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Legacy of Indian judicial system with prominent emerging trends

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Abstract
History comprises of the growth, evolution and development of the legal system in the country and sets forth the historical process whereby a legal system has come to be what it is over time. The legal system of a country at a given time is not the creation of one man or of one day but is the cumulative fruit of the endeavour, experience, thoughtful planning and patient labour of a large number of people through generations. In this paper, I am highlighting the legacy of the judicial system in India with the emerging trends that has become a part and parcel in the life of a common people in India with a hopeful eye towards gaining justice.

Keywords: Historical growth, Judicial review, Judicial activism, Judicial accountability

Introduction
History comprises of the growth, evolution and development of the legal system in the country and sets forth the historical process whereby a legal system has come to be what it is over time. The legal system of a country at a given time is not the creation of one man or of one day but is the cumulative fruit of the endeavour, experience, thoughtful planning and patient labour of a large number of people through generations.
With the coming of the British to India, the legal system of India changed from what it was in the Mughal period where mainly the Islamic law was followed. The legal system currently in India bears a very close resemblance to what the British left us with. As per the needs of the changing times changes and amendments were made, but the procedure which is followed not has its roots in the era of British-India. Little did the traders of the English East India Company while establishing their trades in India know that they would end up establishing their rule for about 200 years here. But the evolution of law as it is today did not come about in one go altogether. It was the Presidency Towns individually that were first affected by this change in hands of the governance of India after which the steps towards amalgamation of the judicial system were taken by the Charters of 1726 and 1753. To improve upon this, under the Regulating Act of 1773 Supreme Courts in the Presidency Towns and then under the Act of 1798 the Recorder's Courts at Madras and Bombay were established. These were ultimately replaced by the establishment of the High Courts under the Act of 1861, which are still running in the country. It was only after independence in 1950 that the Supreme Court was established. Reforms and codifications were made in the pre and post-independence eras and are still continuing. Thus law, as we know today has evolved through a complex procedure which is discussed in detail herein below.

Ancient Period: India has a golden history of over 5000 years. Therefore a comprehensive study of Indian legal history comprises of the historical process of development of legal institutions in Hindus and Muslim periods.

Medieval Period: The charter of 1600 established the English East India Company in India. as per the charter of 1661 the English and the Indians residing under the Company came under its jurisdiction. From the period ranging from 1661 till 1726, laws of equity and justice in conformity with the laws in England were followed. There was no codified law. In Calcutta, the judicial system was based on the Company's authority as a zamindar. This continued till the charter of 1726 was passed. Before Madras attained the position of a Presidency in 1665 it had two courts namely, the Choultry Court and the Court of the Agent

and Council. By the charter of 1668 the Company was conferred powers to make laws for the island of Bombay. From this period till the passing of the Charter of 1726, there were civil and criminal courts in these presidencies. In madras, there was the choultry court, the mayor's court and the admiralty court as well. On the other hand, in Bombay till 1726 judicial systems were not stable and kept changing. Earlier there were courts like the Court of Judicature (1672) which dealt with civil and criminal cases and matters of probates and testaments, and a Court of Conscience to decide petty cases.

There was a system of appeals as well. In madras the appeals from the Mayor's Court were filed to the Governor and Council. On the other hand, Bombay had Deputy-Governor and Council as its appellate Court. In Bombay this system elapsed due to lack of independence of the judiciary. In the following judicial system of Bombay an admiralty court was established with a Judge-Advocate as its head. This court apart from its existing powers enjoyed civil and criminal jurisdiction. Later a court of Judicature was established under this system after which the Admiralty Court lost its ground. The Admiralty court in Madras also became irregular by this time. Another system came about in 1718 in Bombay and this gave representation to the Indians as well by appointing 4 Indian Judges, known as Black Justices, in the Court.

