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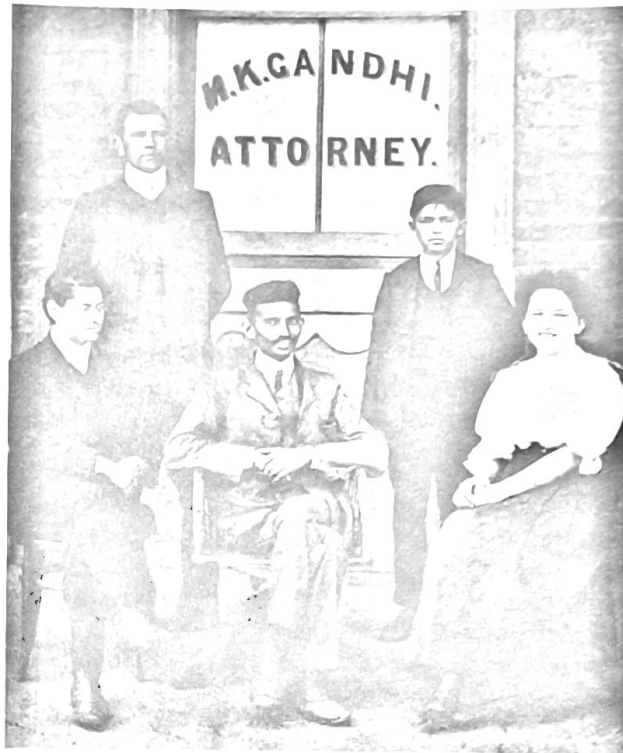
JAMES S. READ

## Indian Law

The South African legal system comprises common law (Roman-Dutch and English law developed through case law), legislation, and (mainly African) customary law, with elements of Muslim, Hindu, Jewish, and Zoroastrian (Parsi) law. Dutch occupation (1652) was followed by two British occupations (1795 and 1806) separated by a short Batavian (Dutch) rule in 1803. British occupation ended in 1910 when the four territories of the Cape, Natal, Orange Free State, and Transvaal formed a union. In 1931, South Africa became independent within the Commonwealth; it became a republic in 1961. In 1948, the National Party came to power on the platform of Apartheid. This was replaced by a Government of National Unity in 1994.

Colonization inadvertently brought Muslims and Hindus to South Africa. Currently, Muslims form a heterogeneous 1.4 percent of the population, with almost equal numbers of Cape Malays and South Asians, whereas South Asians/Indians constitute 2.5 percent of South Africa's population, with Hindus comprising 60 percent and Muslims 20 percent. The arrival of Mahatma Gandhi in 1893 saw a period of political struggle through the Natal Indian Congress for basic human rights. Arrangements for Indians differed greatly in the British colonies (Natal and Cape), which valued Indian economic contributions, and the Boer republics (Orange Free State and Transvaal), which sought to preserve Afrikaner cultural values. The Orange Free State resisted Indian migration beyond 1910; Indians were confined to "coolie compounds" and had to carry a pass at all times. Until 1961, South African Indians were classified as "sojourners" and were not officially recognized as part of South Africa's permanent population. The last vestiges of racially discriminatory legislation only were removed in 1991.

Islam was brought to the (Western) Cape by Muslims from Indonesia (Cape Malays), Bengal, and the Coromandel and Malabar Coasts in India from 1652



**South African Law Practice.** Mohandas K. Gandhi (*center*) surrounded by workers in his law office, Johannesburg, 1902. AP PHOTO

onward. Muslims arrived as slaves, convicts, political exiles (ranging from priests to princes), and soldiers. Indonesian soldiers are officially recorded as the first South African Muslims. The Dutch issued a 1657 proclamation prohibiting public practice of Islam or conversions, with violation punishable by death. In 1804, religious freedom was granted by the Dutch authorities, but Muslims still required permission to build mosques.

In Natal (KwaZulu), Islam was first introduced in 1860 by Muslim descendants of indentured laborers, traders, soldiers, and slaves mainly from India and East Africa. Natal Muslims did not face the same hardships as Cape Muslims and found it easier to follow Muslim Personal Law. Muslims arrived in this British colony with many Indian Hindus as indentured laborers for the sugar plantations. Hindus brought with them the Hindu personal law. After 1869, Indians arriving as free immigrants ("Passenger Indians") opened new avenues of employment and business, especially in Natal, which by 1900 had close to eighty thousand Indian residents. Passenger Indians engaged in trade, could own property, and voted in local government elections. After 1880, some migrated to the Transvaal, where protests against Indian immigration in 1885 led to discriminatory laws. Even in Natal, when "free Indians" started competing with European

farmers. Law 25 of 1891 denied Indians land rights initially offered in 1870. By the mid-1890s, many Europeans were convinced that all Indians should be repatriated.

