

# Indian Legal System and Distinguished from German Legal System: First Impressions of a German Law Student

## Introductory note

Out of sheer curiosity and fascination, I decided to intern with an Indian Law Firm and came to Delhi in August 2014, for a month. Before coming to India, I knew very little about it and even lesser about its legal system. This country used to fascinate me and now confuses as well. The first thing that strikes and unfortunately scares me is the chaotic traffic on the roads of Delhi, it indeed is the most chaotic traffic, I have ever seen. However, I was and am keen to learn as much as possible about this fascinating country in general and its legal system in particular. Having said that, I intend to record my little understanding of Indian legal system, and shall try to compare its various aspects with that of German Law.

I have divided this write up in two parts. In the first part of this article, I try to briefly outline some of the salient features of the Indian Legal System. And in the second part, which may be more interesting for Indian readers, I make an attempt, at distinguishing it with German Law.

## I. Constituents of Indian Legal System

### 1. About India

The most known fact about India is probably the size of its population: over 1.2 billion inhabitants. That makes India the second largest country by population and biggest democracy in the world. Besides India is one of the fastest growing major economies. However, it still faces large problems such as poverty and corruption.

The country is situated just below the Himalayas and its entire coasts lies on the Indian Ocean. Through its relatively close position to the Equator, there is a warm climate (for me too hot) throughout the country.

India has a common law legal system, which derived from the British during the colonial era. The question is whether this legal system is providing a strong ground for the above-mentioned challenges.

### 2. Its Constitution

Foundation of the Indian Legal System is the Constitution of India, which came into effect on 26 Jan. 1950. It is the longest written constitution in the world. The Constitution of India sets out fundamental principles regarding the powers, duties and structure of the government as well as fundamental rights and duties of the citizens. Besides, it contains general provisions regarding the administration of Union (Part III) and states (Part IV) and regarding the relation between the federal government and the state governments.

The constitution has drawn many provisions from the Government of India Act 1935. Other than that, it bears also strong influences from other constitutions such as the American Constitution or the uncodified constitution of the United Kingdom.

### 3. Citizen (Rights and Writs)

Fundamental rights: The Preamble of the Indian Constitution states that the People of India “[...] secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought,

expression, belief, faith and worship; EQUALITY of status and of opportunity;”This sentence quite precisely encapsulates the spirit with which fundamental rights have been conferred and guaranteed by the Constitution in Part III (Articles 12- 35), thereof.

To ensure the enforcement of these fundamental rights the Constitution empowers the Supreme Court under Article 32 and the High courts under Article 226 to issue writs. There are basically five types of writs.

#### **4. Govt. (leg. Jud. Ex.)**

As any (most) democracy, India follows the principle of separation of powers. The Parliament, which is divided into two houses, forms the (union) legislature. The Upper House (Council of States) consists of representatives of the states whereas the Lower House (House of the people) is elected directly by the citizens of India.

There are different levels of the Indian judiciary. At the apex stands the Supreme Court. It is a federal and the ‘court of last resort’ in India. Its judgments are binding on all Indian Courts. The courts that follow (High Court, District Court, etc.), all operate on state level and their decisions, are generally only binding within the state where they were made.

At the top of the executive branch stands the President who is elected every five years, pursuant to Articles 54 and 55, of the Constitution. The President is de jure head of the state. De facto, however, he is only the nominal head. The major political decisions are made by the Council of Ministers, which is headed by the Prime Minister.

#### **5. Civil Law**

##### ***a) Business Law***

Business Law generally could be described as the laws that regulate the conduct of business. Thus, numerous areas of law have a relation to business law. Important Indian regulations that are strongly linked to business law include, among others, the Indian Contract Act, the Sale of Goods Act and the Company Act, which was recently updated.

Business Law is also linked to further areas of law. An entrepreneur if he is to set up a business always has to keep in mind requirements, which are prescribed by Environmental or Labour Law for example.

Apart from all that, India is not seen as a Business friendly country. According to a World Bank Report on the Ease of Doing Business India only ranked 134<sup>th</sup> in the World. <sup>1</sup>The Report took into account aspects like the ease of getting a credit, getting electricity, starting a business and other aspects.

##### ***b) Competition Law***

What competition law is about is comprehensively defined in the preamble of the Competition Act of 2002. Accordingly, the Act establishes a Commission that shall “[...] prevent practices having adverse effect on competition, [...] promote and sustain competition in markets, [...] protect the interests of consumers and to ensure freedom of trade. The main purpose and advantage of competition itself is to promote economic efficiency.

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<sup>1</sup><http://www.doingbusiness.org/data/exploreeconomies/india/> (2014)

### ***c) Labour Law***

The central Indian statute concerning labour law is the Industrial Disputes Act (IDA) of 1947. Its objective is to provide an effective mechanism for the settlement of disputes between employers and employees, direct protection of claims of workers for wages, pension, etc., to protect job security and to regulate working hours. Moreover, India has enacted various further statutes for the protection of workers and the regulation of the labour market such as the Child Labour Act of 1986, etc.

