



Title	Colonial Encouter and Modernization of Law in India
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Citation	Osaka University Law Review. 2016, 63, p. 143-170
Version Type	VoR
URL	https://hdl.handle.net/11094/54614
rights	
Note	

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Colonial Encounter and Modernization of Law in India

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This research paper is descriptive in nature, sketching the ladders of evolution of legal system of India during the British colonial period from 1600 to 1947 to locate modernisation of Law. The paper describes, how India became the British Colony? How English Laws were introduced in India? What was the early administration of Justice in British settlements in India? Why and how, British Parliament controlled the East India Company? Development and Modernization of Law till 1857. Nationalist movement of India and its impact over the development of Indian Constitution. The main objective of this paper is to provide first hand information on process of modernization of legal system of India during the British Rule to its readers. During the course of writing the author attempted to use economic tools such as dependent and independent variables of law to identify valuable contributors in modernisation process. To maintain objectivity, author will make only essential analysis scope for reader to analyse the environment in which modernisation took place.

Advent of Europeans in India and

Legal system during the East India Company's Rule.

India had trade relations with the countries of the west since Harappan Civilization.¹⁾ Since 7th century AD, India's sea borne trade passed into the hands of Arabs who began to dominate Indian Ocean and the Red Sea. It was from them that enterprising merchant of Venice and Genoa purchased Indian Goods. During this period, Arabs played role of important intermediaries between India and West. The fall of Constantinople in 1453 and geographical discoveries of the last quarter of the fifteenth century deeply affected the commercial relations of the different countries all over the world and produced far reaching consequence in the history of coming centuries. Bartholomew Diaz doubled the Cape of Good Hope, or the

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1) Harappan Civilization is one among the oldest Civilization of world flourished during 2300 BC near the Bank of Indus- Sarasvati River.

stormy cape, in 1487; and Vasco da Gama, the Portugal, found out new route to India and reached the famous port of Calicut on 17th May 1498.²⁾ He was friendly received by Hindu ruler of Calicut and thus modern trade relations set between West and India. Portuguese were followed by Dutch, who took several voyages from 1596 and eventually formed Dutch East India Company in 1602. The completion of Drakes voyages round the world in 1580, and the victory of the English over the Spanish Armada, inspired the people of England with a spirit of daring and enterprise in different sphere of activity and encouraged some sea captains to undertake voyages to the eastern waters.³⁾ On the last day of 1600, a charter of British monarch permitted the foundation of English East India Company.⁴⁾ The Company which was established by Charter was a Joint Stock Company of the merchants of London, and begin to send trading voyages to India. English was followed by Danish and French to establish the commercial contacts with India but it were the Britishers who succeeded in establishing its political supremacy. One significant reason was that, since the establishment of the British Rule, quantum of legislative rights and liberty were granted to the Company which facilitated them to make appropriate decisions in timely manner. The management of the company was vested in the hands of the Governor and 24 Directors and it was granted exclusive privilege of trading with the East Indies from the Cape of Good Hope to the strait of the Mageltan and other British subjects were prohibited from interfering with this privilege of Company⁵⁾ At the beginning the company was established for 15 years and the British Monarch was empowered to revoke the Charter even before on a two years notice, if the companies activities are found not commercially profitable to British economy. In addition the same, Charter also granted legislative power to the corporate Company according to which the legislative authority was given to the Company in order to enable it to regulate its own business and maintain discipline among its servants.⁶⁾ Due to subsequent interpretation of these provisions to meet the requirements of

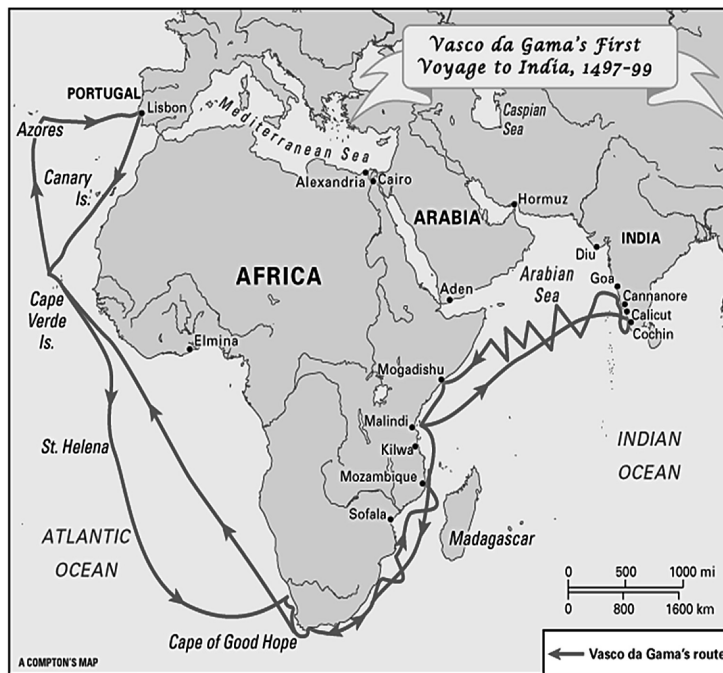
2) R.C. Majumdar, Ray Chaudhuri and Datta, *An Advanced History of India*, Macmilan Publication, New Delhi, 4th edition 1978 reprint 2005, ISBN 033390298X p. 623

3) Ibid p. 628

4) Ishita Banerjee Dube *A History of Modern India*, Cambridge University Press, New Delhi, First publication 2015, ISBN 978-1-107-65972-8

5) Dr. N. V. Paranjape, *Indian Legal and Constitutional History (6th edtn)*, Central Law Agency, Allahabad 2010 , p. 8

6) V.D. KulShreshtha, *LandMarks in Indian Legal and Constitutional History*, (8th Edtn) Easternbook Publication, Luckhnow ISBN 81-7012-853-6 , 2006, p. 30



controlling and administering territorial expansion of the company in India,⁷⁾ Ilbert stated about the Charter as “the germ out of which the Anglo-Indian Code were ultimately developed.”⁸⁾

In 1609, the then Monarch of England, James I, granted a fresh Charter to the Company which continued its privileges in perpetuity, subject to the proviso that they could be withdrawn after three years’ notice.⁹⁾ This grant was a milestone in the journey of legislative and commercial rights and powers which company enjoyed for centuries, ultimately resulted in the development of Anglo-saxon code in India. Factually, it is not only Charters passed by the Crown time to time which strengthened the modernization process but Indian political situation and social environment, time to time, also played its vital role in extending the scope for modernization in India. To understand the legal system of pre-British India, the first and foremost thing readers should know about India is that there were no *lax*

7) V.D. KulShreshtha, *LandMarks in Indian Legal and Constitutional History*, (8th Edtn) Easternbook Publication, Luckhnow ISBN 81-7012-853-6 , 2006, p. 30

8) Ilbert, *Government of India* , p 10

9) V.D. KulShreshtha, *LandMarks in Indian Legal and Constitutional History*, (8th Edtn) Easternbook Publication, Luckhnow ISBN 81-7012-853-6 , 2006, p. 31

loci law in India and instead of that it were customary laws which were in vogue where each community of India was allowed to govern by their own set of laws in their internal matters and the state interference was minimum or negligible until such case may lead to gross injustice or it has been reported to the state. However it also does not mean that there was no law at all, crime against state, religion and individual were well defined and practised but for individual matter and as already emphasized, it was the customary law which was more applicable.

