

FOREWORD: WORLD OF OUR COUSINS

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Most of the people who live under some version of the common law today live in South Asia, as do a large portion (perhaps a majority) of those who live under a working constitutional democracy. Nevertheless, until very recently this part of our world was quite invisible to the American legal academy and profession.

It is a pleasure to introduce this symposium, apparently the first of any mainstream American law review to focus on South Asian law. Its appearance is one of several markers that the neglect of South Asia by American law schools is being left behind. Four of the five articles included here were presented at a session of the Association of American Law Schools (AALS) 2010 meeting; the first appearance of South Asia on the program since a 1986 plenary session on the American participation in the litigation arising from the 1984 Bhopal gas leak disaster. Unlike that earlier, one-off appearance, the 2010 session marks the institutionalization of interest in the area. It will be followed by the formal inauguration of a Section on South Asian Law at the AALS's annual meeting in January 2011.

The presentation of a diverse set of papers on South Asian topics reflects an explosive increase in research and writing on this part of the world by scholars based at American institutions. After a burst of interest in the early years of independence, publications about South Asian topics in journals listed in the Index to Legal Periodicals fell to just 34 in the 1970s but rose to 88 in the 1980s, to 256 in the 1990s, and to 684 in the first decade of this century.

South Asia is the conventional appellation for the Indian subcontinent and its environs, namely India, Pakistan, Bangladesh, Sri Lanka, Nepal and Bhutan. The first three are the successors to British India and the affiliated princely states; they emerged from two centuries of rule by Britain with a

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shared institutional legacy of law, courts, and legal professions. Sri Lanka, though never part of British India, acquired a similar legacy. Nepal, though never colonized, felt the indirect effects of British domination. Each has made its own additions and subtractions to its legal heritage. I do not propose to survey these varied avatars of the common law, but to introduce this symposium by very briefly sketching some basics of the incarnation that I know best, that is, India.

I. INDIAN COURTS AND LAW

India offers an especially vivid demonstration of the capacity of common law legal institutions to adapt to very different conditions. India has pulled off the astonishing feat of sustaining a regime of constitutional liberty, with vigorous judicial protection of human rights, in a very large, very poor, and very diverse society. With all its flaws and imperfections, this is surely one of the epic legal accomplishments of this century. Yet it has gone largely unappreciated by supporters of democracy and the rule of law.

The deeper roots extend back into India's pre-British past, but for our purposes it is sufficient to begin with the coming of the common law to India more than two centuries ago under the auspices of her colonial rulers. The earlier Hindu, Muslim, and local customary laws, along with their expounders, were largely displaced. The major exceptions was the retention (but transformation) of Hindu and Muslim law in family, inheritance, and religious endowments, as personal law applicable to each individual according to his or her religious identity. Apart from these personal law fields, the law was increasingly British in origin and style. By the later part of the nineteenth century, India had a system of common law courts, staffed by a judiciary that was increasingly Indian in make-up and a legal profession that was almost entirely Indian. These courts and lawyers administered a version of the common law that had been codified and rationalized to make it portable. The original notion of the codifiers was that the codes would suffice without the accumulation of precedent, but that proved illusory, and the judges wove over the scaffolding of the codes a thick mantle of judge-made law.

At the time of independence in 1947, the designers of the new institutions of independent India retained intact the

common law and the courts that administered it. They placed a system of parliamentary government over it, but one with major departures from the British model. It was a federal system in which the constituent units retained substantial functions. All of this was spelled out in an immense and detailed American-style constitution that includes a bill of rights, enforceable by a judiciary with explicit and broad powers of judicial review.

At its outset, this system was subjected to a telling challenge: a Gandhian minority in the Independence movement dissented from the idea of taking over the law and institutions imposed by the British and proposed to displace them by a revived indigenous law—at least at the village level. No one really had a vision of what this might look like. Earlier layers had been largely effaced by this time and the Anglo-Indian amalgam had become India's legal vernacular. A half-hearted effort to supplement the courts with revived village tribunals fizzled out ingloriously by the late 1950s. Experiments in bringing justice to the villages continue, but the main contours of the legal system are unchallenged. Even the surge of Hindu religious revivalism that has roiled Indian political life for the past two decades does not manifest a specifically legal dimension, or legal ambitions beyond the curtailment of certain aspects of Muslim personal law.

So India's system of common law courts is its legal heartland. Although it is a federal system, there is no dual system of courts as in the United States. Like Canada, India has a unified hierarchy of courts. They are common law courts whose operations are readily recognizable to American lawyers as cousins of our own. At the apex of the hierarchy is a Supreme Court, consisting of thirty-one judges, which sits in benches of various sizes. In each state there is a High Court. Below these are various subordinate courts at the district and sub-district level, staffed by career civil-servant judges. The High Courts are filled by promotions from the judicial service and, predominantly, by appointment of eminent lawyers well along in their careers. Supreme Court judges are recruited from the High Courts.

India's courts are independent and insulated from direct political control. Indeed in recent years the Supreme Court has acquired the predominant role in the appointment process. The tradition of Indian judges is to be studiously non-political.

But the higher courts, and especially the Supreme Court, are major political players. One of the distinctive features of the Indian legal scene is the writ jurisdiction, as it is called, of the Supreme Court and the High Courts. The Constitution provides that parties can approach these courts directly, without proceeding through the lower courts, to enforce fundamental rights to free speech, press, property, life, movement, and equal treatment. Of course this is confined to constitutional violations, and thus almost exclusively to cases against the government. And it is not without its weaknesses; designed for controversies about law, it provides no mechanism for addressing disputed questions of fact.

