ANCIENT LAW

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Class-room live lectures edited, enlarged and updated

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ANCIENT LAW

—HENRY MAINE

[Selected Chapters]

CHAPTER 1

HISTORY OF TORTS

There was no law of crimes in ancient societies but, only the law of delicts (torts)…Henry Maine

Accordingly, Gaius 'Commentaries' had defined Furtum (theft) as a tort. The modern offences like Assault, Robbery etc., were torts only.

As per the Germanic codes the modern heinous offences like murder, grievous hurt etc. were torts and compensation was recoverable. Hence in the early historical periods the citizen was protected under the-law of torts, and in fact if we go back to ancient history of the codes penal law was minuter.

All sins were under the head of Torts.

Sin against God formed the I class of ordinances. Sins against the neighbor produced the II class.

It was much later that acts which touched the security of the States were made punishable by the legislature. This according to Maine is the origin of crime. Here the State intervened as an arbitrator.

The early torts were disposed off as follows: Plaintiff deposited a sum of money as a stake. The defendant accepted the stake. The Praetor (judge) took security and this went to the coffers (exchequer) of the State. And the party who won got the wager amount. Of course, the Praetor took into consideration the damage incurred and the vengeance thereof.

The twelve tables before Justinian had classified the furtum into manifest arid non-manifest. If a manifest theft is done by a slave, death was the punishment, but if it is done by a citizen the punishment was the bonds-manship of his property. In non-manifest cases, the penalty was double the value of property stolen by the thief. Gaius considerably reduced the nature of punishment. Until this period, there was no development of criminal Jurisprudence.

True criminal jurisprudence started only later. The State considered itself obliged to the wronged and the 'Popular Assembly' started punishing the offender. Thereafter, the committees of the Assembly were formed.

These were the criminal tribunals which later became criminal courts. Broadly speaking Henry Maine classified the entire law of crime into 4 stages.

1. The state recognised an injury to a person as an injury to the state. Here bills of 'pains and penalty' were passed by the Assembly. This named the various offences like murder and also prescribed the punishment (penalties).

2. When crimes increased in number, the legislature delegated its powers to commissions. Each commission was charged with the duty to investigate and was empowered to punish the offenders.

3. The commission was nominated by the legislature periodically.

4. Permanent Benches or Chambers with Judges were later established by the legislature. The legislature made certain acts defining the offences and specifying the punishment.

The development of the crime in Rome in subsequent years related to the establishment of a large number of criminal tribunals. Further, many statutes were also made. They separately dealt with different offences. There were also questions dealing with jurisdiction etc. Later these two were fused together.

The Romans had tolerably a complete criminal law by the time of Augustus.
The process of conversion of torts 'into crime also went on.
The punishment portion of the crime was transferred to the Magistrates nominated by the Emperor. The proceedings of the Senate passed on to the Imperial (Royal) Privy court.

This became the ultimate criminal appellate court this influenced the doctrine that the Sovereign was the fountain of all Justice & Grace.

Two reasons account for fast development of criminal law; the memory of Roman Empire & the Church. Severe punishments were reduced under the influence of the Church, and mercy it taught. But offences against Almighty God and Treason had no mercy.

CHAPTER 2

HISTORY OF CONTRACTS

." **The positive duty resulting from one man's reliance on the word of another was the slowest conquests of civilization". Henry Maine**

"Younger the civilization the simpler were the obligations". Henry Maine

The unit of the society in Ancient Rome was the family headed by the patria potestas and not the individual member of the family. In fact, the members of the family were incapable of entering into contracts. If entered, the patria potestas could disregard such contracts. Hence, a family could contracts with another family. That is one patria potestas with another patria potestas.

In the early phase of development there were no contracts at all. However, families made promises with other families. If the promises were associated with solemn ceremonials then they had the sanction (force) behind it. Promises without them were empty. The gorgeous ceremonies were, in later years, slowly dispensed with. Some contracts were allowed to be entered into without any formalities. The mental element in the contract was called by the Roman as a 'pact'. Hence, contracts meant 'pact plus obligation'.

