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PRESENT INDIAN JUDICIERY: STAGES OF DEVELOPMENT

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ABSTRACT

Judicial system in any part of the globe does not operate in a vacuum. It involves the process of deciding what is just in a controversy between two or more contending parties. The administration of justice has a social function and the judicial process is only a part of the larger social process. Though the Indian Judiciary has been honest and independent in the performance of its duties as regard to the executive control and influence in ancient, medieval and modern times, under the changing socio-economic-politico situations in the country people have higher expectations from the judiciary. In the event of poverty and illiteracy, its challenging task is to ensure justice to all. The entire system of governance is based on the principle of equal justice for all. Under the present Constitution the position of judiciary has been made doubly secure so that it can become in reality the most impartial arbiter of the conflicts and controversies which fall within its jurisdiction. The Constitution of India is supreme legal document of the country. There are various levels of judiciary in India-different types of courts, each with varying powers depending on the tier and jurisdiction bestowed upon them. Thus, in the Constitutional scheme, the judicial system works as an active catalyst to secure justice for every citizen. It acts as the engine of social welfare to secure justice in the various spheres of life.

KEYWORDS: *Indian Judiciary, Ancient, Medieval, British East India Company, Administration.*

Judicial System in Ancient India

India has the oldest judiciary in the world and we find a true and correct picture of legal system of ancient India in the original/religious texts of the time. On the basis of texts, it has been discovered that Indian Jurisprudence was founded on the rule of law, that the King himself was the subject to the law; that arbitrary power was unknown to Indian political theory and jurisprudence and the king's right to govern was subject to the fulfilment of duties the breach of which resulted in forfeiture of kingship; that the judges were independent and subject only to the law. The disputes were decided essentially in accordance with the same principles of natural justice which govern the judicial process in the modern State today. Even at that time in criminal cases the accused could not be punished unless this guilt was proved according to law while in civil cases the trial consisted of four stages like any modern trial-plaint, reply, hearing and decree. The decrees of all courts except the king were subject to appeal or review according to fixed principles; the fundamental duty of the court was to justice without favour or fear. For instance, the legendary book Mahabharata, mentions, 'A King who after having sworn that he shall protect his subjects fails to protect them should be executed like a mad dog. Likewise in a further description, it is said, 'the people should execute a king who does not protect them, but deprives them of their property and assets and who takes no advice or guidance from any one. Such a king is not a king but misfortune.(Dhawan,p01)

There was no relaxation but a complete system of judiciary we witness in the times of Mauryan Empire and Kautilya describes the duties of a king in the Arth-shastra, 'In the happiness of his subjects lies the king's happiness, in their welfare, his welfare; whatever pleases him he shall not consider as good but whatever pleases his people he shall consider to good. According to the *Arth-shastra* the realm was divided into administrative units called Sthaniya, Dronamukha, Khrvatika and Sangrahana, equivalents to the modern concept of districts, tehsils and parganas. Sthaniya was a fortress established in the centre of eight hundred villages, a dronamukha in the midst of 400 villages, a kharvatika in the midst of 200 villages and a sangrahana in the centre of ten villages. Law courts were established in each sangrahana and also at the meeting places of districts. The court consisted of three jurists (dharmastha) and three ministers (amatya). The ancient list of jurists included the names of Manu, Yajn-

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valkya, Katyayana, Brihaspati and others. According to Brihaspati Smiriti, there was a hierarchy of courts in ancient India beginning with the family courts and ending with the king. The lowest was the family arbitrator. The next higher court was that of the judge; the next of the Chief Justice who was called Praadivivaka or adhyaksha; and at the top was King's court. The decision of each higher court superseded that of the court below.(Ibid, p2) It was almost similar to today's judicial system of India which consists of a hierarchy of courts organised on the same principle- the village courts, the Munsif, the civil Judge, the District Judge, the High Court, and finally the Supreme Court which takes the place of King's Court.

In course of time a full-fledged judicial hierarchy was created which relieved the king of much of the judicial work, but leaving untouched his powers as the highest court of appeal. But despite this there was no compromise on the integrity and quality of justice. The concept of integrity was given a very wide meaning and the judicial code of integrity was very strict as Brihaspati says,'A judge should decide cases without any consideration of personal gain or any kind of personal bias; and his decision should be in accordance with the procedure prescribed by texts. In the procedure a trial had to be in open court and judges were forbidden to talk to the parties privately while the suit was pending because it was recognised that a private hearing may lead to partiality. According to Sukra-nitisara there are five causes-attachment, greed, fear, enmity and hearing a party in private which destroy impartiality and lead to judges taking sides in disputes. Kautilya was also of the view that suits should be heard by three judges. Even our present judicial system created by the British, does not follow this excellent safeguard. Today every suit is heard by a single Munsif or Civil Judge or District Judge for reasons of economy. In view of the vital part played by custom in society, the state was required to maintain an authenticated record of the customs observed in the various parts of the country.