Modern period

Pre-Independence: The year 1861 also constituted a conspicuous landmark in the process of development of legal and judicial institutions in India. It was during this year that the steps were taken to establish High Courts at Calcutta, Madras and Bombay. These High Courts were not only better instruments of justice than the preceding courts, but also represented the amalgamation of the hitherto existing two disparate and distinct judicial systems, the Company's Courts in the Provinces of Bengal, Bombay Madras, and the three Supreme Courts(established by the Royal Charter) in the Presidency town. The High Court enjoyed the same power over all persons and estates. It had ordinary original, appellate and extraordinary original jurisdiction in civil cases whereas extraordinary and appellant jurisdiction in criminal cases. While exercising ordinary original jurisdiction the Courts were to apply the law of equity of the corresponding Supreme Court. In extraordinary original jurisdiction, the Courts applied the law of the corresponding local court, whereas in case of appellate jurisdiction the Courts applied the law of the court of original case filing. Acting as the court of appeal, reference or revision in Criminal cases, the courts applied the Indian Penal Code. The High Courts were empowered to make rules and orders for regulating all its proceedings in civil matters. By the subsequent charters High Courts were formed in Allahabad (1875), Patna (1912), Lahore (1865) etc. The King, in the capacity of the being regarded as the fountain of justice in English legal system, could hear any petition filed by a party with respect to any matter with the help of the Privy Council. This was later, exercised by the King in the form of appeals and not otherwise. Appeals from India could be filed as of right or with the special leave of the Privy Council. After the mutiny of 1857 the Company's Government came to an end and the administration of the country was placed in the hands of the Crown through the Secretary of State for India. For this purpose the Indian Councils Act, 1861 and 1892 were passed. But these Acts were not enough to satisfy the growth and organized demand for self-government by the Congress. Thus came about the Morley Minto Reforms in the year 1909 with its most important aspect being the increase of the representative element in the Legislative Councils and the extension of their powers. But the defects such as lack of true representation, etc led to the passing of the Government of India Act in 1919 which emphasized maximum autonomy to provinces with the target of achieving self-government. The dissatisfaction of this led to the Government of India Act, 1935 which aimed to establish federalism.

A Federal Court set up in Delhi was established under this Act. It is believed that out of all the institutions set up under the Act; this was proved to be the most successful in operation. The Court was to consist of Chief Justice and not more that six judges. This Court had original, appellate, and advisory jurisdiction. The Court had exclusive original jurisdiction in all disputed between the federation and the units or between the units inter se. An appeal could go to the Privy Council without leave, against the Judgements of the Federal Court given in its original jurisdiction and in any other matter with the leave of the Privy Council or of the Federal Court. In the matter of the laws to be applied the very idea of a single omni-competent legislative body in India had been mooted in 1829 by the Governor–General, Lord William Bentick. Administrators at that time wanted to secure uniformity of law throughout the country and that was unattainable with three co-extensive legislative powers existing in the country. Charter of 1833 helped to receive the object desired. Under this the Governor–General of Bengal, nominated as Governor-General of India, proposed a uniform All India Legislation and thereby created a Legislative Council. The laws made by the Council were applicable on all persons and courts. It had Lord Macaulay appointed as its first Law Member whose powers were increased by the Charter of 1853. The creation of new council at Calcutta caused the centralization and concentration of power depriving the Councils of Bombay and Madras of their law-making powers.

An important step towards fulfilling the goal of securing a uniform and simple system of law in India through the process of integration of the general system of codes was taken by the Charter Act of 1833. Section 53 provided for the appointment of a Law Commission in India, subsequently forming the first commission of India with its members appointed by the Governor-General. The commissions' most noteworthy contribution was the Penal Code prepared under the guidance of the Macaulay. The Commission then drew its attention to the complaint of the non- Hindu and non- Muslims and thus passed the lex loci report in 1837. The report proposed an Act making a declaration that except for Hindus and Muslims all others in Mofussil were to be put under English substantive Law to the extent that it suited the Indian conditions.

Post-Independence: The Indian Constituent Assembly passed the Abolition of Privy Council Jurisdiction Act in 1949 to abolish the jurisdiction of the Privy Council in respect of appeals from India and also to provide for pending appeals. The present day judicial system in India is quite complicated. It consists of a Supreme Court at its top,

High Courts in the middle and the Subordinate Courts at the bottom. On January 26, 1950, the Federal Court gave way to the Supreme Court (inaugurated on January 28, 1950) under the new Constitution and thus began an exciting new era in Indian Legal History. The Supreme Court, highest court of the land enjoys a very wide jurisdiction. Under Article 131 of the Constitution the Supreme Court has an exclusive original jurisdiction in cases arise from the centre and the constituent States or between the States inter se. The Court even has appellate jurisdiction in case of appeals from its lower courts. Under article 32 of the Constitution the Court can issue directions, orders or writs for enforcement of the fundamental rights granted to the people. The President in case of matters related to public importance or treaties etc even seek the advice of the Supreme Court. The Supreme Court is a court of record and it has the power to review its decisions. It consists of the Chief Justice and twenty five other Judges appointed by the President of the country. The present Chief Justice is S.H.Kapadia.

