The Colonial Hangover:

The lasting impact of colonialism on the Indian legal system, common law and beyond.

-Joanna Shireen Sarkar

PART- I

Pre-colonial India and the British empire

Law in pre-colonial India:

Pre-colonial India was characterized by a pluralistic and fragmented cultural, religious, and political structure in which there was no monolithic Hindu, Muslim, or Christian authority.[1] Multiple tribes, castes, sects, and family groupings crossed religious and political lines, creating a heterogeneous population that may have had a definite notion of authority but no corresponding notion of legality.[2] Much of the law of the period was customary, with adjudication within segregated communities, which gave rise to a common interpretation by outsiders that pre-colonial India lacked law altogether.[3]

The classical Indian traditions had a different conception of both rule and law compared to modem Western traditions. While the constraining power of legality is central to modem Western traditions, in India, especially during pre-colonialism, it was moral authority which was at the core of the rule of law.[4]

There were two sources of law in classical India-the texts of law or the Smritis as they were called such as Manu Smriti and custom. The sastras or the sacred texts were sources of written law, and customs, unwritten laws. "The sastra incorporated numerous customs, inevitably, since it was itself the fruit of custom systematized. [5]Furthermore, since the sastra was based on "usage, in particular in its practical (*vyavaharic*) chapters, usage may be cited to explain written law'' and the sastras (sacred texts concerning law) offered an umbrella "under which various judicial forms

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[1] Flavia Agnes, Law and Gender Inequality: The Politics of Women's rights in India 12 (1999) ("Plurality of laws and customs and a non-state legal structure were the essential characteristics of the ancient Indian communities.")

[2] NAIR, supra note 1, at 22 ("Scholars argued that although there was a definite notion of 'authority,' there was no commensurate notion of 'legality."');

[3] W.H. Rattigan, Customary Law in India, 10 LAW MAG. & L. REV. 1,3-4(5th ser. 1884-1885) (describing the unwritten customary law of Indian villages).

[4] Robert Lingat. The Classical Law of India (New Delhi: Thompson Press, 1973),

[5]J.D.M. Derrett, Religion. Law and State in India (London: Faber & Faber, 1968), p. 158

could shelter." The relationship between sastric written laws and unwritten customs was complex. There were many instances when customs contradicted written laws and rulers and judges of society had to accept custom as a ground of valid law.

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Indian and her encounter with colonial laws:

The onset of British rule in India was a major defining moment for India and her history. The British involvement in the Indian sub-continent began in the early seventeenth century for the purposes of trade. Historian P.J Marshall claimed that - *the British conquest began in Bengal in 1760''s. By the mid-nineteenth century, it was virtually complete. The area that is now India, Pakistan and Bangladesh was either under direct British rule or governed by princes who were subordinate allies of the British.*[6]

British colonial rule in India began primarily as a political expedient through this quasi-private entity, the East India Company, to reap the benefits of imperialism without setting up a fully functioning sovereign state.[7] When the East India Company acquired the right to collect revenue in Bengal, Bihar, and Orissa in 1765, the company had to devise a new political and legal structure for the newly acquired dominions.[8] Colonial rule changed dramatically after 1858, when the company's rule was replaced by the Crown as the legal sovereign.[9] Throughout the Victorian period, colonial authority was largely premised on an ideology of the civilizing mission, both in Indian and English terms. Within India, the company claimed legitimacy through its mission of defeating and replacing the Mughal rulers, who had been the source of aristocratic power and succession. Legitimacy was gained for the English population at home through the self-proclaimed role of "civilizing" the natives by initiating reforms which represented the enlightenment spirit of the British, the harbingers of progress and modernity. [10]

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[6] P. J. Marshall, The Cambridge Illustrated History of the British Empire (Cambridge: Cambridge University Press, 1996), 358

[7] Jana Tschurenev, Between Non-interference in Matters of Religion and the Civilizing Mission: The Prohibition of Suttee in 1829, in COLONIALISM AS CIVILIZING MISSION: CULTURAL IDEOLOGY IN BRITISH INDIA 68,69

[8] NAIR, supra note 1, at 19 (noting the East India Company's desire to fashion a "legal-juridical apparatus" to control the Bengali revenues the company was granted in 1765).

