Chapter IV

HISTORY OF LEGAL PLURALISM IN INDIA

There has been a general recognition, both in sociology and in law, of the fact that most societies are multilegal, that is, in addition to the state law they display kindred regulatory systems of norms, institutions and culture" (Baxi 1982). For instance, in India, there are legal norms operating at local levels formed through the interaction of social groups and local cultures; and along with these there exist universal legal norms framed by the state authority. In the present chapter, a description of the history of various legal systems in India as they have been operating in the past and the different shapes they have assumed during their course has been provided. It highlights the co-existence of various legal systems, their interactions, their dynamics and their relative efficacy in cases of conflict.

Legal Pluralism in Ancient India

Around 1500 B.C., the ancient Indian society which was largely Aryan (Hindu), developed many beliefs and doctrines which prevail even today in many different forms. The works of Kane (1930-62 ; 1950) ; Gune (1953) ; Altekar (1958) ; Mookerji (1958) ; Sarkar (1958) ; Cohn (1961) ; and Derret (1963) mention that in those times India was divided into several independent states most of which were monarchies, while the rest were tribal republics. Each independent state, whether a monarchy or a republic had its own legal system and there was considerable overlapping of jurisdiction between these different legal systems, yet they enjoyed a certain degree of autonomy in administering their own laws to their citizens. The
legal systems of those times did not have a homogenous character. "Even "Dharmashastra", a refined and respected system of written laws, was not able to unify the entire system because of the fragmentation of jurisdiction, the extensive delegation of judicial power to local authorities, relative absence of written records and of professional pleaders" (Galanter 1989).

In order to understand the legal system of the Hindus a study of the three basic features of Hindu social organisation, namely, the system of stratification (Caste and joint family); cultural norms (religion and religious philosophy), and the polity (political system and institutions) is very helpful. The caste system that emerged in ancient India is a unique social system ever developed in any part of the world. All the castes were precisely and clearly defined and the rules pertaining to their lawful activities and functions dominated all their social activities. Even today caste determines the pattern of life of the Hindus, and their status, style of living, marriage, profession and social obligations (Srinivas 1962). The joint family system was another important institution which determined the nature of the social order amongst the Hindus. A family was regarded as a unit of the Hindu social organisation with its own set of norms and regulations under the "family laws". At the head of the family was the patriarch, whose authority over the members of his family was absolute. He represented all the members of his family before the community, and he claimed absolute obedience from them.

The form of Hindu religion which preceded previous to the spread of Buddhism is generally known as Vedic religion, while its form which succeeded Buddhism is generally known as Puranic religion. The Hindu religion and philosophy laid down four great aims of human life: "Dharma"
(religion and social law), "Artha" (wealth and economic well-being), "Kama" (fulfilment of individual and social needs) and "Moksha" (salvation of the soul). The correct balance of the first three leads to the fourth (Dutt 1960). The "Dharmashastra" contains an extensive literature on all aspects of law, ethics and morality, both for the individual and the community as a whole (Galanter 1989).

The political system and institutions in those times were marked by great complexity and variety. However, Dharma was the most important concept of Hindu political thought. The king was mainly respected for being the protector of Dharma. He was entrusted with the supreme authority of administering justice in his kingdom. Also, his functions involved the protection of the kingdom against external aggression as well as protection of life, property and traditional customs against internal foes. The king, generally, with the assistance of his chief priest (Purohit) and military commander (Senapati) carried out the administration of justice. The king's court was regarded as the highest court of appeal as well as an original court in cases of vital importance. Each state was further divided, generally, into provinces or districts which in turn consisted of many villages, which differed in terminology as well as in area. For each province or district, separate governors, according to their status, were appointed with different designations. Similarly, each village consisted of a village headman and a village council or the village Panchayat (Kulshreshtha 1959).

Although, as stated above the king was regarded as the fountain head of justice in a state and the king's court was considered as the highest court of appeal, yet the king could not (or did not) intervene in disputes relating to local customs, norms and practices of castes, subcastes or tribes,
which had their own judicial processes, such as Panchayats, community leaders, chieftains or priests. However, contrary to appearances, there was a definite system in this judicial administration. The system operated within the hierarchical order of authorities, beginning from the patriarchal head of the joint family going up to the local caste, community and tribal Panchayat, then to the council of dominant or ruling clans (local chiefs), and lastly to the court of the king. Sage Brihaspati (as quoted by Mookerji) explained that in ancient India "First come the family arbitrators; the judges are superior to the families, the chief justice (Adhyaksha) is superior to the judges; and the king is superior to all of them and his decision becomes the law" (Mookerji 1958). Even in ancient India the decision of each higher court superceded that of the court below. Each lower court showed full respect to the decision of the higher court. Thus the King's decision was supreme in monarchical states. Distinction was also made about the type of disputes that arose and the methods used for their resolution. For instance, criminal cases were ordinarily presented before the central court or the courts that were held under the royal authority. Judicial assembly at the village level was allowed to hear only minor criminal cases.