Second in the hierarchy come the High Courts. As mentioned above the first High Court in the country was formed under the Act of 1861. But after independence the High Courts have also become the courts of record with appellate and original jurisdiction. They have been conferred the power to issue writs. The High Courts have superintendence over all the courts within its territorial jurisdiction. The decisions of the High Court's become precedents and are followed by the courts subordinate to it. Each State has its own High Court and a common High Court for two or more States can also be made.

With respect to Subordinate Courts, the Judges are appointed by the Governor and is controlled by the corresponding High Court. Nyaya Panchayats are the judicial component of the Panchayat system and are the lowest ring of our judiciary. Their composition and power differs from State to State. They have jurisdiction over petty civil and criminal cases.

A peculiar feature of the legal development in India was that for long the government endeavoured to create a system of courts without ever attempting to develop a body of law. Conscious efforts to remove these defects were made by developing a coherent body of law. But the coherent system of law was developed only after the process of codification. Law then became more territorial and resulted in the abridgment of the differences of law between the resulted in the application of uniform law throughout the country. The independence of the judiciary is fairly well assured by the constitution itself and adequate precautions have been taken to help the judiciary to discharge their functions effectively. Law in the country is now mostly codified and is uniform throughout the country and the objective is now to update, reform and bring the law in conformity with the new social conditions prevailing in the country .In conclusion, we may say that the Indian legal system provides all the machinery for the expansion and preservation of the law. The Indian Judicial System plays a crucial role in the conduct of the Government and Non-Governmental affairs, especially in formalizing business, trade and corporate interfaces. It is not an exaggeration to say than our Judicial System is the most respected public institution in the Country. Millions around the Country – companies or individuals, high or low, rich or poor – routinely seek justice from its portals and get their due. The feature of our Courts in most transactions regardless of their nature. Litigation has become very common in this Country. With increasing complexities in the business world, there has also been a concomitant rise in the number of cases involving industrial concerns and enterprises, not the least of which are with the Government over norms and rules governing the conduct of business affairs.

Emerging Trends

Judicial Accountability

"Ironically the Higher Judiciary in India has powers of control over every organ under the Constitution but there exists no effective method of disciplining its own members." The Preamble to our Constitution declares India is a 'Democratic' State. This broadly means that we have a government by the people, of the people and for the people'. It follows from this principle that, the Government should be accountable for all its acts or omissions to those for whom it exists. The third branch of the government- the judiciary. The power that Judiciary enjoys, the role that it plays in our lives and the onerous task that it performs is beyond comprehension. Infact, it would be no exaggeration to say that of the three branches of the Government, Judiciary is perhaps of the greatest significance to the people, it being closest to them in the sense that anybody (even an ordinary citizen) can approach the Judiciary when he has any grievance.

Judicial independence was not intended to be a shield from public scrutiny. Judicial independence is not only a necessary condition for the impartiality of judges, it can also endanger it. Higher judiciary in our country is the only institution that is virtually not accountable and at the same time enjoys exceptional constitutional protection and formidable weaponry such as contempt of court to silence the critics. Accountability of the judiciary in respect of its judicial functions and orders is safeguarded by provisions for appeal, reversion and review of orders. But there is no mechanism for accountability for serious judicial misconduct, for disciplining errant judges.

Judging the judges: Realizing the important role that judiciary plays, and the possibility of misuse of the power conferred, the Constitution-makers primarily made two provisions (those relating to the appointment and removal of judges) which ensured that Legislature and the Executive, the other two branches of the government (which are directly or indirectly responsible to the people) had some kind of control over the Judiciary.

The independence of judiciary is an important concept being the basic principle of the constitution but what has to be realized is that it is not an end in itself but only a means to achieve an end. The end is to secure efficient, expeditious and impartial delivery of justice. The main intention behind this principle is that the people should get justice, irrespective of their status. This principle is required to in still confidence of the people in its Justice Delivery System. Confidence is very important. Our society is usually peaceful, not because there is a police force and lawyers to take you to the court. It is because people respect the courts and the laws they apply. If, however, people loose confidence in the courts and think that they would not receive a fair hearing, they might disrespect the law generally. So any new step towards

revamping the Judicial System should aim at balancing in the best possible manner judicial independence and judicial accountability.

