

COMMON LAW COURTS AND PRESENT JUSTICE DELIVERY SYSTEM

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What is common law? The expression 'Common Law of England' refers to those unwritten legal doctrine embodying English custom and English 'traditions, which have been developed over the centuries by the English courts. So understood It would not Include and would be different from the English statutes Law, which has from time to time modified the common law. But the English brought into India not only the mass of legal rules strictly known as the common law, but also their traditions, outlook and techniques In establishing, maintaining and developing the judicial system.

The history of present day Indo-British Jurisprudence commences with he formation of the London East India Company In 1600 in the reign of Queen Elizabeth I. The Charters of Queen Elizabeth granted to the Company In the years 1600 and 1609 gave the power to them to make and constitute such and so many reasonable laws, constitution, orders and ordinances as to them so seems necessary .The position of the Company's factories In India was at that time some what anomalous. They were generally a part of the dominion of the Mughal. Yet since the very early days, the Company had obtained the authority of the British Crown to administer justice and constitute judicial authorities fn the areas covered by these factories, In order that they might be able to administer justice according to their own notions and in accordance wIth the laws which they were familiar, the Company had endeavoured to obtain permission to administer their own laws in these areas.

In 1661 the Charter of Charles II gave to the Government and Council of several places belonging to the Company the power to judge all persons belonging to the said Government and Company according to the laws of this kingdom and to execute judgment accordingly.

Almost contemporaneously with this Charter came the Cession of the Island of Bombay by the Portuguese to the English and Its lease by Charles II to the East India Company In 1668, Prior to that this was the territory which had been under Portuguese rules and Portuguese law governed It.

The Charter of Charles II transferring the Island of Bombay to the Company, required the Company to enact laws “consonant to reason and not repugnant or contrary to” and “as near as may be agreeable to” the English laws. The charter also directed that the courts and their procedures should be like those that the established and used in the realm of England.

Rules for the Civil Government and equal distribution of justice upon the Island were drafted in England by the Company's Law Officers and after the approval of the Solicitor General a draft was settled and engrossed to be sent out to India In 1669. These laws provided for the establishment of a court of judicature for the decision of all suits and criminal matters under a Judge to be appointed by the Governor and Council and for all trials in the court to be by a jury of 12 Englishmen, except when any party to the dispute was not English, In which case the jury was to be half English and half non-English. It also made provision for regular sitting of the court, the recording of its proceedings In registers, the

fixing of reasonable court-fees and for a right of appeal from the court of judicature to the Governor and Council it was constituted the Supreme Court in the Port and Island.

There is little information about the administration of criminal justice during this period and the application of laws of the Company. But the correspondence between Bombay and Surat, where the factory of the Company was situated and where the Governor resided contains references of the trial by jury, of crimes, like theft, murder and mutiny. ,

Thus, were laid the foundation In the Seventeenth Century I although In the small area of the town and Island of Bombay of the application of English laws to Indians residing in the Presidency towns and of the system of administering justice fostered by the common law in England.

'Common Law In England' and 'Common Law In India' are distinct expression. Whereas the former referred to the common law prevalent in England, the latter expression referred to the common law expanded by English in India. The common law, i.e., unwritten legal doctrines embodying English customs and English traditions developed over the centuries by English courts was in the beginning applied to the areas which later became the Presidency towns of Calcutta and Bombay.

Common Law In Mufassil

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 lied the Mufassil. These Presidency towns played the leading roles in the introduction of the common law into India.

Mayor's Courts

In the year 1726 the Crown granted Letters Patent creating Mayor's court the Presidency towns. These were not the Company's courts, but courts of the King of England, though at that time the King had no claim of sovereignty to any part of the country, except the Island of Bombay. These courts consisted of e Mayor and certain Alderman and were authorised to try, hear and determine civil suits and actions between party and party and to give judgment and sentence according to justice and right. Appeal from the Mayor's court lay to the Governor and Council, who were made a court of record.

To give judgment and sentence according to justice and right, the Englishmen drew upon the rules of the comon law and prevalent statute law in England in so far as they thought them applicable in the circumstances of this country.

With the advent of the Mayor's court In 1726, the Company had sent to each Presidency a book of instructions prescribing the" method of proceeding civil suits, criminal trials, probate and administrative matters. The constant :orts were made to keep the courts In

the straight and narrow path of English Law, as English Law was unsuited for the prompt and satisfactory disposal of civil and criminal cases of the natives, the Charter of 1726 came to be amended in 1753. The Letters Patent of 1753 expressly excepted from the jurisdiction of the Mayor's courts all suits and actions between the natives only and directed that these suits and actions should be determined amongst themselves, unless both parties submitted them to the jurisdiction of the Mayor's court. The criminal jurisdiction of the Mayor's court was confined to the Presidency towns where the courts existed and was not to extend beyond 10 miles. These courts and the law administered by them commanded confidence of Indians, who continued to resort to these courts. Indian litigation had, in fact, constituted the bulk of the work of these courts from their start and it continued to be so notwithstanding the requirement of the consent of Indians to the court exercising jurisdiction over them.

In the Mufassil, the Company's courts gradually changed their character coming more and more the courts of the ruling power rather than the courts of the Zamindars. The law administered in the courts in the Mufassil was not the English law, but the law of the Mughal to which the people had been accustomed. Application of the personal laws-Hindu Law and Mohammedan Law- remained undisturbed. Regulation II of 1772 provided that these subjects of the Crown were to be governed by their own laws in suits regarding inheritance, marriage, caste and other religious usages and institutions. In 1781 was added the word 'succession' to the word 'inheritance' and the judges were to act according to justice, equity and good conscience. This is how the rules of English Law were made applicable to Indian society and circumstances.

