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Overview of Legal Systems in the Asia-Pacific Region: India

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OVERVIEW OF LEGAL SYSTEMS IN THE ASIA-PACIFIC REGION

Jointly Presented By
THE ASIAN AMERICAN LAW STUDENTS' ASSOCIATION
and **LL.M. ASSOCIATION**

Saturday, April 10, 2004

Harriet Stein Mancuso Amphitheater (G90)
Myron Taylor Hall ~ Cornell Law School

Presented By

Mr. Navoneel Dayanand



Three equal horizontal bands of saffron (subdued orange) (top), white, and green with a blue chakra (24-spoked wheel) centered in the white band; similar to the flag of Niger, which has a small orange disk centered in the white band

INDIA
(Capital: NEW DELHI)

The Indus Valley civilization, one of the oldest in the world, goes back at least 5,000 years. Aryan tribes from the northwest invaded about 1500 B.C.; their merger with the earlier inhabitants created the classical Indian culture. Arab incursions starting in the 8th century and Turkish in 12th were followed by European traders, beginning in the late 15th century. By the 19th century, Britain had assumed political control of virtually all Indian lands. Nonviolent resistance to British colonialism under Mohandas GANDHI and Jawaharlal NEHRU led to independence in 1947. The subcontinent was divided into the secular state of India and the smaller Muslim state of Pakistan. A third war between the two countries in 1971 resulted in East Pakistan becoming the separate nation of Bangladesh. Fundamental concerns in India include the ongoing dispute with Pakistan over Kashmir, massive overpopulation, environmental degradation, extensive poverty, and ethnic and religious strife, all this despite impressive gains in economic investment and output.

- *GEOGRAPHIC DATA* – total: 3,287,590 sq km; land: 2,973,190 sq km; water: 314,400 sq km; slightly more than one-third the size of the US
- *RACE* – Indo-Aryan 72%, Dravidian 25%, Mongoloid and other 3% (2000)

- *LANGUAGE AND LITERACY* – English enjoys associate status but is the most important language for national, political, and commercial communication; Hindi is the national language and primary tongue of 30% of the people; there are 14 other official languages; age 15 and over can read and write; *GOVERNMENT TYPE* – Federal (and Unitary) Republic
- *ADMINISTRATIVE DIVISIONS* – 28 states and 7 union territories
- *LEGAL SYSTEM* – Based on English common law; limited judicial review of legislative acts; accepts compulsory ICJ jurisdiction, with reservations
- *ECONOMY* – India's economy encompasses traditional village farming, modern agriculture, handicrafts, a wide range of modern industries, and a multitude of support services. Overpopulation severely handicaps the economy and about a quarter of the population is too poor to be able to afford an adequate diet. Government controls have been reduced on imports and foreign investment, and privatization of domestic output has proceeded slowly. The economy has posted an excellent average growth rate of 6% since 1990, reducing poverty by about 10 percentage points. India has large numbers of well-educated people skilled in the English language; India is a major exporter of software services and software workers; the information technology sector leads the strong growth pattern.

[Information adapted from the World Fact Book 2003 published by the Central Intelligence Agency of the US Government.]

Detailed Description of the Legal System of India

Demography of India:

Besides the CIA Fact File in India, the following paragraph best depicts India in a today's world.

Modern India is a land where temple elephants exist amicably with the microchip. Its ancient monuments are the backdrop for the world's largest democracy where atomic energy is generated and industrial development has brought the country within the world's top ten nations. Today, fishermen along the country's coastline fashion simple fishing boats in a centuries old tradition while, a few miles away. Motor vehicles glide off conveyor belts in state-of-the-art factories.

