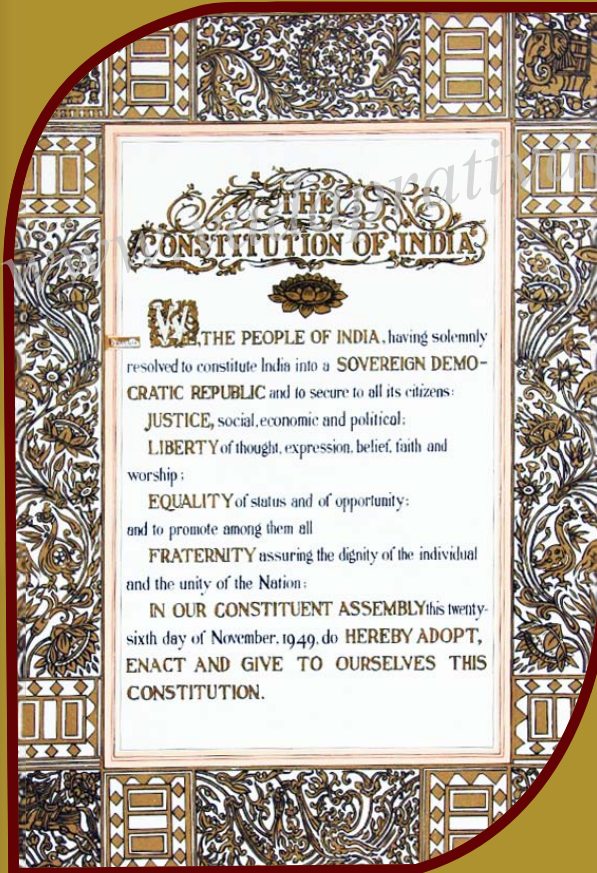




मोहेंजोदड़ो काल : मोहेंजोदड़ो काल की मुहर
Decoration with Mohenjodaro Seal



Pictures from the original Constitution of India



वैदिक काल : वैदिक आश्रम (गुरुकुल) का दृश्य
Scene from Vedic Ashram (Gurukul)



महाकाव्य काल : रामायण का दृश्य (राम की लंका पर विजय और सीता का उद्धार)
Scene from the Ramayana (Conquest of Lanka and recovery of Sita by Rama)



महाकाव्य काल : महाभारत का दृश्य (भगवद्गीता कथन)
Epic Period : Scene from the Mahabharata (Krishna Propounding Gita to Arjuna)



महाजनपद और नंदकाल : बुद्ध के जीवन की एक झांकी
Mahajanpada & Nanda Period : Scene from Buddha's Life



महाजनपद और नंदकाल : महावीर के जीवन की एक झांकी
Mahajanpada & Nanda Period : Scene from Mahavira's Life



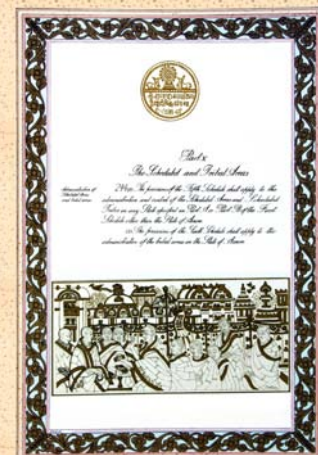
मौर्य काल : सम्राट अशोक द्वारा भारत और विदेशों में बौद्ध धर्म के प्रसार को चित्रित करता एक दृश्य
Maurya Period : Scene depicting the spread of Buddhism by Emperor Ashoka in India and Abroad.



गुप्त काल : गुप्त काल की कला का एक चित्र विभिन्न चरणों में इसका विकास
Gupta Period : Scene from Gupta Art It's Development in different phases



गुप्त काल : विक्रमादित्य के राजदरबार का एक दृश्य
Gupta Period : Scene from Vikramaditya's Court



गुप्त काल : प्राचीन विश्वविद्यालय (नालंदा) का दृश्य
Gupta Period : Scene depicting one of the ancient Universities (Nalanda)

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Decolonisation of the Indian Legal System

Sridhar Potaraju

Advocate-on-Record, Supreme Court of India

"It may be doubted whether democratic India will ever know the happiness which people enjoyed under great rulers like Emperor Ashoka or King Janaka." - N.A. Palkhivala

In the present article, I would not attempt to identify the systemic flaws or possible solutions for they are to be addressed by the competent authorities in charge of the same. I would confine myself to highlight the jurisprudential and civilisational difference between the Colonial Legal System and the Indian approach as envisioned by the framers of our Constitution.

The western civilizational values are premised on material pursuits and furthered by their theological mandates to expand their way of life and belief. The inherent superiority of the ruler over the ruled can be traced to the religious belief in the inherent superiority of their faith and their way of life. As such the invaders/colonisers enforced their faith and imposed their values and their systems on the people conquered by them in far off lands. In the said process they brought in their civilizational experiences as well as cultural practises into the lands so conquered/colonised.

