

Lecture-28



Development of Civil law in Mufassil: Special emphasis on justice, equity and good conscience

In India the doctrine of 'justice, equity and good conscience' was introduced, for the first time, in the Presidency of Bengal, in the year 1780. It was later transplanted in the mofussil of Bombay and Madras Presidencies. The doctrine was later on introduced on the other territories of India.

The general idea behind this doctrine was that if on a particular point of dispute before the Court there was no express/parliamentary law, no Regulation and if it fell outside the heads for which Hindu and Mohammedan laws were prescribed, then the Court was to decide the matter according to 'justice, equity and good conscience.

From the time that the British began to administer the territory that they acquired in 1764 they inadvertently began to change the law and administration of justice. Later developments in the subcontinent were, however, much more conscious. All these devps went on to influence the Constitution of India as also her legal system. English law was introduced initially through the application of the principles of justice, equity and good conscience, as interpreted by the English judges and through the decisions of the Privy Council in England.

The doctrine points to no specific body of law. Simply put, it means the discretion of the judge in many cases.

It was applied by the courts only for few topics, viz., inheritance, marriage, caste, and other religious usages and institutions. It was introduced to cover gaps left in law.

Common Law InMufassil

Then the common law trickled down to Mufassil. Between 1686 and 1694 the Company purchased certain villages in Bengal with the consent of Nawab of Bengal and acquired the status of a Zamindar in regard to those villages. As the Zamindar the Company held Zamindar's courts exercising both civil and criminal jurisdiction. These courts derive their authority from the Mughals, as the Company held this Zamindari from them. The law administered and the procedure followed in these courts were similar to those in the courts where other Zamindars exercised the jurisdiction.

There was a rise of the factories at Bombay, Madras and Calcutta, which in course of time grew into three Presidency towns. The company gradually increased the area of its supervision and control over the places surrounding these growing factories which in contradistinction to the Presidency towns were called the Mufassil. These Presidency towns played the leading role in the introduction of the common law into India.

Presidency town & adalat system

History comprises of the growth, evolution and development of the legal system in the country and sets forth the historical process whereby a legal system has come to be what it is over time. The legal system of a country at a given time is not the creation of one man or of one day but is the cumulative fruit of the endeavor, experience, thoughtful planning and patient labour of a large number of people through generations.

With the coming of the British to India, the legal system of India changed from what it was in the Mughal period where mainly the Islamic law was followed. The legal system currently in India bears a very close resemblance to what the British left us with. As per the needs of the changing times changes and amendments were made, but the procedure which is followed has its roots in the era of British-India. Little did the traders of the English East India Company while establishing their trade in India know that they would end up establishing their rule for about 200 years here. But the evolution of law as it is today did not come about in one go altogether. It was the Presidency Towns individually that were first affected by this change in hands of the governance of India after which the steps towards amalgamation of the judicial system were taken by the Charters of 1726 and 1753. To improve upon this, under the Regulating Act of 1773 Supreme Courts in the Presidency Towns and then under the Act of 1798 the Recorder's Courts at Madras and Bombay were established. These were ultimately replaced by the establishment of the High Courts under the Act of 1861, which are still running in the country. It was only after independence in 1950 that the Supreme Court was established. Reforms and codifications were made in the pre and post independence eras and are still continuing. Thus law, as we know today has evolved through a complex procedure which is discussed in detail herein below.

Ancient Period

India has a golden history of over 5000 years. Therefore a comprehensive study of Indian legal history comprises of the historical process of development of legal institutions in Hindu and Muslim periods.

Pre-Mughal Era

The various sources of law relied upon by the kings at that time were shrutis, smritis, puranas, dharmasutras, dharmashastras, etc. The Arthashastra and Manusmriti were influential treatises in India, texts that were considered authoritative legal guidance.