Source: <http://www.indolink.com/DiscoverIndia/demophy.html>

Political System:

The President is elected by members of an Electoral College consisting of elected members of both Houses of Parliament and Legislative Assemblies of the states, with suitable weight given to each vote. His term of office is five years. The Vice-President is elected by the members of an electoral college consisting of members of both Houses of Parliament in accordance with the system of proportional representation by means of a single transferable vote. He holds office for five years. The Vice-President is Ex-officio Chairman of the Rajya Sabha. The Council of Ministers comprises Cabinet Ministers, Minister of States (independent charge or otherwise) and Deputy Ministers. Prime Minister communicates all decisions of the Council of Ministers relating to administration of affairs of the Union and proposals for legislation to the President. The Legislative Arm of the Union, called Parliament, consists of the President, Rajya Sabha and Lok Sabha. The Rajya Sabha consists of 245 members. Of these, 233 represent states and union territories and 12 members are nominated by the President. Elections to the Rajya Sabha are indirect; members are elected by the elected members of Legislative Assemblies of the concerned states.

The Rajya Sabha is not subject to dissolution, one third of its members retire every second year. The Lok Sabha is composed of representatives of the people chosen by direct election on the basis of universal adult suffrage. As of today, the Lok Sabha consists of 545 members with two members nominated by the President to represent the Anglo-Indian Community. Unless dissolved under unusual circumstances, the term of the Lok Sabha is five years. The system of government in states closely resembles that of the Union. There were 25 states (now 28) and seven Union territories in the country.

Multi-Party system: Structure of the state is both Unitary and Federal. A recognized political party has been classified as a National Party or a State Party. If a political party is recognised in four or more states, it is considered as a National Party.

Legal System:

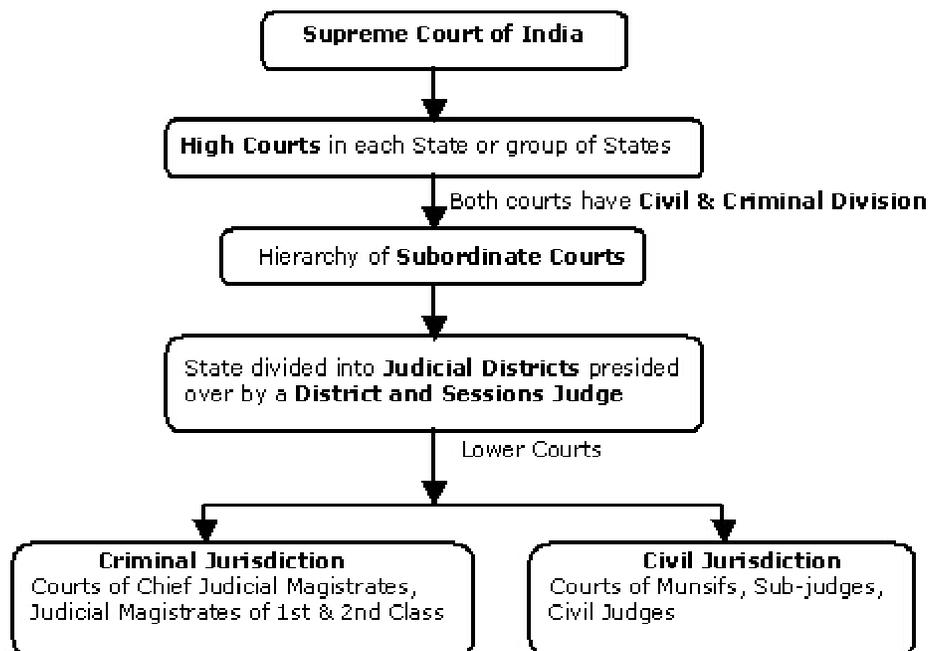
The Indian Constitution which came about in 1950 was drafted on the basis of English Common law and incorporating important US court decisions. The Constitution of India guarantees equal rights to all citizens, and prohibits discrimination on the basis of race, ethnicity, gender, caste, and religion; it also allows universal franchise, thereby making the Indian electorate the largest in the world. The Fourth Part of the Constitution contains what are called "directive principles of state policy", which require the government to set goals for the welfare of the people, such as a minimum wage, jobs for people from disadvantaged backgrounds, and subsidized medical care. The Indian Constitution is one of the largest in the world, and comprehensive and sweeping in its scope.