Although the arrival of Indian Muslims in South Africa occurred long before Pakistan's creation in 1947, their expression of Islam has been influenced by Pakistani scholars and local conservative ulema (religious) bodies representing a variety of religious orientations unofficially regulating Muslim personal law. The judiciary in the Cape colony in the early 1800s made use of a code of "Muhammedan Law." In 1907, a call was made for recognition of Muslim Personal Law to homogenize legislation applicable to Muslims in the Cape, Transvaal, and Natal. Opportunities for recognition arose during Apartheid but were rejected on politicomoral grounds.

A matter of particular legal concern is marriage law. Hindus largely follow South African civil law but, like Muslims, most Hindus undergo a religious marriage ceremony. However, marriage by customary Hindu or Muslim religious rites alone is not considered legally valid in South Africa. Many women protested about this, and Gandhi, in *Satyagraha in South Africa*, criticized the judgment of the Cape Supreme Court that nullified all marriages celebrated under Hindu, Muslim, and Zoroastrian rites. Many married women in South Africa were thus degraded to concubines, their progeny deprived of rights to inherit property. Unless spouses also undergo a civil marriage or these marriages are conducted by a priest who is a marriage officer, even today these marriages are not officially recognized because they are potentially polygamous.

Legal challenges facing Muslims and Indians in South Africa today center particularly around recognition of marriages and related matters. As marriage other than secular marriage is not considered legally valid, women and children are often disadvantaged in cases of death of a spouse or divorce. Legislative concessions and court interventions to redress the consequences of nonrecognition have provided only partial relief. It is for this reason that especially Muslims have endeavored to have Muslim Personal Law officially recognized.

The new constitutionally guaranteed right to religious freedom opens the door for custom, culture, religion, and tradition to be elevated to equal status in South African law. Section 15 of the 1996 Constitution appears to guarantee the right to freedom of religion to all South Africans, which intrinsically includes the right to live according to the customs and traditions prescribed by those religions. The Constitution therefore lays the groundwork for the recognition and application of religious family law systems, but it does not constitutionalize the right to have any system of family law recognized by the state. Therefore, religious groups still have to lobby for legislative recognition.

The South African Law Reform Commission (see <http://www.law.wits.ac.za/salc/salc.html>), as the governmental

body responsible for considering law reform, has examined the scope for recognition of Muslim Personal Law while paying less attention to Hindu law. A Bill has been proposed to harmonize Muslim marriages and related matters with the South African constitutional Bill of Rights and its emphasis on equality.

[See also Hindu Law: Overview.]

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NAJMA MOOSA

**SOUTH AND CENTRAL AMERICA.** [This entry contains six subentries, an overview of South and Central American law and discussion of pre-colonial laws, Spanish colonial law, Portuguese colonial law, other colonial laws, and legal pluralism.]

#### Overview

Apart from a few significant civilizations, little is known about the legal systems of indigenous peoples of the region before European contact. Where indigenous legal customs are present today, some extrapolation can be made to pre-colonial practices. Colonial legal systems mostly obscured prior customary law, although some indigenous law has continued to operate alongside colonial law, particularly in communities where colonial powers permitted local autonomy.

The Aztecs and Incas had sufficiently developed legal systems that various attributes were noted by colonial observers in the early years of contact. For example, the Texcocan legal system of the Aztecs included a supreme legal council, jurisdictional divisions, dedicated chambers, and calendars for hearing cases. Local lords, towns, and wards also settled legal disputes. The system of dispute resolution reflected the hierarchical structure of Aztec society, with the division between nobility and commoner often determining not only the appropriate forum but also the applicable rule of law. Grounded in an asserted antiquity, Aztec law regulated many aspects of life including slavery, marriage, landholding, personal property, barter, inheritance, and debt enforcement.

**Colonial Law.** During the colonial period, the imported European legal systems—mainly Spanish and Portuguese law, but also English, Dutch, and French—did not explicitly