Medieval Period

In the medieval India in which the country was divided once more into small kingdoms, the political instability did not result in any change in the judicial system that has taken roots during the preceding thousands of years. The standards and ideas of justice were maintained in each kingdom in spite of political divisions, the unity of civilization was preserved, and the fundamental principles of law and procedure were applied throughout the country. However, the establishment of the Muslim rule in India opened a new chapter in our judicial history. The Muslim conquerors brought with them a new religion, a new civilization and a new social system. The ideal of justice under Islam was one of the highest in the middle ages. The Prophet himself set the standards and said in the Quran, 'Justice is the balance of God upon earth in which things when weighed are not by a practice less or more. And He appointed the balance that he should not transgress in respect to the balance; wherefore observe a just weight and diminish not the balance.'(Rose,p12) This high tradition reached its zenith under the first four Caliphs. The first Qadi was appointed by the Caliph Umar who enunciated the principle that the law was supreme and that the judge must never be subservient to the ruler. No Sultan felt secure for a long time. One dynasty was replaced by another within a comparatively short period and the manner of replacement was violent. Consequently the quality of justice depended very much on the personality of the sovereign. Thus, during the Sultanate, Islamic standards of justice did not take root in India as an established tradition unlike the judicial traditions of ancient India which had struck deep roots in the course of several thousand years and could not be uprooted by political divisions.

Under the Mughal Empire the country had an efficient system of government with the result that the system of justice took shape. In this period the unit of judicial administration was under Qazi- an office which was borrowed from the Caliphate. Every provincial capital had its Qazi and at the head of judicial administration was the Supreme Qazi of the empire. In addition, every town and every village large enough to be classed as Qasba had its own Qazi. In theory, a Qazi had to be 'a Muslim Scholar of blameless life, thoroughly conversant with the prescriptions of the scared law.(Encyclopedia of Islam, p606) On the appointment of a Qazi, he was charged by the Impeial Diwan in the words like, 'Be just' be honest, be impartial. Hold trials in the presence of the parties and at the court house and the seat of Government. Do not accept presents from the people of the place where you serve, not attend entertainments given by anybody and everybody. Write your decrees, sale deeds, mortgage bonds and other legal documents very carefully, so that learned men may not pick holes in them and bring you to shame. Know poverty to be your glory'. But due to lack of supervision and absence of good tradition, these noble ideals were not observed. In spite of this there is overwhelming evidence that all the Emperors from Akbar to Aurangzeb took their judicial function seriously and discharged their duties. Jahangir made a

great show of it and his Golden Chain has become famous in history.

Unlike the British the Mughals failed to make a long-term impact on the existing judicial system of India. No Indian Emperors or Qazi's decisions was ever considered authoritative to lay down a legal principle to elucidate any obscurity in the Quran or supplement the Quranic law by following the line of its obvious intention in respect of cases not explicitly provided for by it. Hence it became necessary for Indian Qazis to have at their slbow a digest of Islamic law and precedent compiled from the accepted Arabic writer Muslim law in India was, therefore, incapable of growth and change, except so far as it reflected changes of juristic thought in Arabia or Egypt. However, the Mughal judicial system has left its imprint on the present system and a good part of our legal terminology is borrowed from it. Our civil courts of first instance and called Munsifs, the plaintiff and the defendants are termed Muddai and Muddaliya and scores of other legal terms remind us of the days. After the conquest of Bengal by the British the process of replacement of the Mughal system of justice by the British began but it took a long time to be established.

British India and Judicial System

The present judicial system of India is at large a part of the inheritance India received from the British after more than 200 years of their colonial rule and the same is obvious from the many similarities the Indian legal system shares with the English legal system. Earlier Muslims came to India when they conquered Sindh in 712 A.D. The Delhi Sultanate came into existence in 1206, when Qutubuddin Aibak of the Slave dynasty became the first independent Sultan of Delhi. From 1206 to 1526 five different dynasties- the Slaves, the Khaljis, the Thughluqs, the Sayyids and the Lodhis ruled India. The Mughal dynasty was established in 1526 and continued till 1857, it was in decay since the death of Aurangzeb Alamghir in 1707. The foundations of the British Empire in India was laid down by East India Company which was organised to further British interest in overseas countries. The representative of the Company arrived in India in 1604 and by the 1661 the Company had factories in Surat, Madras and Bombay.(Junaid,retrived from www.academia.edu/.../judicial-system-o.) The Company delivered justice arbitrarily which could be called as ‘trader's justice' because the Company's officials were all traders and had no knowledge of law. However, after its coming the East India Company slowly and gradually started interfering in the local justice system by acquiring revenue collection of 38 villages in 1717 near Calcutta. Soon the Company also acquired the administration of justice in the areas under its control and the role of Muslim qazis and judges was over. Company's officials became judges without any formal training and at the time the Privy Council was born as the highest court of appeal.

