



## Continental and Socialist Legal System

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### 1. The Continental Legal System

The Legal System followed by the countries in the mainland of Western Europe (which is commonly referred to as 'Continent' as distinguished from the island of England) is referred to as Continental Legal System. The origin of 'Continental Legal System' can be traced to the old age Roman Empire of the 5<sup>th</sup> century A.D. You might have heard about the Roman Emperor Justinian (A.D.483-565) during whose time many rules and regulations were compiled and were called 'Code'. From that time onwards, this legal system spread all over Europe, including England for some time. In the rest of the world, this legal system was imposed during the era of colonialism during the seventeenth and eighteenth centuries. Now you may find this legal system present in many countries of Southern America and parts of Africa. As you might be aware that in India, even French and Portuguese had come to establish their suzerainty for some time and during that period they had successfully imposed their legal system in those places, such as Pondicherry, Goa, Daman, and Diu. You may identify the 'Continental Legal System' on the basis of the following salient features:

- (a) importance of Acts, Statutes passed by the Parliament or competent authorities;
- (b) composition of judiciary;
- (c) power of the judges to make law; and
- (d) inquisitorial approach of the court proceedings.

Here some discussion these features again with respect to 'Common Legal System'.



Figure 1: Court

#### (a) Importance of Acts, Statutes passed by Competent Legislature:

The Acts passed by the Parliament or the competent authorities receive the highest importance in this legal system. Authority of the competent legislature is to assimilate the scattered rules and then draft them according to the modern conditions and get them passed in the Parliament. This is called the process of 'Codification of Rules'. For example, Rules assimilated and framed in the area of crimes are called 'Penal Code'. These rules passed by the Parliament are then applied by the judges in the resolution of disputes. Judges regard the rules framed by the Parliament as supreme and do not try to change it by asserting their own authority as in the Common Law family. They may give their own

interpretations of the vague language used in the Act, but they would say that it would be not binding except upon the parties to the dispute. Interpretations of the rules framed by the Parliament are given not by the judges but by the legal scholars and academicians. The abstract law passed by the Parliament is given high regard even by the judges and advocates.

### **(b) Composition of Judiciary**

Judiciary constituted in the Continental Legal System is from diverse fields as a person of any background can be a judge in this legal system. Persons who have specialized knowledge of any particular field may be appointed as judges. Thus, an engineer or a doctor or a Scientist may become a judge. There is no requirement to study law as a separate discipline for a requisite number of years and practice in the court of law thereafter. So the judges of the higher courts or trial courts are appointed from diverse backgrounds and without the need of a degree in legal education. Legal education is also imparted in the countries which follow 'Continental Legal System', but that is not the only mandatory requirement to become a judge. In India too, you might find that a technical member is sometimes appointed by the court to assist them in arriving at a conclusion in which any technical problem is also involved.

### **(c) Power of the judges to make law**

Judges in 'Continental Legal System' do not make laws and their judgements do not carry authority except in the dispute before the court. They apply the laws made by the legislature and cannot make the law themselves. In other words, the judgements rendered by the judges of even the higher courts do not enjoy the status of 'judicial precedents' as in the Common Law System. Their judgements are given respect by the judges in other cases but they are not bound by them. For example, the judgements given by the highest court of appeal in France, namely, 'Court de Cassation' are not binding on all courts of France. However, the judgement of that Court is given high respect in the judicial bodies. The judges of the highest court cannot strike down the law passed by the legislature; they can only apply the law passed by the legislature. One of the advantages of this system is that the voluminous judgments of courts would not have to be read by the lawyers to know the law which is the case in 'Common Law System' and an advocate has not only to know the law passed by the Parliament and legislatures, but also the judgments delivered by the higher judiciary.

### **(d) Inquisitorial approach of the court proceedings**

Unlike the passive role of the judges in finding the truth and being dependant on the ability of the advocates to establish the fact of the matter, the judges in the 'Continental Legal System' play active roles in finding the truth. The approach followed in the court proceedings is not adversarial in nature but 'inquisitorial' (the term 'inquisition' means investigative). The judges do not simply act as a referee between the prosecutor and the defense but they actively investigate the matter themselves with the co-operation of all disputing parties and try to establish the truth by collection of evidence. Collection of evidence is thus not the sole responsibility of the advocates but the judges too. Judges may go to the scene of the crime and collect evidence on their own if they think that the evidence produced by the advocates of the disputing parties leave some doubts as to the establishment of the truth. Judges are not passive observers but active participants in the quest to establish the truth. In India, you may see the application of this approach in the fact-finding commissions established by the government. You may have heard of 'Nanavati Commission of Inquiry', established by the Gujarat Government to inquire about the actual facts related to 'Godhra Riots of 2002'.

