

COMMON CIVIL CODE IN INDIA A NEW PERSPECTIVE

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The debate over a Common Civil Code has often become a communal debate where Muslims and Hindus have treated it either as an exercise to flex their muscles or as a paranoid reaction to some deep-rooted fears. It is essential that we examine the issue from an ethical-pragmatic point of view based on first principles rather than on legal, religious, constitutional historical or moralist grounds. We must also take into account the changing realities. Pre-marital and extra-marital sex is much more widespread today than it was forty years ago. The ritual of marriage is no longer as sacrosanct as it was at one time. Prostitution has spread from the so-called red light areas to the supposedly posh areas. In this scenario, we cannot just assume the desirability of monogamy compared to polygamy or polyandry. Divorce is a reality that each one of us has been exposed to in our circle of family and friends. We are aware of the painful process of divorce, which in almost all cases does permanent irreparable damage to the individuals concerned, to their families and to the society at large. We must ask ourselves whether we need to find an alternative process for effecting conjugal separation.

Before we take this discussion any further, we must get back to the basic concepts of marriage and divorce. Society is a collection of individuals linked and bonded to each other by linkages of various types- physical, economic, emotive etc. Sex is a physical need and is the basis of one of the most important bonding elements of the social structure. Man-woman relationship is the primary basis of a family and influences almost all social structures. Husband-wife, Mother-son, Father-daughter, Lovers, Brother-sister, Cousins, Colleagues, Classmates, *Devar-Bhabhi*, *Jeeja-Sali*, Man-prostitute are some of the examples of man-woman relationships. Every society prescribes norms, limits, responsibilities, obligations and authorities for each type of man-woman relationship. There does not exist nor has ever existed any society which does not control the man-woman relationship. No society can ever permit a man-woman relationship where the need for sex is fulfilled without any obligations. Marriage is a package deal, duly permitted by the society, involving a fulfilment of some needs, in return for some responsibilities, obligations and authorities. Divorce is the termination of the package deal. Just as every contract must have a termination clause, terms of divorce can be considered to be a part of the package deal called marriage.

The controls exercised by society over the man-woman relationship are at various levels and take various forms:-

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- a) Controls by the State - Legal controls, which are given shape of laws and are enforced by the judiciary and the police.
 - b) Controls by Religion
 - c) Controls by religious sects
 - d) Controls by caste
 - e) Controls by family
 - f) Controls by work-group cultural patterns
 - g) Controls by regional groupings and norms.

Each of these controls is of a different nature and has varying levels of flexibility and dynamism.

The concept of controlling or regulating individuals by the society needs to be examined further. Let us examine the case of food habits. It seems that food is a highly personal issue and society need not have any concern with such a personal matter. Yet, food habits are controlled by every society. Food, in reality, is not as personal a matter as it may seem. All over the world, every social gathering is accompanied by consumption of food by the assembled individuals. Apparently, eating food together and eating the same food leads to a bondage or linkage between individuals and is a building block of the social structure. Hence all the controls mentioned above for man-woman relationship apply to food consumption. Each family, caste, work-group, region, religion, religious sect and country has different rules and norms for food consumption. In one case vegetarian food is permitted, in other eggs are permitted but no other non-veg. is permitted, for some eating with hands is the norm, others recommend chopsticks, some use black pepper, others use red chilly, some do not permit tomatoes, others do not permit onion, potato and garlic, some sit on the floor and eat, some prefer a table and chair, for some wine is religious, for others anything alcoholic is forbidden - the list is endless. The important point to be noted is that most of these controls or norms are not prescribed by the state, and yet are often followed more strictly than the tax laws duly passed by Parliament.

In case of food consumption, the rules of state or laws are always very wide and prescribe only the bare minimum. For example, no country in the world legally permits consumption of human flesh, even though the flesh may come from a dead person who has not been killed for the purpose of being eaten. Many countries in Europe do not permit eating of dog meat. Regulation of consumption of alcoholic drinks by way of either complete prohibition or by way of restriction on sale to some categories is well known. Almost all countries prohibit and severely punish use of drugs. There exist laws to regulate smoking. All such statutory and legal control seem almost negligible compared to the controls exercised by other institutions of the society. It is relatively easy to bypass a control exercised by the state but it is often very difficult and sometimes impossible to break a control exercised by other institutions of the society. It is possible to obtain and consume alcoholic drinks in a city where prohibition is enforced but it is almost impossible for a Muslim to eat pork. Hence, even though a control may seem logical, rational and in the best interests of the society, it must always be asked whether the control should be exercised by the state through laws or by other institutions of the society.