[9] AGNES, supra note 1, at 59 (describing the administrative shift in India from the East India Company to the British Crown).

[10] Himani Bannerji, Age of Consent and Hegemonic Social Reform, in GENDER AND IMPERIALISM 21, 26 (Clare Midgley ed., 1998)

As Erik Stokes tells us in instructive historical study, *English Utilitarians and India*: "The British mind found incomprehensible a society based on unwritten customs and on government by personal discretion, and it knew only one sure method of marking off public from private rights-the introduction of a system of legality under which rights were defined by a body of formal law equally binding upon the state as upon its subjects."[11]

Colonialism legitimized on the backs of Indian women:

The British wanted to bring Western enlightenment to the native Indian family by abolishing child marriages, sati, the prohibition of the remarriage of widows, purdah, and similar patriarchal customs that oppressed women. In other words, both the interpretation of India as a society driven by religion and the alleged degraded position of women in Indian society and the barbaric actions of Indian men were used as a means to an end to justify the colonial mission in the first place.[12]

British imperialists were not an entirely male species. The imagery of the civilizing mission, especially as it pertained to relieving Indian women of the horrors of their subjugated state, was profoundly attractive to British women who felt that they had some greater authority to speak on behalf of their Indian sisters than British men. [13]

As British women were advocating in England for civil divorce, married women's property rights, the abolition of the Contagious Diseases Acts, suffrage, and a host of other women's reforms, they would routinely praise the enlightened state of Western law as it related to women because of its stark contrast to the family laws that prevailed in India. Ironically, of course, English women had very few legal rights during the Victorian period, but that merely highlighted the problem of women in general.[14] Antoinette Burton writes on how middle-class British feminists invoked images of Indian women as victims awaiting redress at the hands of imperial saviours in order to further their own claims for suffrage and political rights: "'The Indian Woman,' represented almost invariably as a helpless, degraded victim of religious

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[11] Erik Stokes, The English Utilitarians and India (Delhi: Oxford U. Press, 1982). p. 82).
[12] AGNES, supra note 1, at 54 (describing the British goal to rescue Indian women from barbaric family customs); Bannerji, supra note 9, at 25 (noting that British reform was initiated in the name of protecting Indian woman and describing Indian women's bodies as "the discursive battleground between indigenous men and a patriarchal colonial state").
[13] BURTON, supra note 15, at 3 (noting the British feminists' view that they were saviours of the entire world and trumpeters of a "global sisterhood"); see also supra note 17 and accompanying text (explaining how British feminists believed they related to Indian women).
[14] AGNES, supra note 1, at 53 (describing the "near subordination of women in Britain")

custom and uncivilized cultural practices, signified a burden for whose sake many white women left Britain and devoted their lives in the empire.[15]

There was an indelible link in the minds of British feminists that if they lost a battle on the Indian front, they would be likely to lose it at home as well. They cautioned against the moral as well as legal contagion coming from the colonies and argued that they were best situated to guard the home front. There was a complex relationship between the British feminists' beliefs about their Christian duty to rescue their downtrodden Indian sisters and their self-interested motives in depicting Indian women as downtrodden to legitimize their own authority to speak at home. This conflict is, of course, also played out in the context of contested notions of Victorian femininity. As British feminists acted in paternalistic and protectionist ways, they sought to impose on Indian women precisely the constraints of Victorian femininity that they were fighting at home.

The three major areas of the British influence on laws pertaining to Indian women can be traced back to the following domains:

(i) **Reforms in the age of consent law, prostitution, and sexual agency**: Nineteenth century age of consent laws in England and India arose in the context of prostitution and child marriage, respectively, which were social issues directly linked to Victorian notions of domesticity and sexual restraint.

(ii) **Reforms in widow remarriage, widow reversion, and property rights**: In order to deal with the concerns of widow remarriage and the patriarchal concerns of loss the of familial and ancestral property, the Hindu Widow' Remarriage Act 1856 was enacted, thereby replacing the customary laws of Indian society in the 1800s.

