CHAPTER II

GENESIS OF INDIAN SOCIAL JUSTICE

2.1 Administration of Justice in Ancient India

Administration of justice was not a part of the duties of the States in early times. There is no any reference to any judicial organizations in Vedic literature. Later, justice was administered by the tribe and clan assemblies and the judicial procedure was very simple. But with the extension of the functions of the State and the growth of the royal powers, the king came gradually to be regarded as the origin of justice and a more or less elaborate system of judicial administration came into existence. The Dharma Shastras, Niti Shastras and Arthashastra provide us information about the well-developed judiciary. According to these literatures the king was the fountain head of all justice and he was required to spend every day about a couple of hours in adjudication. The paramount duty of the king was the protection of his subject which involved the punishment of the wrongdoer. The law to be administered was the Dharma Shastras subject to local and other usages having consistency with the Shastras.

Brihaspati speaks of four types of Courts--- (i) Movable court, (ii) Stationary Courts, (iii) Courts deriving authority from the king and (iv) Courts presided by the king himself.

According to Bhrigu there were fifteen kinds of Courts. Some of the prominent Courts delivering justice were –

(i) **The king's Court** - At the head of the judicial system stood the king's court at the capital and presided by the king himself. But more often a learned Brahmana was appointed for the purpose and he was known as Adhyaksha or Sabhapati. Earlier the Adhyaksha was selected for each particular occasion and in course of time became a permanent officer of state and held the position of the Chief Justice (Pradvivaka). Apart from the king, this court consisted of the Pradvivaka and three or four jurors.

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(ii) **Court presided by the Chief Justice** - The Court presided by the Chief Justice appointed by the king called Pradvivaka was the second type of court.

(iii) **Principal Courts** - Another Court of importance were the Principal Courts in large town where royal officers assisted by learned person administered justice. They were presided by Adhyakshas appointed by the Central Government.

(iv) **Popular Courts** - One special feature of ancient Indian judicial system is the existence of popular courts. Yajnavalkya, for the first time refers to three types of popular courts——

(a) **Kula** - The Kula has been defined by the Mitakshara as consisting group of relations, near or distant. The Kula or joint families were very extensive in ancient India. If there was a quarrel between two members the elders used to attempt to settle it. This Kula Court was an informal body of family elders.

(b) **Sreni** - When the effort at the family arbitration failed, the matter was taken to Sreni Court. The term 'Sreni' was used to denote the courts of guilds which became a prominent feature of the commercial life in ancient India from 500 B.C. Sreni had their own executive committees of four or five members and it is likely that they might have functioned as the Sreni Court also for settling the disputes among their members. This was an assembly of persons following a particular profession like betel-sellers, weavers, shoe makers and such like.

(c) **Puga** - This was an association of persons drawn from various castes and following different professions but staying in the same village or town. The sabha or the village assembly of the Vedic period and Gramavriddha court of the Arthasastra were the forerunner of the Puga Court. Though these courts were essentially non-official and popular, they had the royal authority behind them. The Government refused to entertain any suit except in appeals against their decision. It also gave effect to their decrees. In ancient India village Panchayats and guilds were held for several reasons —

(i) They reduced the burden of the Central administration.

(ii) The members of a village Panchayat or a guild had more or less reliable knowledge of the fact in dispute as the parties belonged to their guild or locality.

(iii) It would be difficult for a witness to tell a lie in the presence of his own people and thereby lose his respect.
There was no limit to the jurisdiction of the popular courts in civil matters. However, they could not try criminal cases of a serious nature. The popular courts played a prominent role in ancient India.

The regular courts met once or twice every day usually in the morning and evening and were open to all. Trials were always held in public.

Justice was administered in accordance with rules which fell under one or other of the following four heads—

(i) Sacred Law (Dharma),
(ii) Secular Law (Vyavahara),
(iii) Custom (Charitra) and
(iv) Royal Commands (Rajasasana).

Dharmasastra constituted the sacred law and secular law depended upon evidence. Custom was decided by the opinion of the people and royal verdicts constituted the administrative law. Among the divisions of law, Manu and almost all the law-givers of ancient India considered custom as the most essential principle in the administration of justice and according to them disputes should be decided by giving prime importance to the customs of countries and districts, of castes, of guilds and of families.

The judicial proceeding in a case consisted of four stages—

(i) The statement of the Arthi/Purvapaksha (plaintiff) who had filed a Prathinga (complaint) stating precisely his case and claim.
(ii) The Prathyarthi/Uttarapaksha (defendant) was summoned with a notice and was required to submit his written statement in reply.
(iii) The actual trial had begun when the judge called upon the parties to cite Pramana (evidence/proof) which were of two kinds- manushik (human) and daivik (divine). The manushik pramana consisted of documentary evidence, oral evidence and possessions. Daivik pramana was resorted to only in absence of manushik pramana. Davik pramana was of five kinds— ordeal by balance, by fire, water, poison and by drinking water.
(iv) When the evidence was over, the Judge gave his decision in consultation with sabhyas or jurors. A copy of the judgment was given to the parties. The unsuccessful party could appeal to the higher courts.