In other words, several legal concepts which were rooted in theology were brought in as standards approved by the civil society, of which some have been penalised by the Penal code. Those who were not following their standards or norms, hence needed to be civilised. This process was coupled with the expansion of trade and administrative control over territories explored under the guise of trade with a discreet sanction of the religious heads coupled with the human ambition to conquer the world. The Indian legal system has been strongly influenced by the religious and social values of the invaders and colonisers.

The Legal System which has so developed with strong colonial imprint has evolved into a legal system which sub-consciously or unwittingly alienated the consumers of justice both with the language barrier as much as procedural complexities. Not to mention the usage of Latin maxims in the Indian Courts, though the same has been more or less

done away even in the Queen's own land¹, it is neither a language taught in Indian Schools nor spoken but still finds place in the Indian Legal System. It becomes a hurdle for even educated people to decipher what is sought to be communicated when it is in a language which is not even prevalent outside the Legal world, not to speak of the less literate. This fact appears to have been endorsed by the Hon'ble Chief Justice of India as reported in The Indian Express on 19th September 2021.²

One but wonders what is the distinguishing factor which makes the Indian Legal System different from a Colonial Legal System and what is the material on which one can decipher the difference. Herein, if we look at the core value cherished and adhered to by a large segment of the population in the Indian civilization during its history spread over thousands of years of various forms of Governance and is still accepted is the need to adhere to one's dharma. The legendary jurist and scholar Nani Palkhivala has this to say on what encompasses the phrase dharma,

"The Sanskrit word dharma cannot be easily translated into English. It has within it elements from the different concepts of the law, righteousness, duty and basic morality."³

Palkhivala quotes with approval C. Rajagopalachari as follows:

"In Our Culture (A Bhavan's Publication) C. Rajagopalachari makes the significant point that India, probably more than any other country, had the largest number of very big intervals between one effective government and another. There were a great many long periods during which the people had neither central nor regional governments exercising effective authority:

"All these periods of what may be called a no-government condition could not possibly have been tided over but for the self-restraints imposed by our culture, the joint family, and the jaati discipline. Not only was order maintained, but trade and arts flourished, the fine arts as well as the common artisans' work so essential for life. The absence of government made no great difference.

¹ See Civil Procedure Rules (CPR), 1998 available at <http://www.legislation.gov.uk/ukSI/1998/3132/contents/made>.

² <https://indianexpress.com/article/india/justice-system-colonial-not-suited-for-indian-population-says-cji-7517470/>

³ India's Priceless Heritage - N.A. Palkhivala.

A mere figurehead of a king was enough to do duty. Sometimes even that was not found necessary.”

Indian dharma emphasized self-restraint. It taught compassion by the strong towards the weak. It inculcated the value of suppression of immediate gratifications for the more distant, but more rewarding, goals of national glory and progress.

Above all, Indian culture encouraged the cultivation of the intellect, not as a commodity for sale in the marketplace, but for the inner joy experienced by the questing mind.”⁴

One but has to wonder as to what was the Indian Legal System conceived by the framers of Indian Constitution. The members of the Constituent Assembly were scholars in Indian texts and epics and had great insight into the values they promote. The framers of the Indian Constitution were alive to the great history and spiritual and cultural heritage of our country that is Bharat. No wonder Article 1 of the Constitution recognises India as ‘Bharat’. The original Constitution has captured the evolution of Bharat as the people born here know it and its transformation into India as the world has recognized it. Anyone who has seen the original Constitution or its replicas with the Illustrations would appreciate the edifice on which the Republic has been built while duly acknowledging its past while laying down the path for the future.

The guiding principle for the Indian Republic has been enshrined in the motto Satyameva Jayathe which is engraved on the State Emblem of India and is also the motto of the High Courts in our country. The Motto for the Supreme Court of India has been very thoughtfully chosen from the Mahabharata as “yato Dharma stato Jaya”, which translates to “Victory will be there where Dharma is”.

The Constitution as originally adopted was ‘ism’ free, until during the national emergency the preamble was amended⁵ adopting Socialism as a political and economic philosophy. The influence of the ideology primarily concerned with control of material resources influenced the Indian Legal System, wherein jurisprudence of Rights evolved. Ironically, the amendment to the Preamble was when all Rights were suspended. The objective of making it part of the Preamble is difficult to find as there is not much material available on the discussions preceding the amendment of the Preamble. The Society moved towards

a “Rights” only approach without corresponding duties/responsibilities being highlighted. Everyone started asserting their rights but no one was accountable for their corresponding duties / responsibilities. The balance between the Rights and Duties was lost in the process since, the Rights are justiciable while Duties are not.

The colonial imprints are much more deeper than the mere complex rules of procedure or legal concepts of property, ownership and possession which have evolved in Europe in its own socio-cultural setup. The strong influence of the Industrial Revolution followed by development of political structures based on socialism (communism/marxism) have also become part of the politico-cultural invasion into the Indian Legal system by making it more focused on materialism and individual rights.