(iii) Rights of abortion in India in an era of female feticide:

In England, abortion had been heavily regulated and restricted within a predominantly Christian ideology that stressed the sanctity of life and the notion that life begins at conception. Abortion was not regulated in pre-colonial India; however, population pressures and infanticide led to a

[15] Jana Tschurenev, Between Non-interference in Matters of Religion and the Civilizing Mission: The Prohibition of Suttee in 1829, in COLONIALISM AS CIVILIZING MISSION: CULTURAL IDEOLOGY IN BRITISH INDIA 68,69 (Harald Fischer-Tine & Michael Mann eds., 2004) (discussing British desire to secure the East India Company's economic success while remaining uninvolved in religious and cultural practices of the local populations).

liberalization of abortion laws. What is interesting is that while the reforms in England adopting a liberal attitude towards abortion was linked to the issue and concerns regarding the quality of the life of a woman- in India, it was used as tool for population control and in a society deeply ingrained with patriarchy, led to widespread female feticide.

PART-II

India's post-colonial tryst with law:

Once India acquired its independence in 1947, it was faced with enormous challenge of reorganizing the structure of the country into a national community and state. With the British leaving, India was given a fresh tryst with destiny. Interestingly, while learning from the past pre-colonial lessons, the founding framers of the of a new India began deliberating over possible principles for India's political reorganization instead of considering being replaced by the descendant of the last Mughal ruler. However, the question was and still is- could free India's functioning be envisaged in an epistemic vacuum, completely devoid of any kind of "hangover" from the colonial rule which lasted for about 200 years, such rule have an overarching reach over every sphere of governmental functioning, especially the legal system?

This is an important question to keep in mind while reflecting upon the post-colonial working in the Indian legal system and its laws, which many including myself would argue, is still problematically looming under the shadow of the history of the colonial rule.

Interestingly, the first framers of the Constitution a now free India embraced the British rule of law while framing the constitution- the Constitution of 1950 borrowed heavily from the previous constitution—the Government of India Act, 1935 while designing the framework of governance for the State.[16] Right from the very early days of the working of the Constitution, respect for the rule of law had come to be seen as the most important and beneficial heritage of the British period, which was affirmed by adopting the same principles of the supremacy of the rule of law in the Indian constitution. In other words, the Constitution did not signify a radical departure from

[16] See Mithi Mukherjee, India in the Shadows of Empire: A Legal and Political History 1774-1950 203-04 (2010)

the colonial regime, at least as far as its preferred mode of government was concerned.

Ghosts of Colonialism in Indian Law:

Ten years post-Independence, the Law Commission in its report on the British Statutes Applicable to India[17] considered that India with regard to her new and independent status as a Republic ought to enact her own laws and take necessary legislative actions to make it clear that the statues in question were no longer applicable to India.

Subsequently, more than 400 statues vis-à-vis 1200 archaic regulations were repealed in bulk; however, the colonial rule left its legacy in the form of various act and rule that are still in rigorous continuation till today.

For the course of the trajectory of this paper and area of expertise in criminal law, the focus shall on particularly highlight penal provisions that can trace their roots back to the British rule. Interestingly, majority of these provisions were long repealed in the United Kingdom but owning to dynamic judicial developments, some of have been repealed in India while unfortunately, some of them continue to remain in force.

1. Marital Rape:

   One of the legal reforms in India that most clearly followed upon the efforts of the British law reformers was the "age of consent" law- law governing the age at which adolescents could legally consent to sexual intercourse.[18] Nineteenth century age of consent laws in England and India arose in the context of prostitution and child marriage, respectively, which were social issues directly linked to Victorian notions of domesticity and sexual restraint. In 1981, the Age of Consent Bill was introduced in India in order to raise the age of consent from ten to twelve[19]. While the bill was spurred by the publication of a rather heinous case involving the death of a child-bride often or eleven who was killed

[17] See Setalvad, M.C Fifth Report: British Statues Applicable in India; Law Commission of India-Report-1957; Ministry of Law- Report-India-1957 published by Government of India Press, Ministry of Law, New Delhi.
[18] HEIMSATH, supra note 11, at 161 (describing the British effort to reform Indian age of consent laws).
[19] MEREDITH BORTHWICK, THE CHANGING ROLE OF WOMEN IN BENGAL: 1849-1905, at 126-27 (1984) ("More direct measures were seen to be necessary, and were taken in the Age of Consent Bill of 1891 .... The 1890 bill proposed to raise the age of consent from ten to twelve.").

by a brutal sexual encounter with her thirty-five-year-old husband, another image of male sexual license run amok[20], it is undeniable that much of the reforms surrounding consent were based on colonial norms of sexual restraint and family structure.