Even the King and the Chief Justice could not begin the trial of a case if they are not assisted by a panel of three, five or seven jurors called sabhyas. They were
expected to be impartial and fearless. A juror keeping silence had been condemned. They were to express their opinion even if it was in opposition to that of the king. They were to restrain a king from going astray or giving a wrong decision. A number of famous jurists maintain that the king or judge is to be guided by the verdict of the jury and only when the jurors could not come to a definite decision, the king exercised his privilege to decide the case according to his own view. These sabhyas were usually Brahmins as they were well versed in Dharmashastras. However, knowledge of sacred law was not necessary when the case concerned the disputes among the cultivators, merchants and forest-dwellers. Dharmashastra writers themselves recommended that the case should be tried with the help of the jurors selected from the castes or the professions of the parties themselves.

Pleaders rarely figured in ancient judicial system. Sukra refers to the practice of appointing recognized agents in the law courts to defend a case when a party was himself unable to do so owing to his preoccupation or ignorance of the law. Such agents were known as Niyogins and they were expected to protect the interest of their parties very carefully. Their fee varied from six to half percent, according to the value of the property. If they colluded with the other party they were punished by the State.

Fines, imprisonment, banishment, mutilation and death sentence were the punishment in vogue. Fines were most common and punishment often differed with the caste of the accused. The jail department was under the charge of an official called Sannidhata and the jailor was called Bandhanagaradhyaksha. Male and female prisoners were kept in separate wards.

2.1.1 Mauryan Times²

During the Mauryan times, the King was the head of justice, but there were special tribunals of justice both in cities and country-side presided over by Mahamantras and Rajukas. The Chief Justice was known as Dharmadhikarin. Kautilya speaks of two types of courts—

(i) **Dharmasteeya**—Civil Courts with jurisdiction over ordinary civil and criminal issues.

(ii) **Kantakasodhana**—Courts consisting of three Commissioners (Pradestaras) with jurisdiction over matters of commerce and industries and prevention of breach of peace.

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² www.ithihas.wordpress.com, last visited on 10/08/2013
According to the Greek accounts the Criminal Code of the Mauryas was rather severe and sternly administered. A large number of ordinary offences like giving false evidence, evasion of Government taxes, causing serious hurt to artisans and workmen were punished by mutilation and death. Judicial torture was used to extort confessions. There were 18 codes of torture including seven varieties of whipping. Such a harsh criminal code had the good effect in maintenance of peace and order. According to Magasthenese there were very few crimes and thefts. People left the door of their house unlocked. Ashoka introduced reforms in the judicial administration and procedure. He ordered that a respite of three days was to be granted to a person condemned to death so that his relatives might use the interval to petition for mercy to the local authorities or enable the convicts to prepare spiritually for death by giving alms or observing fasts.

2.1.2 Gupta Times

In Gupta times, the King was considered to be the incarnation of justice and so justice was often administered by the sovereign himself. There was also a high official called Mahadandanayaka who probably performed the combined duties of the Great Judge and General. Another official closely associated with him must have been the Mahaksapatalika or the Great Keeper of Records. In villages justice was administered by royal officials with the help of the members of the village council or assembly. In addition to official courts at the head quarters of districts and provinces there existed a number of popular special courts of self-governing corporations or guilds which decided disputes arising among their members. The criminal laws during the Gupta rule were not as severe as it was in the time of the Mauryans. They were mild and most of the crimes were punished only by fines varying in amounts according to the gravity of the offence. Capital punishment was unknown and the highest punishment for repeated rebellions was mutilation. Still law and order were well preserved and the Chinese traveler, Fa-Hien toured all over India without molestation.

2.1.3 Harsha Times

The Chief Judge during Harsha’s time was known as Mahapramatara and the Record Keeper is styled as the Mahaksapataladhikaranadhikrita. Judicial Officers were called Nyayakaranika. Compared to the Gupta period, the criminal code during

3. www.ithihas.wordpress.com, last visited on 10/08/2013
4. ibid.
Harsha’s time was very severe. For violation of the statute or law and conspiracy against the king, the offender was imprisoned for life and was socially ostracized. For breach of social mobility and filial duty, the penalty was mutilation of limbs or exile. For minor ordinary offences the penalty was payment of money. In spite of this severity in the administration of justice, highways were infested with robber gangs and the Chinese traveler Hiuen-Tsang himself fell a victim to them.

