

The Indian Legal System

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The first thing anyone should know about the Indian legal system is that it has one of the, if not the longest, written constitutions in the world. This came into force on 26th January, 1950. It was prepared by the Constituent Assembly which consisted of about 300 members. A Drafting Committee was set up from among its members with Dr. B. R. Ambedkar as the Chairman of this Committee. While all the articles were discussed and debated in the Constituent Assembly it was the Drafting Committee which had the largest share of the work of drafting the Constitution. It is a flexible Constitution and as a consequence has been amended 94 times in the last fifty seven years since it came into force. There is only single citizenship in India. It provides for an independent judiciary. The Supreme Court is the highest Court of the land and judges of the Supreme Court and the various High Courts are appointed by the President of India in consultation with the Chief Justice of India and other judicial authorities. The doctrine of judicial review is implicit in the Constitution. The Constitution represents the aspirations of the people of Independent India.

Two hundred years of colonial rule in the Indian subcontinent brought about several changes in various fields – be it the economy, society, the political institutions or the legal system. It completely transformed the laws and the legal system in the region. A few of these changes were brought about inadvertently, mostly due to ignorance regarding the nature of the laws and the legal system followed by the people in the that the British went on to rule. This was especially so with reference to the laws relating to marriage, inheritance, succession etc. Thus, if one were to identify the three most important characteristics of the Indian legal system then I would say that they are firstly, the fact that we follow the common law system, secondly, the codified laws and the thirdly the personal laws or the lack of a civil code.

From the time that the British began to administer the territory that they acquired in 1764 they inadvertently began to change the law and the administration of justice. Later developments in the subcontinent were, however, much more conscious. All these developments went on to influence the Constitution of India as also her legal system. English Law was introduced initially through the application of the principles of justice, equity and good conscience, as interpreted by the English judges and through the decisions of the Privy Council in England. Later through the codification of the various laws and procedure English law was imported into the subcontinent and thus one will find a great deal of similarity in the criminal law and procedure of the countries in the South Asia region even today. And also find similarities between many of the laws and the legal systems in this region and those of other Commonwealth countries. As a consequence decisions of the English and American courts are cited and used in many cases decided by the Supreme Court of India.

The next important influence of Colonial rule to be still found in India is that virtually

all the laws are codified in one form or the other. Most of these were codified during colonial rule and continue to be the law even today while a few others were amended and subsequently replaced by new statutes, like the Criminal Procedure Code, 1973 (1862). The various codified enactments are the Indian Penal Code, 1860, Indian Evidence Act, 1872, The Indian Contract Act, 1872, The Transfer of Property Act, 1882, The Civil Procedure Code, 1908, The Negotiable Instruments Act, 1881, etc. This process of codification was not of the prevailing laws in the Indian subcontinent, but of the English laws. Though there were local laws relating to commercial topics, contract in general or civil wrongs and the Hindu and Muslim laws of evidence, the British during the course of the nineteenth century either ignored the prevailing law or abolished them and introduced English law through the process of codification. Thus, one will again see a great deal of similarity between these laws and the English law as a consequence.

The third most drastic change was in the area of personal laws. The British administrators presumed that the laws relating to marriage, inheritance, succession etc. were derived from the religious texts of the people, instead of customary practices in the different regions and as a consequence laws that were prescribed about a thousand years ago, particularly for upper caste “Hindus”,⁸¹ were codified and uniformly applied to all “Hindus”, while the Quran and more specifically a legal text like the *al-Hedaya* was applied to everyone categorized as Muslims.⁸² As a consequence in the course of administering justice for the people of this region they inadvertently not only changed the identities of the people but also changed the very laws that were actually in force, viz., customary law and instead brahmanised the law for all non muslims and non Christians while they enforced the sharia law on all muslims, irrespective of the practices followed by the various communities based on their historical development. Thus, even today, there is no one civil law that governs marriage, inheritance etc. Instead each religious community is governed by a set of codified laws for these matters. As a consequence even today the so called personal law in India is still presumed to be derived from the religious texts of the communities that exist in India, viz., the Hindus, the Muslims, the Christians and the Parsis. There is no Uniform Civil Code, though there is the Special Marriage Act which is the civil law available, if one chooses to be married under it.

