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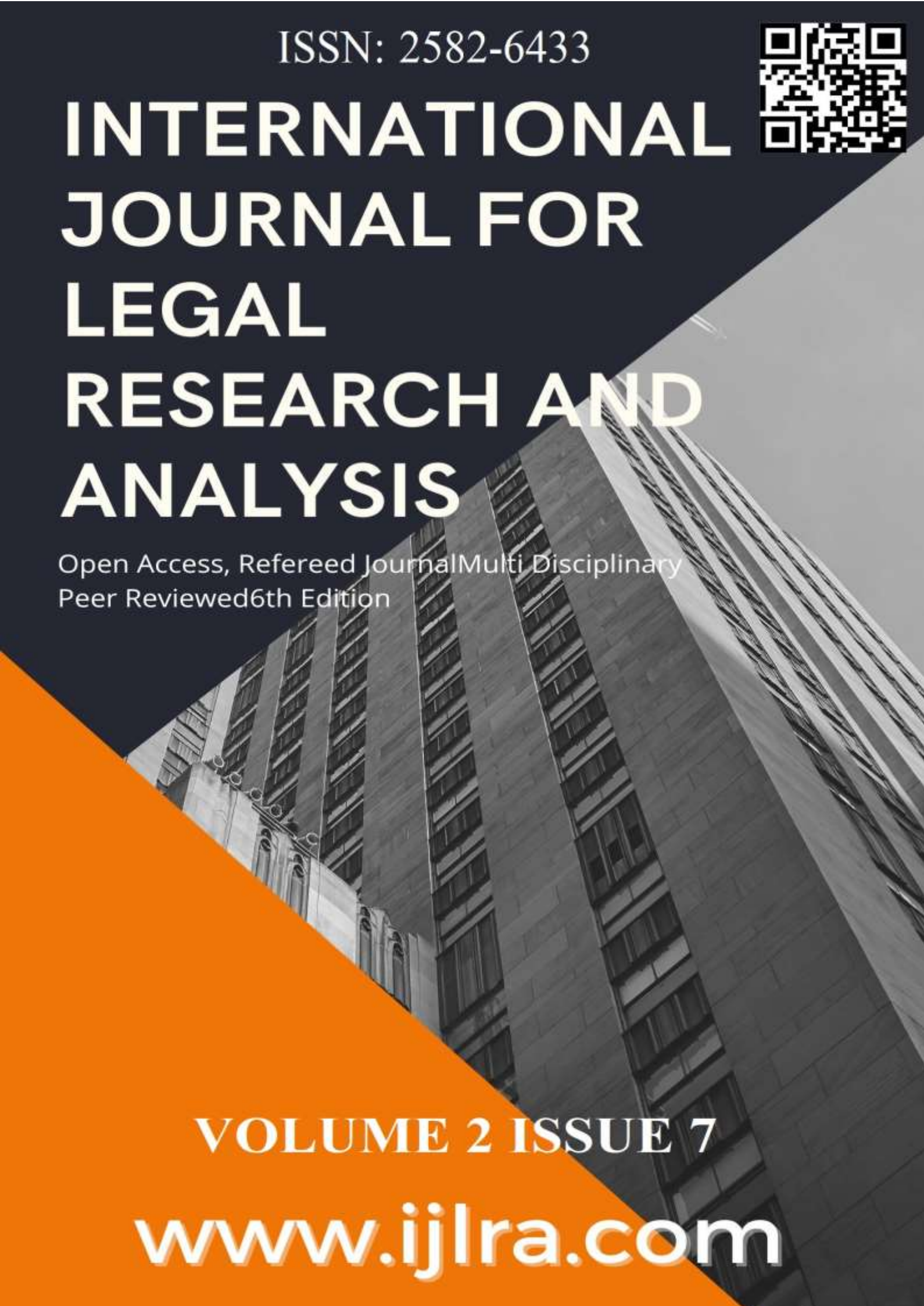