Supreme Court

The Regulating Act of 1773 abolished the Mayor's court and created the Supreme Court for the Presidency towns. By that Act the Government was empowered from time to time to make and issue such rules, regulations and ordinances for the good order and Civil Government of the said United Company's settlement. In 1774 came the establishment of the first Supreme Court at Calcutta. It was to be a court of record and was to hold such jurisdiction as the court of King's Bench had in England by the common law of England. It was also to be a court of equity. It had authority to appoint guardians of infants and of insane persons and of their estate. The jurisdiction of the court extended to all persons employed in the service of the Company and in certain cases who were other Indian inhabitants also. The court was modelled entirely on the English pattern with jurisdiction over a large population in the Presidency towns and other areas.

The administration of civil justice outside the Presidency towns to a considerable time to evolve a regular system established two superior courts:

1. Sadar Diwani Adalat -a final court of appeal in civil matters, and
2. Sadar Nizamat Adalat -the final court of criminal appeal, which was empowered to revise and confirm sentences awarded by the criminal courts. Subordinate to these superior courts were the District Diwani and Faujdari Adalats.

What we have seen so far relates to the Mufassil of Bengal, but the same system of administration of justice and similar regulations as to the laws, which were to be applicable, were soon extended to the other parts of the country, like Banaras, Awadh and Allahabad and eventually to the Mufassil areas of Madras and Bombay.

The rule of decision in accordance with justice, equity and good conscience in the absence of specific directions meant in substance the rules of English law where-ever applicable. In the words of Sir Henry Maine, India was then a country singularly empty of law. The inevitable result was that the courts of justice had to legislate. The vast gap in the substantive law was filled by the principles of English common law and the statute law. The wide door of justice, equity and good conscience made it easy for these principles to become through decisions of the courts, the governing law of the country.

Regulation III of 1793 heralded the gradual advance in India of the rule of law in the closing years of the Eighteenth Century. It made Executive Officers of the Government, who transgressed the law in the discharge of their official duties amenable to the jurisdiction of the court. The Sadar Diwani and Nizamat Adalat- Principal civil and criminal courts in the Mufassil-were by Regulation II of 1801 directed to be composed of a Chief Judge and Puisne Judges. This measure is the highest judiciary independent of the legislative and executive authority of State and laid the foundation of independence of the judiciary in India.

High Courts

The final phase during the British regime commenced with the High Courts. Letters Patent were issued in 1862 establishing High Courts at Calcutta, as and Bombay which brought about long contemplated fusion of the Supreme and Sadar Courts in each province. High Court of Judicature in each province was given power as original and appellate court over the matters arising in the Presidency Towns and as an appellate court over matters arising in the Mufassil.

Later, High Courts were established in other provinces of India. Till recently however a distinction existed between the powers of the older High courts in three Presidency Towns and the newly constituted High Courts. The High Courts had inherited from the Supreme Courts the common law powers exercised by the King's Bench Division which included a power to issue a writ of certiorari and other writs within their limits of Presidency Towns. The newer High Courts were however, not endowed with this power. With the amalgamation of Sadar Courts and Supreme Courts into High Courts in 1862, a right of appeal was given to Sovereign in Council from the decisions of the High Court.

Adversary System of Trial

This established feature of the common law soon took root in India. This system was not known in India. In the Hindu or Mohammedan system the Judge an active role in eliciting the truth as in the continental system. The theory of the common law that justice can be achieved by giving each party fullest opportunity to present his own case was brought into vogue in India by the English. Civil and Criminal Procedure Codes of India and the Law of Evidence enacted in the later half of the Nineteenth Century are in conformity with this common law doctrine. Throughout the trial the Judge is supposed to perform the duty impartially holding the balance between the two adversaries and ensure that the proper procedure is being followed. His eventual duty is to render his decision at the end of the trial. It is not open to the Judge or the Jury to consider matters extraneous to the evidence or let their personal knowledge come into play.

The System of Precedents

The common law has been described as a system, which consisted in applying to new combinations of circumstances, those rules which were derived from legal principles and judicial precedents. The system of precedents has been a powerful source of development of the common law in England.

The Rule of Law

The Fundamental principles of English Constitution law which maintain the freedom of the individual and limit the power of the servants of the crown derive from the common law. The rule of law means in the words of Dicey: the absolute supremacy or pre-dominance of regular law as opposed to influence of the arbitrary powers and excludes the existence of arbitrariness of prerogative or even of wide discretionary authority on the part.

The common law remedies of prohibition, certiorari and mandamus which have served as powerful aids to the establishment of law could be availed of in the Presidency Towns.

Indeed It has been said that one of the most beneficent results of the association of England with India has been to introduce the rule of law Into the land and to embed it so firmly into the lives of the people that Its displacement seems unlikely In any foreseeable future.

Indian Common Law

Common law consists of customary rules of the realm recognised by the Courts. In that sense every country can be said to have its common law, rules of conduct which apply to citizens generally and the rights and privileges which they can enjoy. Some of these customary rules prevailing In India have come to be known as the Indian common law. The right to a public highway, the right to set up ferry on his own property and take toll from strangers for carrying them across, right to fishery In navigable river In Bengal. Right of burial and with It right to perform all customary rites, right to worship In a mosque and temple and right to take out a religious procession are the Instances of common law rights. The Indian Courts have recognised as a common law right a right to have access to courts of law if a person can show a cause of action.

[J.T.R.I. JOURNAL – First Year, Issue – 3 - Year – July – September, 1995]