A word of promise was the basis of contract. **The positive duty resulting from one man's reliance on the word of another was the slowest conquests of civilisation.**

The early form of contract was called Nexum. This meant a transaction with help of libripans (copper and balance). The contract was a right in personam. Distinctions had been made between contract and conveyance. When property was transferred it was called 'mancipation'.

Henry Maine has traced the origin and has set out the different stages of development as follows:

1. First stage: A conveyance being completed with formalities E.g. sale of a slave.

2. Second Stage: The slave was transferred but money was not paid. Here the contract Nexum continued.

3.Third stage: Nothing is handed over and nothing is paid by the vendee. Here both obligations were deferred, (postponed).

4. Fourth StageAs already stated contract was "pact plus obligation'. Obligation was a bond which bound the parties together

. A pact without obligation was not a contract. Obligation signified the rights and duties,

Henry Maine has made the classification of contract as follows

1. **Verbal contract**: This was the most ancient contract. This was done under stipulation i.e, questions and answers.
Eg. The purchaser asked 'Do you promise to deliver me your ten slaves at such a place and on such a day for such an amount. The seller answered 'I do promise'. This was the original method of contract.

2. **Literal contract** : This meant the written contract: Here a ledger had been kept and entries were made therein. This had the effect of making the obligation complete. This shows the remarkable domestic system of maintaining accounts.

3. **Real contracts** : Here-the contract imposed a legal duty but this was based on moral consideration. Undertaking to return the loan was essential in the case of loan agreement.

4. **Consensual contract**: 'consensus' meant mutual consent of the parties to contract; without it there was no contract.

Four different kinds of this were apparent in Roman law:

1. Mandatum (Agency)

2. Societas (Partnership)

3. Emptio Venditio (Sale)

4. Locatio conductio (letting out or hiring)

It is evident from the above analysis **that the younger the civilization the simpler were the obligations.**

CHAPTER 3

PRIMITIVE SOCIETY

The movement of all progressive societies has hitherto been a movement from status to contract'..Henry Maine

Henry Maine in Chapter V, 'Primitive Society and Ancient Law', makes a deep and penetrating enquiry into the early primitive societies and analyses the then existing system, and compares them with the later systems.

With this analysis, he comes to the conclusion that '**the movement of all progressive societies has hitherto been a movement from status to contract'.**

The oldest prevalent system was the particular family. Here the eldest male parent called partia protestas was absolutely supreme. He had extraordinary powers over his children women and the slaves.

He could kill them if he decided to do so, the children had no rights what-so-ever. They had no right to property also.
The son obeyed the father and it was moral obligation of the father to look after the son.
The son was to gain superior strength and wisdom under his father's guidance.

This Absolute power of the father saw a change.

Eg. Where a son was appointed as commander in the army and the father continued as an ordinary solider, the father was supreme in the family but the son was supreme in the battle field. The son had the power to punish his father !

Where a son was appointed as Magistrate and the father a clerk under him, this naturally brought a change. The father's powers to sell the sons, to physically punish etc. slowly lost their foothold.

The **first stage** came when sons acquired properties as commander or as Magistrate etc. The sons could have for themselves the properties acquired by them.

Emperor Constantine took away the absolute powers of the father over the property of children

. Justinian

also introduced changes. The sons were allowed to have their own properties.

Position of Woman and Slaves :

The position of the families was that of a tutelage (under control of others). Restrictions had been imposed on the property.

Further in respect of the. selling of the slaves the position was pathetic, to say the least. The slave could be sold or killed or ill-treated or controlled by the partia potestas

. Later, under manumission the slaves were freed from their bondage. Such a free slave could be appointed as an heir by the partia potestas.
The succeeding generations saw innumerable changes.

There was a gradual dissolution of the family dependency and individuals started living on their own. In many cases the individual lived separately and his relationship with others was one of contracts.

The social order changed to an order in which the relationship between individuals and individuals became governed by contracts.

Slaves became free and the contractual relationship of master and servant came into existence. **A move from status to contract.**

Hence Henry Maine is right in his conclusion that the movement of all progressive societies has been a movement from status to contract.