Judicial Activism

Its emergence can be traced back to 1893, when Justice Mahmood of Allahabad High Court delivered a dissenting judgement. It was a case of an under trial who could not afford to engage a lawyer, So the question was whether the court could decide his case by merely looking his papers, Justice Mahmood held that the pre-condition of the case being "heard" would be fulfilled only when somebody speaks. Judicial Activism is not a distinctly separate concept from usual judicial activities. The word 'activism' means "being active", 'doing things with decision' and activist is the 'one' who favours intensified activities. Justice Krishna Iyer observed 'every judge is an activist either on the forward gear or on the reverse'. Judicial policy making can be either an activity in support of legislative and executive policy choices or in opposition to them. But the latter one is usually referred to as judicial activism. The essence of true judicial activism is the rendering of decision which is in tune with the temper and tempo of the times.

Activism in judicial policy making furthers the cause of social change or articulates concepts such as liberty, equality or justice. It has to be an arm of the social revolution. An activist judge activates the legal mechanism and makes it play a vital role in socio-economic process. Few Causes of Judicial Activism are expansion of rights of hearing in the administrative process, excessive delegation without limitation, expansion of judicial review over administration, promotion of open government, indiscriminate exercise of contempt power, exercise of jurisdiction when non-exist; over extending the standard rules of interpretation in its search to achieve economic, social and educational objectives; and passing of orders which are unworkable. In the first decade of independence, activism on part of the judiciary was almost nil with political stalwarts running the executive and the parliament functioning with great enthusiasm, judiciary went along with the executive. In the 50s through half of the 70s, the apex court wholly held a judicial and structural view of the constitution.

In the famous Keshavananda Bharati case, two years before the declaration of emergency, the Supreme Court declared that the Executive had no right to tamper with the Constitution and alter its fundamental features. But it could not avert the emergency declared by Mrs. Gandhi and it was only at the end of it that the apex court and the lower courts began to continuously intervene in executive as well as legislative areas.The first major case of judicial activism through social action litigation was the Bihar under trials case. In 1980 it came in the form of a writ petition under article 21, by some professors of law revealing the barbaric conditions of detention in the Agra Protective Home, followed by a case against Delhi Women's Home filed by a Delhi law faculty student and a social worker. Then three journalists filed a petition for the prohibition of the prostitution trade in which women were bought and sold as cattle.

Judiciary is one of the indispensable organs of the Indian democracy, but recently it has been grabbing too much public attention, grabbing mixed reactions from the media and civil society. The recent judgements regarding NEET, defining what does and does not constitute religion, deposition of a fixed amount of fee for early hearing of cases, staying the order of Uttarakhand HC and some of those of recent past, including NOTA, blanket ban on mining after Coalgate scam and questioning the authority of CBI as an investigation agency, have all evoked mixed reactions from the public in India.

But the allegations cannot be avoidaded.The judiciary is already reeling under the huge amount of cases to be decided, while being underequipped in judge's strength. But still SC finds time to define religion for the people, which is a very sensitive subject in the multi-religious country and needs to be decided by the people on their own, according to their own traditions. The NEET has been forcible imposed over states like Tamil Nadu, which already have presidential assent for conducting separate state exam. Also, a sudden change in regime is playing with the aspirants career. The Supreme court's orders, directing the govt to formulate a new policy for drought are redundant, as the central and state govt's are already doing their best to tackle the problem The recent step to impose a fixed fees for obtaining an early hearing date, is a bias in the favour of rich people, and falsifies the provisions of Article 14, where every citizens should be treated equally. In this, the judiciary is sidestepping the constitution itself

But nowadays it has become a necessity.In the face of regular adjournments and policy paralysis in the Parliament procedure, the judiciary is morally equipped with the duty to pass innovative judgements, which are not looked upon by the legislature and executive .Steps like NOTA have rekindled the citizen's faith in the administration, as it gives a right to reject to the citizen, which more reforms in this direction on their way. The recent step of imposing a fees will discourage the non-serious litigants from filing a case. Although this measure needs more reform, to be applicable only after a particular income level, but this is definitely a start. Although Judicial activism is needed in a country like India, where various coalition govts tend to slow down the implementation process and red tape mechanism si prevalent, but still the judiciary should understand its limits and restrict its role to dispute resolution or giving non-binding suggestions to the govt.