Thus, from the above discussion it can be concluded that in ancient Hindu society, religion was the most important basis of law, although religion and custom were intertwined to regulate individual behaviour. Religious norms were universal, mainly drawn from the written texts (such as "Dharamshastras"), and were applicable to the whole community. On the other hand, customary norms were formed and developed at the local levels through community interactions. Thus customary norms differed from group to group or community to community. Society, on the whole, was marked
by a great diversity of legal norms operating at both the local and the state levels.

**Legal Pluralism during Muslim Regime**

Towards the end of the twelfth and in the beginning of the thirteenth century, Indian states in the north, west and central regions of India were invaded and subjugated by foreign invaders of Turkish origin whose religion was Islam. The existing Hindu social organisation - its system of stratification, cultural norms and its polity-were then subjected to the process of transformation in accordance with the philosophy of Islam and Islamic culture. Islamic philosophy is based on the principles of equality of all men, and, therefore, it was opposed to the graded and sanctified inequality of the caste system of the Hindus.

Sovereignty in a Muslim state belongs to God. Muslim kings in India, in general, regarded themselves as God's delegates or representatives according to the Quran. The Muslim polity was based on the concept of the legal sovereignty of the "Shariat" or Islamic law. According to this law, all the members of the Muslim religious community elected the 'Khalifa" or 'Caliph" as the community commander of the faithful. It was obligatory (according to Islam) on all Muslims to owe allegiance to the Caliph who was also their supreme earthly ruler. "Though kings enjoyed unlimited powers within their territory, yet they regarded themselves as representatives of the Caliph" (Qureshi 1971). This shows the supremacy of religion in Muslim rule, wherever it was established in the world.

The territory of a king was divided into administrative divisions, from the province to the village level. A province ("Suba") was composed of
districts ("Sarkars"). Each district or Sarkar was further divided into "parganas" which consisted of groups of villages. The judicial system was organised on the basis of administrative divisions of the kingdom. A systematic classification and gradation of the courts with administrative officers existed at the seat of the capital, in provinces, districts, parganas and villages (Ahmed 1942). At the upper end of the system, the king was the supreme authority to administer justice in his kingdom. The king administered justice in three ways and in three capacities: (a) as arbitrator in the disputes of his subjects he dispensed justice through the "Diwan-e-Quza"; (b) as head of the bureaucracy, justice was administered through the "Diwan-e-Mazalim"; and (c) as the Commander-in-chief of the forces, through his military commander who was "Diwan-e-Siyasat".

At the lowest end of the system, village assembly or Panchayat - a body of five leading men - existed to look after the executive and judicial affairs of each village. The Sarpanch or Chairman of a Panchayat was appointed by the judicial officer of the district. Panchayats decided civil and criminal cases of purely local character. The decrees given by the Panchayats were based on local customs and were not strictly in accordance with the law of the kingdom. There was no interference in the working of Panchayats. As a general rule, the decision of a Panchayat was binding on the parties and no appeal was allowed from its decision (Altekar 1958).

Thus, during the Muslim rule, Indian society experienced a widening of the plural base of the legal system as in the case of Hindus, for Muslims also religion formed an important basis of law. Muslim rulers had superimposed a new legal culture on Indian society with its bases in Islamic law, but their legal institutions did not percolate deep into the countryside. There
was no attempt to control the administration of law in the villages by the Muslims. Hindus were generally allowed their own tribunals in civil matters. If such matters came before the royal courts, the Hindu law was followed. Thus, Muslim law allowed the old to remain alongside the new, the Hindu tribunals proceeded as they did before the Muslim rule. The ties that had bound these tribunals to governmental authority earlier were weakened.

Legal Pluralism during British Era

The British East India Company was established in England in 1601 for trading with India and other far eastern countries. The Company became very prosperous during the next hundred and fifty years as a result of its trade with India. Then it started dabbling in political affairs of the Indian states. In the middle of the 18th century, it actually acquired some political power in certain regions of India. The East India Company tried to implant the British judicial system in the territories controlled by it, but at the most it remained a haphazard attempt. By the middle of the 19th century the Company had acquired a vast empire in India. However, after the revolt of the people against the company’s rule in 1857, the administration of India was taken over by the British crown, that is, the Government of Britain, from the Company (Kulshreshtha 1959).

The period from 1858 to 1947 was an era of direct government by the British Government. From 1858 onwards, the concepts, principles and rules of the English Law were introduced for the administration of justice in India. The new judicial system was initially established in a few areas, but ultimately it was introduced in all the other regions of British, India. The salient features of this system included uniform rules, based on universalistic,
secular criteria. Therefore, the traditional system of stratification, cultural norms, and the ancient polity enjoyed no status under the new system of law. Bryce (1901) has rightly commented that "the indigenous legal norms were altogether ignored and no place was given to them under the new system".