Source: <http://www.sscnet.ucla.edu/southasia/History/Independent/indep.html>

Judicial System:

A unique feature of the Indian Constitution is that, despite its Federal system and the existence of the Central and State laws with their predefined spheres of application, there exists a single integrated system of Courts which administers both the central and the state laws.

The flow chart below shows the general **Hierarchy of the Courts in India**



The **Supreme Court of India** and the **High Courts** are the two constitutional courts that are vested with major powers to protect the Fundamental Rights of the citizens and also to interpret the Constitution and other laws.

■ THE SUPREME COURT OF INDIA

The Supreme Court stands at the helm of the Indian Judicial System. It is located in the capital city of **New Delhi**, and comprises of the **Chief Justice of India** and 25 other Judges who are appointed by the President of India. The Supreme Court of India was inaugurated on the **28th January 1950**; just two days after the Constitution of India came into force.

It has many Benches for litigation and its **exclusive original jurisdiction** extends to any dispute between the Government of India and one or more States; or between the States themselves. It also has an **advisory jurisdiction** wherein the President can always seek advice on any matter of law. The Law pronounced by this court is binding on all courts within India and the Court has the **power to punish** anybody for its contempt.

■ THE HIGH COURTS

There are total **21 High Courts** in India, each of which stand at the head of the concerned States administration, while three of them have jurisdiction over more than one State. They work under the direct guidance and supervision of the Supreme Court of India. However **no direct administrative control** is exercised by the latter that may in any way affect the functioning of the High Courts as independent judicial institutions. Every High Court has a Chief Justice and such other Judges which the President may appoint from time to time.

Source: http://ip-boutique.com/legal_market/legal2.html

Decisions of the Supreme Court are considered law of the land and are binding unless overruled by a larger bench of the same court. High Court decisions are binding to the extent of their respective state jurisdiction.

LEGAL EDUCATION IN INDIA

It was in **1857** that the common **law education** started in India, with the establishment of law departments in three universities in Calcutta (Kolkata), Madras (Chennai) and Bombay (Mumbai). In the beginning, Law was available, as a part-time course free for students and this continued for almost a century. It was during this period that institutions such as Government Law College in Bombay, the Law College in Poona, the Symbiosis College of Law also in Poona, the University College of Law in Calcutta and the Law College in Madras, which were all affiliated to their respective Universities, also created their own **Law-teaching traditions**.

It was not before **1961**, that the **Parliament of India** made efforts to consolidate the law

governing the Indian legal profession with the establishment of an All India statutory body called "**The Bar Council of India**". Among the prime responsibilities of this body was (i) to recognize the law degree from universities, as one of the qualification for a graduate's enrolment as an "advocate" and (ii) to introduce stringent legal education standards along with curricular specifications, so as to prevent the mushroom growth of sub-standard law schools.

Source: http://ip-boutique.com/legal_market/legal13.html

Over 500 law colleges and universities in India offer the LLB professional degree course. Students, who opt for a three-year LLB degree course, have to be a graduate in any discipline with 50 per cent marks. For the five-year integrated law program, the minimum requirement is 10+2 with 50 per cent marks. Generally, the students of the five year law degree course are selected on the basis of their performance in an entrance test which comprises objective papers on general awareness and legal aptitude. Subjects typically covered are based on knowledge in law, analytical reasoning and current events of national and international importance with special reference to law, general sciences, history and geography of the country, Indian policy and economy. The upper age limit for admission to the five year law programs is usually 20 years (22 years for SC/ST). For the three year degree course after graduation, different universities follow their own criteria - either merit/marks based or a combination of merit and testing.

Source: <http://students.indlaw.com/courses.asp>

The premier law institutes among these are National Law School of India University, Bangalore, Indian Law Society, Pune, Bangalore University Law College, Law Faculty, Delhi and NALSAR University of Law, Hyderabad, NUJS, Calcutta et al.