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THE ROLE OF INDIAN VOLKSGEIST IN ITS LEGAL EDUCATION AND PRACTICE

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ABSTRACT

This study is based on NATIONAL EDUCATION POLICY 2020 with reference to Legal Education in India and its Practice. Through NEP 2020 Indian government wants to spread Legal Education and its Practice in global form, also curricula for legal studies must reflect socio-cultural contexts along with the global form in an evidence-based manner, that is, the history of legal thinking, principles of justice, and practice of jurisprudence. So this purposes it is needed to study of the Indian Volksgeist of Legal Education and practice. The core of Volksgeist was that a legal system of a nation is mainly influenced by the historical culture and traditions of the people and its growth was located in their acceptance. Through this article we try to trace principles which govern the ancient legal education and practice and their prevalent customs. We also make effort to trace Indian Historical Jurisprudence in Medieval period after as well as in British Period in order to trace the presence of facts and the in the legal system in India after its independence. In the study of NEP 2020 this article had made effort to trace the India ancient volksgeist in the current legal system or legal system of after its independence. Through this article try to know what kind of practice and legal education governed that phase, which principles were relinquished and which principles are still carrying on. This study is based on the researches which may highlight completeness of ancient Indian legal system and its reflection well noticed in present system.

KEYWORDS: VOLKSGEIST, CORE, NEP2020, JURISPRUDENCE, GLOBLE

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Introduction

The topic of this article is clearly talks about what was the role of Indian Volkgeist in its legal education and practice. for this kind of research work we need to know all kinds of phases that they help us to trace the actual fact regarding practice. We study mainly four phase like ancient period and practice, Medieval period and practice, British period and practice, Independent India and practice. We will study all four aspects one by one to know about role of Indian Volksgeist in its legal education and practice. We will also find through the study of this article National Education Policy 2020 has made strive to find volksgeist of Indian legal system.

1. Ancient Period and Practice

We Start from Ancient Hindu legal system and it is but natural for Hindus to consider their law as of divine origin. Hindus consider their law as a revealed law. The theory is that someone among us, our great *rishis*, had attained such spiritual heights that they could be in direct communion with *God*. At some such time, Hindu law was revealed to them and through them we got our divine law. The revealed law come to us in four *Vedas*. The assumption is that the later development, the *Smritis*, the Digests and Commentaries are nothing but the expositions of the sacred law contained in the *Vedas* which are considered to be the source of all *knowledge*. On that premise emerges the concept that Hindu law is divine law, and being divine law, it is sacrosanct, inviolable and immutable. The word sacrosanct implies that Hindu law is not merely very sacred or holy law but also hallowed law- a law to be looked at with reverence, the validity of which cannot be questioned. The word inviolable implies that it is a law which cannot be violated, which cannot be changed. In short, it is a permanent law. The word immutable signifies that it is an unchangeable law which is valid for all times to come, it is an eternal law.[1]

Hindu Jurisprudence

When we are going to elaborate the term Hindu Jurisprudence then we should know that Hindu is a religion of human being and Jurisprudence is secured from latin term "Jurisprudentia". Jurisprudential means "knowledge of law". When we study both terms then we find that Hindu law means study of Hindu law is known as Hindu Jurisprudence. It is a sacred law since our sages, rishis used to give the suggestion to our kings. Kings always in touch of these rishis, Acharyas to

[1] Sen Priya Nath "*General Principle of Hindu Jurisprudence"* Allahabad Law Agency, p-11

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about "Dharma". Dharma was that time law rules and regulation which is given by Acharyas to the king to maintain the "Rule of law" in the society. For this our law governed by that time source of law like Vedas, Smriti, Shrutis, Digest and Commentaries. These sources are given by the very renounced sage because that time of sage reached and gain the spiritual height. So that they are able to suggested the people as well as the kings. We can say that Hindu Jurisprudence was found in Hindu religion and custom.[2] This kind of law is start from when the new born baby come on the earth and during his/her life period till death all the rules help to live the life. These kinds of law help us how to leave in society, we can say that it is Rule[3] of law to govern our life. It starts from Morality Education and many more. ancient Hindu legal system based on Hindu Jurisprudence.

