumstances, when made in exercise of a power of appointment. There are provisions for the grant of probate, letters of administration and a succession certificate, which is a device to legally recover, in the absence of representation, a debt or security due to the estate. Many provisions of the Succession Act (XXXIX of 1925) are similar to those of English law.

## V. COMMERCIAL (ECONOMIC) LAW

### 1. Conception and Content

The present commercial law in India is very largely codified and has evolved through the transposition of English common and statutory law. The incorporation of English law has led to the adoption of English methods and institutions of trade and the erosion of native commercial practices. Commercial law does not form a distinct branch of law but is regarded as part of the ordinary civil law and is administered by the ordinary civil courts. Apart from the statutes dealing with specific aspects of commerce, the general law of contract and the law of property are also applicable to commercial matters. There is no separate law dealing with foreign trade.

There is no statutory or judicial definition of the expressions "trade", "business" or "commerce". (The Monopolies and Restrictive Trade Practices Act (LIV of 1969) contains a definition of the expression "trade" (s. 2 *lit.* s) for the purposes of the Act.) Courts have preferred to decide each case on its merits. Activities, which are regarded as immoral or anti-social by overwhelming public opinion, are deemed to be *extra commercium* although the external forms, formalities and instruments of trade are employed.[8]

### 2. Trading Companies

Trading companies in India are organised either as partnerships or corporations. A trading company consisting of more than 20 persons (more than 10 persons in the case of a banking company) must be incorporated. Companies owned or controlled by the State are either incorporated or established by statute (see *infra* VI 2).

a. The basic law relating to *partnership* is contained in the Partnership Act (IX of 1932). The Indian law is analogous to the English law but there are two important differences. The liability of a partner in India is always unlimited as the concept of limited partnership is not recognised. Registration of a firm in India is not compulsory but there is strong inducement to register as the members of an unregistered firm cannot sue a third party or one another except for dissolution of the firm.

b. *Corporations.* – The basic law relating to corporations is contained in the Companies Act (I of

[8] *State of Bombay v. R.M.D. Chamarbaugwalla*, [1957] S.C.R. 874, A.I.R. 1957 S.C. 699.