Chapter I

INTRODUCTORY

Historical

At the present day the most powerful instrument for legal change in the hands of the State is legislation and few topics in legal history are more interesting than the rise and progress of legislation, the development of special bodies for the purpose of making statute law, and the attitude of the law courts in applying and interpreting the results of their labours.[1] It is in this context the role of the draftsman assumes great importance. When a person, otherwise qualified, is called upon to give, or takes upon himself the task of giving expression to commandments, precepts, edicts, rules and the like which are to be observed by the community in general, whether they owe their origin to custom, religion or the State he chooses or is compelled to choose a medium which enables him to express himself clearly, unambiguously and with the minimum of words carefully employed for the purpose and which as far as possible avoids opportunities for differences of opinion. He is conscious that the matter to which he is giving expression will be open to public scrutiny and should be comprehended by them and this necessarily leads him to exercising great care in the choice of words.

This has been true of all law-givers from ancient times amongst whom could be included persons who were called upon from time to time to reduce to writing the rules of law in vogue in the community at any given point of time.

Law, which originally may be regarded as the common property of collective people in consequence of the ramifying relations of actual life, begins to develop in such a way that it soon reaches a stage when it can no longer be comprehended by the people at large. A separate class of legal experts therefore comes into existence. No doubt they are from the people, but they represent the community in the domain of legal thought. In its fundamentals, the law continues to exist in the continuous consciousness of

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1 T.F.A Plucknett, *A Concise History of Common Law*, Butterworths, 315 (1956).

the people; but the precise determination and application of details becomes the special task of this class of experts.

Another important feature of law which is common to all the societies is that in its origin, law always is intermingled with religion and magic. This is so because enforcement of law required coercive sanction which was lacking in primitive times in the absence of a state machinery. Fear of divine retribution was invoked to instill a sense of fear in the minds of the people to secure obedience to law. Sir Henry Maine captures this spirit of law in the following words:

> "There is no system of recorded law literally from China to Peru, which when it first emerges into notice is not entangled with religious ritual and observance."[2]

YAJNAVALKYA

Amongst this class of jurisconsults could be included sages like Yajnavalkya who gave the early Hindus a *smriti* or a system of law which was concise, systematic and more logically arranged than its forerunners, the Dharmasutras. The Dharmasutras were mostly in prose or in prose mixed with verse, while the Dharmasastras came to be written entirely in verse, in metre familiar to the masses and in a style less archaic and very close to classical Sanskrit. It was an attempt to make the Dharmasastras more clear, each to comprehend and free them from being elliptical. In the Dharmasastras, for instance, the rules intended to assist in the administration of justice are methodically classified and studied under a fixed number of heads.[3] Of all the *smritis* which have come down to us that of Yajnavalkya is assuredly the best compiled and appears to be the most homogeneous... We are struck... by the sober tone, the concise style, the strictness with which the topics are arranged. We find none of those lyrical flights which are after all, the literary beauty of Manu... we come across no repetitions, no contradictions, none of those "second thoughts" which make the meaning of Manu at times somewhat less than definite. The author has obviously sought to make his formulas as brief as is consistent with clarity... There are cases where he appears to compress two *slokas* of Manu into one.[4]

Mahamahopadhyaya Kane has this to say of Yajnavalkya "Yajnavalkya's work is more systematic than that of Manu. He divides his work into three

2 Henry Maine, *Early Law and Custom,* Chapter 1.

3 Robert Lingat, *The Classical Law of India,73* (1973).

4 *Id.* at 98; see also Max Muller, *Sacred Books of the East Series*, Vol. XXXV.

sections and relegates all topics to their proper positions and avoids repetitions. He treats of almost all subject that we find in Manu, but his treatment is always concise and he makes very great and successful effort at brevity.[5] And again, though the author's great aim has been to be concise, his verses are hardly ever obscure. The style is flowing and direct. There are not many unPaninian expressions.[6]

Tirukkural- Secular Among All Religious Codes

Considered as Tamil Veda, Tirukkural consists of 1330 aphorisms grouped into 133 Chapters of ten couplets each. Authored 2000 years ago by Saint Tiruvalluvar, Tirukkural emphasises on universality of God, Universality of virtues, the need for non-violence and vegetarianism. Saint Tiruvalluvar performs the extraordinary feat of devoting ten couplets exclusively to submitting oneself to God but not revealing even remotely his own religious affiliation as well as keeping his references to the Almighty so general that he is kept universal and would not be identified exclusively with any religion. Even today Tirukkural constitutes a rich material source of law and is a classic example of how laws should be drafted in short and simple sentences.[7] Tirukkural is God's answer to natural lawyers yearning for a common law of mankind unchanging with time and place. Mastery of Tirukkural is a must for all drafters.

Early Codes

Another oldest codes of law is that of Hammurabi and it is described as the "completest and most perfect monument of Babylonian law".[8] The Ten

5 P.V. Kane, *History of Dharma Sastra* , Vol. I, 176 (1930).

6 *Id.* at 177. Panini was a great Sanskrit grammarian.

7 Tirukkural with English translation and Explanation by Dr.S.M.Diaz I.P.S, Ph.d, General Editor Dr. N. Mahalingam B.Sc F.I.E Ramanandha Adigalar Foundation 72, Mount Road Guindy Chennai-600032.

8 The most remarkable of the Hammurabi records is his code of laws, the earliest-known example of a ruler proclaiming publicly to his people an entire body of laws, arranged in orderly groups, so that all men might read and know what was required of them. The code was carved upon a black stone monument, eight feet high, and clearly intended to be reared in public view. It begins and ends with addresses to the gods. For more details see the *Ancient History Sourcebook*- Code of Hammurabi, c. 1780 BCE – The entire Code and other related material are available at *The Encyclopaedia Britannica*, 11th ed, 1910- Text, Translated by L. W. King http://www.fordham.edu/halsall/ancient/hamcode.html# horne#horne accessed on 15-10-06.

