



## BOOK REVIEWS

*The Common Law of India*, by M.C. Setalvad, Padma Vibhushan, Attorney-General of India. Published under the auspices of The Hamlyn Trust, London: Stevens & Sons Ltd., 1961, pp. 227, price 21 sh. net.

One is happy to review this book for more reasons than one. The learned author has been the first jurist outside U.K. to be invited to deliver the Hamlyn Lectures. One of the main objects of these lectures being the formulation of the specific aspects of the common law in comparison with other legal systems in such a way that the common people of England understands the privileges they enjoy—the present lectures have succeeded in doing it. The author has given us in a narrative of refreshing simplicity the successful survival of the common law in a land thousands of miles away from its homeland on a vast sub-continent inhabited by varied communities of people. This is in itself a significant contribution. Finally, it is undoubtedly the one book now available which gives a comprehensive view of the Indian legal system in its main outlines and in that respect it is a convenient companion to the Indian, and an invaluable guide to the foreign, student of law.

Shri M. C. Setalvad, defining the Common Law of India states, “When, therefore, I speak of the Common Law of India I have in view comprehensively all that is of English origin in our system of law. In that wide meaning the expression will include not only what in England is known strictly as the common law of England but also its traditions, some of the principles underlying the English Statute Law, the equitable principles developed in England in order to mitigate the rigours of the common law and even the attitudes and methods pervading the British system of administration of justice”<sup>1</sup>

The catholicity of this conception reminds one both by analogy and by antithesis of some of the well-known trends of juristic thought. To Lycergus, the great jurist of ancient Greece, law was a set of uncoded principles and rules governing the private and public relations, activities, rights and duties of the people. He went to the extent of prohibiting the codification of law. The present author's inclusion of ‘even the attitudes and methods pervading’ a legal system is reminiscent of this Lycergian approach. To St. Thomas Aquinas, on the

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1. Shri Setalvad, M.C., *The Common law of India*, pp. 3-4.



other hand, law was codified principles, rules and commands or edicts ordained by the sovereign. In any exposition on Indian law this trend of a partiality for statute is inevitable, for, what is still kept in the form of principles in England have been discriminately distilled into statutes in India. But both Lycergus and Aquinas who were comparatively ancient thinkers were essentially deductive in their approach, even as Bentham, one of the greatest of modern jurists, whose zeal for law reform did not wholly wean him from the belief that laws could be deducted from the utilitarian calculus. In contrast the approach of Shri Setalvad in this book is, as apparent from the above extract, a pragmatic inductive approach. He defines common law as he finds it and proceeds to describe it as he has seen it functioning.

The book is divided into four chapters corresponding to the four lectures delivered by the learned author. They are: (1) Rise of the Common Law, (2) Civil Law, (3) Criminal Law and (4) The Indian Constitution. There is also a short Epilogue. In chapter one, Shri Setalvad traces the rise and growth of the Common Law in India and the establishment and development of judicial institutions from the time of the British advent. The story as revealed in these pages is very fascinating. In the succeeding two chapters he has discussed the relevant topics under appropriate headings pointing out the common law principles adopted in India and the deviations from and modifications of the English Common Law principles to suit the Indian conditions. In the field of Civil Law it was felt by the first Law Commission that there must be a law applicable to every person. "It was not, however, suggested that the personal laws of Hindus and Mohammedans should be taken away. The territorial law was to be restricted to law applicable to all inhabitants of the country alike".<sup>2</sup> Shri Setalvad points out that even though, as Sir Frederick Pollock thought, the Indian Penal Code was "English Criminal Law simplified and set in order" the inhuman punishments (like capital punishments for comparatively minor offences) under the English Law as it stood even in 1862 did not find a place in it. He considers that one of the most admirable features of the Indian Penal Code is the clarity and precision of the definitions of crimes.

