I Indian Legal System

(A) Introduction

Indian Legal System has been compared with 'Triveni' meaning confluence of 3 rivers. Thus, there are 3 streams which make the Indian Legal System. The first one is that of Common Law, the second one is that of Civil Law and the third one consists of the Personal and Customary Laws. Let us examine each one of them in some detail.

Common Law: It is generally assumed that India is a Common Law Country. In many countries of the world where colonisation by England took place; common law is found to be dominant even after decolonisation. English people took with them to their colonies the legal system which has come to be known as Common Law system.

Common Law simply speaking is Judge made Law or Case-law. Setalvad defines common law as:

"those unwritten legal doctrines embodying custom and tradition which have been developed over the centuries by the courts".
Whenever the disputes between different citizens reach a stage at which one of the parties seek redressal of the grievance in the court of law, the decisions by the courts are responsible for the development of Common law. In deciding the disputes between the people, the Judges interpret and apply Black letter Law or Civil Law if it is available and they decide the cases on the basis of the principle of *Stare Decisis*(2). It is a doctrine that when court has once laid down a principle of law as applicable to a certain state of fact it will adhere to that principle, and apply it to all future cases where facts are substantially the same, regardless of whether the parties and property are the same. Under the doctrine, deliberate or solemn decision of court made after argument; a question of Law fairly arisen in the case, and necessary to its determination, is an authority, or binding precedent in the same court, or any other courts of equal or lower rank in subsequent cases where the very point is again in controversy.3

Thus, on the basis of the principle of *Stare Decisis*, the Judges develop a set of law which is termed as Common law. If there are no precedents
or codified law in respect of a particular fact situation the Judges apply some very fundamental principles to the dispute and decide the same. They are the principles of justice, equity and good conscience. In this process Judges, not only apply the law but in even make the law.

In India, the English courts started the development of common law. After independence, the same was continued under our Constitution by virtue of Art.372. Moreover, Articles 32, 226 and 227 of our constitution give a power of judicial review i.e. our judiciary is empowered to strike down any legislation if it is found to be violative of the fundamental rights of citizens. Thus the courts are given wide powers to do justice. We in India have a unitary and not dual judicial system in the sense that the questions of Central Law and State law are not decided by different courts. Scalso, there is fusion both of common law and equity jurisdictions in the same courts in India. The Indian Courts have over a period of time even departed from the English common law whenever Indian circumstances and society demanded such a departure.

Common law is based as Holmes would say "the
life of law has not been logic, it has been experience. Even if there are Codes and Black Letter Laws, legislature has its limitations to foresee and take into consideration all the possible contingencies. Many a times, the legislations are vague or open textured. Thus, it is only the Common law which helps the redressal of disputes by filling in the gaps in the legislation.

For a long time, the Judges brought up in the Common Law tradition denied that they were law makers. The myth was that they either found the law or interpreted it. Today, it is not disputed that Judges make the law even in India. There are many occasions where the statutes do not give direct answers to the issues before the judge and so they have to on the basis of their sense of justice in fact carve out new principles of law. Moreover the common law attitude of treating judicial decisions as binding on future courts no longer holds good. Today's judges believe in overruling the past decisions if found necessary to do so due to changes in time and circumstances. Today's judges not only find and make law but also state what the law ought to be. This trend has been notable in India since the decision of
Thus, today the innovative and creative elements are part of the judicial function. Because of this, today Judges are more accountable to the people considering their law making function.

Civil Law: Law needs to be certain, precise and predictable. Civil Law or Codified Law or Black Letter Law is looked at to fulfil this requirement of certainty. The idea of Civil codes is derived from the Codes of continental Europe, where the Judges decide each case on its merits by applying the law as enacted into the Codes and not in conformity with the system of stare decisis. Some of the common law in India is codified. Codification of Indian Laws started during British regime. For this purpose, Law Commissions were appointed by the British Government.

The Second Law Commission gave final shape to Macaulay's Penal Code. It also prepared drafts of the Code of Civil Procedure and the Code of Criminal procedure, incorporating into them materials left by the first law commission. Later on these Codes were enacted by the legislative councils as Laws of India and again due to Article
of the Constitution of India, they have remained binding Laws till today. The second Law commission however emphasised that such a body of law ought to be prepared with a constant regard to the conditions and institutions of India and the character, religions and usages of the population. The Indian Penal Code, the Code of Criminal Procedure, Indian Evidence Act, the Civil Procedure Code, the Transfer of Properties Act, the Indian Contract Act are some of the classic pieces of codified Law in India. It should however be borne in mind that much is added to all these pieces of legislation by the courts in as-much-as due to the disputes between the parties, the courts have to interpret the various provisions of these codified laws and in the process as we have seen above, the courts have developed their own set of law the Common law.