Two distinctive, but overlapping, stages can be seen in the development of the British legal system in India. During the earlier phase of the British rule, there was a general expansion of governments' judicial functions and the attrition of other kinds of indigenous tribunals, while the authoritative sources of law to be used in governmental courts were isolated and legislation initiated (Misra 1959, and 1961; and Patra 1962). There were numerous attempts to reorganise and reform the courts and to systematize and reform the old native law, including Hindu and Muslim laws. However, there was no major progress towards simplifying and systematizing this law. Thus, the law applied in the courts remained extremely varied. Parliamentary charters and acts, legislation, English Common Law, ecclesiastical and admiralty law, Hindu law, Muslim law and many bodies of customary law were all combined in a bewildering array (Ilbert 1915; Rankin 1946; Patra 1962 and Morley 1976).

The later phase of British rule saw the consolidation of the court system and the codification of law. This phase also saw the growth of a unified nation-wide legal system based on the "Cornwallis model" of judicial administration. This model provided a formal basis for judicial administration based on universalistic norms. These norms were administered by a hierarchy of courts, staffed by professionals and organised bureaucratically. Along with a new structure of legal administration also came the codification and
rationalization of laws, fixation of sources of law and legislation as the dominant trends in the modification of the legal system. Only the personal laws of Hindus and Muslims were exempted, while the complete codification of all fields of commercial, criminal and procedural law was done (Stokes 1887-88). The new codes introduced by the British were very different from Hindu, Muslim or customary laws practised by people at local levels. There was occasional accommodation of local rules, and there were also adjustments and elaborations of the common law to deal with certain kinds of persons, situations and conditions. Inspite of this, the new legal system remained a matter of mysticism, suspicion, alien and remote for most people of India (Galanter 1989). It was mainly because of these elements that the new system was not able to make the traditional notions of legality completely redundant. Rather local practices such as customary laws and community traditions remained in practice alongwith the new system. Thus the legal system introduced by the British further contributed to the plurality of legal systems in Indian society.

Legal Pluralism after Independence

On the eve of independence, a debate on the merits of indigenization or westernization of the legal system took place. Members of the Constitution Drafting Committee were fully aware of the "impersonal" and "alien" character of the British Law, yet they adopted the same in view of the fact that the traditional legal system was not in consonance with the values enshrined in the Constitution. Thus, a more rational secular model based on western law was considered necessary for fostering the constitutional values of equality, liberty, dignity, fraternity and social justice.
The legal system modelled along these values was introduced in India soon after independence. This legal system represents a modification largely of the British legal system and it envisaged at displacing the traditional legal systems. It was felt that the new legal system would completely replace the existing patterns of stratification, cultural practices and political systems. However, the displacement of traditional legal systems did not occur as it was envisaged under the new model. Traditional notions of legality persisted at a sub-legal level. For example, the activities that are covered by the doctrine of "caste autonomy", are treated as accepted deviance in law (Galanter 1989). Thus though the new legal system has influenced and to some extent permeated the indigenous legal system, it has still not been able to completely uproot the indigenous legal systems. The co-existence or co-presence of the indigenous and the state legal systems has led to the emergence of two legal cultures in India. One of "lawyer's law" and the other of "local law ways" (Galanter 1989). Galanter further states that "the state has realised that the gap between the two legal systems has widened, so the state has been making efforts to bridge this gap. Attention is given to the allowable leeways - how localism has to be accommodated and how it has to be deflected into general standards". The Indian state has been trying to resolve these problems by introducing informalism within the formal legal system. This has given rise to a new set of legal norms that are "semi-formal" in character and has further contributed to the complexity of the legal systems.

There is a considerable overlapping between these legal systems. These are: (a) Informal legal systems which can be further divided into two categories - (i) those deriving their strength from religious scriptures,
such as familial, caste or kinship laws (ii) Those that are operative at the local level and community or customary practices. Customary law is still very important. The dominant forms of informal legal system are caste and village Panchayats. Its judicial processes represent large-scale participation, paternalism, flexibility, emphasis on compromise, and hierarchy (Singh 1988). It seeks social harmony through concensus. The flexibility of the system has a wider relevance, than that of the strait-jacket notion of relevance (Baxi 1986). (b) Formal legal system can also be subdivided into two categories - (i) That consisting of constitutional law and other official laws ordained by it. It is based on universalistic criteria and is most authoritative and technically elaborate written document. They operate at the level of the nation-state. (ii) Semi-formal legal systems relating to different dimensions of formal and informal legal systems. It is a part of the attempt of the government to bring flexibility in the judicial process. Three important steps in this direction were taken after independence. These were - the introduction of (I) Nyaya Panchayats for village level judicial administration; (II) Lok-Adalats to make justice available at low cost, and speedily; and (III) Legal-aid to make justice available to the poor.

From the whole discussion, it can be concluded that present-day Indian society is marked by much legal plurality. There are many overlapping sets of legal systems. For the present study, the varied systems have been grouped into two: (a) Formal legal systems, deriving authority from the state legal system, and (b) Informal legal systems, deriving authority from the non-state or non-official legal system. The main problems for any
student of sociology of law in India is to analyse how the two interact and what is their usefulness to society. Such a study has not only theoretical relevance but also a practical value. It helps us in understanding the role of the state legal system as an instrument of social change.