However, raising the age of consent by a mere two years, from ten to twelve, the colonial authorities appeared to be correcting a moral wrong deeply rooted in a Victorian religious belief system they did very little to protect young girls. The Bill immediately created opposition from the native population of India, particularly upper-class strata on the grounds that the Bill interfered with the rights of the native male over his wife.[21] To counter the claim that they were interfering in the private realm of the Indian family, the colonial and reform authorities maintained that the Age of Consent Bill was not about age of marriage, but rather about an age at which sexual intercourse is appropriate.[22]

From the perspective of the colonial rulers, interference in the autonomous Indian family laws and religious principles was not the intent, provided that those principles did not enrage the British reformists and feminists as sati, child-brides, and polygamy did.[23] Quite unfortunately however, while the State raised the age of consent without changing the age of marriage which was only changed some forty year later, it was only introducing the possibility of marital rape within Indian families at a time when England herself did not recognize it as a crime.[24] In Chief Justice Sir Mathew Hale's book The History of the Pleas of the Crown, published in 1736, laid out the theory of implied consent. "The husband cannot be guilty of raping his lawful wife because the wife has thus given herself to her husband with their mutual consent and marriage contract, which she cannot retract," he claimed. This theory

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21 Meera Kosambi, Gender Reform and Competing State Controls over Women: The Rakhmabai Case (1884-1888), in SOCIAL REFORM, SEXUALITY AND THE STATE 265, 265-289 (Patricia Uberoi ed., 1996) (discussing the Rakhmabai case in conjunction with gender reform in India); Nalini Rajan, Personal Laws and Public Memory, 40 EcON. & POL. WKLY. 2653, 2654-55 (2005) (discussing the struggle between British colonial rule and Hindu orthodoxy).

22 Himani Bannerji, Age of Consent and Hegemonic Social Reform, in GENDER AND IMPERIALISM 21, 26 (Clare Midgley ed., 1998) (discussing colonial Britain's projection of an "enlightened" self-identity); see also Mann, supra note 7, at 5 (describing British justification for the civilizing mission).

23 See Bannerji, supra note 23("Hindu writers ... represented the bill as an attempt to introduce 'unholiness' into this sacred bond by allowing the possibility of rape in marriage. It was pointed out that rape within marriage was not recognized under English law.")

24 See BORTHWICK, supra note 20, at 128-29

had been adopted by the legal systems of all British colonies, as well as the British common law system.

A significant impact of the culmination of all these factors were reflected in the Indian Penal Code where, while defining the offense of rape, a clearly stipulated exception was carved out wherein "sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape." [25]

This exception has been part of the IPC since its inception in 1860, having been justified by Lord Macaulay in his original draft of the criminal law in 1839 as an exception necessary to protect the "conjugal rights" of a husband. This, in turn, was based on the concept of 'coverture' explained by the above-mentioned English judge from the 1600s, Sir Matthew Hale – who said that upon marriage, a woman surrendered her agency to her husband, including when it came to consent for sexual intercourse.

In 2017, the Supreme Court of India read down the marital rape exception but only to change the age, and held that it should read "the wife not being under eighteen years of age" -- and not 15 -- ensuring that the Indian Penal Code was in line with the age of consent, which is 18; however while delivering the judgement the Apex Court specified that this exception would not carve out a new offence.[26]

Even as British law moved in in England Wales in 1991, when Lord Keith communicated on behalf of the Court that modern marriage is a “partnership of equals and the wife is no longer considered the subservient chattel of the husband,” Indian laws remain the same concerning marital rape.

Unfortunately, by constantly and vehemently refusing to criminalise marital rape even today, lawmakers in India have implicitly reiterated that it is a wife's duty to have sex with her husband irrespective of whether or not it is consensual, and that the institution of marriage is implies the signing away of a woman's right to consent.

2. Adultery:

In 2018, the Supreme Court of Indian struck down Section 497 of the Indian Penal Code which penalised and provided punishment for adultery in *Joseph Shine vs. Union of India.*[27] While the move was applauded by jurists across the

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[25] Section 375, Exception 2-Indian Penal Code 1860

[26] Independent Thought vs. Union of India dated 11th October 2017, Supreme Court of India- Civil Original Jurisdiction, Writ Petition No. 382 of 2013

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world, a bare reading of the Section provides much insight of the English influence of the Indian legal system and how such laws were modified to suit the British rule in India.