2.1.4 In South Indian Regions

In the regions ruled by the Chalukyas of Badami and Pallavas of Kanchi, the King was the fountainhead of justice and the final court of appeal. In villages and rural tracts the village courts decided the disputes. During the Rashtrakuta rule the King’s Court did not entertain any cases at the first instance and only when the parties felt dissatisfied with the decision of the village courts, they could appeal to the King or his courts. There was a Chief Judge who was the final appellate authority for cases coming from the lower courts except when the King decided them himself. The records of the Kalyani-Chalukyas mentioned the office of Dharmadhikari or Chief Justice. During the times of the Cholas we have references to Dharmasana in several inscriptions, probably signifying the King’s court of justice. Learned Brahmins known as Dharmasanabhattachas assisted the court. The village assemblies exercised large powers in matters of local interest which they settled with the help of small committees called Nyayattar or Nyayavattar. All offences civil or criminal were tried in the first instance in village courts and in cases of dissatisfaction the matter was taken to the officer of the King’s government in charge of the administration of the nadu. The Chinese writer, Chou-ju-Kua mentioned about flogging or giving blows to the culprit with a stick after tying him to a wooden frame for minor offence. It is said that punishments during the Chola period was not at all severe. Even for murder, the punishment meted out to the criminal was the payment of a fine to the temple. During the time of Rajendra II the assassin of a State official was asked to give 96 sheep towards the maintenance of a perpetual lamp in the temple. Hence, it was remarked that the Cholas administration of justice could not be charged with severity or vindictiveness, it may rather be regarded as swayed by over mercifulness.

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5. [www.ithihas.wordpress.com](http://www.ithihas.wordpress.com), last visited on 10/08/2013
2.2 Indian Legal System before Independence

Indian legal system as imposed and designed by British rulers before 1947 was static, stale and counter-productive to social change and social justice. It was anti-people, suppressive to human dignity and non-responsive to egalitarian goals of Indian people. Accordingly, legal fraternity of judges, lawyers and jurists were insensitive to the urges, expectations and needs of people. To them the English notion of ‘free contract’ was almost sacred like the proverbial Indian cow and was literally followed and enforced by the courts with veneration and vehemence. This was because in English jurisprudence freedom of contract being inviolable gave the havesthe master, the employer and the landlord the absolute right to ‘hire and fire’ at will his servant, employee and the serf. The Austinian positivistic notion of imposing law from above was meant to restrain, coerce, control and above all defeat the claims of the poor seeking redressal of their oppression and exploitation. Such was the texture of the Indian legal system smuggled into India by the colonial masters. The legal system which legalized and ensured continued domination of India by the British also sustained and buttressed its political domination and economic exploitation. The laissez faire philosophy in law was based on the notion of free and open market economy - its pillars being freedom of contract and law of supply and demand. Such a cover of public policy claiming to be neutral was virtually devalued of socio-economic perception and non-accountability towards society. In India, thus, the legislature, executive and judiciary were oriented to reflect such a policy perception to protect and promote the interests of the British. The courts administered justice according to law pretending to be impartial and neutral- a veneer of justice between unequal interests and landlords and the peasants, rich and poor, master and servant. The impression gained in the Indian mind that their sacred inalienable human rights and vital interests had been ignored, denied and trampled for the sake of England and English rulers. Indians were reduced to hewers of wood and drawers of water sinking racy and slavery. To these, were added the exploitation of arterial reserves and its wealth which foreign domination entailed on the country. The English law imparted and implanted from England statistically cut and dry, legalistic, formal, draconic and punitive in character supported and sustained the system engrafted by the alien rulers in an alien soil. The old Hindu society with its integrative organism, with its emphasis on individual freedom combined with his social obligations and service prevented conflict and tension between individual and social groups or classes. The British
destroyed the age old social and economic system by dividing people and classes on the basis of caste, religion, occupation, language and religion and created a permanent gulf between people *inter se* which gave rise to perpetual conflict between different communities which thwarted the growth of egalitarian, secular democratic ideals within the pluralistic Indian society necessary for realizing justice, equality and fairness. The theatre of legal, political and economic regulations imposed on India, subjected the Indians to the threats of coercive sanctions of both law and rulers which scoffed of moral dignity of Indians and social justice for masses. On the contrary, sanctions were imposed in the name of justice according to law to enforce an unequal law of free contract between unequal individuals. In short, the law, the country and its wealth belonged to the British and not to Indians – one law for the ruler and the other for the ruled.