Ancient India represented a distinct tradition of law, and had a historically independent school of legal theory and practice. The political structure in the Vedic Period consisted of kingdoms, each tribe forming a separate kingdom. The basic unit of political organization was the kula (family). A number of kulas formed a grama (village), Gramani being the head. A group of gramas formed a vis (clan) and a number of vis formed the jana (tribe). The leader was Rajan (the Vedic King). The king (raja) was the supreme head of the legislative, executive and judiciary branches. The members of the council of minister could give advice to the king, but final decisions were left to the king. The ministers and other officials were directly appointed by the king. The sabha and the samithi were responsible for the administration of justice at the village level.

According to BrihaspatiSmiriti, there was a hierarchy of courts in Ancient India beginning with the family Courts and ending with the King. The lowest was the family arbitrator. The next higher court was that of the judge; the next of the Chief Justice who was called Praadivivaka, or adhyaksha; and at the top was the King's court.

Early in this period, which finally culminated into the creation of the Gupta Empire, relations with ancient Greece and Rome were not infrequent. The appearances of similar fundamental institutions of international law in various parts of the world show that they are inherent in international society, irrespective of culture and tradition.

Mughal Era

The ideal of justice under Islam was one of the highest in the Middle ages.

The administration of justice was regarded by the Muslim kings as a religious duty.

Sources of Islamic Law are divided into Primary and Secondary Sources.

Quran is the first and the most important source of Islamic law. It is believed to be the direct words of God as revealed to Muhammad through angel Gabriel in Mecca and Medina. Muslim jurists agree that the Quran in its entirety is not a legal code.

Sunna is the traditions or known practices of Prophet Muhammad, recorded in the Hadith literature.

Quran justifies the use of Sunna as a source of law.

Ijma and Qiyas are the secondary sources of Islamic law. There are 72 Muslim sects in all with the Shia sect being the most popular in India. Under the Moghal Empire the country had an efficient system of government with the result that the system of justice took shape. The unit of judicial administration was Qazi. Every provincial capital had its Qazi and at the head of the judicial administration was the Supreme Qazi of the empire (Qazi-ulquzat).

Moreover, every town and every village large enough to be classed as a Qasba had its own Qazi. During this period, the personal laws of the non-Muslims were applied in civil matters, but the criminal law was the Islamic in nature. Whenever there was a conflict between Islamic Law and sacred laws of the Hindus, the former prevailed.

Medieval Period 1600-1726

The charter of 1600 established the English East India Company in India. As per the charter of 1661 the English and the Indians residing under the Company came under its jurisdiction.

From the period ranging from 1661 till 1726, laws of equity and justice in conformity with the laws in England were followed. There was no codified law.

In Calcutta, the judicial system was based on the Company's authority as a zamindar. This continued till the charter of 1726 was passed.

Before Madras attained the position of a Presidency in 1665 it had two courts namely, the Choultry Court and the Court of the Agent and Council.

By the charter of 1668 the Company was conferred powers to make laws for the island of Bombay.

From this period till the passing of the Charter of 1726, there were civil and criminal courts in these presidencies. In Madras, there was the Choultry court, the Mayor's court and the Admiralty court as well.

On the other hand, in Bombay till 1726 judicial systems were not stable and kept changing. Earlier there were courts like the Court of Judicature (1672) which dealt with civil and criminal cases and matters of probates and testaments, and a Court of Conscience to decide petty cases.

There was a system of appeals as well. In Madras the appeals from the Mayor's Court were filed to the Governor and Council. On the other hand, Bombay had Deputy-Governor and Council as its appellate Court. In Bombay this system elapsed due to lack of independence of the judiciary. In the following judicial system of Bombay an Admiralty court was established with a Judge-Advocate as its head. This court apart from its existing powers enjoyed civil and criminal jurisdiction. Later a court of Judicature was established under this system after which the Admiralty Court lost its ground. The Admiralty court in Madras also became irregular by this time. Another system came about in 1718 in Bombay and this gave representation to the Indians as well by appointing 4 Indian Judges, known as Black Justices, in the Court.