Administration of Justice in Ancient Period

Administration of justice was one of the most challenging issue of kings of that time period. If we talk about Yudhistira in epic of Mahabharata he went to Bhishmapitamah after the war of Mahabharata to know about how to govern states and how to implement Rule of Law and Dharma among the people of his own state. After all these things we have to know about king's strategy to regulate his kingdom. First of all it was duty to detect all the disputes arising among the people and when they go to king for justice which kind of strategies are followed by the king of that time. They need to appoint expert, jurist and some sometime self. People go to authority for the remedy and authority treats them as directed by the king. If matter is not fitted in any situation then they go through then they go through the sages view. We can say that it all belongs to the dharma. Dharma is not an individual thing for all every person ha its own Dharma. Dharma followed by the Smritis, Shrutis and Digest and also apply presence of mind apply by king. For this king must have knowledge about the fact and he must be well educated person. As per need king administrate his function of justice in ancient period. If the officer of the court also found in guilty and committing offence then they also punished by the king. For the solution of these kind of dispute king make court of justice for legal proceedings[4]. Legal proceeding also known as Vyavahara.

[2] Sen P. N (The general principle of Hindu Jurisprudence) 1918 P-3.
[3] Koolwal. Dr. Manju., "*Development in Hindu Law*", University Book House(P.) Ltd.,Jaipur,p1
[4] Jois Justice. M. Rama, "*Legal and Constitutional History of India*" (Universal Law Publishing),p489.

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Vyavaharaha (Legal Proceeding)

Vyavahara means legal proceeding for the justice of innocent people. When we look on back of time that time people are very innocent they don't think about profit or loss never be jealous to any other people and when time passes it started happening in the society for the small matters. Now those days they were starting to cheat and fighting to each other for the purpose of his ownership, possession, right or wrong, for threat people for the money and many more matters. This type of matters were went to the court of justice and king was entitle to decide their dispute we heard se many stories as for example Akbar Birbal and many more stories for the example of vyavahara was found in society. Those time people obey Dharma as a rule voluntary. But when time changes as per situation they were starting telling a lie with each other, they want to deceive for gain some money and extra attention on his own work. So there was need a place where justice found for the sufferers. Some rules had framed for the tool of justice and codification of law as per demanding situation. Situations means that there were so many kind of nature of offences like civil or criminal individual or in combine form so it falls which type of offence this mechanism will be worked. Some where it is rightly said that offence and punishment were define and arranged topic wise by the known jurists or authors. Mostly famous Manu codification of law mostly followed by the kings and that time jurist. Main object of Dharma to protect the law and that person who suffering from the conduct of another people[5].

Vyavaharapada

When we talk about Vyavaharapada (topic of litigation) then there are so many kind of disputes which were come into existence in those days. Its classified by Manu's eighteen title of law, out of thirteen come under the nature of civil disputes and next five come under crime. These branches of law were called Vyavaharapada. In the ancient period all disputes and law had been under eighteen topic of Vyavahara[6] are: Runadana means payment of debts, Nikshepa means deposits, Aswamy Vikraya mens sale without ownership, Sambhuya Samuthana means partnership, Dattasyanapakarma means resumption of gift, Vetanadana means payment of money for work, Samvidvyatikrama means violation of convention of guilds and corporations, Krayavikrayanusaya means purchase and sale, Swamipala Vivada means dispute between servant and master, sima vivada means boundary dispute vakparushya means defamation, Dandaparushya

[5] Jois Justice. M. Rama, "*Legal and Constitutional History of India*",(Universal Law Publishing),p65.
[6] Jois Justice. M. Rama, "*Legal and Constitutional History of India*",(Universal Law Publishing),p67.

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means Assault, Steya means theft, Sahasa means offence by violation, Strisangrahana means adultery, Stripum dharma means duties of wife and husband, vibhaga means partition, Dyutasamahvaya means gambling and[7] betting.

Niyogi (Representative)

Niyogi means representative[8] of that person who suffered from any people and place where people went and got face some illegal act, misbehave from any other person or administrative officer also. Its kind of person who advocate that person who help and speak on the behalf of that person who not able to represent his problem in front of the court of justice and that time person not permitted to meat court of justice. So the people went to that person who represent matters in front of the court of justice. On the above statement its clear that any plaintiff or defendant who want to justice and want to present his matter then he/she must have had a representative who represent their matters in front of the court of justice. Order 3 of code of civil procedure give the permission to person who depute his /her representative. That time who litigate the matter in front of the court of justice. The person who competent and eligible to represent the matters so appointment was very necessary that time.