When the East India Company embarked its commercial career in India it was the reign of mighty Mughals and it was son of Akbar the Great, Jahangir ruling from the seat of Agra. To carry on its trade effectively, which consisted of import and exports of various commodities between India and England, the Company required to establish few factories.¹⁰⁾ The Western Indian city, Surat was one of the most important and well know international port of India at that time. British people regarded Surat as the most suitable place for establishing a factory.¹¹⁾ Therefore, to secure permission to establish factory in Surat, which was under Mughals, Hawkins followed by Sir Thomas Roe remained in the Court of Jahangir. Though Hawkins was warmly welcomed and his account became useful in tracing history of Mughals was unable to secure permission to lay factory at Surat. Thomas Roes who succeeded Hawkins, as mentioned before succeeded in obtaining a Firman from Jahangir allowing the English to trade at Surat.¹²⁾ The Mughal Government granted the right of self-government to the English by issuing the *Firman*¹³⁾ and this said to be proved a turning point in in the legal history of India as the English Company secured various privileges from the Mughal Emperor.¹⁴⁾

10) A factory was place comprising offices, residence for companies employees and big warehouses for storages of goods.

11) M. P Jain, *Outline of Indian Legal and Constitutional History* (6th edtn), LexisNexis Butterworths Wadhwa Publication Lukhnow, ISBN 978-81-8038-264-2, 2006 (reprint 2009), p. 9

12) Ferman of Jahangir <http://www.preservearticles.com/2012031026094/visit-of-foreigners-during-the-ruling-of-jahangir.html> visited on 14-10-202-15

13) A firman/farman or ferman was a royal mandate or decree issued by a sovereign in certain historical Islamic states, like the Empire, Mughal Empire, State of Hyderabad, and Iran under Shah Mohammed Reza Pahlavi. During various periods they were collected and applied as traditional bodies of law.. The word firman comes from the persian meaning "decree" or "order".

14) V.D. KulShreshtha, *LandMarks in Indian Legal and Constitutional History*, (8th Edtn) Easternbook Publication, Luckhnow ISBN 81-7012-853-6 , 2006, p. 31

Some salient features of *Firman* are as follows:

- English will be regulated by their tribunals
- English people enjoy their own religion and laws in the administration of the Company.
- That the local native authorities will settle such disputed cases in which parties belongs to different community like English i.e. Companies servants at one side and Hindu or Muslim at another.
- Mughal Governor or Qazi will protect the English from all sort of operations or injury.

Consequently, if we look at Law and Justice at Surat Factory, the Englishmen living in factory owed allegiance to two set of Law's, native and English. As per the royal grants, they had the power to determine Criminal as well as Civil cases and the president and council were empowered to deliver justice in the factory of India. Being a non judicial persons they decided the cases on the bases of their notion of justice with adoption of trial and error method. British began their legal journey in India with a moderate factory of Surat but no one knew, at that time, these factory or settlement will become the major laboratories for the judicial experiments in India. Alike Surat, Madras, Calcutta and Bombay were three other important settlements, grew as major presidency towns of East India Company. After the acquisition of Bombay,¹⁵⁾ Surat was merged into the Bombay Settlement.

Administration of Justice in Three Presidency Towns

The early centre of power of East India Company in India were three Presidency towns, Bombay Calcutta and Madras, reflects the administration of justice at the advent of Company's rule to be at rudimentary level. The scope of the Company's Judicial powers were very vague and indefinite, therefore they hesitated in handling serious criminal cases and very often referred such cases to

15) Mumbai is also known as Bombay, is the capital city of the Indian state of Maharashtra and also known as commercial capital of India. It is the most populous city in India and the ninth most populous agglomeration in the world, with an estimated city population of 18.4 million. Along with the neighbouring regions of the Mumbai Metropolitan Region, it is one of the most populous urban regions in the world and the second most populous metropolitan area in India, with a population of 20.7 million as per the Indian Census of 2011.

the Company's authority in England.¹⁶⁾ They also tried to seek assistance from the native judges when the matters were pertaining to foreign subjects. The native judicial officers considered Company should handle administration of justice in their territorial jurisdiction and therefore when matters were reported to local judicial officer they directed Company to resolve such dispute by their own set of laws. The Company's administrators were from merchants cadre and were not professionally trained in law hence decided the cases in summary manner leading to miscarriage of justice.¹⁷⁾ There was no clear idea about the jurisdiction whether it is related territorial or personal. British carried some basic understanding of the jurisdiction but whenever their interest clashed with the interest of natives manipulation of justice has been observed. The trial of Mrs. Ascentia Dawes can help the readers to understand the condition of justice delivery system in India in the 17th Century,

The first trial by jury in Madras happened during this time, when one Mrs. Ascentia Dawes was accused of murdering her maid servant, a native girl. A total of 36 persons were summoned for jury duty, out of which only 3 were challenged. A jury of 12, consisting of 6 Englishmen and 6 Portuguese were empanelled and they found Mrs. Dawes guilty of murder, but not in the manner in which she was alleged to have committed the offense. They sought the direction of the court as to the manner in which to proceed further, to which the Court directed that they were to bring upon a verdict of either guilty or not guilty. To everyone's surprise, the foreman of the jury, Mr. Reade, a son in law of Sir Edward Winter, pronounced a verdict of not guilty and thus, Mrs. Dawes were acquitted. The outcome of the case left no one in doubt that the Court needed the assistance of a person qualified in law.¹⁸⁾

During the phase of East India Company's rule, many judicial demerits came into lime light, for which Indians as well Company both can held responsible. First instance, in Madras there were two bodies to administer Justice; Agent and

16) M. P Jain, *Outline of Indian Legal and Constitutional History* (6th edtn), LexisNexis Butterworths Wadhwa Publication Lukhnow, ISBN 978-81-8038-264-2, 2006 (reprint 2009), p. 9

17) Please refer, Hanery Davidson Love's historic Work, *Vesitages of Old Madras*, Vol, I p. 272-273 further citation are found in M. P Jain p. 13-16 and V. D Kulshreshtha p. 36-39

18) Madras Vignettes, <http://madrasramblings.blogspot.in/2012/05/madras-high-court.html> visited on 13-10-2015

Council of Company and Natives. The first was not efficient as it was very hesitating sort of Court and was not clear about its powers while later was also not sure about how to tackle foreign settlements and their judicial issues. They delegated their primary responsibility to the foreigners which itself was incorrect from their part ultimately resulting into the passing of arbitrary decisions by Company, as one can see in Mrs Dawes's Case too. The other problems which came under notice were prisoners were found rotting in jail without trial and much time was lost in consultations and demand from the Company for more power.¹⁹⁾ Less number of Courts, irregularity in settings of Courts, no separation of Power were also major issues found during the early phase. There was no uniform growth of judiciary found in three presidencies. For instance the type of courts which were found in the Madras had no similarity with Calcutta and Bombay this situation brought attention of crown to provide some uniformity in judicial administration and thus Charter of 1726 was passed.