Further after the battle of Plassey, the Company installed Mir Zafar as the Nawab of Calcutta who ceded the Zamindari of the 24 Parganas to the Company which now controlled 800 square miles of area called ‘moffussil'. The Company provided the adalat system for the administration of justice in the moffussil. The 1772 plan provided for a moffussil Diwani Adalat in each district with collector as judge to decide civil cases. For Muslims the court was to apply the Quran while for Hindus it was applying Shaster. The Regulations of 1793 referred to Hindu law and Mohammedan laws instead of Quran and Shaster. In case of Muslim cases the collector was to be advised by the Qazi while in case of Hindus, by a Pandit. In an important decision on December 3, 1790 the Criminal justice system was taken from the Muslim Qazis, Muftis and Maulvis and was given in the hands of the Company's English servants. The Regulation Act of 1773 authorised the Supreme Court in Calcutta to enrol English, Irish and Scottish attorney at law.(Ibid p11) Likewise in1793 Cornwallis created a regular profession authorising the Sadar Diwani Adalat to enrol pleaders or vakeels, both Hindus and Muslims for all Company's courts. The 1857 war of independence changed the fate of India. The Bill of 1858 gave all territories in the possession or under the government of the East India Company to the Crown. However, before the take-over by the Crown the East India Company done the ground work for the colonisation of the subcontinent. The British rulers changed the whole administration of country especially the law and justice. The British East India Company established a system of courts in each of the three Presidencies. The types of courts and their jurisdiction varied from Presidency to Presidency, until the Crown replaced the Company's administration and greater uniformity in the entire judicial structure became possible. In nutshell, the judicial conditions during the prolonged period of 17th and 18th century in British India was taken up as a solemn effort, paving the way for future law developments.

The system of administration of justice and laws as we have today is the product of well thought out efforts of the British Government. No less than four law commissions and other committees were appointed during

the years 1834 to 1947 to give shape to the system. Administration of justice is one of the most essential functions of the state.(Sharma,1988,p170) If men were gods and angels, no low courts would perhaps be necessary though even then the skeptics might refer to quarrels among gods, particularly in the context of goddesses. As it is we find that though man may be a little lower than the angels, he has not shed off the brute. Not far beneath within the man, there lurks the brute and the brute is apt to break loose on occasions. To curb and control that brute and prevent degeneration of society into a state of tooth and claw, we need the rule of law. We also need the rule of law for punishing all deviations and lapses from the code conduct and standard of behaviour which the community speaking through its representatives has prescribed as the law of the land. Being human disputes are bound to arise amongst us. For the settlement of these disputes, we need guidelines in the form of laws and forums to redress the wrongs in the form of courts. Laws and courts have always gone together. There is a close nexus between them: neither court can exist without the laws or laws without the courts. The judicial system deals with the administration of the laws through the agency of the courts.

The British rule in India introduced a more or less unified legal system in the continent, which may be considered a major step in the globalisation of laws. The quarter of a century following the takeover by the Crown the governing of India from East India Company in 1858 was the major period of codification of law and consolidation of the court system in India. During this period a series of Codes based on English law were enacted which were applicable throughout British India. By 1882, there was virtually complete codification of all fields of commercial, criminal and procedural law, except some aspects of personal law. In the context initially, the British Administration of Hindu law elevated Brahminical textual law over the customary law that was practiced by Indians. To prevail over the written law in British courts a custom must be proved to be immemorial or ancient, uniform, invariable, continuous, certain, notorious, reasonable, peaceful obligatory and it must not be immoral to an express enactment or to public policy.(Mark,1994,p15-99) On the basis of the above criterias and with the help of local leaders like Veereshalingam Kandukuri of Andhra and Raja Rammohan Roy of Bengal encouraged social reform and established firmly British-Indian law much against the local law. As a result the new British-Indian law, in contrast to the earlier allowed divorce and remarriage, prohibited child marriages and banned the practice of Sati. But slowly the Brahminical law was completely ignored and dependence on the judicial precedent and legislation took over the legal system.

Thus, from the earliest India has a wide system of caste, kinship, religion, economic activity or land tenure, but now there is an all- India legal system which handles local disputes in accordance with uniform Indian standards based mainly on common law. The new legal system provides machinery and the ideology for legislation to be enforced throughout the continent. In opposite, today the government usually does not make any laws to reform Muslim Personal law for the fear of hurting the sentiments of Muslims, thereby hurting the political future of the government. Even the judiciary's intervention into affairs of Muslims is considered violation of minority rights. This pampering of minorities by politicians for votes has its impact on modernisation of Islamic personal law.(Robert,p15) But the British system of law made possible unprecedented consolidation and standardization of the Indian societies in general and provided a unifying element in India in a way that neither Brahminical nor Muslim law ever did. Likewise, in the matter of succession and other allied matters, the parties were left to be governed by the personal. Although the impact of the English common law was perceptible in the codified law of India departure from the common law was also made whenever, it was considered, necessary, to local needs.

REFERENCE

D. Ross (ed.), *Fakhr-ud-din Mubarak Shah*

Encyclopaedia of Islam, Vol.II,

Junaid Iqbal Awan, 'Judicial System of East India Company', also available on www.academia.edu/.../judicial-system-o.

Mark Galanter(1999), *Law and Society in Modern India* ,Newyork: Oxford University Press,

S.D.Sharma(1988), *Administration of Justice in Ancient India* ,New Delhi: Harman Publishing House,

Translated from the Sanskrit Sloks of Mahabharata as quoted in Justice S.S.Dhavan's article, *'The Indian Judicial System:A Historical Survey'*, also available on www.allahabadhighcourt.in.