The Constitution of India in Articles 245 to 255 distributes the legislating powers of the Central Government and the State Governments. Accordingly, in the VIIth Schedule to the Constitution, list I is the Union list, List-II is the State List and list-III is the Concurrent list. In respect of the items in list-I, it is
the Central Government which has powers to make Laws, in respect of item II it is the State Government which has powers to make Law and in respect of List-III Central Government as well as State Government can make Laws. In case of any conflict between the Union and State laws, the Union laws prevail. This is in contrast with the American Constitution where residuary powers vest with the States and people. Accordingly, a number of laws have been passed by the Central as well as State Governments in India.

Today, there is another sub-branch of this type of law which is fast developing due to increasing state intervention and regulation of the complex modern world. It is Administrative law essentially comprising of the rules made by those branches of the government which are responsible for execution of laws for their working. Administrative Law determines the organisation, powers and duties of administrative authorities. In India too there has been enormous growth of Administrative Law.

In civil law systems of the world, system of precedent is not given the same scope and status as it enjoys in common law systems.
Personal and Customary Law: Now coming to the third stream of law which consists of Personal Laws of various communities in India, it should be noted that India is a Heterogeneous country. It has a very long cultural heritage. The oldest part of the Indian Legal system is the Personal Laws governing Hindus and Muslims. They are based on the religious treatises of the respective religions. Some portion of this Law too has been codified. Directive principle of common civil code as enshrined in Article 44 of the Constitution of India still remains an ideal.

Apart from above, the customary Laws of various tribal communities and other ethnic groups also form part of the Law administered in India. To cite one instance, matriliny among the Muppila Muslims of Kerala though not favoured by the Tenets of Islam, is permitted to play a decisive role in the rules of succession applicable to them.

(B) A critical appraisal.

From the above introduction, it is clear that Indian Legal System is a mixed legal system. The ideal of uniform Civil Code as expected in our
constitution is not easy to achieve due to political, social and religious reasons. One feature of the Indian legal system is that it has a great influence in making, interpreting and executing the Laws of the British Legal system. Our legislation is based on a parliamentary system of democracy. Our executive branch has a similar executing machinery as that of the English executing machinery. Our judiciary is unified and it too has a great influence of the British system.

After independence a number of changes have been made, yet our legal system basically remains a British based common law system. It has its obvious advantages and disadvantages.

The Western oriented and based legal system which is imposed on India is based on the paramountcy of individual right. Judge is supposed to be blind, unbiased and completely objective. To the Romans, Justice was a goddess whose symbols were a throne that tempests could not shake, a pulse that passion could not stir, eyes that were blind to any feeling of favour or ill-will, and the sword that fell on all offenders with equal certainty and with impartial strength. The adverserial system aims at giving fullest opportunity to both the
sides on the principle of natural justice. The concept of the due process of law is given great importance.

The most important principle is that of the rule of Law. The classic description of the rule of Law given by A.V.Dicey includes i) the absence of exercise of arbitrary powers on the part of the Government which always acts according to law, ii) legal equality i.e no man is above the law and that everyone is subject to the ordinary law of the land and is amenable to the jurisdiction of the ordinary courts and Tribunals, and iii) Customary and the Common law rights of people result in judicial decisions form the general rules of constitutional law.

The above principles on which the western legal system is based are noble. However, it has its defects and again when put into practice they give rise to a number of problems. David Kayris, Garett Dorsey and other Marxist thinkers of law reject the common western characterisation of the Law and the State as neutral, value free and independent of and unaffected by social and economic relations, political forces and the cultural
phenomena. They call it "myth of legal reasoning"
creating a distorted notion of Government by law
and not people. They challenge the core assumptions
of the western system. 19.

The dispute settlement systems of the world
in which communetarian ends are paramount, the
emphasis is not on who wins or who looses but rather
on bringing about an amicable settlement and
preserving the community relations. On the other
hand, in the western adversarial system winning
or loosing is crucially important, and since
individual rights are paramount neither the lawyers
nor the Judges think about the preservation of
community relationships. As Folberg states,20.

