CHAPTER I

INTRODUCTORY

Historical

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

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, easy 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.[1]

YAJNAVALKYA

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

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.[2]

Mahamahopadhyaya Kane has this to say of Yajnavalkya

> Yajnavalkya's work is more systematic than that of Manu. He divides his work into three sections and relegates all topics to their proper positions and avoids repetitions. He treats of almost all subjects that we find in Manu, but his treatment is always concise and he makes very great and successful effort at brevity.[3]

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...[4]

EARLY CODES

One of the oldest codes of law is that of Hammurabi and it is described as the "completest and most perfect monument of Babylonian law".[5] 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 instances; and qualifications, limitations and exceptions were kept to a bare minimum[6]

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2. *Id.* at p. 98; see also p. *liv* of Max Muller's *Sacred Books of the East Series*, vol. XXV. Even about the Code of Manu, S.H. Allen has this to say in his book, *The Evolution of Governments and Laws*.—"In the original it is written in verse and is divided into twelve chapters. In most Parts, the rules are so clearly and concisely stated that nothing can be gained by attempting to summarise or condense" p. 1005 (1916).
3. P.V. Kane, *History of Dharamsastra*, vol. I, p. 176 (1930).
4. *Id.* at p. 177. Panini was a great Sanskrit grammarian.
5. *Encyclopaedia Britannica*, vol. 11, p. 41 (1968).
6. *Id.*, vol. 6, p. 11 (1968).

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.[7]

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.[8] 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.[9]

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.[10]

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 recognised 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.

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7. *Studies in History and Jurisprudence*, vol. II, ch. XVII, pp. 880-881 (1901).
8. Duncan B. Macdonald, *Development of Muslim Theology, Jurisprudence and Constitutional Theory*, pp. 69-70 (1973)
9. Joseph Schacht, *Introduction to Islamic Law*, p. 210 (1964).
10. A.S. Diamond, *Primitive Law, Past and Present*, p. 45 (1971).

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