The writ jurisdiction has proved enormously popular. Indian lawyers—and judges, too—have exercised considerable ingenuity in bringing matters within the ambit of this jurisdiction, and have deployed it quite effectively to control government excesses. Government may gripe, but it accedes to judicial orders. The singular exception to this acceptance of judicial independence was Indira Gandhi's Emergency Rule from 1975 to 1977, in which judicial enforcement of Fundamental Rights was suspended, although the courts continued to function as before in administering private claims. The Emergency is generally regarded as something that should not and will not happen again. Indeed, it was followed by a period of intense judicial elaboration of fundamental rights and the development of judicially-sponsored "public interest litigation" in which courts have proactively intervened to vindicate constitutional values.

For all the successes of the writ jurisdiction and public interest litigation, the courts from top to bottom are desperately congested. Delays of *Bleak House* proportions are routine in many sorts of litigation. The average time to disposition of a simple tort case that is appealed to a High Court is well over a dozen years. In the lower courts, judges sit alone, and in the High Courts they typically sit in panels of two or three, although larger panels do occur in cases of significant constitutional import. Multiple benches is something Americans are familiar with in intermediate appellate courts, but not in courts of last resort. But in India, the Supreme Court—whose bench has increased over time to keep up with caseloads—decides most cases in panels of two or three judges, just as the High Courts do. It is as if we had a collegial body like the

Ninth Circuit at the apex of the system. Decision by benches is one of a number of factors that contribute to problems of coherence. Among the other contributors are very short individual tenures, due to the combination of seniority in appointments and compulsory retirement at age sixty-five.

Indians tend to think of their society as litigious. This is a perception that has been current for two centuries. Certainly the Indian courts are desperately congested. But there are relatively few courts (compared to the United States, Canada, or Britain), and they are poorly equipped and inefficient. Rates of litigation per capita in the lower courts are comparatively low and have actually been declining for decades. For large sectors of society and large areas of conduct, courts afford no remedies or protections. Tort law, for example, provides virtually no remedy for ordinary personal injuries. Its use is inhibited by high court fees that must be paid in advance, protracted delays, and low recoveries. As pressure builds up to provide remedies, because the courts—particularly the lower courts—are in such gridlock, the solution is not to reform them but to bypass them by establishing special tribunals outside the judicial hierarchy. That is what is done for automobile accidents and, recently, for consumer grievances. In a way, the writ jurisdiction was the model for this bypassing strategy. It seems likely that more bypasses will be devised to address problems of the dynamic business sector.

Notwithstanding these infirmities, the Indian courts have managed to sustain a regime of constitutional order and legal regularity. With scant material resources, they have managed to adapt the structure of colonial law to the vastly different conditions of independent democratic India and to protect and extend constitutional liberty. Popular culture in India tends to be cynical about law and courts. Yet my sense is that although Indians generally have a low opinion of lawyers, think that law often fails to deliver justice, and regard the courts as an unpromising avenue to secure remedies, they nevertheless have more confidence in the integrity of the courts than in other branches of government.

II. THE INDIAN BAR

India has a populous legal profession, although no one knows just how many of the multitude of law graduates are actually engaged in practicing law. Before independence, there were various grades of pleaders and some local variation. All distinctions were abolished by the Advocates Act of 1961, which established a single, ungraded profession throughout India. Generally, Indian lawyers have seen themselves and have been seen by others as courtroom advocates, rather than business advisors or deal-makers. Most lawyers confined their practice to a particular court and literally stationed themselves at the court premises when court was in session. The lawyer's product was his oral argument. There was little recourse to written presentations—and even today Indian court proceedings turn on oral proceedings to an extent that we find surprising. Argument may consume days or even weeks in important cases. Lawyers have successfully resisted judicial initiatives to impose time limits on their oratory.

Until recently, there was only rudimentary specialization and little coordination in the form of firms. Successful lawyers might be surrounded by juniors, but these were transient apprentices or lifetime subordinates, not peers or potential peers. The profession has been steeply stratified, with a small number of busy leading lawyers and many aspirants with little to do. But now specialization is increasing rapidly, and there is a dynamic, new firm sector. The principle of regular and predictable promotion on merit that has made the American law firm the model for business lawyering throughout the world is on the cusp of institutionalization. Demand for planning, counseling, and transactional work is rising. Indian lawyers are groping for new ways to collaborate in order to provide a wider range of services. India's liberalization and opening to the global economy, with the concomitant implication of intensified legal interchange, is putting new pressure to perform on all of India's legal institutions. Lawyers and judges face the prospect of wrenching themselves out of accustomed ways and adapting to the demands of contemporary business law practice—familiarizing themselves not just with new technologies, but also the larger collaborative and cooperative relations that modern lawyering demands. Beyond this, they face

the challenge of fashioning new access to justice for a public with rising expectations of its legal institutions.

III. CONCLUSION

Much of this picture is shared elsewhere in South Asia—a dynamic, politically astute, activist higher judiciary, the writ jurisdiction, public interest litigation, and a legal profession undergoing profound transformation. These features are juxtaposed to the multiple challenges of protecting fundamental rights, facilitating economic development, and delivering the benefits of legality to a diverse citizenry. Lest we dismiss these as remote from our concerns, we should consider our growing legal connections to South Asia—the outsourcing of a significant chunk of American legal work, the prospect of South Asian lawyers as important players in the provision of transnational legal services, and potentially the collaborative fashioning of institutions that realize meaningful access to justice for ordinary citizens. It is time to put a close to the long prehistory of isolation and apathy and to begin a new era of interchange and dialogue, so that we may participate in the release of energy and imagination that will make South Asia one of the great sites of legal development in the twenty-first century.