Law in India Since Independence*

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A. Preliminary Remarks :

My sisters and brothers from Korea and other lands,

First of all I congratulate the Hon'ble President Professor Kim, Woo-Jo and other Hon'ble office bearers and members of the Korean Society for Indian Studies for successfully taking the historic initiative of organising this memorable event. Their initiative represents not only their intense love and concern for India and its people but also sets an excellent example of how the people from different cultures can look for appropriate opportunities to get to know one another and discover and promote what is good in them so that we can make our planet much more pleasant and livable. In the case of Korea and India this event also strengthens the existing bonds of friendship - a friendship based on mutual respect and the ideal of peace, progress and prosperity not just in the two countries but all over the earth. I hope the example set by the Korean Society for Indian Studies will unfold itself into its many incarnations

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* 이글은 1998년 5월 14일 영남대 법과대학 초청강연 원고임.

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everywhere and in all societies.

Secondly, I must express my heartfelt gratitude to the Hon'ble President and the Hon'ble office bearers and members of the Korean Society for Indian Studies for inviting me to participate in this grand event and for giving me the honour of speaking to you from this podium. I am also grateful to all of you who have come here to listen to me and other speakers.

B. Introduction :

Now, coming to the subject I have been asked to speak upon, namely, Law in India Since Independence. I have my difficulties in presenting this vast subject to an audience which I understand does not comprise exclusively of law persons. Therefore, please forgive me if my presentation becomes too tardy and complex for some of you and too simple and superficial for others.

I proceed on the assumption that all of you are aware that India is one of the oldest, if not the oldest, existing societies in the world. Therefore, the roots of its laws and legal system go back to ancient times estimated to be no less than five thousand years. However, all these years have not been the years of exclusevity and isolation for India. From the very early times India has been attracting people from different lands to its territories not always as invaders but also as settlers. All of them have left their imprints on the laws and legal system of India some of which have become the matters of history but others remain very much operative. Since the British were the last to come and stay, they have left the most pervasive and lasting imprints on the laws and legal system of

India. It is generally admitted that wherever the British ruled they have established their legal system which is known as the common law system. It is generally contrasted with the other legal system of the West, namely, the Roman or civil law system. The main difference between these two systems is that while the civil law is primarily base on written or codified law the common law is primarily unwritten and is found by the judges. Thus while in the civil law system the legislator plays the primarily role of making and shaping the law in common law that role is played by the judge. These differences have, however, blurred in the recent times and seem to be disappearing.

If we take this division as the starting point then the legal system which India inherited at the time of its Independence was primarily the common law. I say primarily because along with it many other legal systems were also operating in India at that time and have been operating since then. It may be noted that though India had been always struggling for its freedom from British rule it did not have serious differences with the common law tradition which they gave to it. Thus on 15 August 1947 when India won its freedom it inherited a system of laws which was primarily common law. Of course the comon law was also supplemented by various native and received traditions of law such as the ancient Hindu law, the Islamic law received during the middle ages and various other religions, Including Christian, Parsi, Jewish, and tribal and local traditions.

In brief, starting in the second quarter of the last century and by the end of the first quarter of this century the major laws applicable to all people generally irrespective of their religion and descent had been codifide by the British rulers on the principles of

common law of England with modifications suited to Indian conditions. These laws applied throughout the length and breadth of the country. The laws relating to family matters were, however, left almost untouched to operate in accordance with the tenets of different religions or customs of different communities. This continues to be the position even now though of course much of the Hindu law was codified in 1995-96.

The main difference with the British rulers was, however, with respect to the constitutional structure and the polity. Soon after the British Crown took direct control of the Government of India in 1858 demands for constitutional reforms had started surfacing. The demands were primarily for greater participation in the government and self rule. The rulers were reluctant to concede these demands. Consequently the constitutional reforms they introduced could never effectively work. Therefore, the most remarkable, fundamental and revolutionary development in the law since Independence has been the making, adoption and operation of the Constitution of India which is the law of all the laws and to which alone I confine my presentation.