Introduction of English Law

It has been observed that since the first Charter i.e. 1600, principles of English Laws were sowed in the Indian soil but were applicable only to the British subjects. The Company was directed to enact its by-laws which shall not be repugnant and contrary to English law and based on the principles of Justice Equity and Good Conscience. Charter of 1661, further authorised the Company to empower the Governor and Council of all three respected presidencies to administer with respect to the person employed under them, both civil and criminal justice according to the English Law.²⁰⁾ Since Bombay and Calcutta came under the Company's authority after 1661, the English law was introduced by this charter only in the settlement of Madras.²¹⁾ To set uniformity, Charter of 1726 was passed, the major feature of this Charter was establishment of civil and criminal courts in the Presidency towns, deriving their authority not from the Company but directly from the British monarch. The Charter is also known as Royal Charter or Judicial Charter as majority of the provisions of the Charter were dealing with the

19) V.D. KulShreshtha, *Land Marks in Indian Legal and Constitutional History*, (8th Edtn) Easternbook Publication, Luckhnow ISBN 81-7012-853-6 , 2006, p. 41

20) V.D. KulShreshtha, *Land Marks in Indian Legal and Constitutional History*, (8th Edtn) Easternbook Publication, Luckhnow ISBN 81-7012-853-6 , 2006, p. 32

21) Dr. N. V. Paranjape, *Indian Legal and Constitutional History* (6th edtn), Central Law Agency, Allahabad 2010 , p. 180

judicial development in India. The establishment of Corporation in Bombay, Calcutta and Madras, constitution of Mayor's court, Procedure, Right of Appeal, Justice of Peace and Legislation were some important provisions of Charter, explicitly reflecting characteristic of British Judiciary. Further, Charter also authorized Governor and Council of each presidency to make bye-laws, rules and regulations for the cooperation and inhabitants of the settlements concerned and they could and they could prescribe punishment for the breach of such laws.²²⁾ Consequently the Charter made native inhabitants to be governed by English law system. The Charter also introduced the system of appeal from India to Privy Council thus making Monarch of England fountain head of justice for India. The Privy Council always applied English law in deciding such appeals thus charter opened the door of for the common law precedent to be followed in India. This gradually resulted in making India a common law country.²³⁾

The Charter of 1726, can be seen as positive development towards streamlining the Judicial administration in India but unfortunately this also failed to satisfy minimum requirements demands of admirable judiciary in India. The actual working of the Mayor's Court brought on surface the ambiguity of language used in the charter.²⁴⁾ It led to frequent clashes between executive and judiciary. The new courts were expensive and led many difficulties to natives. For instance, As being a Crowns Court, Mayor's started working with the spirit of Judicial independence which ultimately resulted in bitterness between judiciary and executives.

Conversion Case

In 1730, a Hindu Women of Shimpy caste became Roman Catholic. Due to this it portrayed that her 12 year son left her and decided to stay with Hindu relatives. The mother filed a suit in the Mayor's Court against her relative on grounds of unlawfully detaining some jewels and Boy. Court passed judgment in her favour and ordered the relatives to handover the boy to his mother. The head of the Caste filed a complaint in the Governors Council and held that Mayor Court has no authority to deal with cases of religious nature or dispute, it has only jurisdiction over civil matters. The real issue of the native was subsided but brought Mayors court in direct conflict with Governor's Council.

22) Ibid

23) India legal system is combination common law and civil law system, majorly we follow common law system and partially we follow civil law system.

24) S.K. Puri, *The Legal History of India*, Allahbad Law Agency, Delhi, 2008, p. 43

The conflict between these two was reported to the Court of Director.

Case of Arab Merchant

The merchant sued a person in the Mayor Court on the charges that he extorted the pearls from him, while he was rescued near the coast of Gujarat from a burning boat. The Governor and Council suggested the Mayor court that the suit is invalid as the defendant was already tried for piracy and was acquitted. Mayor's Court paid no attention and declared the suit in favour of merchant. On further appeal the decision was reversed by the casting vote of the Governor. This added fuel to the fire and the relations between the two became more strained.

Now, to overcome the conflicting situation another Charter was issued by Monarch of England, Charter of 1753. It excluded the natives from the jurisdiction of English Courts in civil matters.²⁵⁾ It brought change in the Constitution of the Mayor's Court, earlier, by the Charter of the 1726 he was elected by the Aldermans of corporation of the Presidency town but now he was to be nominee of the Governor of the presidency. Thus English resolved the dispute but undermined their own principle of independence of Judiciary.

Modernisation of Law (MoL), British Parliament and Establishment of Uniform Courts in India.

By the time one reaches to the second half of the 18th century India, observes the growing political power of British through their East India Company. Politically in India, British East India Company not only successfully over ridden its French rivals but fully exploited the changed political situation of India led due to disintegration of mighty Mughal Empire of medieval India. Due to Glorious Revolution and setting up of Parliamentary form of Government in British, Britishers started demanding of the share in the trade with the East from the Crown. Further, territorial gains and expansion of Company in India, corruption amongst the servants of company, lack of proper judicial administration, lack of proper central authority, deteriorating financial condition of the company, Company's defeat in 1769 at the hands of Hyder Ali, Terrible famine in Bengal²⁶⁾ and in

25) Until both the parties ready to submit their case to English Court.

26) For details please check V.D. Kulshreshtha p. 92-104, S.K Puri 54-67

addition to application of Company to monarch for a loan of one Million Pounds in 1772, collectively resulted in the beginning of the new era of British Parliamentary control in the History of the MoL. These reasons landed a hand to the British Parliament to interfere and regulate the affairs of the Company in India. Consequently British Parliament passed first two Acts, to grant financial assistance and regulate the Companies affairs in India.

So far, if one examines, there were only two stakeholders who were inter-playing in the process of modernization, Company and native Indian including both rulers and population. Nevertheless, now it is third and one of the most important stakeholders introduced, the British Parliament who led the sway over the process of MoL in India. The major and immediate outcome of the Parliaments involvement into India led to the establishment of first Supreme Court of Judicature in Calcutta Presidency.²⁷⁾ The good thing about this court was it was presided by the persons who were well versed in law. The Supreme Court of Judicature at Calcutta was a Court of Record, with full power & authority to hear and determine all complaints for any crimes and also to entertain, hear and determine any suits or actions against any of His Majesty's subjects in Bengal, Bihar and Orissa.²⁸⁾ In similar line, the Supreme Courts at Madras and Bombay were also established by King George – III on 26 December 1800 and on 8 December 1823 respectively. This all led to the establishment of uniform higher court in India. Now each town had Mayor Court as well as supreme Court and appeals were allowed to go to Privy Council. The law implemented in these courts were all laws passed by the British Parliament for instance criminal laws, admiralty, ecclesiastic or writ jurisdiction. The court gives diorama of English court system in India. There is no doubt the set of law which were introduced during that time in India were need of an hour and required to be introduced to streamline judicial administration of country. At the same time it was the law of the new ruler of India who were totally different and alien to the customary and previous legal system of India. Hence it was bound to lead to various difficulties to the natives who were to be govern by alien law now. There are many cases reported soon after the implementation of Regulating Act of 1773 reflecting the

27) Under section 13 of the Regulating Act of 1773, George II the than monarch of England issued a charter on 26th March 1774 which established Supreme Court at Calcutta.