At National Law School, for example, the faculty has impressive visiting professors as like senior advocate Soli Sorabjee, former chief justice Y.V. Chandrachud and members of the House of Lords. The school has already established an enviable reputation in India and internationally as a unique, innovative and multi-functional institution. Admission to this course is based purely on merits, assessed at the all India admission test which is held in May every year.

Bar Council of India directs the legal education pattern in India. A Mandatory reservation exists in a certain portion of the admission in favor of SC/ST candidates. 15% for S.C. Candidates, 7.5% for S.T. candidates & 30%. At NALSAR, Annual tuition fee Rs.35,000/- (approximately \$800) (likely to be revised upward) Academic Services and other Fee, Hostel and Mess charges will be extra. Hostel residence is compulsory.

Source: <http://www.nalsarlawuniv.org/>

At NLSIU, the tuition is twice the amount per year. Many public or government run law colleges charge a far lesser tuition than the ones prescribed here. For example, at Bangalore University, the Annual tuition is around Rs.1000 which is about \$22

Source: <http://www.nls.ac.in>

Class size and method of instruction

On an average most universities accept about 200 students a year for the 5 year program. Although minor changes to the curriculum is accepted, the Bar Council of India is one which prescribes changes to the syllabus and curriculum from time to time.

LEGAL PROFESSION

The birth of the Advocates Act, 1961, arose primarily from need of a uniform and well-knit structure for a legal profession which further strengthens the administrative justice system in the country. The Law relating to Legal Practitioners was also there in the Legal Practitioners Act, 1879, the Bombay Pleaders Act, 1920 and the Indian Bar Councils Act, 1926.

THE ADVOCATES ACT, 1961

Realizing the importance of an integrated Bar and the need for Reforms of Judicial Administration, the **Indian Bar Committee** in **1951** made some recommendations relating to the Bar and to Legal education. These recommendations were endorsed in **1958** by the **Law Commission** in its Fourteenth Report on **Reforms of Judicial Administration** and urged the Government to implement the same. It was in 1959 that the Legal Practitioners Bill which incorporated these recommendations, was introduced in the Parliament, which was to be later on adopted with the new name of Indian Advocates Act, 1961. The main features of the bill included:

- The establishment of an All India Bar Council and a common role of advocates with the right to practice in any court in any part of the country.
- The integration of the bar into a single class of legal practitioners known as advocates.
- The prescription of a uniform qualification for admission of persons as advocates.
- Division of advocates into senior advocates and other advocates based on merit.
- Autonomous Bar Councils creation, one for the whole of India and one for each state.

As the Bill was a comprehensive measure, it repealed the Indian Bar Councils Act 1926 and all other laws on the same subject.

The Advocate Bill was passed by both the Houses of Parliament and received the assent of the President, on **19th May, 1961** to become *an Act to amend and consolidate the law relating to legal practitioners and to provide for the constitution of Bar Councils and an All-India Bar.*

The Advocates Act, 1961 provides for an autonomous Bar Council in each State and an All India Bar Council consisting mainly of the representatives of the State Bar Councils. Under this Act, a **State Bar Council** is required to enroll qualified persons as advocates and prepare a roll of those practicing in the State. A common roll of advocates for the whole of India is to be then prepared by the **Bar Council of India**. These Advocates whose names appear in the common roll have permission to practice in all the Courts in India including the Supreme Court.

Under the Advocates Act, 1961 the members of a State Bar Council are elected from among the advocates in the State. Also the **Advocate General** of the concerned State is the **ex-officio member** of the Bar Council. Similarly a member is elected from each State Bar Council from amongst the elected members so as to form the council for the Bar Council of India. The posts of **Chairman and Vice-Chairman** for each State Bar Councils and the Bar Council of India are elective ones. The term of office for the members of the Bar Council is five years. There is a Secretary for each State Bar Council who is also the Chief Executive Officer of the council. The decisions of the council are taken by the various committees constituted under the different heads and also by the entire council.