"litigation only fans flames. Whenever, you
have a relationship that should continue,
winning and loosing only creates further
friction". He observes that many of the personal cases may
not belong in court, or belong there only as the
final resort after efforts at conciliation. Lawyers,
judges and others in the Adversary system are
trained in precision which he says is the antithesis
of what we want, to help parties resolve matters
which are sensitive.

Lord Delyin recently pointed out some major
defects in the present legal system in Britain. According to him, the availability of legal services depend upon wealth rather than need, mitigated only marginally by legal aid, which rightly has low priority amongst the social services. Justice is defined by an adversary system which is costly and primarily protects only the better off and the focus of the system on protecting property tends to obliterate the social responsibility of the lawyers. These words apply equally to the situation in India. 21

Sandle points out that within academic philosophy the last decade has seen the ascendance of the rights based (Kantian) ethic over the utilitarian-one. But the Kantian right based ethic is recently faced with challenge from a view that gives fuller expression of the claims of the citizenship and community than the liberal vision allows, which has come to be known as communitarianism based on Hegoell & Aristotle, they argue that we cannot justify political arrangements without reference to common progress and ends, and that we cannot conceive of ourselves without reference to our role as citizens, as participants in a common life.
Number of such criticisms are being made against the present Indian legal system. Laws delays, high Cost of litigation are main criticisms. In pursuit of giving opportunity to both sides on the noble principle of natural justice, it is the procedural formalities which assume great importance as against substantive justice. Truth seems to be given a back place as against justice according to law. The due process of law is used by scrupulous litigants with the help of intelligent lawyers to defeat Civil and/or Criminal liability. Judges just seem to be passing the order of "other side to say" on any application that comes in front of them without even applying their mind to the same.

Indian law students are taught by lecture methods, not the famed "Socratic" method used in the United States. Indian law students rarely read actual case reports. There is uniformity and rigidity about the subjects taught, books prescribed and examinations conducted. In contrast with the U.S. as we shall see where most law students intend to make careers as lawyers, most Indian law students do not intend to practice law. Instead, they intend to use the law degree as a
credential for advancement in other careers.  

Among the prominent features of Indian lawyers are their orientation to courts to the exclusion of other legal settings, their orientation to litigation rather than advising, negotiating or planning, their conceptualism and orientation to rules, their individualism and their lack of specialisation.

In short, therefore, all is not well. In a system like that of ours where in fact tradition and culture gives more importance to communitarian ends, a number of problems have arisen due to imposition of the western legal system. 70% of the Indian population depends on agriculture and is living in villages. 40% of the Indian population is below the poverty line. Illiteracy rate is very high. We can not therefore even expect the majority of the Indians to understand such a legal system and that they therefore can not really protect and enforce their legal rights. There is great need and scope for reforms aimed at increasing the access to justice of the Indian people.

In the words of Prof. C.G. Raghavan:

"The dilemma of Indian Jurisprudence is the incongruity involved in our operating on
the levels of substantive and processual justice with a legal system and a legal methodology which ill-fits the needs of the present because apart from the cultural contradictions which are inherent in any system of justice which is modelled on the patterns of the common law, modernisation and social change are constitutional objectives that cannot be realised speedily and adequately without imaginative institutional innovations and adaptations of some sort.26

In such a situation, what arose on the horizons of Indian legal system recently was public interest litigation. Akeen, to this concept is the concept of representative suits. Both these concepts aim at taking up cause of a group of people by one person. In a public interest litigation of the widest scope that person may or may not himself be an affected person. However, in a representative suit the person must be interested in the litigation himself, i.e. his rights must also be at stake. In a representative suit, resources of the group can be combined. It can result in saving of time, money and energy of everyone involved. The decision of the Court is binding on all the persons coming under that class. Both these types of legal devices aim at providing greater access to justice by collectivisation.27

Over the years, from the time Mr. Justice P.N.
Bhagawati adorned the Chief Justiceship of the Supreme Court of India, public interest litigation has grown enormously. It has also been misused. There does not however, seem to be that much awareness, use or misuse of the representative suits. Bearing in mind the above situation, I propose to examine the law relating to representative/class action suits as a method of facilitating greater access to justice.
Foot Notes of Indian Legal System

(1) Joseph Minattur "Introduction", The Indian Legal System, the Indian Law Institute, New Delhi, 1978.