28) History of Supreme Court of India, <http://supremecourtindia.nic.in/supct/scm/m2.pdf>, visited on 26-9-2015

misery caused by the vague term “British Subject” which remained undefined up to 1813.²⁹⁾

To locate progress in modernisation as by product of British rule uniform court system which was processed from 1773 was advanced in 1861, when Indian High Court Act was passed. The India High Court Act, 1861 was enacted to create High Courts for various provinces and abolished Supreme Courts at Calcutta, Madras and Bombay and also the Sadar Adalats in Presidency towns. These High Courts had the distinction of being the highest Courts for all cases till the creation of Federal Court of India under the Government of India Act, 1935. The Federal Court had jurisdiction to solve disputes between provinces and federal states and hear appeal against Judgments from High Courts. After India attained independence in 1947, the Constitution of India came into being on 26 January 1950. The Supreme Court of India also came into existence and its first sitting was held on 28 January 1950.³⁰⁾

Codification of Indian Law as Dependent variable of MoL

During the Colonial rule, India was extremely diverse as well as multi-ethnic and multi-lingual country where law changes even after crossing a river. Therefore to minimize ambiguity and bring certainty in legal system, it became essential for British to codify the Indian law under one mould. The other reason was, the law of the Presidency town was antiquated because of the rule that English law of 1726 was applicable there.³¹⁾ There were also variations in law in Presidency town and *muffosil*³²⁾ areas, even the law of the Presidency towns was not uniform as

29) The jurisdiction of the Supreme Court was confined to ‘British subject as mentioned in the Charter of 1774. Neither the Act nor the Charter defined as to who were the British Subject. In one sense, whole population of Bengal, Bihar and Orissa, (three most important and rich provinces of eastern India) which came into the control of the British), can be called the British subjects. The collective territories of these provinces are larger than many countries of Europe were British subject. Second, all those who were of British origin and third all those who were working under East India Company can be defined as British Subjects. The interpretation of the British Subject varied from one bench of judges to the other, at time leading to the misuse of judicial powers. For further details please refer Trial of Raja Nandkumar of 1775 available on various websites.

30) History of Supreme Court of India, <http://supremecourtindia.nic.in/supct/scm/m2.pdf>, visited on 26-9-2015

31) M.P. Jain, p. 417

32) *Muffosil* was an adjoining areas of Presidency town which became the part of British territory as an outcome of political contest in contrast to the Presidency town area which

judicial decisions have introduced some difference therein also. For Hindu and Muslim at least some relief was their due to personal Law safeguard provided during the Law Reforms of Warren Hasting.³³⁾ The non-Hindu and non-Muslim section of the population were subjected to the different laws according to the residence being in the *moffosil* or Presidency town and this might have caused them great inconvenience.³⁴⁾ At other side if we look at England, the nineteenth century was age of Jeremy Bentham and he was fervent support of law reforms and strong advocate of codification. Codification is said to be passion of his professional life. To be 'without Code' is to be 'without justice'. According to Ilbert, it was he who coined the word codification for English language.³⁵⁾ The very idea of omni-competent legislative body in India had been mooted in 1829 by then Governor General of India Lord William Bentick. To achieve objective of uniform and codified system of law in India, the Charter of 1833 made the provisions in this respect. Since the third decade of the nineteenth century, Law Commissions were constituted by the Government from time to time and were empowered to recommend legislative reforms with a view to clarify, consolidate and codify particular branches of law where the Government felt the necessity for it.³⁶⁾ The first such Commission was established in 1834 following the provisions of Charter Act of 1833 under the Chairmanship of Lord Macaulay, who was also the first law member in the Governor, General Council and from this germ gradually the separate legislative body for India was about to establish in the years to come. This recommended codification of the Penal Code, the Criminal

they acquired with Mughals and local rulers in previous century. For example; Bengal, Bihar and Orissa were *muffosil* of eastern India while Calcutta was Presidency town in the same region. In *Muffosil* area courts were established by Governor's order while in Presidency Court were established with Royal Charter. The set of law were also varying in these two reason, in former native law influence was high and in later English Law were in vogue.

33) Warren Hasting was the first Governor General of Calcutta/Bengal, established through Regulating Act of 1773. The other Governor of the Presidency became subordinate to him by this Act as it was an administrative reform introduced by British Parliament to Stream line and centralise administration of East India Company in India. Warren Hasting deserves great name in the legal History of India as he provided personal Law safeguards to natives. His contribution is major reason why even today in India Indian custom are having legal sanction and place in modern law system of India.

34) M.P. Jain 417-418

35) For details please refer, Ilbert, Legislative Methods and Forms, P. 124

36) Early beginning of codification in India, <http://www.lawcommissionofindia.nic.in/main.htm>, visited on 23-9-2015.

Procedure Code and a few other matters. Thereafter, the second, third and fourth Law Commissions were constituted in 1853, 1861 and 1879 respectively which, during a span of fifty years contributed a great deal to enrich the Indian Statute Book with a large variety of legislations on the pattern of the then prevailing English Laws adapted to Indian conditions. The Indian Code of Civil Procedure, the Indian Contract Act, the Indian Evidence Act, and Transfer of Property Act etc. are products of the labour of the first four Law Commissions.³⁷⁾ The work of the first four law commission played major role in the MoL in India. The British sword imposed the political unity, common subjection, common institutions and common law began to shape India in a common mould.³⁸⁾ Codification of Law made the law uniform throughout the country and thus fostered a kind of legal unity of the country in the fundamental laws, which India had never experienced before. Through the codification English Law firmly rooted in Indian soil.³⁹⁾ This English law were non conventional and non-customary in nature. Not only this most of the codes were drafted in London by a mixed team of English Lawyers who were only legal technicians having no experience of Indian conditions along with some lawyers who had earlier served in India. No Indian was ever a member of Law commissions. While critically evaluating the codification of Indian law for Indian without Indian representation M.P Jain states,

Thus Indian Law got assimilated with the fabric of English Law. One could appreciate the approach of English lawyers who set on the Law Commissions. They knew their own law well and naturally had inclination towards it. But looking at the development from the Indian point of view, one entertains a doubt whether it was right to throw over boardlock, stock amid, barrel all that was indigenous in favour of imparting English Law wholesale. Doubt remains

37) After India's independence from british rule, the Constitution of India with its Fundamental Rights and Directive Principles of State Policy gave a new bearing to law reform gearing to the needs of a democratic legal order in a multi ethnic and multi- lingual society. Though the Constitution stipulated the continuation of pre-Constitution Laws (Article 372) till they are amended or repealed, there had been demands in Parliament and outside for establishing a Central Law Commission to recommend revision and updating of the inherited laws to serve the changing needs of the country. The Government of India responced positively and established the First Law Commission of Independent India in 1955 with the then Attorney-General of India, Mr. M. C. Setalvad, as its Chairman. Since then twenty one more Law Commissions have been appointed, each with a three-year term and with different terms of reference.

38) B. L. Grover, p. 293

39) M.P Jain, p. 461

*whether the foreign law system remained confined to the elite or has permeated the Indian soil and come to be accepted by the common man.*⁴⁰⁾

A question remains whether or not it would have been more prudent to give consideration to Indian social condition equally and ascertain indigenous law equally to test that which has validity and viability in social scenario of India and then to codify them naturally due to this codification process would have been more laborious and time consuming and would have required an empirical study.

