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TORTS AND STATUTES: JURISPRUDENTIAL ANALYSIS

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Abstract:

Codification of law is a practice for ages and various evolution in the method of codification has been witnessed. On the other hand, there exists a branch of law that derives its power from the judicial precedents, and it is more flexible than the former with greater space for subjective interpretations and in some cases, better delivery of justice has been witnessed. These laws have a different jurisprudence as well which has been discussed in this manuscript along with the historical development of the same tracing its origin from England and the common law system to the application in the Indian context.

Keywords: *Torts, Jurisprudence, Schools of Law*

Introduction

"Law is a reason free from passion- Aristotle"

The above words were once quoted by the master of polity and law in his time. Talking about the word reason, many synonyms can give the meaning of this word but to develop the reason, it takes an understanding of the particular subject, extensive research, and most importantly, the social conditions and mentality of the men dwelling in that particular society with giving due credit and respect to their norms, morals, and cultural values. If one talks about the classification of reason or Logic particularly referring to this topic, as per general understanding it is of two types.

- Nearly Exhaustive Logic
- Developing Logic.

Now let's understand these two concerning the topic of our discussion. Talking about statutes they fall in the category of nearly exhaustive logic because these are so meticulously drafted by the most prolific minds of that era, these are termed exhaustive because their contents almost cover everything which can be related to that particular field.

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Torts, on the other hand, is a developing logic and these are in this category because it is a law that derives its authority from the subsequent cases which are decided by the eminent judges in their times as per their wit.

Law of torts vs. Positivism[1]

Let's talk about this basic difference between these two terms, positivism[2] is the most popular and widely accepted jurisprudential term. Etymologically if one sees this word it "*is derived from the word* ***posit*** *which*"[3] "*means to put*"[4] and upon carefully applying this meaning to these word in the legal sense, one can have an interpretation as to make or frame something and on this very interpretation, John Austin, the "*father of positivism*"[5] gave his theory that "*Law is the command of the sovereign*"[6] and the black letter law is the law of the land as per him and the "*source of the law is the will of the sovereign*"[7]. Referring to how this system works, in simple words positivism is a rigid and nearly watertight compartment of the legal field that restricts the reader and the judge to derive strict interpretations of the written text with negligible room for personal opinions and sometimes the written texts and statutes do not stand as per the demand of the society and time and henceforth amendments are made in the same but the frequency of these amendments are so frequent that it may take 2-3 decades for a person to realize that those particular laws were for no good and so this is a drawback of positivism. Talking about the advantages of positivism, it saves the precious time of the judiciary as it is rigid and only 2-3 interpretations are possible of the same, it protects the legal discussion to go haywire and restricts the lawyers to beat about the bush. Even in the current world, positivism is the most popular approach which is globally accepted.

Now let's talk about the Law of torts, it is an "*uncodified law*"[8] and as per the general understanding, it works on the notion and ideologies of "*Natural Law*"[9]. This school of thought is an antithesis for positivism. As per their ideology "*Law is a product of reason and reason cannot accept something which is unjust, unfair and unreasonable and therefore the law cannot be unjust, unfair and unreasonable*"[10]. As already discussed in this research work that the reasoning of the society varies from time to time and from situation to situation so

[1] RWM Dias, Jurisprudence, (1994).
[2] RWM Dias, Jurisprudence, (1994).
[3] Oxford English dictionary, 11th edition, (2004).
[4] Oxford English dictionary, 11th edition, (2004).
[5] RWM Dias, Jurisprudence, (1994).
[6] RWM Dias, Jurisprudence, (1994).
[7] RWM Dias, Jurisprudence, (1994).
[8] RWM Dias, Jurisprudence, (1994).
[9] RWM Dias, Jurisprudence, (1994).
[10] RWM Dias, Jurisprudence, (1994).

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the laws are based on the ideology of natural law and this school mainly depends on the decided case laws which have a binding precedent in them. One of the most important features of natural law which is a potential drawback of the same is that two persons who are a believer of natural law may disagree at a particular point owing to that the reasoning of two-person differs and therefore it is not so popular approach. For instance, let's discuss briefly the concept of "*Strict Liability*"[11] and the Indian variant of the former I.e., "*Absolute Liability*"[12]. If we talk briefly what are the elements to constitute either of the above torts, they are the same which are

- *"There is a dangerous thing on land"*[13]
- *"It tends to escape"*[14]
- *"It escapes"*.[15]
- *"Causes loss to the Plaintiff"*.[16]
- *"Non-natural use of land"*.[17]

But as discussed above, the same elements different logics same are the case here. In "*strict liability*"[18] there are few exceptions that can be used by the defendant to escape the allegations to the contrary, "*absolute liability*"[19] "*there are no exceptions available for the defendant to escape the claws of justice*"[20].

From this discussion, one can infer the point that why the codification of the law of torts was not done like any other law. It can be very well seen that, unlike the other codified laws which cover almost everything under the umbrella of their definitions, tort law fails to do the same, and tort law is more inclined towards the "*pigeon hole theory*" [21] which works on the maxim of *"Ibi remedium Ubi jus"*[22] which means there are a definite number of torts and the recognition for the same and a major criticism of this theory is that it fails to provide enough room for future additions.