2. Medieval Period and Practice.

After the end of ancient phase and the beginning of the medieval period and starting the downfall of Hindu period. All the Hindu kings were defeated by foreign attack. Due to lackness of some trust and many other factors which was related to political military social and economic factors were cause of the down fall of Hindu Legal System. This period was also faced some struggles for supremacy. Some states discovered an atmosphere nobody can believe his words that's why there were so many common enemy got profit state need to meet and make a list of common enemy for preventing their attack. Due to lacking of a great leadership for controlling the political and military powers. That time Indian was not able to accept and adapt the present situation which was created by that time administration. All person were suffering from individual or mutual problems. Hindu kingdom also faced some problem and they want to separate from each other on the basis of caste or Religion matter it was also biggest factor. When we talk about the judicial procedure of Muslim period[9] it followed systematic procedure court system. We can say that it

[8] Jois Justice. M. Rama, "*Legal and Constitutional History of India*", (Universal Law Publishing),p531.
[9] Ahmad M.B., "The Administration of justice in Mediaeval India", p176-88.

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used to mainly governed by two laws first one FIQH-E-FIROZ– SAHIHI and second FATWA-I-ALAMGIRI. That time status of the court was sort out by same political bifurcation of the kingdom. If they had consider civil cases then the plaintiff had duly authorized agent and required to file a plaint for his/her claim in front of the court of law which falls on appropriate jurisdiction in that matter. The defendant whose name mention in the plaint was called which by the court to give his/her acceptance or deny the claim which was duly framed by the plaintiff. In the case of deny the court was entitled to frame the issue and then plaintiff was required to produce evidence for supporting his/her claims. The court give a chance to defendant also to prove his/her matter with the help of his/her witness. They were cross- examined by the court after concluding his/her judgement the officer of the court give judgement in open court. If we talk about the criminal cases then a complaint was submitted in front of the court either representative or personally for each and every criminal court had a public prosecutor also known as MOHTASIB. Mohatasib do prosecution against the accused in front of the court. The court was authorized to call the accused at once and to begin hearing of the case. The judgement was given in open court but sometime the court insisted on hearing the complainants evidence when calling the accused person. There are three kinds of evidence and its was followed by Hanafi law. First one was TAWATUR which means give full confirmation Second was IHAD means description of a single one, third was IQRAR means admission and confession both on the same time. Tawatur evidence was more referred by the court of justice. The faith in the god to the god faither they thought that they never rejected as dishonestly unless proved so.

Appointment

In the Muslim period the chief justice (QAZI-UL-QUZAR) and judicial officer of higher rank were appointed by the monarch. It was also seen that time chief justice and other judges were directly appointed from the well practicing lawyers.

Institution of Lawyers

When the matters were presented before the court by the legal experts. They were known as VAKIL. So we can say that the legal profession be very strong during the mediaeval period. That time there was no any kind of institution of lawyers like the “Bar Association” as it present in current era that the lawyers played a vital role for the administration of justice. Two Muslim codes like Fiqh-e-firoz Shahi and Fatwa-e-Alamgiri, clearly speak about the work of Vakil. At the time of Mu hammed Tughlaq as a judge Ibn Batuta was working and it was also mention in his book

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"Mawardi" shown in the legal profession, said that knowledge regarding law was compulsory both who entitled to act as a Qazi and for the legal practice. Some foreigner people were misguide that there was no any legal profession happening in Mughal period[10] but we could seen that here all judicial act done by the Qazi and had legal education also because for being a Qazi they must had legal knowledge also we also know that to defend civil suits against the state in the time of Shah Jahan it was first time happened govt advocate appointed when we talk Aurangzeb's time period full time practicing lawyer were appointed in every district they also known as Vakil-e-sarkar or Vakil-e-shara. These Vakil were appointed by chief justice (Qazi-ul-quzat) and some time by the chief Qazi. Some Vakil was recruit to help the poor litigious giving them free legal aid. We should also know that vakil had a right of audience in the court, Vakil should maintain a standard of legal education and advocacy.