The word adultery derives its origin from the French word *avoutre*, which has evolved from the Latin verb *adulterium* which means to corrupt. *The concept of a wife corrupting the marital bond with her husband by having a relationship outside the marriage, was termed as adultery*. This definition of adultery emanated from the historical context of Victorian morality, where a woman considered to be the property of her husband; and the offence was committed only by the adulterous man.

Post the seventeenth century in England, adultery came to be one of the only grounds for divorce which could be granted only by Parliament.

Around the same time period in India, the first draft of the Indian Penal Code was published by the Law Commission of India in 1837, which did not indict adultery as an offence Lord Macaulay was of the view that adultery or marital infidelity was a private wrong between the parties, and not a criminal offence. The views of Lord Macaulay were, however, overruled by the other members of the Law Commission, who were of the opinion that the existing remedy for adultery under common law would be insufficient for the poor natives, who would have no recourse against the paramour of their wife. The debate that took place in order to determine whether adultery should be a criminal offence in India was recorded in the second report on the Indian Penal Code prepared by the Indian law commissioners. The existing laws for the punishment of adultery were considered to be altogether inefficacious for preventing the injured husband from taking matters into his own hands. The Law Commissioners considered that by not treating adultery as a criminal offence, it may give sanction to immorality. In 1860, when the Penal Code was enacted, the vast majority of the population in this country, namely, Hindus, neither had a codified law of divorce as marriage was considered to be a sacrament nor were Hindu men specifically prohibited from marrying any number of women till 1955; these were subsequently amended with the advent of the Hindu code around 1955-1956.

Things of course drastically changed in 2018, when the Supreme Court of India while passing the *Joseph Shine vs. Union of India* judgement struck

down the penal provision of Section 497 of the Indian Penal Code which defined adultery as:

"Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine or with both. In such a case, the wife shall not be punishable as an abettor".

The apex court held that provision created differences on the basis of gender stereotypes that create a dent indignity of women. According to the five-judge constitutional Bench headed by the then Chief Justice of India, Hon'ble Justice Deepak Mishra *" a legislation that perpetuates such stereotypes in relationships, and institutionalises discrimination is a clear violation of the fundamental rights guaranteed by Part III of the Constitution. There is, therefore, no justification for the continuance of Section 497 of the IPC as framed in 1860, to remain on the statute book."*

However, while adultery is no longer a criminal offence in the country-it is still a valid ground for divorce.

3. Homosexuality

It was only in 2018 when the Supreme Court of India ruled unanimously in *Navtej Singh Johar v. Union of India* that Section 377 was unconstitutional "in so far as it criminalises consensual sexual conduct between adults of the same sex". Over the years, the Code underwent several changes; however. a provision which stood out for controversy was Section 377, which penalised *unnatural sex* or sexual activities *against the order of nature.* The term "unnatural sex" itself has not been defined in Indian law.

Although Section 377 did not explicitly include the word *homosexual*, it has been used to prosecute homosexual activity. The provision was introduced by authorities in the British Raj in 1862 as Section 377 of the Indian Penal Code and functioned as the legal impetus behind the criminalization of what was referred to as, "unnatural offenses" throughout the various colonies, in several cases with the same section number.

Tracing its history, the act of sodomy was sometimes prosecuted in England under British common law, it was first codified in the British empire as Section 377 in the Indian Penal Code as "carnal intercourse against the order of nature" in 1860. Section 377 was then exported to other colonies and even to England itself, providing the legal model for the act of 'buggery' in the Offenses Against the Person Act (1861).

4. Sedition:

The legacy of colonial rule in India includes any abusive laws to supress any opposition to the governing authorities, chief among those was the sedition laws used by the imperialists to imprison nationalists and dissenting voices. Drafted by British historian-politician Thomas Babington Macaulay in 1837, sedition was defined as an act by "*whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India."*

The sedition charge, which was included in Section 124 A of the Indian Penal Code in 1870, was imposed by the British colonial government to primarily suppress the writings and speeches of prominent Indian freedom fighters. Writings of leaders like Mahatma Gandhi, Lokmanya Tilak, and Jogendra Chandra Bose were suppressed and they were tried under sedition law for their comments on the British rule.