Indian protests against denial of civil liberty and human rights, against exploitation and fomentation of communal and linguistic divisive tendencies went unheeded. Under the British rule human rights and democracy were in doubt and socialism was anathema for the processes of administrative and judicial justice. The idea of a value-loaded law acting for lodestar for social justice and social change was beyond the ken of law courts and lawyers and their colonial masters who glorified colonial jurisprudence and its deity Austin. Austinian positivity created a permanent wall between people and their law, between law makers – the masters and the ruled – the subjects who browbeat people clamouring both for bread and freedom. Law and justice during the British rule smacked despotism, absolutism and tyranny to enslave people never intended to serve them. Gandhiji condemned British rule over India as satanic, adharmik (unjust) and coercively violent (hinsha). Therefore, he expounded the theory of peaceful resistance (satyagraha) to fight against the British Government, its laws and courts as they deprived the Indians of a meaningful life, liberty and national independence (swaraj). So far as new Gandhian jural-cum-moral postulates are concerned, he expounded the theory of open society based on non-violence, where social equality, human dignity, class harmony, non-multiplication of wants and service to the poor are guide posts of social evolution and social revolution. He chartered the theory of Ram Rajya for the Indians *vis-a-vis* demonic British Raj sustained by force, fraud and power. Gandhiji assured, “I shall work for an India in which the poorest shall feel that it is their country in whose making they have an effective voice, an India in which there shall be no high class or low class of people;
an India in which all the communities shall live in perfect harmony. This is the India of my dream”. Contextually it would not be inappropriate to characterize British Indian judicial system as ‘cancer-ridden’, ‘smuggled’, ‘rootless’ and ‘counter productive’ to satyam, shivam and sundaram (truth, good and beautiful).

Likewise, Jawaharlal Nehru, another architect of modern India condemned the un-Indianness of British law which failed to move with changing needs of time and place due to its stricter adherence to the doctrine of judicial precedent. As to need of the reform and modernization of the existing legal system, Nehru made prophetic observations in his Autobiography to bring home the need of making law as an instrument of socio-economic change. He remarked:

“Even more important are the economic changes that are rapidly taking place in the world over. We must realise that nineteenth century system has passed away and has no application to present day needs. The lawyer’s view, so prevalent in India of proceeding from precedent to precedent is of little use when there are no precedents. We cannot put a bullock cart on rails and call it a railway train. It has to give way and be scrapped as obsolete material”.

2.3 Sociological Overtone – New Jurisprudence

In the backdrop of Gandhian humanism and Nehru’s scientific temper the new Constitution enacted and adopted in 1950 contributed in ushering a new legal and constitutional philosophy embodying ideals of liberty, equality and human dignity. The Preamble of the Constitution together with Fundamental Rights and Directive Principles constitute the Bhagavadgita of Indian sociological jurisprudence. Its core principles made the people of India the ultimate sovereign, the country socialist, democratic and republican in character in order to secure to all its citizens justice – social, economic and political. The Fundamental Rights in the Constitution constitute the Magna Carta of individual liberty and human rights. The Directive Principles of the State Policy contain the social charter of economic justice and it is paramount that the courts ought to synthesize these twin goals in a spirit of mutual accommodation and co-existence to sub serve the social ends free from coercion and exploitation necessary for founding an egalitarian society in India. Granville Austin remarked that the Indian Constitution is first and foremost a social document and the majority of its

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7. Austin, Granville – The Indian Constitution – Cornerstone of a Nation, P. 50.
provisions are either directly or indirectly, aimed at furthering the goals of social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement.

Thus, the Constitution aims at the creation of new legal norms, social philosophy and economic values which are to be effected by striking synthesis, harmony and fundamental adjustment between individual rights and social interests to achieve the desired community goals. Of course, individual rights have not been ignored, it is the larger interest of the society which has been assigned a key place in the scheme of Government priorities and planning. As Mr. Justice S.R. Das of the Supreme Court of India correctly overserved\(^8\) that our Constitution has not ignored the individual but has endeavoured to harmonise the individual interest with the paramount interest of community and it is, this interest which pervades our Constitution.

In the sphere of family law, labour law, commercial law, social law prohibiting discrimination on the grounds of sex, religion or region the Indian judges resorted to social engineering device to realize social harmony and class reconciliation. But, with regard to land reforms land ceiling, town planning, slum clearance and land-management legislation the judges failed to discover the ‘inarticulate major premises’ of land reforms legislation and policy and through restrictive interpretation defeated the legislative efforts on which depended the welfare of the toiling and exploited peasantry. This generated social dissensions, national and political acrimony not only between land owners and tillers of land but also even involved the politicians, social reformers, legislators in arry against judiciary itself. The new juristic philosophy expounded by the Court appeared with new sociological temper and overtone which rejected once for all the classical contractual market society based on \textit{laissez faire} for regulating individual and social interests. It has exploded\(^9\), the myth of ‘freedom of contract’, the myth of ‘self made man’ and the myth of ‘absolute rights’ as anti-social, anti-poor and contrary to the values and goals enshrined in the Constitution. The three departments of the Government in India - the legislature, executive and judiciary too have turned themselves to the spirit of the Constitution in making, executing and interpreting law

as an effective and purposive exercise in the well-being and welfare of the masses. Indian legal system is socially, psychologically, economically and politically conditioned, oriented and interwined to grass-root problems and solutions to alleviate hardships and devise techniques to secure maximum satisfaction of maximum numbers.