C. The Making and Adoption of the Constitution :

The Constitution making process had srarted well before the declaration of Independence with the announcement of the Cabinet Mission Plan on 16 May 1946. The Plan laid down the broad principles and procedures according to which the Constitution was to be framed. A Constituent assembly for framing the Constitution was elected in September 1946 which first met in December 1946.

With the announcement on June 3, 1947 that India will attain Independence on 15 August the Assembly got relawed of the constraints of the Cabinet Mission Plan and started functioning as a sovereign body of a sovereign country. Acting as such it produced the Constitution which was adopted on 26 November 1949 and came into force on 26 January 1950.

D. The Constitution as Instrument of Social Revolution :

The Constitution is not just a manifestation of transfer of power from the British to Indian hands. From beginning to end it represents a revolutionary change and a complete break from the past. It constitutes India into a "SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC" and promises to secure to its citizens JUSTICE... LIBERTY... [and] EQUALITY" and "to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation". Towards the achievement of these goals it makes detailed provisions a few of which may be highlighted.

E. Highlights of the Constitution :

1. Structure of the Government :

The Constitution of India provides a polity which is not federal in the classical sense but which establishes a Union of States. Presently the Consists of 25 States. The Constitution of India is the Constitution for the Union as well as for the States. The States do

not have their separate Constitutions. Thus the same Constitution provides the structure of the Union and the State governments, their powers and functions and the limitations on them.

The Union Government is represented by the President of India who is also the head of the nation. The President is elected for five years by the representatives of the people in the Parliament and State Legislatures. He acts on the 'aid and advice' of a Council of Ministers headed by the Prime Minister of India. The Prime Minister and other Ministers are appointed by the President of India from amongst the Members of Parliament. The Council is collectively responsible to the people's representatives in the Parliament - the Lok Sabha - and ceases to hold its office on losing the confidence of that House. The Parliament consists of two Houses. The upper House - the Rajya Sabha - represents the States in the Union. It is a permanent body and one third of its members retire after every two years and are replaced by the new ones. The lower House, i.e. the Lok Sabha consists of the representatives of the people directly elected from the geographical constituencies. The normal life of the Lok Sabha is five years. The two Houses together are competent to make all laws falling within the jurisdiction of the Union of India. The laws enacted by the Parliament must however be assented by the President.

The State governments are organised on the same principle. The head of the State is the Governor who is appointed by the President and the head of his Council is the Chief Minister.

A third tier of the government are the village Panchayats and municipalities which are also organised on the democratic principle.

One important organ of the state is the judiciary. The judiciary is unitary and the same courts entertain legal disputes both under

the Union and the State laws. At the apex of the judiciary is the Supreme Court of India which is situated in New Delhi. Below the Supreme Court are the various High Courts each of which normally serves one State. Below the High Courts are the subordinate courts spread all over country. Besides these regular courts the Constitution and other laws also provide for various administrative tribunals. All these tribunals are, however, subject to the supervisory jurisdiction of the High Courts and appellate jurisdiction of the Supreme Court. The Supreme Court is the ultimate court in all respects and has an almost unlimited appellate and also a limited original jurisdiction. There are no parallel or separate courts for constitutional, administrative or any other matters as in the civil law countries.

Not only the structure of the Union and State governments but also their powers and relations are also provided in the Constitutions. All conceivable powers of the government have been enumerated in the three lists, i.e. the Union, State and the Concurrent lists. The Union and the States have exclusive legislative and executive powers respectively on matters in the Union and State lists while both of them have the powers on the Concurrent list. The powers not enumerated in any of the lists belong to the Union.