The people's representatives have not been able to provide what people demanded from them. Instead, many of them are mired in corruption charges and are ignorant. Faith in elected officials, a critical social capital which makes a democracy work, has been declining. People are increasingly resorting to courts for redressal of their grievances. Many institutions of the government are ineffective and they are heavily biased against poor people. For e.g. there is a high chance that a poor person's complaint in a police station will not be taken as seriously as a rich one's.

Judicial Review

Judicial Review refers to the power of the judiciary to interpret the constitution and to declare any such law or order of the legislature and executive void, if it finds them in conflict the Constitution of India. Judicial Review Power is used by both the Supreme Court and High Courts: Both the Supreme Court and High Courts exercise the power of Judicial Review. But the final power to determine the constitutional validity of any law is in the hands of the

Supreme Court of India. Judicial Review of both Central and State Laws: Judicial Review can be conducted in respect of all Central and State laws, the orders and ordinances of the executives and constitutional amendments.

But still Judicial Review is also not devoid of criticisms. The critics describe Judicial Review as an undemocratic system. It empowers the court to decide the fate of the laws passed by the legislature, which represent the sovereign, will of the people. The Constitution of India does not clearly describe the system of Judicial Review. It rests upon the basis of several articles of the Constitution. When a law is struck down by the Supreme Court as unconstitutional, the decision becomes effective from the date on which the judgement is delivered. Now a law can face Judicial Review only when a question of its constitutionality arises in any case being heard by the Supreme Court. Such a case can come before the Supreme Court after 5 or 10 or more years after the enforcement of that law. As such when the Court rejects it as unconstitutional, it creates administrative problems. A Judicial Review decision can create more problems than it solves. Several critics regard the Judicial Review system as a reactionary system. They hold that while determining the constitutional validity of a law, the Supreme Court often adopts a legalistic and conservative approach. It can reject progressive laws enacted by the legislature. Judicial Review is a source of delay and inefficiency. The people in general and the law-enforcing agencies in particular sometimes decide to go slow or keep their fingers crossed in respect of the implementation of a law. They prefer to wait and let the Supreme Court first decide its constitutional validity in a case that may come before it at any time. The critics further argue that the Judicial Review can make the Parliament irresponsible as it can decide to depend upon the Supreme Court for determining the constitutionality/ reasonableness of a law passed by it. A bench (3 or 5 or 9 judges) of the Supreme Court hears a judicial review case. It gives a decision by a simple majority. Very often, the fate of a law is determined by the majority of a single judge. In this way a single judge's reasoning can determine the fate of a law which had been passed by a majority of the elected representatives of the sovereign people. It is on record that on several occasions the Supreme Court reversed its earlier decisions. The judgment in the Golaknath case reversed the earlier judgments and the judgment in the Keshwananda Bharati case reversed the judgment in the Golaknath case. The same enactment was held valid, then invalid and then again valid. Such reversals reflect the element of subjectivity in the judgments. On all these grounds the critics strongly criticise the system of Judicial Review as it operates in India.

But a very large number of the supporters of Judicial Review do not accept the arguments of the critics. They argue that Judicial Review is an essential and very useful system for Indian liberal democratic and federal system. It has been playing an important and desired role in the protection and development of the Constitution. Judicial Review is essential for maintaining the supremacy of the Constitution. It is essential for checking the possible misuse of power by the legislature and executive. Judicial Review is a device for protecting the rights of the people. No one can deny the importance of judiciary as an umpire, or as an arbiter between the centre and states for maintaining the federal balance. The grant of Judicial Review power to the judiciary is also essential for strengthening the position of judiciary. It is also essential for securing the independence of judiciary. The power of Judicial Review has helped the Supreme Court of India in exercising its constitutional duties.

Certain limitations can prevent a possible misuse of Judicial Review power by the Courts. A formidable fact which justifies the presence and continuance of the Judicial Review has been the judiciousness with which it is being used by the Supreme Court and High Courts for carrying out their constitutional obligations. These have used it with restraint and without creating hindrances in the way of essential socio-economic reforms.

Conclusion

The societies in the beginning were rudimentary and so were the laws of the societies. Laws have grown with the growth of society. This establishes a relationship between law and society, where law is an instrument of social change, and as Pound would put it law must be stable, but it must not stand still. To comprehend, understand, and appreciate the present legal system adequately, it is necessary to acquire a back-ground knowledge of the course of growth and development of the legal history.

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