The tempo and temper of socio-politico-economic change that foreshadowed in the post-Independence era can be properly understood from the observation of Jawaharlal Nehru. He remarked:\(^{10}\):

"The country is progressing towards a classless and casteless society according to the socialist pattern ...we are more and more rapidly moving away from the purely political into social plan...In order to get socialist pattern of society we have to break through a certain crust of the structure – call it economic or social structure – which inhibits progress and which prevents full growth of energy exercised by the masses of people. Therefore, we have to get over a lot of crust, all of feudal crust and the capitalist crust. As a matter of fact, all over the world that process is continuing. Some individuals might talk somewhere in some distant countries about private enterprise and laisseez faire – but nobody practically believed in laissez faire”.

The pattern of social legislation in India since independence has been in accordance with the constitutional mandate. In fact, ninety percent of social legislation enacted by the parliament has been concerning human rights of Indians – be it laws concerning agrarian reforms, abolition of zamindari system, ceilings on land holdings, regulation and control of labour problems, laws concerning labour welfare, safety, health, wages, bonus, gratuity, social insurance and social security, protection of migrant workers, women and child labour, contract labour, bonded labour, equal remuneration for equal work, laws concerning social and family relations of Hindus in particular regarding marriage, divorce, dowry, succession, adoption, guardianship, reforms in social status of Harijans, Girijans by protecting their civil rights, abolition of untouchability, suppression of immoral traffic in women and girls, prohibition laws, laws concerning bail, detention, arrest, control of population explosion by way of medical termination of pregnancy, punishment of tax evasion, trafficking on narcotic drugs, protection of environment pollution etc. Law,

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\(^{10}\) The Hindu, dated 22.12.1954.
therefore, has been extensively used as tool of effective social change and for eradicating social and economic evils.

2.4 English Legal System Rejected–Gandhian and Other Alternatives

The process of social change through law involves not only the social legislations passed by the Parliament but also inter-act and react through interpretative device of the judiciary and thereby acting as catalytic agent of social control, regulator, arbiter and reformer the courts have became reconciler of conflicting interests rejecting Austinian brand of legal positivism which thrives on the abstract notion of legal justice, freedom of contract and formal legal equality. These notions are like the dictum ‘justice free for all like the Ashoka Hotel’. The British legal system developed the principle that ‘justice is blind’ or ‘judges ought to live in Ivory tower’, which means that they are required to interpret law logically and statistically unmindful and unconcern of social consequences or effects of their judgement on society. The Indian judges like M.C. Changla, P.B. Gajendragadkar, Krishna Iyer, P.N. Bhagawati, D.A. Desai, Chinnappa Reddy, Kuldeep Singh, Dr. A.S. Anand C.J. etc. have rejected the Anglo-Saxon jurisprudence being anti-people, draconian, cancerous and smuggled system which is utterly alien to the genius of the country. Krishna Iyer.J., scoffed at the notion that principles of justice, equity and good conscience are to be equated with English common laws during the reign of Queen Victoria. He remarked that the imperative of independence and the jural postulates based on new value system of developing country must break off from the borrowed law of England received sweetly as justice, equity and good conscience.

Free India has to find its conscience in our rugged realities and no more in alien legal thought. Gandhiji had suggested the national leaders that when there is a doubt about desirability of any policy or programmes, they should recall the face of the poorest man in the country and see in the proposed policy or programme was likely to benefit him. As he puts it:

“I will give you a talisman. Whenever you are in doubt, or when the self becomes too much with you, apply the following test. Recall the face of the poorest and the weakest man whom you have seen and ask yourself, if the step you contemplate is to be of any use to him. Will he gain anything by it? Will it restore him to a control over his

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own life and destiny? In other words, will it lead to swaraj for the hungry and spiritually starving millions? Then you will find your doubt and yourself melting away”.

Accordingly, Indian judges have rightly interpreted law in its contextual and social setting and no more draw their inspiration from unknown alien soil and system which has different life style and social milieu. Mr. Justice D.A. Desai observed that the justice delivery system of this country is utterly alien to the genius of this country. This is a smuggled system from across the shores imposed upon us by the empire builders for their own political motives and during the foreign rule a class came into existence which has enormously benefited this justice delivery to the detriment of teeming millions and therefore, they have become the protagonists of the system. Another activist judge of the Supreme Court Mr. Justice Chinnappa Reddy has come forward openly commenting the Marxist model as an alternative to the traditional models for effecting rapid social change. Mr. Justice Reddy has sharply reacted at the bourgeoisie concept of freedom and its alleged indifference to equality. He remarked\(^{13}\) that freedom was the watchword and freedom was the philosophy of the bourgeoisie in their struggle against feudalism, freedom is still the end of their legal ideology, freedom is still their armour.

