

Background note

History:

Law in India has evolved from religious prescription to the current constitutional and legal system we have today, traversing through secular legal systems and the common law.

India has a recorded legal history starting from the Vedic ages and some sort of civil law system may have been in place during the Bronze Age and the Indus Valley civilization. Law as a matter of religious prescriptions and philosophical discourse has an illustrious history in India. Emanating from the Vedas, the Upanishads and other religious texts, it was a fertile field enriched by practitioners from different Hindu philosophical schools and later by Jains and Buddhists.

Secular law in India varied widely from region to region and from ruler to ruler. Court systems for civil and criminal matters were essential features of many ruling dynasties of ancient India. Excellent secular court systems existed under the Mauryas (321-185 BCE) and the Mughals (16th – 19th centuries) with the latter giving way to the current common law system.

Law in British-ruled India

The common law system – a system of law based on recorded judicial precedents- came to India with the British East India Company. The company was granted charter by King George-I in 1726 to establish “Mayor’s Courts” in Madras, Bombay and Calcutta (now Chennai, Mumbai and Kolkata respectively). Judicial functions of the company expanded substantially after its victory in Battle of Plassey and by 1772 company’s courts expanded out from the three major cities. In the process, the company slowly replaced the existing Mughal legal system in those parts.

Following the First War of Independence in 1857, the control of company territories in India passed to the British Crown. Being part of the empire saw the next big shift in the Indian legal system. Supreme courts were established replacing the existing mayoral courts. These courts were converted to the first High Courts through letters of patents authorized by the Indian High Courts Act passed by the British parliament in 1862. Superintendence of lower courts and enrolment of law practitioners were deputed to the respective high courts.

During the Raj, the Privy Council acted as the highest court of appeal. Cases before the council were adjudicated by the law lords of the House of Lords. The state sued and was sued in the name of the British sovereign in her capacity as Empress of India.

During the shift from Mughal legal system, the advocates under that regimen, “vakils”, too followed suit, though they mostly continued their earlier role as client representatives. The doors of the newly created Supreme Courts were barred to Indian practitioners as right of audience was limited to members of English, Irish and Scottish professional bodies. Subsequent rules and statutes culminated the Legal Practitioners Act of 1846, which opened up the profession regardless of nationality or religion.

Coding of law also began in earnest with the forming of the first Law Commission. Under the stewardship of its chairman, Thomas Babington Macaulay, the Indian Penal Code was drafted, enacted and brought into force by 1862. The Code of Criminal Procedure was also drafted by the same commission. Host of other statutes and codes like; Evidence Act (1872) and Contracts Act (1872).

Law in Maharaja-ruled J&K

The full-fledged High Court of Judicature for the Jammu and Kashmir State was established in the year 1928. Prior to the establishment of High Court of Judicature, The Ruler of the State (Maharaja) was the final authority in the administration of justice. In the year 1889, the British Government asked the then Ruler of the State, Maharaja Partap Singh to appoint a Council and the Judicial member of the Council exercised all the appellate powers both on civil and criminal side. The State having two provinces Jammu and Kashmir, had chief judges exercising judicial authority but they acted under the superintendence and control of the Law member of the Council. Later the Council was abolished and a Minister designated as Judge of the High Court was appointed by the Ruler to decide judicial cases. In 1927 a new Constitution was sanctioned by the then Ruler of the State and instead of Law Member, a Ministry in the Judicial Department was created. Thereafter, in 1928, by virtue of Order No. 1 dated 26.3.1928, the High Court of Judicature was established and for the first time the High Court was to consist of The Chief Justice and two Judges. On 26.3.1928, the Maharaja appointed Lala Kanwar Sein as the First Chief Justice of the Court and Rai Bahadur Lala Bodh Raj Sawhney and Khan Sahib Aga Syed Hussain as Puisne Judges. The usual places of sitting of the High Court uses to be Jammu and Srinagar.

In 1939 the Ruler promulgated the Constitution Act of 1939 which incorporated the provisions of law relating to the High Court and conferred upon the High Court a substantial measure of Independence. The High Court was vested with the powers of superintendence and control over the Courts / District judiciary. The 1939 (1939 A.D.) Act also constituted a three [3] members Board of Judicial Advisers akin to the Privy Council in British India. The Board was to advise the Ruler in the disposal of the civil and criminal appeals against the decisions of the High Court.