⁸¹ The British administrators, especially Warren Hastings, the then Governor General of Bengal, assumed that the customary law was derived from the dharmasastra and therefore directed the judges to refer to only what these texts provided for. In the words of the provision, “In all suits regarding inheritance, marriage, caste and other religious usages or institutions, the laws of the Koran with respect to Mohammedans and those of the Shaster with respect to the Gentoos shall invariably be adhered to.” This passage became law as s. 27 of the Regulation of 11 April 1780. J. Duncan M. Derrett, “The administration of Hindu Law by the British” in *Comparative Studies in Society and History*, Vol. 4. No. 1 (Nov., 1961), p.24

⁸² Hindu is a category that the colonial administrators created, transforming the very identities of communities through the application of codified laws and judicial decisions. This is very clearly brought out by Amrita Shodan in her work, *A Question of Community: Religious Groups and Colonial Law* (Samya, 2001, Calcutta). See also Michael R. Anderson, “Islamic Law and the Colonial Encounter in British India” in *Institutions and Ideologies*, David Arnold and Peter Robb, (eds.), London, Curzon Press, 1993.

Apart from these developments, in the context of India today some of the most critical issues before the Government and thus, the judiciary, are the questions of delay in justice because of the backlog of cases. As an example, just in the Supreme Court of India itself, there was a backlog of over 10,000 cases at the beginning of this year. The Judiciary has sought to remedy this position by computerizing the courts and by setting up fast track courts, first in the criminal justice system and now in the civil justice system as well. In the pre-colonial days the administration of justice was not based on adversarial system, but on an adjudicatory process that sought through arbitration and negotiation to bring about a compromise. This was available at the local level and did not involve distance or financial expenses as the present system involves. Another reason for the backlog of cases is the fact that all judicial appointments have not been made. There are several vacancies at all levels of the judiciary.

Secondly, is the question of access to justice for various marginalized groups like women, the dalits, tribals etc. Though there is provision for legal aid in the Constitution itself and The Legal Services Authorities Act 1986, the marginalised groups either lack the awareness of the law and their rights or are ignorant of the mechanisms through which they can access justice and as a consequence except for interventions through Art 32 of the Constitution through filing of writ petitions⁸³ by organizations or groups most marginalised communities have not been able to avail of the rights granted to them in the Constitution leading to a sense of hopelessness and frustration. The Legal Aid Boards in many of the States and a few of the law colleges regularly conduct legal awareness programmes and try to even provide some legal aid through their legal services clinics. When I speak of access to justice I am referring to the two parts to it, one is the investigation and the other is prosecution of the case itself. What we find in the context of India is the inherent biases of caste, class, gender, religion etc which come in the way of the investigating officers registering the cases filed by members of these marginalised groups and in the context of investigation resulting in low levels of conviction in cases from these groups. As a consequence in recent days there has been the very uncomfortable trend in one of the states of people taking justice into their hands.

A third critical issue before the judiciary today is the issue of social justice, a mandate of the Constitution, an eg., is the gender imbalance in the judicial system and in the administration of justice. In over fifty years of the Supreme Court's existence there have been only three women judges, similarly in the High Court of Karnataka, in about fifty years since the High Court was established there has been only one woman judge, despite the fact that there are over 13,000 women lawyers in the State. In the context of globalisation and privatization which was initiated in the 1990's this is one of the pressing concerns given the widening gap between the haves and the have-nots. Given that the current economic policy is not in keeping the provisions of Part IV of the Constitution which provides guidelines aiming to provide social and economic

⁸³ The Supreme Court through its decisions in these public interest litigations has been reading into the fundamental rights, like the right to life, certain basic socio-economic rights like right to clean water, environment, education etc M.C. Mehta v. India AIR 1988 SC 1037; Mohini Jain v. Karnataka, AIR 1992 SC 1858

justice we find a recent trend of the Supreme Court which is in keeping with the state's policy rather than with the Directive Principles of State Policy. Though originally and for a long time as I have mentioned in the earlier paragraph it was through the Supreme Court's interpretation and intervention that social justice was actually carried out.

Law and the Legal system being seen as the means by which justice and equality can be achieved in a liberal democratic society these new trends are obviously matters of concern for all well meaning members of civil society in India. Increasingly there has been the suggestion to decentralize the justice administration system and revert to a modified version of the precolonial justice system.