Indian Nationalism and Legislative and Constitutional Developments

The Second half of the 19th century witnessed major political changes affecting the status and condition of all three Stakeholder who were involved in the modernization process; Parliament, East India Company and people of India. Historically, it was the East India Company who had not only established British political supremacy in India but also instrumental in bringing English Law System in India. However due to launch of new economic laissez faire policy and continental system introduced by the Napoleon at the beginning of 19th Century, weakened the Company's foothold in India. The mounting demand of people of Britain to have share in Indian trade and on-growing parliamentary control over the company, gradually minimised and later replaced the Company in India in 1858 by passing Government of India Act 1858. By this Act all powers were transferred from East India Company to British Crown. Meanwhile one major change which was noticed by the historians is growing unrest amongst the Indian against the colonial rule. The worst feature of the British rule in India was the economic exploitation of all classes.⁴¹⁾ They came to India as traders and their primary motive was how to gain financial benefit. After becoming territorial masters they took full advantage of their position. The industrial revolution in Britain necessitated the import of raw materials from different foreign countries and to search extensive market for its goods outside. India provided both to them. At times Economic analysis of British Rule are considered a biased approach. In a recent analysis by Mr. B Shyantanu in his work, Drain of wealth during the British Raj analyzed 5 articles on economic impact of British rule of foreign author to prove that there was economic degradation of India. And this economic

40) M.P. Jain , p. 461

41) Growth of Indian Nationalism, <http://www.historydiscussion.net/history-of-india/growth-of-indian-nationalism-10-factors/3184>, visited on 26-9-2015

impact was one of the major reason for rise of nationalism. This can be considered as dependent variable of Law in MoL.

The major demand put forth by the nationalist leaders of India was to have larger representation in decision making body. Putting in other words, share in legislative and administrative functioning of Governor's Council. This demand itself reflects the political awareness of India which was once again the by-product of the British rule. Introduction of English education system fetched many positive changes in Indian society. The introduction to modern system of education afforded opportunities for assimilation of modern western ideas which in turn gave new direction to Indian political thinking.⁴²⁾

MoL was just a part of whole process of overall modernisation process which was taking place in India since second half of 19th century. Change in social outlook, use of modern technology, modernisation of education setup along with new economic policy collectively, rise of nationalism had an impact on the MoL. The major and direct impact of social political upheaval of the time was on development of parliamentary form of government and later Indian Constitution. Though, in the 19th century it is too early to state this development as Indian Parliamentary development and where legislative development would be more suitable. Notwithstanding, if one examines the outcome of these developments it was nothing but the establishment of Parliamentary form of government in India after independence, where slowly but steady Indians learned from their political masters art of legislation. Whether willingly or unwillingly Indian accepts or not Indians have learnt Parliamentary Government from them. At the same time whether British did this willingly or unwillingly it was unavoidable for them not be teachers of Indian to teach Parliamentary System.

The first step in this direction was taken in the year 1861 with the passing of Indian Council Act of 1861.⁴³⁾ This along with many other important legal

42) B.L Grover and Alka Mehta *New Look at Modern Indian History* (13th edtn), S. Chand Publication, 2014

43) Features of the Act of 1861 at glance

1. The Act led the beginning of representative institutions by associating Indians with the law-making process. It empowered viceroy (Governor General) should nominate some Indians as non-official members of his expanded council. It initiated the process of decentralisation by restoring the legislative powers to the Bombay and Madras Presidencies.
2. It also provided for the establishment of new legislative councils for Bengal, North-Western Frontier Province (NV/FP) and Punjab, which were established in 1862, 1866 and 1897 respectively.

assortments Britishers had passed were the result of Revolt of 1857. British accepted by themselves that they have to take some regular counsel with the Indians to avoid such incidents in future. Sir Charles Wood⁴⁴⁾ in his speech in the House of Common aptly remarked:

“It would be folly to shut our eyes to increasing difficulties of our position in India and it is an additional reason why we should make it the earliest endeavour to put all our institution to the soundest possible foundations”

The steps taken to centralize legislation under the Charter Act of 1833 and 1853 were considered inadequate to meet the demands of a great country like India. It was realized as necessary by the British statement to take non official Indians and European in Legislative Council of the country,⁴⁵⁾ “with a view to obtaining timely expressions of the feelings and sentiments of the members of the outside public concerning measures proposed to be taken by Government.”⁴⁶⁾ The Act of 1861 was considered significant, Professor Gurmukh Nihal Singh academician and later first Governor of Rajasthan (state of western India) and second Chief Minister of Delhi from 1955 to 1956 and was a Congress leader, has characterized the Indian Council Act as great landmark in the Indian Constitutional History of India for two reasons. Firstly, it made provisions for inclusion of native -element to the councils, Sir Bartle Frere and Sir Saiyad ahmad had already emphasized the absolute necessity of non-official advise in the work of legislation.⁴⁷⁾ The expansion of the provincial and central legislature by addition of non-official members provided opportunities for the government to know the views of the natives and helped in removing their misunderstanding regarding the intention of Government. Secondly, by restoring the legislative power to the

3. It empowered the Viceroy to make rules and orders for the more convenient transaction of business in the council.

4. It also gave a recognition to the 'portfolio' system introduced by Lord Canning in 1859. Ultimately resulted to the cabinet form of Government in before and after India's independence.

5. It empowered the Viceroy to issue ordinances, without the concurrence of the legislative council, during an emergency. The life of such an ordinance was six months.

44) Sir Charles wood Speech on the Indian Council Bill, 1861 in the House of Common on June 6, in 1861 in A.C Bemerjee Indian Constitutional Documents, Vol 2, pp.53-64

45) V.D. Kulshreshtha p. 324

46) Herbert Cowell, *History and Constitution of Courts and Legislative Authorities in India*, 1936, p. 83

47) N. V. Paranjape, p. 334

Governments of Madras and Bombay and by making provisions for the institution of similar legislative councils in other provinces, the Act laid down the policy of legislative devolution which resulted in the grant of almost complete internal autonomy to the provinces.⁴⁸⁾ The framework of the Act laid the guideline upon which the future Government of India was carried on till the end of British Rule in 1947. It also laid the beginning of definite legislative procedure to be followed by the legislative council while performing their Business.⁴⁹⁾ Despite many noteworthy provisions the Act of 1861 was not altogether free from the defects.⁵⁰⁾ Though, legislative form of government introduced but without any democratic elements. The non-official members nominated by the Governor General for the Council were not elected person and thus they were not representatives of people.⁵¹⁾

The council was not legislature in legal sense as it was only to advise and assist executive Council of Viceroy or Governor in Law making procedure. This resulted in the higher criticism among the Nationalist. The Indian National Congress had adopted some resolutions in its sessions in 1885 and 1889 and put its demand.⁵²⁾ One of the demand was: *Reforms of the legislative council and adoption of the principle of election in place of nomination*. This demand reflected the dissatisfaction of the Indian National Congress over the existing system of governance. The Indian leaders wanted admission of a considerable number of the elected members. They also wanted the creation of similar councils of North Western Province and Oudh and also for Punjab. The Indian leaders also wanted a right to discussion on budget matters. Consequently Indian Council Act 1892⁵³⁾ was passed enlarging the powers of legislature and giving larger share to the Indians in it.

48) G.N Singh Land Marks in the Indian Constitutional and National Movement, Vol. I(1600-1919), 2nd edtn p. 77

49) N. V. Paranjape, p. 335

50) Ibid p.336

51) Kailash Rai, *Indian Legal and Constitutional History*, published by Allahabad Law Agency p. 275. In 1862, Lord Canning, the then viceroy, nominated three Indians to his legislative council—the Raja of Benaras, the Maharaja of Patiala and Sir Dinkar Rao.

52) The Indian Council Act, 1891, <http://selfstudyhistory.com/2015/01/30/the-indian-council-act-1892/> visited on 30-9-2015

53) Salient feature of 1892 Act:

1. The Indian Council Act of 1892 was an Amending Act to the Indian Council Act of 1861. It did not introduce any significant changes in the existing set up.