Commandments[9] is another Code which has survived through ages which underscores the fact that Legislative Drafting is of ancient lineage – and perhaps of divine inspiration.[10]

ROMAN LAW

Roman Law is a complete system of perfect law which is still the basis of the civil law systems around the world. Lord Bryce commenting on the legal language employed by the Romans in the Digests, Pandects or the Code of Justinian, observes:

> "Now the legal language of the Romans is a model of terseness, perspicuity and precision, and from a study of it, even allowing for the differences between the structure of the two languages (the other language being English), the English draftsman may derive many valuable suggestions."[11]

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9 For a critical analysis of the Ten Commandments and its failings and generally about the ancient codes, see Document No. 11 The Role of Parliamentary Counsel in Legislative Drafting-Paper written following a UNITAR Sub-Regional Workshop on Legislative Drafting for African Lawyers (Kampala, Uganda 20 to 31 March 2000). In a Great response to a question about why the Canadian Income Tax Act could not be drafted using a Ten Commandments style, Don Thorson, former Canadian Deputy Minister of Justice and principal drafter of the Act said. "The fact is that Moses is not available for employment by the Department of Justice, and even if he were available it would be interesting to see that Moses could hope to do with concepts such as "tax paid undistributed surplus on hand" "control period earnings" and "foreign accrual property incomes"
(ML Friedland: *Access to the Law*, Carswell-Methuen, at 65 (1975). Cited in Using Plain English In Statutes, Clarity's submission to the Hansard Society for Parliamentary Government Prepared on behalf of Clarity by David C. Elliott June, 1992; The advantages and disadvantages of general principles drafting are epitomised by the Ten Commandments with reference to, two of them - 'Thou shalt not kill', and 'Thou shalt not steal'. They are so simple that everybody thinks he or she understands what they mean. But consider how the courts have developed these statements of principle. They are still finding new things to say about murder, and they made the law of theft so elaborate that the English Parliament had to pass a series of statutes to sort it out, and we have similar statutes in Australia. See Ian Turnbull, Plain Language and Drafting in General Principles http://www.opc.gov.au/plain/pdf/plain_draftin_principles.pdf

10 I am not sure whether divine inspiration is essential for acquiring expertise in legislative drafting ,but I am very sure that every draftsman requires divine protection to save his skin from his tormentors and detractors!

11 Lord Bryce, *Studies in History and Jurisprudence*, Oxford University Press, 880-881 (1901).

Evolution of Roman Law through various stages is very interesting. It started with the Twelve Tables and ended with the Corpus Juris Civilis of Emperor Justinian.

CAPITULARIES

The Carolingian kings of the Franks likewise produced a considerable body of legislative acts called "capitularies"[12]. Capitularies were decrees and written commands so called because they were divided into capitula, or chapters. Both legislative and administrative, they were the chief written instrument of royal authority. The ordinances were issued either by the king alone or by the king and his counselors. They also served to amend or extend the Germanic laws as they applied to the entire Carolingian empire. These instruments are partly administrative, being substantially instructions to royal officials, but some of them are beyond doubt truly legislative, and openly profess to introduce new law. It is perfectly clear that they were an important element in the machinery of government throughout the ninth century.

CODE NAPOLEON

Another Code owing its origin to Napoleon (1804) is remarkable for the measure of lucidity it possesses. It is almost free from the intrusion of non-juristic elements, confusing casuistry and sterile abstractions. Its legal precepts have a tangible clarity, the definition of legal concepts was avoided except in a comparatively small number of instance; and qualifications, limitations and exceptions were kept to a bare minimum.[13]

ISLAMIC LAW

In Islamic law no commandments, twelve tables, digests or codes were originally drawn up. The concept of a rounded and complete system which will meet any case and to which all cases must be adjusted by legal fiction or equity, the concept which we owe to the genius and experience of the Roman lawyers, was foreign to this system.[14] In that system, legal science and not the State played the part of the legislator. To the extent to which Islamic law was applied in practice, scholarly handbooks having the force of law formed the guide.[15]

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12 *Supra* note 1 at 316.

13 *Encyclopaedia Britannica,* Vol.11, 41 (1968).

14 Duncan B. MacDonald, *Development of Muslim Theology, Jurisprudence and Constututional Theory*, 69-70 (1973).

15 Joseph Schacht, *Introduction to Islamic Law*, 210 (1964).

LANGUAGE OF CODES GENERALLY

Whenever a Code of laws is attempted, the author aims at a systematic and comprehensive written statement of rules on the subject, whether the rules purport to be authoritatively promulgated, or otherwise and whether the subject is broad or narrow. All general Codes are couched in the natural language of statutory legislation, namely conditional sentences in the third person, the protasis containing the facts supposed and the apodosis the sanction. Nowhere is there to be found a rule of law in the second person. Nowhere is there a rule of law without a sanction. The arrangements of topics, such as it is, is the natural arrangement of statutory legislation.[16]

THE MODERN LEGAL DRAFTSMAN ANTICIPATED

This brief introduction, however perfunctory it may be, will suffice to show that even in early days the preparation of a Code of laws was recognized as requiring special effort and talent. We can see in these early law givers the birth of the modern legal draftsman. No doubt the art of legal drafting has become so complicated at the present day that it can have no comparison with what has gone before, but the fundamental principles have always remained the same.

16 A.S. Diamond, *Primitive Law, Past and Present*, 45 (1971).