It was only until recently in 2022[28], that the Apex Court of India put a hold on the use of the sedition law provisions directing that no new cases were to be registered or investigation be carried under this colonial-era provision till such time the provision was re-examined and reconsidered by the government- the first time in 162 years that the operation of the sedition law was suspended.

Quite interestingly, Britain abolished her sedition laws in 2009 whilst observing that sedition along with seditious and defamatory libel were arcane offences - from a bygone era when freedom of expression wasn't seen as the right it is today.

On a similar footing, the Supreme Court of India in *S.G Vombatkere*[29] observed that the provisions of Section 124A was not in tune with the current social

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[28] Read S.G Vombatkere v. Union of India, Writ Petition (Civil) No. 682 of 2021, SC 470 (2022)

[29] See 30.

milieu and that the seditions laws were in fact intended for a time when the country was under the colonial regime while emphasizing the requirements of balancing the sovereignty of the nation along with civil liberties of the people.

5. Death Penalty:

The practice of death penalty as a form of state punishment in India can be traced to the British era rule in the country. Capital punishment was first incorporated into India's legal system during British colonial rule when, in 1860, the Governor-General of India Council instituted the Indian Penal Code (IPC). In India, unfortunately there still exists an obvious tilt towards this pre-colonial method of punishment. The IPC's approach to capital punishment has remained unchanged since and still recognizes the death penalty for various crimes including criminal conspiracy, waging war against the government, and murder.

The main resistance to India joining the global consensus on the death penalty comes from the belief that common people can be made to obey the law only through fear instilled by harsh punishment. The view that exemplary capital punishment will deter capital crimes is a matter of faith—there is no empirical evidence to support this view. The British and their collaborators had made a similar mistake. They thought that the common people of India would be deterred and cowed down by the violence of the state. There are statistical reports available in the National Archives showing that the British were hanging on average *three people daily* in the 1920s in a desperate bid to frighten Indians into obeying British rule. [30] Another key driver of capital punishment is retribution. The role of vengeance in punishment is ambiguous in India. There are authorities in favour of and against accepting retribution as a legitimate goal of sentencing in India. Even if it is not formally acknowledged, there is little doubt that vengeance does play an unofficial role in the approach of judges, victims and the general public in many cases.

India's police and judicial institutions were invented by the British and carried through unreconstructed into our Constitution. Both wings of the government by and large believe in the same strong punitive approach to law enforcement that prevailed in colonial times. Their fundamental culture and relationship

[30] Refer A Global History of Execution and the Criminal Corpse, Chapter- Execution and its Aftermath in the Nineteenth Century British Empire, Palgrave Macmillan.

with people remain resistant to ideas of freedom and equality that have animated the global change. It is quite unfortunate that the Indian establishment remains impervious to the radical change in attitude to capital punishment worldwide.

Colonialism, Common Law and India:

The common law system – a system of law based on recorded judicial precedents- came to India with the British East India Company. The company was granted charter by King George I in 1726 to establish "Mayor's Courts" in Madras, Bombay and Calcutta (now Chennai, Mumbai and Kolkata respectively). Judicial functions of the company expanded substantially after its victory in Battle of Plassey and by 1772 company's courts expanded out from the three major cities. In the process, the company slowly replaced the existing Mughal legal system in those parts.

Following the First War of Independence in 1857, the control of company territories in India passed to the British Crown. Being part of the empire saw the next big shift in the Indian legal system. Supreme courts were established replacing the existing mayoral courts. These courts were converted to the first High Courts through letters of patents authorized by the Indian High Courts Act passed by the British parliament in 1862. Superintendence of lower courts and enrolment of law practitioners were deputed to the respective high courts.

During the British rule in India, the Privy Council acted as the highest court of appeal. Cases before the Council were adjudicated by the law lords of the House of Lords. The State sued and was sued in the name of the British sovereign in her capacity as Empress of India.