The Union-State relations have been a matter of debate and discussion ever since independence and even before. However, because of one party rule of the Union and almost in all the State until 1967 serious difficulties in the Union-State relations were not faced. After the formation of different party governments at the Union and the States in 1967, the State, however, started asking for more powers and autonomy so that they could plan and act with greater freedom for the respective States. These demands got further articulated in 1977 when the first coalition government came

into being at the Union. Since 1989 the ground realities have changed in favour of the States in so far as the Union governments since then have either been coalitions of regional parties having their hold in one or the other State or a minority government of one party dependent upon the support of a regional of national party from outside. Consequently, while earlier the Union used to have a say in the formation of the State governments now the State governments have a say in the formation of the Union government which makes the Union dependent upon the support of the States. This changed political reality has not yet turned into a demand for changes in the constitutional structure regarding the Union-State relations. It has, however, changed the style of functioning of the Union government to the extent that it will not like to do anything in any manner that will be resented by the States. It is hoped that these developments would lead to more mature and healthy Union-State relations envisaged by the Constitution makers.

2. The Fundamental Right and Duties and the Directive Principles of State Policy :

Besides this broad framework of the Union, State and local governments the Constitution provides for many other things according to which these governments should run. The most distinguished among them are:

1) The Fundamental Rights (FRs): FRs bind all authorities including the union and State executive the right to equality before the law; prohibition of discrimination on the ground of race, religion, caste, sex, place of birth, etc,; equality of opportunity in employment; abolition of untouchability; prohibition on conferment of

titles; freedom of speech and expression, assembly, association, movement, residence and settlement, and of profession, occupation, trade or business; right against retrospective penal law. double jeopardy, and self-incrimination; right to life and personal liberty; right to be informed of the grounds of arrest, to consult and be defended by a lawyer of one's choice and to be produced before a magistrate within twenty four hours of arrest; prohibition of traffic in human beings, forced labour, and employment of children in hazardous activities; freedom of religion; rights of the minorities to conserve their language, script or culture and to establish and administer educational institutions of their choice; and the right to approach the Supreme Court to enforce the FRs. The FRs are not absolute. They can be restricted by law. but all restrictions are subject to judicial review and can be invalidated by the courts if found inconsistent with any of the FRs.

Starting with a cautious approach to the FRs in 1950 the Courts have slowly widened their scope either by drawing support for one right from the other or from the other provisions of the Constitution or from international developments in human rights. They have also created many new rights from the existing rights.

2) The Directive Principles of State Policy (DPs): The DPs originally conceived as nonjusticiable FRs are not enforceable by the courts "but are nevertheless fundamental in the governance of the country and it [is] the duty of the State to apply [them] in making laws." Just after the commencement of the Constitution the Supreme Court held that in case of conflict between the DPs and FRs the former had to give way to the latter. This decision led to the first amendment of the Constitution in 1951 by which a provision for the

protection of backward classes was added in the Constitution. A few years later the Court changed its stand and held that in case of conflict the DPs and the FRs must be harmonised and reconciled. The harmony between the DPs and FRs has been recognised as one of the basic features of the Constitution and therefore an amendment of the Constitution which gave superiority to all DPs over certain FRs was invalidated by the Court.

The DPs, inter alia, require the State "to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life" and lay down specific tasks which the state must perform the achieve that goal.

3) Fundamental Duties: In 1976 a few fundamental duties of the citizens were also added to the Constitution. They include the duty to abide by the Constitution and respect its ideals and institutional; to cherish and follow the noble ideals which inspired the national struggle for freedom; to uphold and protect the sovereignty, unity and integrity of India; to promote harmony and the spirit of common brotherhood amongst all the people and to renounce practices derogatory to the dignity of women; to value and preserve the rich heritage of composite culture; to develop scientific temper; to abjure violence; and to strive towards excellence in all spheres of individual and collective activity.