Chief Justice Bhagawati has also remarked\(^{14}\) that the Supreme Court should not be guided by any verbal or formalistic canons of construction but by the paramount object and purpose for which this Constitution has been enacted. He too has made law as a tool of social transformation for creating a new social order imbued with social justice. Bhagawati, J., made prophetic observation\(^{15}\) which had inspired the poor, the weak and the destitute to seek protection of the Court against exploitation, injustice and tyranny. Chief Justice Bhagawati highlighted the new swing and significance of a judicial process in these words\(^{16}\):

“Today a vast revolution is taking place in the judicial process, the theatre of law is fast changing and the problems of the poor are coming to the forefront. The Court has to innovate new methods and

\(^{13}\) Reddy, O.C., Social Ferment Legal Ideology and Judicial Process at the Third International Conference of Appellate Judges, New Delhi, March 1984.

\(^{14}\) Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802.

\(^{15}\) People’s Union for Democratic Rights v. Union of India, AIR 1982 SC 1473.

\(^{16}\) S.P. Gupta v. Union of India, AIR 1982 SC 149.
devise new strategies for the purpose of providing access to the justice to large masses of people who are denied their basic human rights and to whom, freedom, and liberty has no meaning”.

Thus, a new sociological juriprudential approach wherein law is committed to the service of the people, law as a vehicle of social transformation and above all with social objectives is geared to remove the social disabilities, discrimination and inequalities. The Courts have by now acquired a firm social philosophy founded on humanism, socialism and secularism of the Constitution. It is, therefore, imperative both for Indian jurists and judges to be fully alive to this new wind of change and reform and desist from measuring Indian laws from Austinian or even Poundian philosophy. The emergence of anti-poverty and egalitarian jurisprudence in India seem to have resurrected judicial conscience as the contemporary judicial process is more than the social philosophy of the founding fathers of the Constitution. It is now people-oriented, social-justice-oriented, effect and result-oriented and above all human rights-oriented leaning more on *swadeshi* values by ridding of the alien, abstract, legalistic and individualistic slant from Indian law\(^\text{17}\). The fundamental thing which the Indian judges and jurists to remember is that law must work in order to deliver the much needed results or desired goals. Interesting enough the judgements of the Supreme Courts are not only animated with social change but are indicative of law making by the judiciary through its interpretative process. Thus, the traditional mechanical jurisprudence which treats law as a slot machine stands discredited. Judicial activism in India has exploded the theory that judges are the creator of law, initiator of change and protector of the weak and the oppressed. The era of *status-quo* oriented positivism and adversial jurisprudential system inherited from Anglo-Saxon jurisprudence has been once for all rejected and ridiculed by Indian Judges. Mr. Justice Krishna Iyer has warned the judges not to be mere mechanical in their interpretation of law. He remarked that social justice is not constitutional clap-trap but fighting faith which enlivens the legislative text with militant meaning\(^\text{18}\).


Likewise, Chinnappa Reddy, J., observed\(^{19}\) that the Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of the State Policy.

To the Indian Judges and legislators justice is not mere abstract ideal derived from or based on reason. Indeed economic and social justice is the ideal and the criterion for adjusting competing claims and interests and these norms are to be followed by the Courts while interpreting the Constitution or any other social legislation. In this way the judges mould the spirit of law according to the changing values and mores of society by giving new meaning and new cast to the letter of law. This exercise is generally described as judicial legislation and its examples in India are the doctrine of prospective overruling\(^{20}\), the doctrine of basic structure\(^{21}\) which are greatly influenced by the philosophy and ideology of the adjudicating judges. Numerous decisions of the Supreme Court on basic human rights and fundamental freedoms prepared a new ground for the growth and development of indigenous swadeshi jurisprudence.

2.5 Emerging Socio-Legal Realities

In India, in the wake of *Keshavananda Bharati*\(^{22}\), *Maneka Gandhi*\(^{23}\), *S.P. Gupta*\(^{24}\) etc. have led to a democracy – fundamental rights enforcement cum judicial independence syndrome which constitute the macro-jurisprudential sociological structure in the late nineties and even beyond. These developments in law and society have been possible on account of a free and independent judiciary which have been envisaging that all socio-legal transformation must take place within the frame-work of a free society and the Constitution. Accordingly, judiciary has become not only corrective to legislative and executive excesses and irregularities, its power of judicial review has come as a boon to underprivileged individuals or groups since its verdicts have been in consonance with basic freedoms and liberties of the people in the context of times and space. In justice delivery system the courts have evolved new theories, principles and practice by elbowing out old notions and contradicting time