The application of common law has been overarching in the Indian context; it has been enshrined in the Indian legal system essentially through the codification of law which began in earnest with the forming of the first Law Commission. Under the stewardship of its chairman, Thomas Babington Macaulay, the Indian Penal Code was drafted, enacted and brought into force by 1862. The Code of Criminal Procedure was also drafted by the same commission. Host of other statutes and codes like Evidence Act (1872) and Contracts Act (1872) and the Code of Civil Procedure (1908) fostered a kind of legal unity in the legal system of the country.

Thus, it can be said that common law has been applicable here though in a different format than that of England as the needs and demands of the Indian society were and still are different from that of the English. It is to be found out that much of the law compiled in codes we have today were primarily derived from the common law principles.

The system of precedents derived from the common law too has wide application within the Indian legal system, a precedent in common law parlance means a previously decided case which establishes a rule or principle that may be utilized by the court or a judicial body in deciding other cases that are similar in facts or issue. Initially the English judges and barristers presiding and practicing in the Indian courts followed the decisions of the courts in England, thus slowly the concept of precedents came to be ardently followed within the Indian courts. This law has been carried forward in the present day legal system as in regard to the judgments of the Supreme Court of India the Indian Constitution provides that "*The law declared by the Supreme Court shall be binding on all courts within the territory of India.*"[31] Hence it can be said unequivocally that common law has wide application within the Indian legal fold as many of the features of this system have been adopted and further developed from that of the English common law system, even though its application hasn't been discussed in entirety and only the major principles derived from it have been discussed.

Moving forward the colonial past:

In conclusion, it can be said that common law traces back its origins to England and is primarily a method of administering justice, which has incorporated different aspects of the legal pedagogy and practice with the help of deliberations of laymen and the learned over the course of time. One such principle is that of "*equity*." Most of the equitable principles and rules have, in India, been embodied in the statute law and has been made applicable to the extent of the provisions made therein. The provisions of equity in Indian statute books might have their source in common law or in equity or in an adjustment between the two, is immaterial. Statutory recognitions of the principles of equity are also found in the Indian Contract Act,

[31] Article 141, Constitution of India.

1872; the Specific Relief Act, 1877; the Indian Trust act, 1882; The Transfer of Property Act, 1882; 24 and the Indian Succession Act, 1925.

In India the common law doctrine of equity had traditionally been followed even after it became independent in 1947. However, it is also interesting to observe that though the English rules of equity have been substantially incorporated by the Indian Legislature, yet there are many other rules of English Equity are either not been followed in India or are adopted only in a modified form, keeping in view the different ground realities of the country.[32]

Now in this context and as a country that is developing at a fast pace, the question that one begets is that in India, in view of its large cultural diversity, and for various social circumstances, different factual circumstances may warrant circumstances for protection and therefore, would the broad principles of the English decisions and laws which may apply, particularly those based on equity, hold value of a binding precedent?

There is no doubt that as a country we have developed a symbiotic relationship between the Indian customary law and the common law which has given birth to the modern day Indian legal system and there are principles of the common law system which ought to be imbibed in its true spirit such *'ubi jus ibi remedium'* -where there is a right there is a remedy.

Fundamentally, any development in any legal system which seeks to bring a change to the social values is based on the principle that same will only be successful if socio economic cultural situation in the society is made conducive for the operation of the law i.e., the law in isolation can never be successful in bringing about a social change unless backed by various socio economic and cultural factors.

"*We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes from, but we have to build up our own jurisprudence,*"

[32] Karnwal Megha, "Law of Equity". http://jurisonline.in/2008/11/law-of-equity/

the Supreme Court, speaking through then Chief Justice of India P.N. Bhagwati, had said with confidence in the M.C. Mehta case way back in 1986.

And while we must look to common law principles to ensure not just the principles of equity but also equality, justice and fairness- the law makers of the country need to do much work to shed the vestige of the colonial nature of some of the existing laws.

About the author:

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Joanna is also the co-author of Umeed, a Statistical Analysis of 50 Convictions in Sex Trafficking Cases in West Bengal and has authored a chapter in the book, Revisiting Reforms in the Criminal Justice System in India, published by Thompson Reuters. Joanna also writes on mental health and socio-political issues on various platforms.

She was awarded the PEGASUS Scholarship by the Hon'ble Society of the Inner Temple, U.K in association with the Kapila and Nirmal Hingorani Foundation for the year 2022.