In terms of Section-10 of Jammu and Kashmir Constitution Act, 1939 promulgated on September-10, 1939, the Advocate General, was created to defend

and raise the interests of the Government before the Hon'ble Courts. The Advocate General with qualification to become eligible for appointment of a Judge of the High Court with State subject, was appointed by His Highness the Maharaja with stipulated duties, period and remuneration. The Advocate General was also given the right to speak in the Praja Sabha and to take part in its proceedings and in the proceedings of any of its committees but shall not merely by virtue of this section, have a right to vote. On 10.9.1943, Letters Patent was conferred on the High Court.

Erstwhile State of J&K:

In 1954 vide Constitution Application Order of 1954, the jurisdiction of the Supreme Court was extended to the State of J&K. Under Art.32(2-A) of the Constitution of India, the State High Court was for the first time given power to issue writs for enforcement of the fundamental rights so far as they are applicable to the State of J&K.

The Board of Judicial Advisers at the time of its abolition by the Constitution Act 1956 had 17 appeals pending before it. On request of the Chief Justice, the Government of India in consultation with the Chief Justice of India, constituted a Special Bench of the Supreme Court of India consisting of Justice Mehar Chand Mahajan, Chief Justice of India, Justice S.R. Das and Justice Ghulam Hassan for disposing off the pending 17 appeals. The Bench heard the appeals in Srinagar and upheld the judgement of the High court in all the 17 appeals. It was a historical event, when a Bench of Supreme Court held sitting outside the place of seat at Delhi till date this is the sole instance. The Government counsel to contest these appeals was headed by Mr. Raja Jaswant Singh, the then Advocate General, J&K.

In 1957, by the Jammu and Kashmir Constitution Act, an independent judicial body with the High Court of Judicature at the top was created. The High Court has at present a sanctioned strength of 17 Judges including 13 Permanent Judges and 4 Additional Judges. The Court sections of both the Jammu and Srinagar Wings of the High Court function throughout the year. The Advocate General office at State level in terms of Section 42 and Section 56 of the Jammu and Kashmir Constitution Act, 1956 was continued with same terms and conditions of legal nature as were promulgated in J&K Constitution Act, 1939.

Current Status of J&K:

At present, while repealing the Jammu and Kashmir Constitution, 1956 after promulgation of Jammu and Kashmir Re-Organisation Act, 2019 vide SO No.34 of 2019 dated: 09.08.2019, the Office of the Advocate General being constitutional office has been continued under Article 165 of the Constitution of India. The authority and the functions of the Advocate General are specified in the Constitution of India under Article 165 and 177. So far as the UT of Jammu and Kashmir is concerned, the Advocate General is appointed under Section 79 of the

Jammu and Kashmir Re-organisation Act, 2019. The terms and conditions of the Advocate General are same as were hither-to-fore.

The business of the Advocate General's Office is transacted in accordance with the mandate given in the Constitution of India read with J&K Re-organisation Act, 2019 on legal management related matters. The Office headed by the Learned Advocate General of the rank of High Court Judge [selected from Senior Advocates], is the Chief Advisor and executive authority / Major Head of the Department. The Learned Advocate General is assisted by Government Counsels [GC] at Divisional level by the Additional Advocate Generals, Deputy Advocate Generals and Government Advocates to be appointed by Law, Justice and Parliamentary Affairs Department, J&K. The Government Counsels are allocated separate business / departments to deal with the litigation cases before the Hon'ble High Court of J&K with regard to Civil and criminal matters, and before the Central Administrative Tribunal, Jammu and Srinagar Benches with regard to civil service petitions/ applications. Besides, the Government Counsels [Advocate on Record, Addl. Advocate Generals] are also appointed by the Administrative Department Law, Justice and Parliamentary Affairs to attend the cases at Supreme Court of India, High Court of Delhi, Chandigarh etc. as per requirement. At the Direction office level, the business is transacted by the Administrative Officer [ADO] through various Branches, headed by an officer of relevant field. Further, the Law Department is the Administrative Department at Secretariat level to the office of the Advocate General.

Reference: History at website of J&K HC and Apex court, and history of courts in India in google SE.