3. British Period and Practice.

Now we discussed about legal practice in British period. When we talk about history of legal profession in British period we must know about history of legal profession in British period in India then we can see that British laws and formal simple legal frame work in the18th century. A number of legislation deals with different part of political, economic and social life a contract law, Indian penal laws, evidence law, trust law, transfer of property law, specific relief law, tort law etc. these all somewhere based on English Common low were introduced in India by the British administrating body and legal institution like English courts. English courts were also established for matter settlement in that place where native court structure. The origination of the professional legal practitioner in India was a resultant out come of these factors. There were two categories of court like king court and company court. The arrival of East India company on the Indian land in 1600 give rise to growth of Judicial System in the country starting from two categories of court structure developed in India which were popularly referred to as the king's court and company courts.

King's court Mayor's court and the Charter Act of 1726.

In 1615 the East India Company placed its factories in Surat after taking Royal permission from the Jahangir had that time Mughal Emperor resultant it open their factories in the three towns that

[10] Kulshrestha's V.D., "*Landmark in Indian Legal and Constitutional History*", Eastern Book Company, Eleventh Edition, Reprint 2017, p30.

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was namely Madras, Calcutta and Bombay. These town was also known as presidency town and these town's officer was the officer of the company framed their living flats and the factory storage. These officers were always unhappy to be regulate by the laws and legal organization of the spot land and they wanted to initiate an individual court system in these town's factory which would be regulated by the English people and based on legal system. For shifting up of Mayor's Court and court of Terminer King George had issued Charter Act 1726. These court were classified as court of record and English Language was classified as the official language of the of the court. The Charter Act of 1726 did not tell about any laws regarding to legal practitioners or individuals who could practice in these kind of court. After this a new Charter Act was framed by King George 2 in 1755. It continued the prior court system in these three settlements. During this time period no any specific laws regarding legal practitioners were running in these of courts and people that time usually unaware in law of the company practiced in these type court which was own knowledge point of view[11].

Supreme Court and the Regulating Act, 1773

The enactment of Regulating, Act 1773 there were major changes introduced in the rule of the three factories town its happened after the Battle of Plassey in 1757 and Battle of Buxar in 1764. There were many changes come into existence in judicial system by exchanging the Mayor's court for the stable of the Supreme court in the presidency town of Culcutta.

For the growth of legal profession and professional also Act of 1773 was very important in India become the provision for initial time presume the functioning the lawyers and govern their capacity to appear and practice in the courts. Under clause 2 of the Supreme Court Act authorize to frame rules and apply power regarding to sanction enhance and nomination of advocates. The court had special power to discard any Advocate on a genuine ground. Here no other person except Advocate or Attorney was permitted to give his presence and practice in the court on behalf of the petitioner. This practice was functioning in England, the known Attorney were permitted the implied authority to appear and do practice on behalf of the petitioner, whereas the Vakil were able to appear and make practice in front of the court in India. English solicitors and Attorneys were prefer to as the Attorneys, whereas the Irish and English Advocates member in Scotland were known an Advocate. It is rightly said that by the grace of 1773 Act, the Supreme Court

[11] Ghosh. Yashomati., "*Legal Ethics and the Profession of Law*", Lexis Nexis, p60-61.

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become unique estate for the members of the Indian and the British Advocates were decline all rights of present in that kind of court[12]. Some changes were come into effect Madras, Bombay, and Supreme Court these town were slug with the power to enroll and admit value and law Attorney in these courts. After all these things there were so many acts and regulations were come to the welfare of the Advocate point of view written as Company's Courts, Regulation VII of 1793, Regulation XXVII of 1814, Bengal Regulation XII of 1833, The Legal Practitioners Act, 1846, The Legal Practitioners Act, 1853, Pleaders, Mukhtars and Revenue Agents Act, 1865, Indian High Courts Act, 1961, The Legal Practitioners Act, 1979, The Legal Practitioners (Women) Act, 1923, Legal Practitioners (Fees) Act, 1926, after these Acts and regulations want to uplift of the demand Indian Bar. Resultant The Indian Bar Council Act, 1926 come and the struggle for reform in the profession and judicial system remain continue till the end of the British rule in India. Leaders of innovative India forwarded their activism to bring about structural changes in the whole administration of justice by demanding for equal treatment for different format of legal professionals and for establishing a integrated Bar for the whole India.