(2A) For a detailed discussion of civil law see next sub-topic.

(3) Ibid foot-note 2.

(4) Text of Art.372 of the Constitution of India.

Continuance in force of existing laws and their adaptation:

372(1) Notwithstanding the repeal by this Constitution of the enactments referred to in
article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

(2) For the purpose of bringing the provisions of any law in force in the territory of India in accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law.

(3) Nothing in clause (2) shall be deemed

(a) to empower the President to make any adaptation or modification of any law after the expiration of (three years) from the commencement of this Constitution; or

(b) to prevent any competent Legislature
or other competent authority from repealing or amending any law adapted or modified by the President under the said clause.

Explanation I-The expression "Law in force" in the article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously referred, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

Explanation II-Any law passed or made by a legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra-territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra-territorial effect.

Explanation III-Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force.

Explanation IV-An Ordinance promulgated by
the Governor of a Province under section 88 of the Government of India Act 1935, and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the Corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause (1) of article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.

(5) The Delhi High Court in AIR 1975 Delhi 200, Para 8 has quoted with approval the following: The relationship between statute law and common law has been expressed by Professor W.M.Galdart as follows :- "The most fundamental part of our law is still Common Law ....... The statutes assume the existence of the common law; they are the addenda and errata of the book of the Common Law; they would have no meaning except by reference to the Common Law." (Elements of English Law, page 9).

It is well known rule of construction of statutes that "the legislature does not intend to make any
substantial alteration in the existing law beyond the immediate scope and the object of the statute" (Maxwell on Interpretation of Statutes. 12th Edition, page 116). We have therefore, to look to the existing common law which surrounds the statutory provision giving the State Bar Council the power to elect a Chairman.

(6) It is worthwhile to note that the Power to review the legislation is expressly given by our Constitution of India. No such power is expressly given by the Constitution of United States. It however, has been assumed by American courts from famous decision in Marbury v/s Madison given by justice Marshall.

(7) In the United States there is a duel system of courts. The questions relating to Federal Law are decided by the Federal courts and questions relating to State Law are decided by the State courts. The U.S. Supreme court however, is the final appellate court at present consisting of 9 Judges sitting enblock and they can take up matters coming from the Federal as well as the State Courts in their appellate jurisdiction.


(9) See Sathe S.P. "Judicial Process: Creativity and Accountability", Corporate Law Review, Vol. IV. November 1987, page 4. The author points out the following as the constraints on the judicial creativity: Doctrine of Stare Decisis and Precedent, Resoned Judgements, Rules of Interpretation,
Concept of Locus Standi, Creativness of the Bar, Resourcefulness of the Court.

(10) Supra Foot Note 4.

(11) A.C. Banarjee, Constitutional History of India 1977 at Page 314.

(12) Amendment IX to the American Constitution: The enumeration in the Constitution of certain right, shall not be construed to deny or disparage others retained by the people.

Amendment X to the American Constitution: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.


(14) Hindu Marriage Act 1955, Hindu Adoption & Maintenance Act 1956, The Hindu Succession Act 1956, Hindu Minority & Guardianship Act 1956, the
Indian Succession Act, The Muslim Women Protection of rights' Act, etc. are some examples.

(15) Art.44 Constitution of India: State shall endeavour to secure for the citizens Uniform Civil Code throughout the territory of India.

(16) J.Minatur, "The nature of Malay Customary Law".


(20) Jay Folberg, a Professor at Lewis & Clark Law School in Portland Oregon, U.S.A. and an official of the Association of Family Concilliation Courts quoted in Philadelphia Inquirer, 9-14-80


(23) Art. 21 of the Indian Constitution: No person shall be deprived of his life or personal liberty except according to the procedure established by law. This protection is a fundamental individual right known as due process clause in the western legal systems.

(24) Robert Hayden "Lawyers and Courts In Contemporary India" Film Guide to Courts and Councils: Dispute Settlement In India, South Asian Area Centre, University of Wisconsin, U.S.A.

(25) Marc Gallenter: Law and Society in Modern India Edited with an Introduction by Rajiv Dhavan,

(27) A detailed discussion of PIL vis a vis representative suits is made later in the thesis.