\(^{19}\) *U.P. State Electricity Board v. Hari Shankar*, AIR 1979 SC 65.
\(^{22}\) *ibid.*
\(^{23}\) *Maneka Gandhi v. Union of India*, AIR 1978 SC 597
\(^{24}\) *supra note* 16.
tested traditional jurisprudential false beliefs like that judges do not make law, the
docline of separation of powers and the doctrine of *locus standi* and have innovated
new principles of combating socio-economic problems, promote collective rights and
protect social interests in respect of consumerism and environmental hazards etc.
Likewise, the Supreme Court evolved a new natural law doctrine over and beyond the
Constitution in *Keshavananda* which embodies the principles of higher natural law,
cherished moral values, social and political goals in the backdrop of changing needs
of social life of our democratic policy. In *Maneka Gandhi* the Court evolved a liberal
and pragmatic slant in human rights jurisprudence by injecting the U.S. due process of
law into Article 21 overruling the *Gopalan* and subjecting enacted law to due process
of law in order to be just, fair and reasonable and not draconian and arbitrary. In
*Maneka Gandhi*, Justice Krishna Iyer reiterated that procedural safeguards are the
indispensable essence of liberty. In fact, the history of personal liberty is largely the
history of procedural safeguards and the right to hearing has a human right ring……
and a fascinating subject of sociological relevance in many areas.  

These juristic developments reflect the social realities of India today so that
law and legal theory could respond to meet effectively the needs of the poor and the
oppressed.

Indeed a legal revolution is taking place in India within the framework of law
and the Constitution where judiciary is using legal and constitutional devices for
providing the content and quality of justice – social, political and economic especially
through public interest litigation. While the Preamble enshrines goals and direction of
social change in accordance with spirit and ethos of the Constitution, it is the judiciary
which has explored a new meaning and content to such goals making them more
effective and resilient to meet the ever changing requirements of Indian democracy.
These are –

(i) Independence of judiciary,
(ii) Social justice and equality,
(iii) Dignity and freedom of the individual,
(iv) Secularism and
(v) Democracy.

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An independent judiciary is the substratum on which the whole edifice of constitutional fabric, democratic way of life, the rule of law and legal process rest. The vitality of democratic process and the ideals of justice, the imperatives of social change and other great values of human liberty, equality and freedoms are all dependent on the tenor and tone of the judiciary. Where judicial wings are clipped, trimmed or transgressed by way of politically motivated supersession or transfer to brow-beat the judges to follow the social philosophy of the Government rather than the philosophy of the Constitution the consequences of such a policy are disastrous to the rule of law and the Constitution. It is the judicial independence which ensures democratic form of Government, the rule of law and basic rights and liberties of the citizens. An independent judiciary is an indispensable requisite of a free society under the rule of law. Democracy, rule of law, individual liberties, legal and social justices are such vibrant noble concepts which are made purposive and meaningful and which grow and develop only under the canopy of a free and independent judiciary. It is a cardinal principle of the Constitution. There cannot be free society without a free independent judiciary.

2.6 Sociological Jurisprudence – Post-Emergency Era

One of the great juristic developments in the post-emergency era in India has been the realization on the part of the Parliament and the Supreme Court that they must live in harmony and work in unison for the good of the Daridranarayana – the cobbler, the mason, the farmer, the women, the worker etc. The new interaction between legislative policies and purposive judicial response thereto have restored the balance and harmony in our social polity and the Supreme Court more or less has relegated its five-star hotel approach while dealing with questions of social and economic import. Now, law both for the Parliament and the Court is nothing but a means to an end and not an end in itself. It is a tool and a technique to serve the people and not to paralyse social change and reforms through legal process. It is a method to adjust and accommodate law to the needs of the country ‘we the people’. Both the legislators and the judges have to be faithful to the ‘we the people of India’ changing and interpreting law according to changing times, needs and circumstances of Indian society.

26. The term used by Gandhiji for the poor little Indians.
In 1973 a Committee on Procedural Justice to the People had diagnosed the pathological features of Indian judicial justice and the forensic crisis which denied justice to people and the need of creative initiatives so that remedial jurisprudence is realized. Justice Krishna Iyer was the first among early crusaders who deeply felt how the humble Indian humanity is denied justice both by robbed and gowned legal fraternity and the courts which were paralyzed by limitative prolixity and other factors which delayed and denied justice to little Indians. As a judicial statesman ushering in a new philosophy responsive to the needs and aspiration of the disadvantaged groups he moulded the Indian legal theory to the needs of time and of people. He heralded the emergence of sociological jurisprudence through his innovative and creative judicial engineering. He envisaged the need to understand and define law as a social science based on hard societal facts and realities and not on abstract principles or rigid legal canons. Justice Krishna Iyer sought the help of counsels to enable the Court to adopt and apply these facts of sociological jurisprudence. He remarked:

“Welfare legislations, calculated to benefit weaker classes, when their vires is challenged in Court, cast an obligation on the State, particularly when notice is given to the Advocate–General, to support law if necessary by a Brandeis brief and supply of socio-economic circumstances and statistics inspiring the enactment. Courts can not of their own, adventure into social research outside the record and if Government lets down legislature in Court by not illuminining the provisions from the angle of social mischief or economic menace sought to be countered, the victims will be the class of beneficiaries the State professed to protect”.