A curious provision is section 151 (5) IDA under which managerial, administrative or supervisory employees (in private sector companies) drawing a salary of Rs.1600/- or more per month do not fall under the protection of the IDA.<sup>2</sup> This provision has apparently never been changed and still reflects the salary levels of 1940/50ies. Thus, these employees are factually excluded from any statutory labour protection.

### ***d) Environmental Law***

There are about 200 different laws or regulations in place, which deal in one way or another with environmental protection. Interestingly, the Indian Penal Code (IPC) of 1860 is counted among those rules promoting environmental protection. It contains provisions for offences affecting public health, safety and convenience (Section 268 IPC).

### ***e) Tax Law***

As many matters, the power to enact taxation rules is divided between the Union and the States' Governments. Which matters fall under whose competence is set out by the constitution.<sup>3</sup> India's main act concerning tax law is probably the Indian Income Tax Act of 1961. It requires all persons including individuals, companies, associations of persons, etc. to pay an income tax on all taxable income. The money thus gained is the largest revenue for the Government.

Taxes in India are divided into direct taxes and indirect taxes. Direct taxes are taxes, which you have to pay directly to the government such as the income tax or wealth tax. On the other side there are indirect taxes, for instance service taxes, customs duty, excise duty, value-added-duty, etc. The consumer only indirectly pays these taxes. If a consumer buys a product on which an excise duty is imposed, he just pays the price to the provider. The provider pays the taxes to the government at an earlier (or later) stage.

## **6. Criminal Law**

There are three central statutes relating to a criminal trial. These are the Code of Criminal Procedure (CrPC), the Indian Penal Code and the Indian Evidence Act

### ***a) Investigation***

The investigation is the first stage of a criminal case. The CrPC generally distinguishes between cases that are initiated based on a police report and those based on private complaints. Investigation serves primarily the objective to ascertain the circumstances and facts of a case thereby providing evidence for a later trial. It is conducted by the police. The investigation ends with a police report to the magistrate.

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<sup>2</sup><http://labour.gov.in/upload/uploadfiles/files/ActsandRules/LawsRelatedtoIndustrialRelations/THE%20INDUSTRIAL%20DISPUTES%20ACT%2C%201947.pdf>

<sup>3</sup> See seventh schedule List 1 and 2 Constitution of India.

### ***b) Trial***

The last stage in a criminal case is the trial (preceded by an investigation and inquiry). The CrPC prescribes that every trial before a Session Court has to be conducted by a public prosecutor (Section 225 CrPC).

Further, the CrPC envisages the adversarial system, which means that the prosecutor (for the State) accuses a person of having committed a crime. The accused is presumed to be innocent unless and until the prosecutor has proven the case beyond a reasonable doubt. The CrPC categorises offences in bailable/non-bailable offences and Cognizable/non-cognizable offences.<sup>4</sup>

## **7. Personal Law**

A truly distinct feature of the Indian Legal System are its Personal Laws. Sometimes also referred to as family laws, the personal laws set out different rules relating to marriage, divorce, inheritance, etc. for the major religious communities in India. That means that Hindus, Muslims, Christians and Jews are subject to a different set of personal laws. It is, however, important to note that the Hindu Laws cover various religious communities, namely Hindus, Jains, Sikhs and Buddhists. There have been attempts to unify these rules in a uniform civil code (UCC), however, each attempt failed because of opposition of some minority religious group. These minorities fear an attack on their religious rights through a UCC.<sup>5</sup> While Hindu Laws have been unified and codified to a large extent (e.g. Hindu Marriage Act 1955), the rules relating to Muslims remain largely uncodified.

## **II. Difference to German Legal System**

### **1. Fundamental differences as to the general Framework of the Legal System**

#### ***a) The Legal System***

The first thing one has to mention here is that Germany has in place a civil law legal system. That is, while Indian Law largely relies on case law and precedents German Law is based on a comprehensive compendium of statutes. That entails another major difference between both systems. As we have seen, judgements of courts are generally binding on lower courts (at least within the same state). This is not the case in Germany. According to Article 97 I German Constitution (hereinafter GG)<sup>6</sup> a judge is solely bound by the law. Therefore, even a judge sitting in the lowest regional court does not have to follow a decision of the highest court. However, in practice lower courts do respect and follow decisions rendered by higher courts in the majority of cases.