CHAPTER 4

EVOLUTION OF LAW (ERA OF CODES)

"The fate of Hindu Law, is in fact, the measure of the value of the Roman Code."Henry Maine

The first part of the history of law is spontaneous, according to Sir Henry Maine, the celebrated author of 'Ancient Law'. During this period three stages are evidenced. The 'Era of Themistes', the 'Era of customs' and the 'Era of codes'.

When the king decided disputes it was believed, in the infancy of society, that his judgment was the divine inspiration. 'Themists', were 'commands'.

These authoritative pronouncements-Themists-followed by community practice resulted in Customary rules. The decay in Royal power gave way to the aristocracy which claimed exclusive knowledge of the customs.

This resulted in the codes. Instead of leaving the customs to the-aristocracy to decide, it was found expedient to reduce to writing these customs. Laws were engraved on tablets and published to the people, in the form of codes.

The ancient codes had gorgeous religious formalities. Still they were extremely valuable as everyone could know the rules. A timely code made, would solve many problems. If not so made, the usages would create dangerous situations. Further, the aristocracy which had the monopoly of knowing the law, could lend itself to perversions. These dangers were met by the early codes.

Codes : The Twelve Tables of Romans and the Hindu Code Manu's Dharma sastras, are taken for examination by Henry Maine.

The Roman Code XII Tables appeared in 250 B.C. The Roman were

thus fortunate as they could protect themselves against the dangers and the privileged. Aristocracy and the debasement of national institutions.

But, the Hindus were not so fortunate as the Manu code, came late in point of time. There was much degeration of the usages. Further, the priestly oligarcy of the Hindus, tampered with the customs and resorted to cruel absurdities to protect their own interests. The Hindu code is an ideal picture of what ought to be the law. It therefore did not fully reflect the rules administered then. The Hindu society therefore suffered under these circumstances. The Romans had a practical code and hence escaped these cruel absurdities. Hence, according to Henry Maine. **'The fate of the Hindu Law is, in fact, the measure of value of the Roman Code'.**

CHAPTER 5

CODIFICATION

'The most celebrated system of jurisprudence known to the world begins as it ends with a code' Henry Maine

The magnificent role played by codification is expressed by Henry Maine with these words. **'The most celebrated system of jurisprudence known to the world begins as it ends with a code'.**

The **twelve tables of Roman Law** dates back to 450 B.C. This is the beginning. This ended with the corpus juris civils of Justinian (534A.D) Codification marks the beginning as well as the **matured stage** of Roman jurisprudence. Two meanings are given to codification
i) Conversion of unwritten law into written law : The twelve tables,
ii) Conversion of written into well written law : The corpus Juris belongs to this type.
The twelve tables was an enunciation in words of the existing customs of the Roman people. The reasons for making this code are to be seen in the political discontent in Rome. The patricians had all the political and administrative powers. There were many perversions in the rules applied to the plebians. The patricians interpreted the customs. Hence there was discontent among plebians. After a long struggle, a commission 'The Decemarate' consisting of 5 pleabians and 5 patricians was formed which drafted the twelve tables.
Responsa Prudentium: The customary law of the Romans called Jus civile was a part of the twelve tables. The Romans had a progressive method. 'Jurists' were specialists in law. They gave 'responsa' (answers) to elucidate law. These were complied. Emperor Hadrian declared that these had the force of law. Great luminaries like Gaius, Paul, Papinian etc. wrote elaborate treatises on law. ie., on praetor's edict. This was a great legal reform.
The development of the office of the Praetor was a great step forward. He published the **'Edict'- a set of rules.**
One remarkable development was the office of Praetor Peregrines who resolved cases between a foreigner and a civilian. This became a special law called Jus Gentium : the law of Nations.
Justinian in 528 A.D. Issued instruction for compilation of new code which was made in 529 A.D. This was replaced by the 534 A.D. Code. Besides this code, Justinian had compiled 'Digest' of Roman Law and the 'Institutes' (text-books for students).
All these are collectively called corpus juris civilis. This is a glorious monument of fame to its creators and also a priceless legacy to the modern world. This is a classical work in legal history.