2.7 Beginning of a Sociological Movement

The post- Keshavananda era witnessed the emergence of sociological jurisprudence in India at a macrocosmic scale. Some jurists like Prof. Upendra Baxi etc. had begun to envisage the need of studying law on the matrix of socio-economic reality. The legal scholars and jurists began to share the functional approach of the sociologists who had made serious studies on the relationship between law, society and social change explaining inter-actions and inter-sections between law and society. In fact, there was a revolt against the conventional definition of law and jurisprudence. The jurists and more particularly some of the progressive and liberal

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judges envisaged the need of applying socio-economic criteria in the solution of current social and economic conflicts by dumping the nineteenth century *laissez faire* notion of free contract, absolute freedom and rigid application of law irrespective of social needs or social consequences. The Indian Poundians began to explain and analyze law objectively, pragmatically and functionally deriving help from social scientists and social sciences for the resolution of socio-economic issues through social engineering. Such a strategy for legal action and adaptation of law to social responses, pressures, claims, demands and requirements ushered in sociological jurisprudence in India. The Holmesian Indian judges too adopted and applied the new sociological approach towards interpretation and application of law with an emphasis ‘law is what law does’ for resolving the problems of the poor, the exploited, the disadvantaged, the weak, the unequals, the untouchables etc. Indeed some of the judges highlighted on this new role of law which gave first priority to ill-starved and other little Indians over tycoons and bigwigs who represent five-star hotel culture and interest. In fact, Justice Vivian Bose of the Supreme Court had initiated during 1950’s such a role of social realities and needs and the accountability of the judges towards ‘we the people’ so that social justice could inform all aspects of national life.\(^{28}\)

But the judges were not ready to come out of their ‘ivory tower’ having no linkage with the society and social problems. It was only during late 1970’s that there was marked swing towards protection and promotion of varied interest of the common masses through judicial activism which greatly accelerated the growth of sociological jurisprudence in India.

It is only after over two decades from the commencement of the Constitution the judiciary turned law and its judicial process to respond to social philosophy of the Constitution. It began to take up the challenges to meet social and economic realities involving the poor, the weak, the slum-dwellers, the bonded labour, the rural labour and under-trial prisoners etc. Hitherto the traditional conservative judges were not looking beyond and behind the letter of law and were strictly following the rigid legalistic approach in defence of individual rights of property irrespective of the socio-economic and jurisprudential repercussions of their judgments on society. Some of the progressive judges like V.R. Krishna Iyer, Y.V. Chandrachud, P.N. Bhagawati, D.A. Desai, O.Chinnappa Reddy, Kuldip Singh, Dr. A.S. Anand etc. launched a jehad

\[^{28}\text{Bidi Supply Co. v. Union of India, AIR 1956 SC 479.}\]
against fossilizing law and judicial system and vigorously pleaded for the adoption of sociological approach in the interpretation of law to meet the felt needs of the people. In particular, it was V.R. Krishna Iyer who loaded law with a social mission in order to make law value or goal-oriented and stirred judicial creativity to support poverty-alienation legislation. He observed that the social philosophy of the Constitution shapes creative judicial vision and orientation and a judge is a social scientist in his role as a constitutional invigilator and fails functionally if he forgets this dimension in his complex duties.

It may be said that Justice Krishna Iyer subscribed to the views of great American judge like Oliver Windell Holmes, Brandies, Cardozo, Warren and Burger who had played significant role in the protection and furtherance of justice for the disadvantaged groups like labour, blacks, women, children, indigent prisoners through judicial review. He came to the Supreme Court in the post-Keshavananda Bharati period. He tried to attune the judicial process to the resolution of the formidable socio-economic problems within the democratic process. His blisting compassion for the poor and his concept of jurisprudence of access to justice remains a perennial inspiration and a fountain of Indian jurisprudence both in form and content. His incessant efforts to free Indian law and jurisprudence from its colonial heritage, to link law with life of masses, its creative role of making law as an instrument of social change and social justice, his love for Gandhian values and his crusade for judicial independence had made Krishna Iyer the founding father of modern Indian sociological jurisprudence.

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