At this point, it may be worthwhile to take a cursory look at the historical development of state. Modern law making and enforcing systems and procedures are based on a European pattern. In Europe, at one time the Church was the law maker and enforcer. The development of the modern concept of state was a replacement of the Church. However, the church continues to exert a strong influence in the social fabric. In colonies, Europeans established a similar system where they as ruler class became the law maker and the law enforcer. The colonial masters tried to establish the Church in the colonies in a similar capacity as in Europe. This did not work.

In the post-colonial era, we, In India, have inherited the colonial legacy and have looked at the state in the image created by the ruling masters of the past. The political class has tried to don the cloak left by the colonial masters and has projected the state as a cure for all ills and as the only institution in the society. In Europe, the Church was never eliminated. In the post-colonial India the rulers have acted with an arrogance that would put any European Government to shame. Secularism has been interpreted to be a negation of all religious/social norms, with a freedom to make laws on every subject under the sky, without any limits and without any consideration of the role of the state as one of the institutions of the society.

In India, Congress was the prime inheritor of the colonial legacy and it has ruled the country for a major part of our post-independence years. Pundit Deendayal Upadhyay was of the opinion that the colonial legacy of an all-important state must be discarded and new model based on the principle of a society controlled by various independent institutions should be established. The followers of Pundit Deendayal need to understand this concept of the great visionary. The limitations of the Government must be understood and the Government should get out of areas where it is not efficient. This getting out of some areas by the Government is not to be restricted to areas of business and industry only but must be extended to areas most vital to human existence and social life.

The Government should adopt a minimalist approach in matters of man-woman relationship and should leave the moralist approach to other institutions, giving due respect and support to such institutions, strengthening them and, if needed, acting as a catalyst to create new institutions or to revitalize old ones. The approach of the Government in matters of man-woman relationship should be similar to the approach adopted in matters of food consumption.

In a multi religion, multi cultural society like India, the state has a duty to act in a manner that it does not interfere with the belief systems of any of the groups, unless absolutely necessary. This makes it all the more necessary for the state to avoid acting as a social reformer.

The minimalist approach does not however mean that the state may permit anarchy or a break down of equity and justice, which are the foundation stones of the trust which makes a society. The duty of the state is to ensure that every relationship between a man and a woman is fair and just and that neither party takes an unfair advantage or gets a benefit without fulfilling the corresponding obligations and responsibilities. Of course, the definition of fair and just cannot be absolute; it will be dependent on the society and will be subject to change from time to time. Yet, the state must be the guardian to ensure “ fair and just” in man-woman relationship and must go no further.

The laws applicable in India to Hindus or Muslims or other communities have focused on marriage as the only man-woman sexual relationship. A sexual relationship between consenting adult man and woman, not bound by marriage, is not covered by any law. Indian Penal Code deals with adultery committed by a married woman without the consent of her husband as a criminal offence. It is strange that a married man can have as many extra marital sexual affairs as he likes without the consent of his wife, but the wife must take his consent. And if the husband consents, the wife is free. In case of unmarried persons there are no restrictions whatsoever except of course that the partner must nod.

The above laws were made at a time when the rites of marriage were supposed to be sacrosanct and the incidence of sex outside marriage a rare phenomenon. The situation has changed drastically.

Due to improved nutrition and better awareness, the age at which boys and girls become capable of reproduction has been going down over the years. A few decades back, most girls would have their first menses around the age of 14-16 years. This has now reduced to 10-12 years. On the other hand, the age at which a boy and a girl do generally get married has been increasing. The period between the time of achieving the capability to reproduce and time of being officially permitted to utilize the capability, has increased to unmanageable levels. It is not uncommon to have this period of ten to fifteen years. Coupled with an increased interaction between the genders, the long period leads to increased level of pre marital sex.

On the other hand extra marital sex is also increasing. Increased mobility of men and woman, larger number of women at work places, higher interaction of the genders, changing value systems, etc. are some of the reasons for a substantial increase in extra marital sex.