[11] Rylands v. Fletcher, (1868) L.R. 3 H.L. 330.
[12] M.C. Mehta v. Union of India, AIR 1987 S.C. 1086.
[13] Rylands v. Fletcher, (1868) L.R. 3 H.L. 330.
[14] Rylands v. Fletcher, (1868) L.R. 3 H.L. 330.
[15] Rylands v. Fletcher, (1868) L.R. 3 H.L. 330.
[16] Rylands v. Fletcher, (1868) L.R. 3 H.L. 330.
[17] Rylands v. Fletcher, (1868) L.R. 3 H.L. 330.
[18] Rylands v. Fletcher, (1868) L.R. 3 H.L. 330.
[19] M.C. Mehta v. Union of India, AIR 1987 S.C. 1086.
[20] Dr. R.K. Bangia, Law of torts, (2020).
[21] Dr. R.K. Bangia, Law of torts, (2020).
[22] Dr. R.K. Bangia, Law of torts, (2020).

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From the above discussions, the difference between the law of torts and positivism is quite clear, thinking about how and why these two approaches evolved and what is the ideology behind codifying one of them and not make a written version of the other.

Evolution of law of torts and statutory laws

Before the colonization began in the Indian subcontinent, the justice delivery system was based on the religious provisions of the respective religions and those scriptures were also a form of codification of the law. As per one's understanding, one can say that India was the first country in the world to have a codified justice delivery system. Some people may disagree with this argument stating that it was England who rolled out with codification for the very first time but if an individual traces and compares both of these systems based on the year, laws in England were first codified around the 1700s whereas in India it was done around 1000 BCE[23]. Tort law is primarily based on what we call as "*common law system*"[24] which is the beginning of the justice delivery system of England and the matters before the court were decided based on the previous decisions of the court on the same factual situation and this practice, in my opinion, was the beginning of the "*doctrine of judicial precedent*"[25]. With time, this system has decided various cases, and to remember the ratio in each of them was a herculean task so it marked the beginning of the codification of laws and this practice is continued in the current time as well. With the codification of law, the factor of heterogeneity in law has been eliminated to a great extent and it bridged the gap between useless ambiguity and deliberate uncertainty in the laws.

As mentioned earlier in this discussion that statutory laws are a result of the most popular school thought I.e., Positivism[26] now pointing at the law of torts, this fits best for two schools of thought which are

- American realism[27].
- Historical School of Law[28].

So, let's discuss how the law of torts can be made fit under these two main heads but before that, one needs to have an understanding of what are the ideologies of these two schools so they will be discussed simultaneously.

[23] HV Sreenivasa Murthy, History of India, (2020).
[24] Caslav Pejovic, Civil Law and Common Law: Two Different Paths Leading to the Same Goal, ppp 7-32, (July 2001).
[25] L. GOODHART, Determining the ratio decidendi of a case, YALE LAW JOURNAL 161-183, (December 1930).
[26] RWM Dias, Jurisprudence, (1994).
[27] RWM Dias, Jurisprudence, (1994).
[28] RWM Dias, Jurisprudence, (1994).

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American realism[29]: As per the believers of "*American realism*"[30] "*Law is what the judge says*"[31] which is very true if we refer to the application and functioning of the law of torts because this is an evolving branch of law and the judgments and amendments which are made in this field derives the authority from the existing decisions. One of the beauties of the judicial precedents is that they are subject to the subjectivity of the judges and we very well know that subjectivity is subjective to each person and the same piece of information may have different meanings for two persons and by the virtue of this fact, the ideology of American realism[32] is not prescribed for future use as there are strong chances of subjective interpretation and the loss of the desired goal.

Historical School of Law[33]**:** The drawback in the law of torts by the virtue of American realism is almost covered by this school of thought, as per them "*Law is the manifestation of people's spirit*"[34]. On the interpretation of this line, we can draw out two very strong conclusions: -

1. Law is what the society wants and accepts and if the society does not accept the law, it is a law on paper only and it fails to perform its functional part.
2. The spirit of the people keeps on changing with time, circumstances and as per the demands of the people and therefore the law is ever-evolving keeping in mind the law of torts specifically, this conclusion gives the answer to the question of why the codification of the law of torts has not been done in the same way as the other codes.

On the extreme side of this ideology, for its followers, even an immoral law is a valid law by the virtue of its acceptance by society at large. The two last questions which need an answer are

- What constitutes as law under this head if we talk about other laws barring torts.
- Can such immoral laws be challenged on their constitutional validity?

Let's answer the first question, these laws comprise Practices, customs, and norms of that particular religion or society, and the combination of the above mentioned with the respective holy scriptures and their interpretations is tantamount to Personal laws.

[29] RWM Dias, Jurisprudence, (1994).
[30] RWM Dias, Jurisprudence, (1994).
[31] RWM Dias, Jurisprudence, (1994).
[32] RWM Dias, Jurisprudence, (1994).
[33] RWM Dias, Jurisprudence, (1994).
[34] RWM Dias, Jurisprudence, (1994).

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The question of their constitutional validity can be answered by understanding two articles of our constitution.

1. Article 25: - By the virtue of this article, Practices, and customs which are essential religious practices fall under the category of exceptions and are protected.
2. Article 13: - Any law not in sync with fundamental rights is void.

But these Practices do not fall under the ambit of this article and therefore can't be challenged at any costs

From the above discussions, the evolution of the law of torts and its components with their constitutional validity is quite clear, and why and how this branch of law is quite different from the statutory laws.

Conclusion

The thorough discussion on these two topics has given the clarity between these two limbs of the law and the justice delivery system in both, i.e., India, and England along with the history of their codification and evolution with the time. If a law is to be called a functional law, it has to pass the acid test of the general public coupled with their beliefs, customs, and the demand of the time as well. It is also witnessed how the constitution guards the citizens against falling prey to the laws which are not in sync with their fundamental rights which are sin qua non for anyone living in a state.

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