In the chapter on the Indian Constitution Shri Setalvad gives briefly the essential features of the Constitution. The narrative, deceptively simple, reveals the author's abiding faith in the Rule of Law and the role of the Judiciary as the sentinel and protector of the Constitution and the rights of the citizen. This zeal of Shri Setalvad for human liberty against arbitrary government is evidenced throughout the book. For example, very early in the book a good extract is

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2. *Common Law of India*, Chapter 2, p. 63.



given from the well-known speech of Governor Aungier, opening the Court in Bombay in 1672 where he exhorted the Judge that the company's *native* subjects as well as Englishmen have all an equal title and right to Justice and that the newly appointed Judge "must doe them all Justice even the meanest person of the Island and in particular the poore, the orphan, the widow and the stranger", and not only even against himself and those who are in office under him but against the Hon'ble Company themselves when law, reason and equity shall require so to do.<sup>3</sup> After quoting these "noble words of Governor Aungier", Shri Setalvad states that these words<sup>4</sup> "enunciate principles which in the course of years that followed set the pattern for the administration of justice not only in the Island but in other areas in the country which gradually fell under the sway of the British". Thus the basic principles of common law like the equality before law and the protection against executive excesses contained in these words of Governor Aungier which were associated with the establishment of the first British India tribunal of justice in India is unobtrusively projected forward to the latest judicial tribunals under the Republican Constitution of 1950. Thus a reader not only observes the idea of essential continuity in the Indian traditions themselves but also the similarity in the substantial principles of the Indian legal system with that of the English.

Common law, since it consists of "customary rules of the realm recognized by the Courts" is not a feature found only in English law but has its existence in every other country. Therefore, even before the principles of English Common Law were engrafted into the body of the Indian Jurisprudence, India could point out to a common law of its own. Shri Setalvad cites the right to public highway, the right to set up a ferry on his own property and to take toll from strangers for carrying them across, the right to a fishery in a tidal and navigable river in Bengal, the right of burial, the right to worship in a mosque or temple and the right to have access to courts of law if a person can show a cause of action<sup>5</sup> as examples of such common law.

Apart from the common law rights cited above, there were, in India, uncodified bodies of law both substantive and procedural, namely, the Hindu Law, Mohammedan Law, local and customary laws, and laws governing trade and contractual and landlord-tenant

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3. *Ibid.* p. 10.

4. *Ibid. supra.*

5. *Common Law of India*, pp. 59-60.



relations and obligations. Did they (or do they) form part of what may be called the common law of India? To what extent they were modified by the engrafting of English Common Law and to what extent they were in consonance with English common law principles?

The author closes the Epilogue with these words: "With the ever growing expansion of Indian legal thought there is bound to be a greater interplay between legal minds in India and elsewhere in the world of Anglo-Saxon Jurisprudence. As judges and lawyers in India resort to English so may, in course of time, the English courts recognize Indian Contribution to legal thought and principles.<sup>6</sup> One is likely to ask: have we already made such contribution?; if we have what are those contributions?; are there any special fields in which we can make contributions? Without assuming a critical attitude, it is felt *en passant* that the book under review would have been richer if the learned author had dealt in detail with the problems raised in these two paragraphs. Perhaps the fact that he had to cover an extremely wide field in the course of four lectures and the object of the lectures, namely, "the furtherance among the common people of the United Kingdom of the knowledge" have put limitations on the scope, scheme and nature of his discussion.

It is one of the essential virtues of an authentic work that it stimulates thought and inspires the reader to do further work in the same and allied fields and to seek solutions for the problems raised. After reading the common law of India a number of subjects and problems suggested themselves as deserving serious attention and further study. Some of them are: (1) Legal History of India (2) Indigenous common law and the influence of English common law (3) Contribution of India to Anglo-Saxon Jurisprudence—both actual and potential (4) Rule of law and fundamental rights under and after the Constitution—theory and practice (5) Forms and procedures of actions—whether and to what extent reforms are necessary. It is hoped that competent persons may devote their attention to these topics.

Any one who reads and appraises the Common Law of India objectively can say that in the treatment of the subject Shri Setalvad combines the scholarship of an academician with the practical wisdom and sound common sense of a practising lawyer. The book is a very valuable contribution to the legal literature on comparative law.

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6. *Common Law of India*, p. 227.

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