Viceroy Lord Dufferin set up a committee. The committee was given the responsibility to draw a plan for the enlargement of the provincial councils and their status. The plan was drawn, but when it was referred to the Secretary of State for India, he did not agree to introduction of the Principle of election. Therefore not direct but indirect method of election was used and no where in the Act word 'election' was used. However it was the first time in history of India election method was adopted though beyond satisfaction but led a humble beginning and contributed in the process of MoL. Compared to previous Act of 1861, powers of Legislative Council at Centre and at the state were advanced but failed to meet the growing demand of nationalism which grown rapidly after Swadeshi Movement of 1905. At the same time changes took place in British Parliament as well. In 1905, Sir Henry Campbell-Bannerman who is first man to be given official use of the title 'Prime Minister' became Prime Minister of England, when he formed his cabinet he appointed John Morley as Secretary of State for India.⁵⁴⁾ Both the Viceroy and the Secretary of State for India decided to

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2. It increased the number of additional members in the Legislative Councils and enlarged their functions. The number of additional members of the Central Legislative Council was increased to minimum 10 and maximum 16.
 3. Half of these members were supposed to be non-official i.e. persons not in the Civil or Military Service of the Government. In the case of Bombay and Madras it was increased to not less than 8 and not more than 20.
 4. Although the Act introduced a kind of elective principle, but it was the Governor-General who was empowered to invite different bodies in India to elect, select or delegate their representatives as non-official members in the Central Legislative Council.
 5. Similar changes were introduced in the composition of provincial Legislative Councils. In the entire provinces official majority was maintained.
 6. The Act of 1892 also provided for discussion of legislative proposals including Budget. Although Financial Statement was presented by the Government as an unalterable document, the Act however, provided for discussion by the members on Annual Financial Statement.
 7. In the case of Provinces the discussion was limited to those branches of revenue and expenditure which were under the control of Provincial Governments.
 8. Further the Act allowed the members to put questions on internal matters, but supplementary questions were not allowed. The Indian Council Act of 1892 gave the Indians an opportunity to participate in the legislative process and understand the rules and procedures associated with the same. (for details bare Act available on website https://archive.org/stream/indiancouncilsac00gearich/indiancouncilsac00gearich_djvu.txt visited on 26-9-2015).

54) Indian Council Act 1892, <http://www.gktoday.in/indian-councils-act-1909-morley-minto-reforms-communal-representation>, visited on 23-9-2015

work out some scheme to reform the Legislative Councils. This culminated as Indian Councils Act 1909⁵⁵⁾ or Minto-Morley reforms. The idea was to give Indians some more share in the legislative affairs. Like Indian Council Act of 1892, the Act of 1909, was also an Amending Act. It introduced changes in the size and functions of the Councils at the Central as well as Provincial levels.⁵⁶⁾ However the nationalist historians of India consider this Act as clear reflection of divide and rule policy at one side very less political demands of Indians were accepted and reflected in the legislative frameworks.⁵⁷⁾ The Indian National Congress opposed Morley Minto Reforms due to a number of reasons. One of the most important reasons was the separate electorate system. Lord Minto had accepted the Muslim's demand for separate electorate system. But Congress claimed that it was undemocratic, and in democracy majority should be the authority.⁵⁸⁾ According to the first Prime Minister of India, Mr. Jawaharlal Nehru it

55) Silent Features of Act of 1909:

1. It increased the maximum additional membership of the General Legislative Council from 16 (to which it had been raised by the Council Act of 1892) to 60.
2. In the Provincial Councils of Bombay, Bengal, and Madras, which had been created in 1861, the permissible total membership had been raised to 20 by the Act of 1892, and this was increased in 1909 to 50, a majority of whom were to be non-officials.
3. In the case of Punjab, Burma and Assam it was increased to 30. This did not include the ex-officio members. The additional members were to be of two kinds: official and non-official.
4. In the Imperial Legislative Council a substantial official majority was insisted by Lord Morley. Out of the 37 officials 28 were nominated by the Governor-General and the rest were to be ex-officio.
5. The ex-officio members were to be the Governor-General, 6 ordinary members of the Council and 2 extraordinary members.
6. Out of the 32 non-official members 5 were to be nominated by the Governor-General. The remaining 27 seats were to be filled by non-official members of the Provincial Legislative Councils (13), landholders of six provinces (6), Muslims of five provinces (5), alternately by Muslim landholders of U.P. or of Bengal (1) and Chambers of Commerce of Calcutta and Bombay (2). Similar provisions were made for forming Provincial Legislative Councils with variations depending on their peculiar conditions. For details please refer (A Collection of Act Indian Legislatures for the Year 1926, Central Publication Branch, Calcutta, 1927)

56) Indian Council Act, <http://www.shareyouressays.com/89908/the-main-features-of-indian-council-act-1909>, visited on 23-10-2015

57) Here legislative frame-work means various laws enacted by the British Parliament for developing legislative and constitutional form of Government.

58) Impact of Morley minto Reforms, http://olevelshistorynotes.weebly.com/uploads/5/0/6/2/50624361/morley-minto_reforms_1909.pdf, 21-9-2015

was greatest defect in the in Act,

“a political barrier was created round them isolating them from rest of India and revising the unifying and amalgamating process”

In due course it was realized that just demands of Indian people for large share in the Government of India cannot be ignored for longer period but being the colonial ruler their first vested interest was to safeguard their benefits then to modernize law or India. The British Government passed certain legislation to suppress the rising Indian ambitions.⁵⁹⁾ The Indian Press Act of 1910 and 1913 were aimed to minimize and control growing political awareness among the India and their documentation printed media. The Defense Act of 1915 further empowered the Government and every effort was made to suppress the political awakening.⁶⁰⁾ The major wave which ignited the Indian political movement of second decade of the 20th century was advent of Mr. Mohandas Karamchand Gandhi (herein after used as Gandhi-san).⁶¹⁾ The period from 1919-1947 is known as Gandhian Era in the History of India. The active involvement of Gandhi san in Indian politics made the Indian political movement a mass movement where not only right of self-government but dominion status were urged loudly. The rapid and well grown process of modernization was also due to World War I and II. A landmark Act based on Montagu – Chelmsford Report led constitutional development and federal structure of India.⁶²⁾ Though, once again failed to satisfied Indian Nationalist demands of responsible government. This strife between the colonial government and Indian nationalist became more and more prudent in coming centuries leading towards major constitutional development of

59) V. D. Kulshreshtha, p 335

60) Ibid. p 335

61) The period dominated by the personality of Gandhi-san who introduced new ideas into politics, specially the policy of *Satyagrah* (literary persistence in truth) i.e. non violence and non-cooperation towards a government which did not look into the interest of the governed.

62) Main Features of Act, 1919 :-

1. The Declaration – promised for responsible government to India.
2. Dyarchy in the Provinces – Double Rule. Its objects was to train the natives in the act of Self-Government.
3. Central Government – It was responsible to British parliament through the Secretary of State. It has bicameral legislative.
4. Structure of Government to remain unitary – Central Legislative had power to legislative on any matter. Government of India remained unitary and centralized government with the Governor General-in-Council as the key stone of constitution.