The law needs to take the changing reality into account. The present law for Hindus permits only one wife per man and only one husband per woman. The restriction on multiple marriages does not extend to sexual relations with multiple partners. A man can have any number of mistresses, he can go to prostitutes, he can indulge in sexual affairs with any number of women. In practical terms, this means that a man is permitted to get pleasure from as many women as he fancies, but he is obliged to perform his duties and obligations towards only one woman (and vice versa). This is obviously unfair and violates the basic principles of equity and justice.

It is interesting to look at the traditional Hindu view of the matter. Hindu mythology and religion recognizes polygamy as well as polyandry, though undoubtedly it upholds monogamy as the great ideal. *Purushottam* Ram is considered "*purushottam*" because he had only one wife and had no other affairs. On the other hand in Mahabharat, we have Bhima who marries more than once. He is one of the five husbands of Draupadi and even marries a *Rakshasi* (demon). What he does not do- is to have casual sex with any woman. He could have just had sex with the *Rakshasi* and forgotten all about it the next day. He does not do so. He accepts her as a wife subject to certain terms and conditions. Her son is called Bhima's son. Bhima is never criticized for his polygamous and polyandrous life.

Hindu religion advises monogamy but does not criticize polygamy or polyandry. It does not permit casual sex without any responsibilities and commitments. On the other hand Christianity takes a strict and, one may add, simplistic view of life, permitting only

monogamy. Islam permits four wives to a man and no such freedom to a woman. Even Islam imposes certain conditions for taking more than one wife and does not permit casual sex.

The law in India for Hindus is actually the personal law of Christians. It is strange that while the western world was moving away from Christian way of life, the ruling class of India imposed a Christian ideal as the law of the country without a national debate.

Under the present circumstances, the law must change its definition of marriage from a ritual performed by religious or legal authorities to a wider definition of marriage whereby any male and female, above a certain age, (except when either of them is a recognized prostitute) indulging in sexual intercourse by mutual consent shall be considered to be married irrespective of whether the rituals have been performed or not. Such a definition of marriage would need a legal recognition of prostitution, which will have many desirable effects, that need not be discussed here. The modified definition of marriage will recognise ritualized marriages, as at present, as well as de-facto marriages where the marriage has been consummated without the prescribed rituals.

The above definition of marriage can almost be called a Hindu definition of marriage. *Gandharva Vivaha* has been duly recognised as a marriage under the Hindu scriptures, though undoubtedly *Gandharva Vivaha* was never held up to be a great ideal. Dushyanta and Shakuntala were married by a *Gandharva Vivaha* which possibly would not be recognized as a marriage by the present laws governing Hindus.

The widening of the definition of marriage would lead to granting of property rights to every woman with whom a man has sex (and vice versa if the woman has property). This leads to a dilution of the rights of the first wife but is a more fair and just arrangement. The present arrangement is grossly unfair to the second woman and eventually is unfair to even the first.

Take the case of a married Hindu man who falls in love with another girl. The man initially has a clandestine affair hiding it from everybody. Eventually it does get exposed. He has four options. The first option is that if the girl agrees, they can have an open affair, live together and possibly even have children. This is identical to the famous affair of filmstars Dharmendra and Hema Malini. In this case, the wife gets the property but loses the man and has a hell of a life; the girl gets neither the property nor the security of a long-term commitment - she is reduced to being a mistress. The man pays no price. The present law permits this. The second option is to forget the girl and go back to the wife. The girl gets a bad name and nothing else. In case she is already pregnant, she has to bear it all alone. The man gets his pleasure without paying a price and the girl suffers. The present laws permit this too. The third option is to divorce the wife and marry the girl. Grossly unfair to the wife but duly permitted! The fourth option is to marry the girl and let the first and the second wife live together – an arrangement, which minimizes the suffering of everybody and is almost a compromise solution. The present laws do not permit a Hindu to do so.

Another issue that needs to be looked at is the issue of sexual exploitation. To many men and in some cases to women, sex and power are related. Sex is viewed as an instrument to either gain power or to get a feeling of oneself being powerful over the other. Worldwide there is a tendency on part of powerful individuals to sexually exploit members of the opposite sex, who happen to be in a position of weakness. Generally such cases do not fall under the

definition of rape since the person in the weaker position is forced to consent. The present laws in India give no protection to victims of such exploitation. The powerful face no obligations or liabilities for their acts which are most offensive and cause untold misery to the weaker members of the society. It is the duty of the state to uphold equity and justice by taking care of the interests of such exploited persons. The new definition of marriage, as outlined above, will give such oppressed persons rights that have been denied to them so far.