## **2. Socialist Legal System**

An important legal system which has influenced the development of many other legal systems of the world is called 'Socialist Legal System'. This Legal System was adopted by those countries which had started following socialist and Marxist philosophy especially after the First World War of 1914-19. You might be aware that the socialist philosophy was practically adopted by the former U.S.S.R. and China.

When the U.S.S.R. disintegrated in the late 1980s, all breakaway countries adopted this Legal System with some modifications, such as Ukraine, Kazakhstan, and Uzbekistan. Apart from China, other countries, such as Mongolia, North Korea and Cuba follow this legal system. You cannot say that this legal system is quite different from Common Law and Continental Legal System. Instead you must know that the 'Socialist Legal System' has been influenced by Continental and Common Law systems. However, there are certain features of this legal system which have distinguished it from other legal systems. Those features are:

- (a) legal rules are not considered permanent;
- (b) importance of public law;
- (c) no judicial review of administration and law passed by the legislature; and
- (d) great influence of Continental Legal System. We will discuss these features one by one in the following paragraphs.

#### **(a) Legal Rules are not considered permanent**

According to the adherents of this legal system, law is considered to be of temporary character and a time would come when law will not be necessary to govern. The moment everybody would become economically equal, there would be no requirement of law. To promote economic equality, courts and law are required. Law, in 'Socialist Legal System', is of revolutionary nature. Unlike Continental Legal System where law is of static character, the 'Socialist Legal System' throws away any law which promotes private property and wealth. For example, when the former U.S.S.R. adopted Socialist Legal System, all the laws promoting private and commercial rights were abolished. Those laws were called 'bourgeoisie law'. Socialist laws are revolutionary in the sense that they do not recognize old laws which sustained capitalism based on private rights and free markets. It aims to overthrow those power relations which build a capitalist system.

#### **(b) Importance of Public Law**

In 'Socialist Legal System', Private Law has no space and all law has to be in the nature of 'Public Law' which means that all law deals with State matters or public matters, such as Constitutional Law, Administrative Law, and Criminal Law. By Constitutional Law, we mean that law which determines the nature of the State and the structure of the government. It is above and superior to the ordinary law of the land. Administrative Law deals with the structure, powers and functions of the organs of administration, the limits of their powers etc. Private Law, which regulates and governs the relations of citizens with each other, is either abrogated or is given less importance than the Public Law. Examples of Private Law are the law of torts, contract, property, and intellectual property rights. In 'Socialist Legal Systems', many branches of Private Law have shifted and have become a part of Public Law. Thus, Law of Contract which was considered to be a law regulating the contractual freedom of individuals has also now been substantially controlled and the freedom to contract has been severely restricted in this Legal System.

#### **(c) No judicial review of administrative action and law passed by the legislature**

Socialist Law theorists traditionally argue that the legislature is conceived to be the supreme expression of the will of the people and beyond the reach of judicial restraint. Legislation, not judicial decisions, is recognized as the sole source of law. They do not believe in the theory of 'separation of powers' according to which the legislature, executive, and the judiciary are independent and separate from each other. Instead, it believes in the unity of all State organs and above all superiority of legislature. It is assumed that the legislative body is responsible for maintaining the constitutionality of State actions and that constitutional review could not be exercised by extra-parliamentary bodies, such as the judiciary. The Constitutions of socialist countries are recognized as the supreme legal force. The judiciary cannot have the power to review the law passed by the legislature and rules framed by the executive under the authority of legislature. The power of 'judicial review' is considered as a tool of the bourgeoisie.

#### **(d) Influence of Continental Legal System**

The 'Socialist Legal System' is greatly influenced by the 'Continental Legal System'. The members of the socialist family of legal systems are those countries which formerly belonged to the 'Continental Legal System' and the characteristics of that Legal System are still preserved in it except the importance of Private Law. The judges do not enjoy the power to authoritatively interpret the law and to modify it. Judicial precedents cannot be made by the judges who enjoy only the power to apply the given laws and promote social and economic justice thereby. Further, the court proceedings are not adversarial in character but it follows the inquisitorial approach and public prosecution is regarded as provider of justice rather than punishing the offenders. The legal field is also not strictly divided amongst criminal, civil, and intellectual property. This legal system is an integrated one where lawyers may move from one area to another (e.g., from criminal to civil law or from being a defense attorney to a prosecutor) without additional entrance requirements.

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