3. Special Provisions for Minorities and Weaker of the Society:

One of the foremost task before the Constitution makers was the protection of the minorities. Not only did they leave them free

to preserve and pursue their independent identity by guaranteeing them certain fundamental rights but also ensured them active participation in the political and social life of the country through detailed provisions requiring positive action and setting up administrative machinery and other measures in the Constitution. These provisions, inter alia, provide for the reservation of seats in the Lok Sabha, the State Legislative Assemblies, the Panchayats and the Municipalities to the Scheduled Castes (SCs. - former untouchables) and the Scheduled Tribes (STs - the aborigines) in proportion to their population. One third of the total seats in the Panchayats and the municipalities are also reserved for women. the States are also required to make reservations of the offices of the Chairpersons in the Panchayats and the Municipalities for the SCs, STs and women. Serious efforts are also on to reserve seats for women in the Lok Sabha and the State Legislative Assemblies. Upto two seats in the Lok Sabha and one seat in the Legislative Assembly of a State have also been reserved to the members of the Anglo-Indian community.

The Constitution also requires to take into consideration the claims of the members of the SCs and the STs in the making of appointments to services and posts in connection with the affairs of the Union or of a State. Similarly it makes special provision for the Anglo-Indian community in railway, customs, postal and telegraph services and in the matter of grant to their educational institutions. It also provides for a National Commission for the SCs and the STs to look into all matters concerning the protection, welfare and advancement of the SCs and the STs. Provision is also made for the appointment of a national commission to report on the administration of the Scheduled Areas and the welfare of the STs. Detailed provisions are also made for the administration of the

Scheduled Areas and the STs. In some of the States the Constitution also requires the appointment of a Minister in charge of tribal welfare who in addition may also requires the appointment of a Minister in charge of tribal welfare who in addition may also be incharge of the welfare of the SCs and the backward classes.

The Constitution also provides for the appointment of a commission to investigate the conditions of socially and educationally backward classes and the difficulty under which they labour and to make recommendations as to the steps that should be taken by the Union or any State to remove such difficulties and to improve their condition and as to the grants that should be made for the purpose by the Union or any State. Acting on the recommendations of one of such commissions the Union government has reserved twenty seven per cent seats in the Union Services for the members of the backward classes in addition to twenty two and a half per cent already reserved for SCs and STs. Provision is also made for the reservation of seats for the backward classes including the SCs and STs in the educational institutions and other facilities provided by the state as well as in the state services. Under these provisions access to numerous facilities and state service on favourable terms has been provided to these classes by the Union and the States. Special provisions can also be made for women notwithstanding prohibition on discrimination on ground of sex.

4. The Basic Structure:

Although the Constitution does not lay down any express limitations on its amendment, the Supreme Court in 1973 decided that the basic structure of the Constitution cannot be amended. No

conclusive definition or exhaustive catalogue of basic structure has been laid down by the Court but proceeding on a case to case basic it has held that the basic structure includes democracy, secularism, judicial review, rule of law, harmony between the FRs and the DPs, limited power of amendment and independence of judiciary. In the beginning the doctrine of basic structure was a subject of intense debate but by now it is well accepted consitutional doctrine.

F. From Socialist to Market Economy:

It is said the Constituent assembly was dominated by the sympathisers of one or the other kind of socialism and therefore they tried to tilt the Constitution towards socialistic policies. Of course the Constitution which the assembly produced was based on Euro-American liberal traditions until the late seventies the governments pursued the socialisation of property, nationalisation of industry and greater state regulation of economy. In eighties this process slowed down. In 1991 finally a new economic policy based on market economy was adopted. India is a member of the World Trade Organisation and is making its laws to comply with its membership

G. Conclusion:

With these remarks I leave it to you to draw your own conclusions about the laws and legal system of India since its Independence. During these fifty years they had their own share of

trouble and turbulence but they never lost their legitimacy because during these fifty years India has been able to sustain and strengthen its democracy. I believe that their ultimate strength lies in the strenth of Indian democracy and therefore wish that it must flourish. I hope in wishing so I am one with my sisters and brothers from Korea.

Once again I thank you for giving me the opportunity of speaking to you and for listening to me so patiently.