4. Independent India and Practice.

After the Independence, there must be need to reform in the legal profession. It was presumed that lawyers were helpful to bring about political, social, economically and reformative in cultural in the recent independent India. All lawyers with their legal knowledge of legal and constitutional area were deemed to be precious officer for promoting rule of law in the society in the society and defend the right of the people. It can be seen that these goals could be achieved by reform in quality of the legal education so that improvement must reflect in the legal profession in India origination of Independent Bar Concerning of legal professionals only norms the rule for admission and enrollment. It was also necessary to seamless the law regarding to legal practitioners in different area of the country in one law. We can be see that legal profession under All India Bar Committee 1951 was established in 1951 under the chairmanship of Justice S.R Das. It was made commendation in 1953 taking into account the solicitation of law commission. The essential feature of the statement of object and reason of the Bill which become an Act. There was need to establishment of AIBE (All India Bar Council of India) in country as well as having right to practice in any court in India with a enrollment number. The bifurcation of seniority of Advocates based on their merit. For the admission of a person as an advocate they should have

[12] Ghosh. Yashomati., "*Legal Ethics and the Profession of Law*", Lexis Nexis, p61.

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common qualifications. In India there should be create an autonomous Bar Councils for each and every states. For this work the law commission recommend a committee who prevent the non-law graduates for their recruitment as an advocate and they should not be permitted to practice in front of any court of justice[13].

Legal Profession under the Advocates Act, 1961.-The Advocates Act. 1961, was enacted to amend the law relating to legal practitioners in the country. In this Act is an enactment dealing with qualifications. enrolment, right to practice and discipline of advocates. There are seven chapters and 60 sections which speaks about the Legal profession and conduct.

Conclusion and Suggestion

We trace the all periods and we find the what kind of administration of justice run that time we find in ancient and medieval period both period have the same fountain of justice like king or sultan and in the ancient time legal practice and legal education is also their for the be of fountain of justice. In ancient time there are major role of an advocate and he known as *Representative*. In Muslim period they are called *Vakil*. During British period there are so many Acts and Regulations are come in action for the welfare of the Advocates and after the independence we have The Advocate Act 1961, and still we are study the legal education and do practice under the guidance of this act. Through NEP 2020 Indian government wants to spread Legal Education and its Practice in global form, also curricula for legal studies must reflect socio-cultural contexts along with the global form in an evidence-based manner, that is, the history of legal thinking, principles of justice, and practice of jurisprudence. So this purposes it was needed to study of the Indian Volksgeist of Legal Education and practice.

The Indian volksgeist of Legal system has contributed a lot to the present Indian Legal System and not surprising to the world legal system also. In Ancient Hindu Legal System we find the four pilers of justice or we can say these four pilers of justice were the basis of justice system at that time as well as in legal practice and education played a vital role. These four pilers were *Mahakavaya*, i.e *Shruti* and *Smriti, Customs,* saying of *Sages* and *Reasoning*. It is very pleasant to know that justice was not based on *Mahakavaya* but other three pilers also made a significant contribution according to the situations. The role of the reason sometime found to be super

[13] Gupta. S.P., "*Professional Ethics, Accountancy for Lawyers and Bench Bar Relations*", Central law Agency, 5th Edition, p10-11.

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imposed upon all the pilers. The intention of reasoning is to protect the identification of the group subject to the condition of human right. It is not a wonder when we find in many American decisions the sovereignty and integrity in India was given priority to protect the identity of the country. It is also not very surprising when today we learn Mischief Rule which is one of the best principles for interpretation or construction of a legislation. It may be concluded here that by having Mischief Rule the Ancient Hindu Legal System has contributed a lot to the legal system to the world societies. Undoubtedly it is we said that "Ubi societas ibi jus" which means society can be define on the basis of social order and that social order can be formed by adopting such rules of interpretation. If it is not there either the group would be distracted or by the process of socialization it would be achieved so the role of Indian Volksgeist in forming the legal system in India is based upon the concept of justice as it is required by the society. It also not very surprising that the Indian culture although the world culture indicates that it is the specific culture of India but that culture provides a way of human living. It can be very safely concluded that the acceptance of the Indian Volksgeist throughout the world in order to form a democratic society is praise worthy.