India which which led everlasting impact on the Indian constitution. This can be considered as dependent variable for MoL. Here author is talking about Government of India Act 1935⁶³⁾ from which 2/3 of the Indian constitution is derived. The significant features of the Act includes, formation of All India Federation based on a Union of the British India Provinces and the Princely States, a bicameral federal legislature with disproportionate weightage to the States, Diarchy at the Centre with important departments like defence, foreign affairs, ecclesiastical affairs etc. under reserved list with British. Further Governor-General retained special control (Special Responsibility) over the other subjects transferred to the elected members and was to act under the control and directions of the Secretary of State.

The Act of 1935 was the most advanced Act so far British Parliament made for Indian, completing profound base for Indian constitution but again far from satisfactory to Indian aspirant of independent India. In the Act Indians were not given control over government of India. In September 1939 when World War II broke out, the British Government declared India a belligerent country without consulting Indian Leaders. The working Committee of Congress objected that the issues of war and peace must be consulted with the people of India. The committee asked Government to clear their war aims, in regards to democracy and imperialism and the new order which can be envisaged after the termination of war.⁶⁴⁾ In response to this Lord Linthgo the than Governor General and Viceroy of India stated

“....at the end of the war they will be very willing to enter into consultation with representatives of the several communities, parties, and interests in India,

63) Main Fetures of Government of India Act 1935:-

1. Established of an All India Federation of the Provinces in British India and Princely states.
2. Introduced bicameral federal legislature
3. Representatives of the Princely states to be elected by their rulers.
4. Abolition of Diarchy at provincial level and provincial Autonomy was introduced.
5. 14% of the population was now having right to vote. Appointment of Governor General and Governors by British. Special Powers to Governors.
6. Principle of Separate Electorates which were introduced by the Act of 1909.
7. Act established Federal Court as supreme Court of Judicature in India
8. Creation of Sind and Orissa. The federal part of this act was never introduced. However, the provincial part came into being on 1st April 1937. The federal part came in existence after indepenence.

64) V. D. Kulshreshtha p. 342

and with the Indian Princes, with a view to securing their aid and co-operation in the framing of such modifications as may seem desirable.

I have, I trust, in what I have just said, made clear that the intention and the anxiety of His Majesty's Government is, as stated in the Instrument of Instructions to the Governor-General, to further the partnership between India and the United Kingdom within the Empire to the end that India may attain her due place among the great Dominions.”⁶⁵⁾

Lord Linlithgo in January 1940 gave general assurance based on the complexity of the Indian problem with special reference to lack of unity among the different communities and the consequent inability of British Government to divest themselves of their responsibility for the welfare and good government of the people of India. Looking into progress of War, Hitler's astounding success and the fall of Belgium, Holland and France put England in a conciliatory mood.⁶⁶⁾ This was the time when major developments taking place which started consolidating ideal situation of a modern and free country. For the first time, the inherent right of Indians to frame their constitution was recognised and the Congress demand for a constituent assembly was conceded. Dominion status was explicitly offered.⁶⁷⁾ The British Government hoped that all the parties and communities in India would co-operate in India's war efforts and by thus working to-gather pave the way for India's attainment of free and equal partnership in the British Commonwealth of Nations.⁶⁸⁾

However Congress rejected the August Offer. Nehru said, “Dominion status concept is dead as a door nail “ and according to Gandhi san “ the declaration had widened the gulf between the nationalists and the British rulers” The deadlock in Indian policies was continuing due to the refusal of the Congress to cooperate.⁶⁹⁾ Meanwhile victories of Japan in ongoing II World War created new situations expressing political mellowness of British to deal colonial issues. Britain was now desperately anxious to have full and active cooperation of India, not only to halt

65) October Offer, Statement by the Viceroy, Lord Linlithgow, on ‘War Aims ’ and ‘War Effort’, 18 October 1939’, http://www.houseof david.ca/in_o_off.htm, visited on 29-10-2015

66) August Offer, <http://www.yourarticlelibrary.com/history/august-offer-1940-by-viceroy-of-india-lord-linlithgow/23707/> visited on 23-11 2015

67) August Offer, <http://www.yourarticlelibrary.com/history/august-offer-1940-by-viceroy-of-india-lord-linlithgow/23707/>, visited on 24-9-2015

68) M.P. Jain, p 592

69) V.D. Kulshreshtha, p. 344

the Japanese advance but overall war efforts. To secure this cooperation Britain felt that India had to be offered some firm promises for the future and fuller measures of self-government for the present.⁷⁰⁾ After careful consideration, the British Government sent Cripps, a brilliant lawyer, an avowed socialist, an intimate friend of Nehru to India. Cripps had long been a serious student of the Indian question and had the reputation of being favorably disposed to Indian aspirations came to India in March 1942 to begin constitutional negotiations. At the external side, Indian opposition to British rule during the war came from Subhas Chandra Bose, formerly a member of Congress who opposed Gandhi's non-violent approach later formed the 'Forward Bloc' who was more militant in its approach to achieve independence. When War broke out in 1939, Bose declared his support for the Axis powers.⁷¹⁾ Bose's Indian National Army (INA), drew its cadre from Indian POW's in Japanese camps and fought along with Japanese forces on India's eastern front.⁷²⁾ The Fall of Singapore and advancement of Japanese troop from Malaya to the eastern part of India deepened the concern of India's safety and Japan even attacked Calcutta. Though it is debatable as historically it is not accepted but BBC World War II memories, Mrs. Katyun Randhawa narrates;⁷³⁾

"I remember the bombing of Calcutta by the Japanese, the target being Howrah Bridge..... Not far from our house was an Ismaili Religious Centre — called "Jamaat Khana" — it had been bombed — 2 cows had been killed. There was broken glass and shrapnel everywhere.

*The bombing of Calcutta led to an exodus of residents — Howrah and Sealdah Stations being packed with people trying to get out. Some of our street hawkers also disappeared — we never saw our bread delivery man again."*⁷⁴⁾

These all international developments cumulatively affected the ongoing process of making of Indian constitution which is the major variables indicator of modernisation of legal system. Though declaration of the mission were rejected by

70) Bipin Chandra, *Freedom Struggle*, National Book Trust, India, ISBN 978-81-237-0249-0, 1994, p. 206

71) [://www.skillspace.com/DigitalLocker/Assets/View/E8BC2243-4789-4785-B217-8623DA619FD3/0/wwii](http://www.skillspace.com/DigitalLocker/Assets/View/E8BC2243-4789-4785-B217-8623DA619FD3/0/wwii)

72) <http://www.susmitkumar.net/index.php/hitler-not-gandhi-was-the-reason-for-the-1947-indian-independence>

73) The Bombing of the Calcutta by Japanese, BBC UK, <http://www.bbc.co.uk/history/ww2peopleswar/stories/50/a5756150.shtml>, visited on bnbbbn

74) Ibid

all the parties on different grounds however the significant outcome of the Mission was plan for establishment Constituent Assembly for framing Indian Constitution was begin. The failure of the Cripps mission followed by Revolt of 1942, the Quit India Movement. The British withdrawal from Malaya, Singapore and Burma had been followed by total collapse of resistance and surrender to Japan was total and abject⁷⁵⁾ Gandhi-san and Congress leaders were anxious that what had happened in Malaya and Burma should not be repeated in India.⁷⁶⁾ The people reacted in panic when faced with military aggression. The summer of 1942 found Gandhi-san in strange and uniquely militant mood.⁷⁷⁾ He repeatedly urged British- leave India to God or to anarchy, Gandhi san said