#### ***b) Distinction between Public and Private Law***

Further, German Law consists of public law on the one hand, which regulates the relations between a citizen/person and the state or two bodies of the state (including criminal law) and private law on the other hand which deals with the relations between private persons (including judicial persons). Classic examples for public law areas are criminal law, administrative law,

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<sup>4</sup> [http://www.cbseacademic.in/web\\_material/doc/Legal\\_Studies/XI\\_U4\\_Legal\\_Studies.pdf](http://www.cbseacademic.in/web_material/doc/Legal_Studies/XI_U4_Legal_Studies.pdf)

<sup>5</sup> Raya Hazarika, Indian Law Society (ILS) Law College; October 25, 2010; available under [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1697580](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697580) (last seen 20.08.2014).

<sup>6</sup>GG as for Grundgesetz (Federal Basic Law of Germany – German Constitution).

environmental law, etc. Among the private law branch are counted matters such as contract law, family law, tort law, etc.

## **2. Constitution**

### ***a) Fundamental rights***

The German Constitution was drafted around the same time than the Indian Constitution. The GG entered into force just one year earlier, on the 23 May 1949. To emphasise their importance the GG begins with the enumeration fundamental rights (Article 1- 19). In addition, the GG provides an extraordinary appeal in the form of a constitutional complaint: If a fundamental right has been violated and legal protection has failed, one can pursuant to Article 93 I GG file such a complaint to the Federal Constitutional Court of Germany. The constitutional complaint is de facto very similar to writs of the Indian Constitution (see. Articles 32 and 226 of the Ind. Const.).

### ***b) Govt. (Leg, Jud, Ex.)***

The GG also resembles the Indian Constitution in many aspects. For instance, both adopt the concept of separation of powers into legislative, executive and judicial branches.

The Legislative branch in Germany is also formed by two houses: the Parliament, which is elected directly by the citizens and the Federal Council, which comprises representatives of the States ("Länder").

Main difference of the Judiciary is that Germany does not have one Supreme Court, which stands above all other courts and is competent for all matters. There are rather several courts of highest appeal, which are competent for different matters. The highest court for civil and criminal matters is the Federal Court of Justice, for administrative matters the Federal Administrative Court, etc. If the constitution is involved the last appeal can be directed to the Federal Constitutional Court, which has a special status within the GG and is considered to be the most powerful German court.

Germany also has a President. However, the President in Germany literally has almost no power (or very, very limited power). He has rather the role of the main-representative of the state, which, in fact, mirrors the situation in India. Besides there is a cabinet (~ Minister Council) which makes the major political decisions. It is headed by a chancellor (comparable the Indian Prime Minister).

### ***c) Writs:***

Writs, being a classical instrument of common law jurisdictions, have not found entrance in German Law. However, the rights guaranteed or enforced in India by writs are secured also in Germany, merely by other means. Other than the constitutional complaint, there is for instance Article 19 GG specifically imposes a constitutional obligation to provide a remedy for improper detention (similar to the Habeas Corpus writ).

## **3. Public Law**

### ***a) General***

As was mentioned before, Public Law in the sense of the German meaning does not exist in India. In Germany the majority of regulations, in fact, belong to the public law branch. Even the Constitution in a strict sense does belong to Public Law. The same holds true for criminal law, although in some schemes one may find it as an additional branch of law standing beside private and public law. Correctly however, criminal law is a sub branch of public law.

### ***b) Criminal Law***

The German Criminal Code (Strafgesetzbuch) emerged around the same time as the IPC. A principal difference as to punishments is that capital punishment is abolished in Germany. The German Constitution (see Article 102 GG) in any case prohibits it.

Another major difference can be identified in the trial-process. While India has adopted the adversarial system, German trials are conducted according to the inquisitorial system. That is, the judge has a major role in investigating the facts of the case during the trial.

## **4. Civil Law**

### ***a) German Civil Code***

The German Civil Code (hereinafter BGB) constitutes the basis of German civil law. It is of paramount importance for almost all civil law areas. It is divided into 5 books, the first one being a general part, which applies to the whole code, whereas the following parts (book 2-5) regulate specific areas: Law of obligations (~Contract Law); Property Law; Family Law; Law of Succession.

### ***b) Personal Law or rather family law:***

The matters, which are covered under the Indian Personal Laws, are in Germany governed by Family Law and Inheritance Law, both incorporated in the German Civil Code (BGB). Thus, every ethnic and religious group in Germany is subject to the same set of rules (as it is the case in the State of Goa).

## **III. Conclusion**

In conclusion, one can see that there are some major differences between both the legal systems. However, there are also many similar aspects, (which have not been the subject of this article though).

Coming to my personal impressions about this country, I must admit that even after two weeks the traffic is still scaring me and the weather is still way too hot. Apart from that, I was able to adapt quite well to this different environment. I found that Indians are friendly and hospitable people. In particular, the people who I got to know closer, were truly nice and helpful to me, which contributed a lot to the fact that I felt comfortable in Delhi.

Overall, it has been a truly enriching experience and gratifying journey for me.