THE INDIAN LAW INSTITUTE

Seminar

on

The Problems of Law of Torts

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CODIFICATION OF THE LAW OR TORTS

by

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I. INTRODUCTION

The problem of codification arises in view of the fact that our constitution has proposed a uniform code[1] under the National Government. Irrespective of this, after the independence we have thought of renovation in various fields, much more in the field of law. We have our State Legislatures and Union Legislature and the machinery of Legislation has been moving so fast with all its draw-backs[2] that where it will end one is unable to make out. We have discarded the political yoke of Britishers and we are now thinking of removing English as the common linguistic medium for the nation. It was more desirable to first do away with the mannerisms of the Britishers than to go in for these types of unfruitful changes. Now, having once entered into the notions of changes in the changing society and the changing law,[3] it is quite proper to have the Indian codification of Law of Torts, instead of now following the tort action of the Common Law of England as the environments and the social problems and the notions of law in India are quite different from those in England.[4] We had our own legal system and the present system requires orientation or Laws as observed by leading Indian Jurists.[5]

II. The Oriental Law of Torts and English Common Law

We once lived in an age of mores and taboos, suspician and fear and superstition, and custom outweighed the law.[6] We now live in an age of reason, just and sound and the settled law which is termed as legislation as reflecting the law according to the will of the people and sanctioned by them.[7] The law in this sense in India in early ages never existed because even with the Hindus and Mohammadans, law has been

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sacred and respected as principles of religion and as a part of religion.[8] The idea of legislation entered the minds of Indians only after contact with the Britishers.[9] Even with the Britishers, Common Law, i.e. judge made law has been in prevalence for years together and even now, in many branches of law is not in statutory form as in case of Torts and contracts and other laws.[10] The The difficulty which the orientalist felt in the application of their religious law as variedly interpretted by commentators and jurists, has been also felt by the Britishers in the application of the Common Law principles in various fields in view of various and varied interpreations and judgments given by various commentators and judges. Such a law both oriental and English Common Law has been very bulky and unwieldy and difficulty has been experienced by persons in the application of the Law.[11] The advantage that is looked at in this system of common law is that it is dynamic and not static. The flexibility of the law is the only reason why it has yet been maintained under English legal system.[12] There is not much oriental law of Torts. But we find the idea of damages and punishments mixed together in the laws of Manu[13] regarding various wrongs as given by him. Jurist Narada refers to Tortious Wrongs as "Jimha."[14] In Muslim law the idea of punishment is predominent but it had also rules for compensation in case of wrongs like usurpation of property.[15] The subtle notion regarding criminal and civil wrongs has developed subsequently as Kenny puts it "crimes and wrongs whose sanction is punitive and is remissible by the Crown, if remissible at all."[16] As Bentham puts it "The civil law is in fact, only the other aspect of Penal law, one cannot be understood without the other. To establish rights is to grant permission; it is to make prohibitions, it is in one word to creat offences."[17] The distinction between civil and criminal wrongs is not because of the nature of the wrong but because of the remedy available in case of its committal.[18] Civil wrongs have the civil remedy where the private individual is entitled to an action and remedy in his favour. In criminal wrongs in general, it is taken to be a public wrong and the Government is entitled to the action against the person committing the same and in some cases the party suffering may also be compensated. But normally the rule is that there is not personal redress or the remedy available directly to the party. It is in view of this remedial difference that the notion of law of Torts as law of civil wrongs has its root.

III PROBLEM OF CODIFICATION

Adverting to the main topic of codification of Common Law, various authors as Bentham,[19] Rosco Pound,[20] Allen,[21] Oppenheim,[22] Friedmann,[23] Sethna,[24] have dealt with codification in general and the problem of codification of common law in particular. There is always bound to be two sides of a question. Some may be for and some may be against the idea of codification. Bentham in his "The theory of Legislation", in support of the idea of legislation has set out certain principles as to the legislative law and harps upon the same and pleads for codification on the basis of securing certainty and clarity that is generally ensured by codified law.[25] Savigny has been the first and foremost to oppose codification of the common law.[26] His main grounds are that (a) the growth of law may be impeded or diverted, (b) that the code made by one generation is likely to project directly or indirectly the intellectual or moral notions and may lead to anachronisms in course of time, and (c) that there have been many defects in the codes in the past because of the codifiers' superficial knowledge of law and codes being hurriedly drawn.[27] Austin adds his two objections to codification, one being that the codes do not make provision for incorporation of judicial interpretations from time to time and (2) the codes cannot be complete in themselves and only reflect pre-existing law.[28] The general public of common law countries have their objection to codification on the basis that there is no well developed common law techniques of developing legislative texts and that the law will lose its flexibility.[29] The problem of preserving flexibility in codified law could be solved by Amendments as and when required at long intervals, if unforeseen problems arise. To all these objections of codification of common law, Pound has tried to answer making out a good case for codification by advancing various arguments to the opposition.[30] He sides with Bentham, Holland and Stephen on the objects of codification[31]- they being orderly arrangements, convenience of ascertainment and publicity. Surely, Pound has looked to codification of common law from the view point of an American lawyer, jurists, academician and a citizen, and we feel that so far as India is concerned, the situation is the same as to law as we have our laws based on English law[32] which require renovation, as Re-statement of law in America.[33] Indian authors of the Law of Torts as Ramaswamy Iyer[34] have thought of non-practicability of codification of Law of Torts as it may not cover all possible probabilities of the circumstances as per Indian society.[35] I feel that the objection is not a well considered one because in legislation not only the past is to be looked into but the present also is to be considered and the future probabilities also could be covered up by use of general terminology as in case of the Law of Contracts and the Law of Crimes.[36]

IV OBSERVATION

The problem of codification of the Law of Torts as a matter of fact is not so hard at present as it was some years ago. Many of the Legislative Acts have covered up and provided for these Civil Wrongs in their Acts37 and in view of this, what remains to be done is only to have some general rules and definitions and specific remedies available to the parties in case, the specific laws do not provide for them. In view of this I am of the view that it is high time that the Law of Torts should be codified as The Indian Law of Civil Wrongs and Remedies and the form of the Civil Wrongs Act, 1970 may be as under:

1. The title, extent and scope.
2. Definitions (these may go into all the definitions of all the Torts to be included under the Act).
3. The Saving clause (This should state the various acts which provide specifically for the wrongs defined herein but specifically covered under these Acts).
4. Remedies.
5. The General Clause (This should mention the application of this Act and its provisions where no law provides for such wrongs and their remedies).

If we take brevity and clarity as the soul of a legislation, we can have an Act with few sections, yet encompassing the whole field on the above lines.

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If we desire to have good volume of the Law of Torts as our Indian Penal Code - the Law of Crimes or the Companies Act, running into hundreds of sections38 we may follow the pattern of the American Re-statement of Law (Torts) running into about fifty chapters with about a thousand sections with illustrations. With due respect to this American attempt, who have ample money and man to work upon such projects, it is more a digest than a legislative enactment and offends the principles of legislation to have general terms and conciseness in codification or law.39 The writer in due course will present a draft of Civil Wrongs Act, 1970 as per first part of the observation above.