Certain values which are rooted in biblical ideas became part of the Penal codes as well. The Indian Supreme Court has taken judicial notice of certain theological concepts which have found place in the Penal Code and have read them down (Decriminalising Homosexuality).⁶

A legal system whose edifice is based on material values and rights has reached the state where those with material resources are in a better position to access justice as against those with limited or no material resources. The votaries of the commercialised American legal system have also contributed in this regard and have made legal services a commercial venture and justice, a by-product in the process which is controlled by market forces like any other product or service in a free economy. It is but natural that youngsters who have grown adulating the American legal system have naturally started looking at the legal profession from a very materialistic perspective with return on investment as the criterion for evaluating their professional success. In other words the measure of success in Bar for many has now become “yato dhana stato Jaya”, i.e. “Victory is there where Money is.” The ‘isms’, i.e. Socialism (Communism, Marxism and being species of the same ideology) and Capitalism only promote materialism as the end goal and hence the end goal of professional success is also now being measured monetarily in the Legal profession.

Herein, it would be appropriate to recall the observations of Justice S.N Dwivedi in the Kesavananda Bharti’s case :-

“Constitutions which grew up in the preceding three centuries were understood to sanctify the Supremacy of

⁴ Ibid.

⁵ Subs by the Constitution (Forty-second Amendment) Act, 1976, sec. 2(a), for “SOVEREIGN DEMOCRATIC REPUBLIC” (w.e.f. 3-1-1977).

⁶ Navtej Singh Johar v. Union Of India Ministry Of Law 2018 10 SCC 1

Property, said Tocqueville: “The French Revolution has allowed one exclusive right to remain, the right of property, and the main problems of politics will deal with the alterations to be brought about in the right of property-holders”. Our Constitution is conceived in a radically different tradition. Our forbears did not believe in the acquisition of things of pleasure (Preya); they stood for the good and the wholesome (Shrey). They addressed their king as Rajan because it was his duty to secure the welfare of his people. Their rule of law (Dharma) was intended to help the power minus keep the power plus in check. Their rule of law (rita) was a stream, not a puddle. It recognised the inevitability of change. They believed in the moral precept : distribute and enjoy the residue of wealth”.⁷

To my mind, decolonization of the Indian legal system will be possible when all stakeholders ponder over and see if they are playing their part in achieving the institutional goal reflected in the motto ‘satyameva jayathe’ and ‘yato dharma stato Jayah’.

The Indian approach reflected in the motto referred herein above depicts the higher value attributed to Truth and Dharma by the framers of the Constitution. Indian society has always been a society which has been guided by values and was not measured by material wealth or success alone. The social fabric of the society had an inherent affinity to Dharma which has no equivalent word in western civilization. The cultural and civilization values of India are captured in the concept of Dharma as against the western approach of material resources and control of resources as a higher value and measure of success. Hence the Indian society was always a society which traditionally has imposed the duty of adhering to sva dharma on every individual which eventually translates into an orderly society where everyone follows his or her Dharma in their respective roles in the society.

The fruits of such adherence by all to their Dharma were seen in the “Dharmo Rakshati Rakshitah”, i.e. those who follow their Dharma will be protected by Dharma. The protection any society governed by Rule of Law ought to provide to those who abide by its Rules. It may be relevant to point out that the powers conferred on the Supreme Court of India under Article 142 is a direct recognition of Dharma as the higher Constitutional value while administering justice in a given case before it. The power is conferred only on the Supreme Court of India which

enables it to ensure that Dharma prevails over technicalities and procedural inequities which have been built into the legal system brought in by the colonizers to protect their interests.

The social values are also reflected in the Indian tradition that the pursuit of Artha/ material wealth and Kama/fulfillment of desires are permitted only within the bounds of one’s Dharma. A materialistic society would never be able to give justice to its members as long as the stakeholders view material success as the object of their pursuit or measure of their accomplishment without reference to any higher values. Moreso, in the context of stake holders in the Legal System, which is not to be treated at par with a commodity/product but needs to be recognised as a cherished value which every one strives to achieve, while adhering to their respective dharma.

Having explored the legal concepts evolving in the West in the context of a civilization based on materialism, a time has come probably for the Indian legal system to revisit its pursuit for justice by looking within the Indian cultural and civilization ethos reflected in its epics for guidance.

One can’t help but notice the decline in the references to our traditional texts in the judgements of the Constitutional courts from the time of commencement of the Constitution till mid 1980s. Thereafter, the references have been far less and one wonders if they are out of favour, the influence of ‘ism’ which entered the preamble during the dark days of emergency can also not be ruled out completely. It would be relevant to refer to the Bhagavad Gita which cautions against being swayed by ‘para Dharma’ and ignoring ‘svadharma’, ‘for grass is always greener on the other side’ but may not be suitable for our soil. A similar sentiment is also expressed by Hon’ble Justice Jagan Mohan Reddy in his opinion in the case of Kesavananda Bharati’s case as follows:-

“The seed of the Constitution is sown in a particular soil and it is the nature and the quality of soil and climatic conditions prevalent there which will ensure its growth and determine the benefits it confers on people. We cannot plant the same seed in a different climate and in a different soil and expect the same growth and the same benefit therefrom”⁸

It is for the stakeholders in the Indian Legal System to ponder and discern the way forward. □

⁷ Ibid at para 1862, pg 922.

⁸ Kesavnanda Bharati v. Union of India 1973 4 SCC 225, para 1107 pg. 614.