Some people are likely to condemn the above definition on moralist grounds. They treat all sex outside a one-to-one marriage as sin and illegitimate. They may feel that such a definition of marriage will legitimize sin. Sin and virtue cannot be state subjects. The argument that the sinners must suffer is also not valid in this case. In a sexual relationship outside a traditional marriage, it is the weaker partner who gets all the suffering and the stronger goes free. The weaker is normally less of a culprit but suffers more. This cannot be the intention of a state based on equity and justice.

It is also important to look at the matter from another angle. Every system needs a safety valve. The legally permissible and prescribed life pattern of ten to fifteen years of abstinence at the prime of one's youth followed by a one-to-one relationship has no safety valves. It tends to look at life as made up of absolutes where there is good on one side and bad on the other with a sharp dividing line. Unfortunately life is not as simple as that. There can be various occasions when a safety valve is a necessity. For example, let us take the case of either married man or woman being physically incapable of sexual intercourse. The present law prescribes divorce and allows no other course. A safety valve by way of some alternative arrangement for satisfying the sexual urge of the other partner may allow the marriage to continue and also spare the physically affected person the trauma of being treated as an outcast.

It may not be out of place here to say that the CAST IRON morality prescribed by the Roman Catholic Church was responsible for the pendulum to swing to the other extreme of free sex in Europe and America. In the Indian context it may be worthwhile for the sociologists to study the changes in the attitude of average Hindu towards sex in the past forty years after monogamy has been made statutorily compulsory and the age of marriage has been increased. Obviously it is not possible to carry out scientific surveys since the data about attitudes of people half a century ago cannot be collected today. However, if we look at folk cultural expressions like cinema, we find that a major change has come about. In the fifty's the audience wanted romance, today the audience is no longer satisfied by mere romance, the film-makers are showing more explicit actions than ever before and the audience is lapping it all up. Does it not indicate that the country is sitting on a volcano of unsatisfied sexual desires – a volcano, which has been created in the past few decades? Such a situation cannot be healthy for the structure of the society.

It is clear that the Hindu Marriage Act, which should actually be christened Catholic Marriage Act for Hindus, has led to serious problems in the Hindu society. The Hindu society is going through the phase that the European and American society passed through a few decades ago.

The arguments for statutory recognition of de-facto marriages are essentially based on the concept of fair and just responsibility in every relationship between human beings. The state

must intervene to ensure equity and justice, but do no more than that and leave the rest to other institutions of the society. It is hence essential that some limit is put on the number of sexual partners (marriages), excluding prostitutes that any member of the society may have. The limit should be preferably wide enough to avoid interfering with the accepted norms of any of the sub-groups of the society. Islam has fixed this limit at four. In the Hindu society, there is no such strict religious limit. It may hence make sense to accept the limit of four marriages as a statutorily prescribed limit for all citizens of the country, subject to a few conditions as follows:

- a) Recognition of de-facto marriages on par with ritualized marriages.
- b) Every man and woman to have the right of four marriages.
- c) Restrictions on a person having more than one marriage in matters relating to execution of Will or otherwise disposing of his property to ensure fair and just distribution.
- d) The spouse of a person doing second or third or fourth marriage to have a right to divorce with due maintenance etc.
- e) Recognition of the role of other institutions of society in matters of marriage and divorce with due rights subject to a broad framework prescribed under law.

The acceptance of the limit of four marriages by Hindus subject to the conditions as mentioned above will solve many problems faced by the Hindu society and lead to resolving of a major dispute between Hindus and Muslims in conformity with the basic religious principles of Hinduism. The conditions mentioned above are intended to ensure that principles of equity and justice are followed. Basic values of ethics are common to all religions. Neither Islam nor Hinduism will permit a man to deny the due share in property to any of the wives and her children.

The recognition of de-facto marriages coupled with the granting of a right to divorce to every person affected by a second (or third or fourth) marriage of the spouse makes it necessary to simplify the process of conjugal separation.

The present situation regarding divorce has two extremes. On the one hand, a Muslim can get divorce in an extremely simple way with almost no liability towards the separated wife thereafter. On the other hand, a Hindu has to go through a traumatic and long drawn legal process for getting a divorce. The ideal process of conjugal separation should have the following features:

- a) Equality of man and woman
- b) Quick, easy and economical
- c) The economically weaker partner to get a fair deal
- d) All income and assets created during the period of marriage to be treated as common property to be duly shared.