Source: http://ip-boutique.com/legal_market/legal8.html

STATUS OF LEGAL PROFESSION IN INDIA IN PERSPECTIVE TO THE ENTRY OF FOREIGN LAWYERS & LAW FIRMS

Indian Lawyers have been gripped by a constant fear of the Indian Governments proposal, to allow the entry of foreign lawyers and law firms in India. Moreover, India is a founder member of the World Trade Organization including **General Agreement on Trade in Services** (GATS). Hence, it will have to enter into some negotiations, with regard to opening up of its service sector (**Legal Services**) to the Foreign Service suppliers (**Foreign lawyers, Foreign Legal Consultants and Foreign Law firms**). Looking at the critical situation, the Law Commission of India has taken up the awesome task to study the liberalization of legal profession in India and also make suitable suggestions of amendments to the Advocates Act 1961.

BACKGROUND

It all started with the liberalization of the Indian economy in 1991. Liaison offices were set up in India in 1992 by **White & Case of the US** in Mumbai and **Ashurst Morris Crisp of the UK** in New Delhi. This foreign legal participation in India was first attacked by a group of Indian Lawyers called '**Lawyers Collective**' with court proceedings in the **Bombay High Court**. They alleged that these firms were exercising active legal practice in India against the statutory requirements and the permission granted by Reserve Bank of India to merely operate as **liaison offices**.

The functional division of the legal profession as Counseling; Drafting and Pleading were transplanted in the common law traditions of India even before the **Advocates Act 1961**

was introduced. However it was the Act that uniformalized the entire legal profession, called the enrolled legal service providers as **Advocates** with whom alone the activities of **Counseling; Drafting and Pleading** are reserved.

The two **foreign firms** even though not actively practicing in the courts, had actively indulged in **advising and assisting** Indian and non-Indian clients. They were drafting documents, conducting negotiations, reviewing and providing comments on documents, advising clients on international standards and customary practices relating to clients transactions.

In an interim order, the Bombay High Court held that in India since there is no distinction between solicitors and advocates, both counseling and providing legal advice to the clients will be an '**act**' of **Advocacy** and the representatives of these foreign firms will have to be enrolled under the Advocates Act.

Source: http://ip-boutique.com/legal_market/legal17.html

LAW AND POLICY GOVERNING LEGAL PROFESSION IN INDIA

Law has a national character as it is a part of local culture and life. This poses as an obstacle to cross-border trade in legal services. In India, the legal profession is governed and regulated by the Advocates Act, 1961. In view of permitting the foreign law firms in India, the **provisions of the Act** that need consideration include:

- **Section 24** states that only an Indian citizen will have the right to practice and also be enrolled as an Advocate in India.
- Subject to this Act under '**Reciprocity**', a national of any other country may be admitted as an Advocate on a State roll, only if the citizens of India, duly qualified, are permitted to practice law in that other country.
- Subject to the provisions of the **Section 47**, the Bar Council of India may prescribe the conditions, subject to which foreign qualifications in law obtained by persons other than citizens of India shall be recognized for admission as an Advocate.

Laws of India (Ex. Enactments and Statues): <http://indiacode.nic.in/>

Ministry of Law and Justice: <http://lawmin.nic.in/>

Supreme Court of India: <http://supremecourtsofindia.nic.in/>

Indian Courts: <http://indiancourts.nic.in/>

Parliament of India: <http://parliamentofindia.nic.in/>

Law Commission of India: <http://lawcommissionofindia.nic.in/>

The Seventeenth Law Commission - 2003-2006

The Reports of the Law Commission are considered by the Ministry of Law in consultation with the concerned administrative Ministries and are submitted to Parliament from time to time. They are cited in Courts, in academic and public discourses and are

acted upon by concerned Government Departments depending on the Government's recommendations.