“This orderly disciplined anarchy should go, and if as a result there is a complete lawlessness I would risk it.”⁷⁸⁾ If the Britishers withdraw, “Japanese would be bound to reconsider their plans.”⁷⁹⁾

Consequently Quit India resolution was passed in Bombay session of Congress on August 8 1942 followed its call of mass struggle on the principles of non violence on the widest possible scale. All major leaders of India were arrested including Gandhi- san. This movement was violently suppressed by the Government.⁸⁰⁾ Thus deadlock in the constitutional development continued up to 1944 when Gandhi-san was released. In order to ease the political situation Gandhi -san began the negotiation with Lord Wavell, the than Viceroy of India. The conference was called at Shimla⁸¹⁾ on June 25, 1945 under the presidentship of Lord Wavell. Wavells plan were inclined towards active constitutional reforms but was dividing India on religion, class and community basis to carry discussion on Constitutional reform. This became major hurdle in the way leading to it failure. At the same time Muslim league did not cooperated in plan, made clear that Pakistan issue gain importance and the congress realized that it could not prevent its formation.⁸²⁾

75) Bipin Chandra, 208

76) Ibid, p. 209

77) Sumit Sarkar, Modern India 1885-1947,

78) Linlithgow to Amery, reporting Gandhi's press interview of 16th may, Mansergh, Vol. II, p, 96

79) Harijan Article, May 3, 1942

80) V. D. Kulshreshtha, p 344

81) A City in north India

82) V.D. Kulshreshtha, p. 344 also visit for details, B.L grover p. 418-419 and Bipin Chandra 214-217

After the Revolt of 1942 up to the end of the World War II there was scarcely any political activity in India but when the British Government announced their decision to prosecute some of INA with charges of treason as they had broken their oath of loyalty to the British Crown.⁸³⁾ Not only Congress but almost the entire political leaders of the country was opposed to the trials and expressed themselves empathatically in favour of releasing the INA officers. The Congress set up an INA Defense Committee which consisted of such eminent lawyers as Bhulabhai Desai, Tej Bahadur Sapru, Kailashnath Katju and Asaf Ali.⁸⁴⁾ These national leaders who were also eminent lawyers and forms the first generation of pre independent Jurist of India stood up to defend INA officers in the Historical Hall of Delhi's Red fort. The INA Trial is an exemplary reflecting the mastery of Indian Lawyers in English System of law which proves modern law is not only got rooted but became familiar and absorbed well among Indian Legal practitioners.⁸⁵⁾ The INA trial had proved, politically conclusively that the nation was no longer in a mood to put up with repression or be satisfied with vague and repeated promises of Constitutional Government. The World War had completely changed the position and power of Britain in the world.⁸⁶⁾ The Soviet Union and US emerged as the new and bigger powers and both were in favour of Indian independence. These all internal and external developments were clear alarms that the British Raj is on the verge of its end in India. Therefore, British decided to transfer the power to India and to work out the details, sent a Cabinet Mission to India. The main objective of the Mission were to devise a machinery to draw up the constitution of Independent India make arrangements for interim Government. Thus the mission was like a declaration of India's independence. The British Prime Minister, Clement Atlee, announced on 20 February, 1947 that the British would transfer power to India latest by June 1948. As a result Lord Luis Mountbatten was sent to India as Viceroy to transfer of Power. It was decided that India would become free on 15th August 1947 but the Country would be

83) Bipin Chandra, p. 216

84) Ibid, p 217

85) To clarify here the author did not mean that it is only the INA Trial which expresses the legal mellowness of Indian layers but to give an idea of legal maturity India have achieved on the eve of its Independence. Following the Consequence of the trial in brief author informs to its readers that the Court Martial held all the accessed guilty and they were convicted. But the public opinion was so emotionally charged that the Government had to surrender. The sentences were suspended and INA officers set free.

86) Bipin Chandra, p 217

partitioned.⁸⁷⁾ India was getting free after 190 years of the colonial rule but the pride and the joy in the achievement of freedom by diluted by the pain of the sadness partition and consequences of Partition. The establishment of Indian Rule and rule of Law i.e. Constitution paid the huge cost, which is difficult to quantify. After all this miseries and struggle the nation was not despondent. With the self-confidence faith and hope, India began to march forward to meet the challenges of free India by working hard to provide a strong democratic constitutional framework and led new journey with modernised law under Indian supreme law by enacting, adopting and given itself new Constitution on 26th day of January 1950. India is living in modern law with firmly established principles of Rule of Law Independence of law with rights of self governance.

Concluding Remarks

The process of MoL can be identified with the dates and Acts as certain episode or landmark events, setting the graph of MoL. However dates and Act cannot be presented in isolation, hence principles of cause and effect cannot be ignored. While tracing the process of MoL it is found that there were independent as well as dependent variables of law and historical events collectively contributed in the process.⁸⁸⁾ It was Queens Charter of 1600 and consequent Charters or Firman of Jahangir and grants of local rules, which led the humble beginning of the MoL, however the contribution of East India Company and difficulties which native faced in the period of transition of law cannot be disregarded while making

87) There were series difference between two leading parties of Indian Congress and Muslim League to finalise the transfer of power, Lord Mountbatten worked out a compromise plan and also brought forward the date for the transfer of Power by more than a year. It was decided India will be freed but the two countries will be made one India and second Pakistan. This is all together different and important development contemporary to the modernisation process hence author is not much focusing on it.

88) Law as the dependent variable. This genre tries to explain why societies have the laws they do and why laws change over time. Early economic analysis tended to assume that law was efficient, while later scholars have usually adopted more realistic models of judicial and legislative behavior that take into account interest groups, institutions, and transactions costs. Law as an independent variable. Studies of this kind look at the effect of law and legal change on human behavior. Examples include analyses of the Glorious Revolution, legal origin, and nineteenth-century women's rights legislation. For details please refer, Daniel M. Klorman, *Economic Analysis of Legal History, USC CLASS Research Paper No. 14-15*, April 8, 2014, <http://law.bepress.com/cgi/viewcontent.cgi?article=1249&context=usclwps-lss>, visited on 23-11-2015

assessment on introduction of English Law in India. Role of British Parliament and rise of Indian Nationalism along with modernisation of education and administration are found other and very important independent variables of law leading to MoL in 19th and 20th centuries India. MoL was found more of a prize conjecture, demand and supply game between India and British. When India demanded partially legal enactment were made to meet the demands of nationalist. Surprisingly, on the eve of MoL process World War II and Japan's indirectly contributed in the Constitutional developments, this is found as evidently striking feature during the research. Japan's victories and penetration into eastern part of India contributed immensely in India's independent and establishment of Constitutional form of Government. The series of events which took place in the World War II from 1940-42 immensely supported ongoing war of Independence of India where Gandhi-san expressly saying about the Japan threat due to colonial rule.

In the 21st Century along with world India also entered into the era of High/ Ceber modernity India is one among the fastest growing economy of the world have and profound and advance legal system. At the same time various acts and ordinances first introduced by the British are still in effect in modified form today. The first stage of MoL is achieved as an outcome of Independence struggle but establishment of law as instrument of social change, further benefit to the society towards its betterment is need to be crystallize. This can be achieved when implication of modern law will also become more visible. Author hereby conclude with the words of Dr. B.R. Ambedkar, the maker of Indian Constitution on importance of law to sustain modernity in society as *"So long as you don't achieve social liberty, whatever freedom is provided by the Law is of no avail to you"*