Presently, neither the laws governing the Hindus meet all the above criterion, nor do the laws governing the Muslims. It is essential to take the good from both sides to arrive at an ideal Common Civil Code.

The expediency of divorce in Islamic law has often been criticized as too quick. On the other side when one looks at the long drawn out, inhuman and traumatic divorce proceedings in courts, the quick process of Islam seems a virtue rather than a vice. The Courts of justice, established in the country under British rule, can be termed to be a system, which has turned sick and is almost at a point of collapse due to overload and corruption. It makes no sense to burden the system any further with matters involving routine conjugal separation.

It can also be argued that matters involving marriage and divorce need to be handled softly with a sympathetic and humane view, which the present legal education does not impart. A legal person is not trained to understand the complexity of human existence and to appreciate the problems of relationships in a dynamically changing world. The Honourable judges derive their authority from their position and are least accountable members of our society. Once upon a time, they represented our colonial masters and derived their authority from them. Even today the procedures and behaviour of Indian judiciary stink of a colonial era. Every Indian can only feel thoroughly insulted and robbed of his sense of self-respect standing (sitting not permitted) before a judge. Expecting such a system to be humane is expecting the devil to be saintly.

If one looks at other civil contracts between persons, we find that no other contract requires legal intervention for termination. Most contracts provide for a mutually agreed arbitrator and legal recourse is avoided except in extreme situations. Marriage is treated in Islam as a contract while in Hinduism and Christianity it is more than a contract. The state should look at a marriage as a contract and let the religions look at the divine aspects of marriage.

As in all other contracts, the state should adopt a minimalist approach. The solemnization of marriage has been left to the religious authorities. Similarly the dissolution of marriages should also be left to the religious authorities except, of course, under special circumstances. The role of such religious authorities can be identical to the role of arbitrators in civil matters and can be subject to a broad legal framework. It is also possible to licence some persons to act as solemnizers and arbitrators in matters relating to marriages and divorces. The recourse to the judicial system must be only under exceptional circumstances, either when the parties cannot agree to a mutually acceptable arbitrator or when either of the parties is dissatisfied with the judgement of the arbitrator.

Such an arrangement should, it can be hoped, take more than ninety per cent of the divorces outside the purview of the courts. Quick, easy and economical ways of effecting conjugal separation will spare the trauma normally associated with the present means of granting divorces.

The other advantage of the proposed system will be in terms of granting an important role to social institutions other than the state. It is envisaged that social and religious organisations like the Church, Gayatri Parivar, Arya Samaj, Kazi, Imam, Village Panchayats, Caste Panchayats will play an important role. These will more often than not, avoid taking a strictly legal view and will generally try reconciliation measures to avoid conjugal separation. One of the reasons for a very low divorce rate in India is due to social pressure to keep a marriage intact. It is high time that the mechanisms of social pressure are recognized and strengthened by the laws of the country.

The present system of granting divorce by a Muslim male is quick and easy but it is very unfair to the woman. It needs to be made more fair. Incidentally, Islam does not prohibit such an attempt. On the other hand, Islam recommends it.

An Iranian friend once described to me the system of divorce in Iran. Any person, man or woman, can ask for divorce. It is the responsibility of the male to ensure that his wife has adequate to support herself after divorce. In case there has been an increase in the assets of the male after marriage, the wife is entitled to an equal share in the increased value of assets.

In a multi-cultural society like India where patriarchy as well as matriarchy (in places like Nagaland, Kerala etc.) co-exist, the rules of property and maintenance must be such that the basic principles of equity and justice are evenly balanced for both men and women. In case man is in a economically strong position and the woman has no source of livelihood, maintenance should be provided for the woman. Similarly, if woman is in a economically strong position and the man has no source of livelihood, maintenance should be provided for the man.

Present laws do not treat the earnings of a man/woman as the earnings of the family. This is based on the individualistic view of the world taken by European/American. The oriental view treats the family as one unit and the earnings of the man are that of his wife and vice-versa. Hence, it is logical to say that a husband and wife (and children, if any) must have equal rights on the savings made during the continuation of marriage. This is already a part of the Iranian law and should be made a part of the Indian law.

It is hoped that recognition of de-facto marriages, permitting upto four marriages and easing the process of divorce by granting a role to social organisations will solve various problems that are presently plaguing the Indian society.

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