CHAPTER 6
LEGAL FICTION

Agencies by which Law is brought in harmony with society, are three in number : Legal Fictions, Equity and Legislation". Henry Maine

The spontaneous development of the primitive law, came to an end with the codes. In fact, a new era began with the codes, and a line could be drawn between primitive societies which became static, and, the progressive societies, which made improvements. These progressive societies, were a few in number, e.g. Roman Society.

Necessities:

Social necessities and social opinion were always in advance of law. However, law was stable, but society progressive. Thus, there was a gap between such a society and, the law. According to Sir Henry Maine, this gap was filled up by bringing law into harmony with the society, with the instrumentalities : legal fiction, equity and Legislation. The development was also in the same order of sequence: First Legal fiction, second and Equity and then Legislation.

According to Sir Henry Maine, the **"agencies by which Law is brought in harmony with society, are three in number : Legal Fictions, Equity and Legislation**

1. Legal Fiction :

"Fiction", in old Roman Law was a "term of pleading". It was a false averment by the plaintiff which he would aver before the court, that he was a Roman citizen, though in reality, he was a foreigner. The objective was to give the court, the jurisdiction to try the case. Later, the term "legal fiction" began to signify any "assumption which concealed the fact that a rule of law had changed, in its operation, but had not altered in its letter.

In Roman Law, in fact social progress was possible because the fictions helped to overcome the rigidity of law, e.g. the concept of adoption. The fiction was that the adopted child was the child of the adoptive parents, and, that such an adopted person could succeed to the properties of the adoptive parents, and the family genealogy would continue.

2. Equity :

It was a body of rules based on some distinct principles and claiming to supersede civil law. The sanctity of them was inherent in the principles themselves, and their interference with law was direct and open. They were different from legislation, inasmuch as, they originated from some sacred principle and were independent of the consent of any group of persons like the Legislature.

3. Legislation :

This refers to the Acts made by the Legislature. This is the third ameliorating instrumentality. The legislation was by the Parliamentary

assembly or an autocratic prince. The authority came from such an external authority or person. It could impose obligations on the community and there was nothing to prevent its caprice. Its binding force came from the authority of the Legislature itself. If a particular enactment was based on some equity, the binding force came from the legislature , and not from the sanctity of equity.

Two instances of Legal fiction :

Sir Henry Maine had detected legal fiction in two glaring developments.

i) Precedents :

English legal system was full of case law and judicial precedents. Sometimes the decisions modified the existing law ; sometimes the change made, was not easily detectable. Judges of the 13th Century drew heavily from the "compedia" of Roman & Canon Laws ; but when Legislation made innumerable enactments, this tendency ceased. English Common Law was composed of equity (court of chancery) and of law made by the Parliament.

Roman Responsa Prudentium :

This closely resembled the judicial precedents. 'Responsa Prudentium' meant the answers of the learned in the law. These were explanatory glosses (interpretations) on written documents like the Twelve Tables. The fiction was this : The Table or the texts were to remain unchanged. But, in reality he "Books of Responses" showed that the text was constantly modified, extended recorded and edited by the pupils of the great jurisconsults. These were called the "Institutes" or "Commentaries". It was through these responses that Roman Law developed. By the time of the fall of the Roman Empire, these responses were becoming more systematised and reduced into "compendia". Mucius Scaevola, the Pontifix, had published a manual of civil law. The Edict i.e., the annual proclamation of he Praetor mainly gained prominence for law reform. The final blow to responses come from Augustus. He restricted the jurisconsults to confine themselves to the cases referred to them. In later years, Ulpain, Paulus, Gaius and Papinian wrote elaborate treaties, based on Praetor,s Edict.

Legislation : In Rome, it was scanty during the Republic, but became very voluminous under the Roman Empire. Legislation was directed to remove some great abuse, or to set right decisions between classes or dynasties. In fact, to settle he Roman society's great civil commotion, he Roman's solution, was the making of large body of statues. Sylla, Julius Caesar, Augustus Constantine and others desired to the Roman Society by making a number of statutes. However,the true period of Roman statute law, began only with establishment of the Roman Empire.

Conclusion :

Sir Henry Maine, having detected the gap between the law and the progressive society has also elaborated hat this gap was filled by legal fiction. Equity and Legislation. His findings are commendable and noteworthy.

THE END