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PERSONAL LAWS OF INDIA VIS-A-VIS UNIFORM CIVIL CODE A RETROSPECTIVE AND PROSPECTIVE DISCUSSION BY DR. PARMINDER KAUR *

Introduction

Uniform Civil Code – a common code which is applicable to all the communities irrespective of their religion, race, caste, creed etc. is now-a-days posing one of the biggest challenges for a country like India. If implemented in its letter and spirit, then these three words are sufficient enough to divide India politically, religiously and socially. It might be the reason due to which the framers of our constitution decided to include uniform civil code in the directive principles of state policy and not in fundamental rights. Now under the Constitution Article 44 provides that State shall endeavour to secure for its citizens a uniform civil code throughout the territory of India.

Regarding the implementation of uniform civil code, India re-learnt an ancient lesson about demanding the impossible, culturally envisaged as asking for the moon. In the ancient story, the child God Krishna asks his mother Yashoda to give him the moon as a toy and the clever mother hands him a mirror with a reflection of moon. Similarly though now, uniform civil code is not included in Fundamental Rights Chapters, but in post modern India, quick footed thinking of this kind has now resulted in well considered production of a mirror image of the desired object of the uniform civil code in the form of harmonised personal law system. A motherly central state along with arts core institutions, an activist and powerful Supreme Court have taken well- choreographed steps to achieve this particular outcome.[1]

Here, for the better understanding, if we analyze the philosophy of uniform civil code in its retrospective and prospective aspect, it is convenient to divide the study into following parts

Uniform Civil Code and Retrospective Aspect

Position in Pre- Independence Era

In the Hindu Era: The study of Hindu Legal History shows that during Hindu period there was no interference of the State with Hindu law. They enjoyed complete immunity and the whole affairs were regulated by their personal laws. The states used to keep its hands off the personal law and it was considered as welfare organisation dealing with any matter involving social interest. In Hindu India, the society was an organisational unit. The leaders of the society were Hindu sages. There were universal laws which were laid down by the religious leaders of society. These rules not only concerned religious ceremonies and rites but acted as a code of ethics and morality and governed social intercourse of their life. Civil laws

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[1] Werner Menski, 'The Uniform Civil Code Debate in Indian Law: New Development And Changing Agenda' (2008) 9 (4) *German Law Journal* at 212-213.

and religious and social rules were not differentiated from each other. Hindus regarded law as an integral part of their religion. This claim was, perhaps founded on the belief that the sages being the Hindu law-givers were divinely inspired who had sufficient spiritual efficiency to evolve practices to regulate the human conduct from time to time. There is no difference of opinion about the fact that the entire spectrum of social, political and economic life of the people was regulated on the basis of rules and regulations excavated by the divinely inspired human agents like the sages and philosophers of Manu's calibre who dominated the entire Hindu period[2].

Thus the entire Hindu law in ancient India was almost identical with the Hindu conviction and since there were no other religious communities the conflict between personal laws did not attract much attention and with slight difference of opinions about personal laws in the small Hindu communities the uniformity of law was a general rule than an exception.

In the Muslim Era: Under the Muslim period the prophet, who was the religious leader of Muslims was gradually elevated to be the Head of the State. With the death of Mohammed, the Muslims faced the problem of want of leadership. The leading members of the Muslim community decided to have a single leader and they selected Abu Bakr as the first Imam. Every Muslim was required to owe allegiance to single head who was called Imam or Caliph. The Caliph was required to rule in accordance with the tenets of Koran which were believed to have a divine origin. Consequently, no individual could alter the law or question the authority of Caliph[3]. Consequent on the invasion and acquisition of territory and settling in India, it was impracticable for the Muslims in India to be governed by Caliph who was far away. Inevitably, therefore, some persons had to take the political leadership. With the establishment of Muslim rule in India, Muslim law also became the law of land which is enforceable through the machinery of the State. As the rulers were strangers to this country, they did not accept Hindu law for themselves, nor did they abolish the Hindu system of law altogether. Hindu law was allowed to be reserved for the Hindus and the Mohammedan rulers did not interfere with the system. The result was that the Muslim followed their Muslim law and the Hindus were allowed to stick to their own system of law. Thus there arose two separate systems of personal law which practically proceeded on parallel lines and which remained to be modified latter only at the time of British administration

In the British Era: In a multicultural society like India there is a divergent system of personal laws. When the British established their hegemony over India, they more or less continued the Muslim pattern of judicial administration. But in course of time, the Britishers consolidated their position and they completely changed the criminal law. They introduced their own system to deal with the various matters of civil law[4]. Legislative immunity was granted to certain specified topics of Hindus and Muslims laws, which they considered were deeply interwoven with religion. The Britishers did not want to hurt the religious susceptibilities of Indians as they considered that interference in religious matters was not at all conductive to their friendly trade with Hindus and Muslims or their political stability. The Second law Commission of India, 1833, constituted under the President ship of Master of the

[2] U.C Sarkar, Hindu Law, 'Its character and Evolution' (1964) 6 *Journal of Indian Law Institute* at 214.

[3] M. Rama Jois, *Legal and Constitutional History of India,* (Muimbai: N.M Tripathi Pvt. Ltd. Vol. II 1990) at 4.

[4] M.P. Jain, *Outlines of Indian Legal History* (Mumbai: N.M Tripathi Pvt. Ltd. 1990) at 581-90.

Rolls observed: "it is our opinion that no portion either of the Mohammedan law or of Hindu law ought to be enacted as such in any form by a British legislation.…The Hindu law and Mohammedan law derived their authority respectively from Hindu and Mohammedan religion. It follows that, as a British legislature cannot make Mohammedan or religion, so neither can it make Mohammedan or Hindu law"[5]. So the Britishers adopted the policy of neutrality while dealing with the personal matters of Hindus and Muslims.

Position in Post- Independence Era

In 1947 when India got independence, the idea of uniform civil code was mooted in the Constituent Assembly but after long debates and discussions, separate personal laws were retained for separate communities The framers of the Indian constitution, including men such as Nehru, were convinced that a certain amount of modernisation is required before a uniform civil code is imposed on citizens belonging to different religions including Muslims. It was also feared that any attempt to ignore personal laws of various religions might lead to civil war, wide-scale rioting and social unrest. India's leaders at the time wanted a secular constitution on the model of a western democracy. However, what resulted was not secularism in the western sense of the word, but rather a 'secular' state with religious laws for its religious groups.

But this retention of separate personal laws leads to contradictions within the constitution. First, the separate personal laws of India are inherently unequal as they are founded on the rules and traditions of completely different religions. Thus on the one hand, the constitution recognizes the continued existence of Personal Law, due to which Article 44 expects that India at some later date will have a uniform civil code and on the other hand, there exist several Articles, such as Article 14-19 which guarantee equal rights. Since personal laws for various groups are inherently unequal, since a divorcee in Muslim law is entitled to different things than in Hindu law, therefore Article 15 would seem to make personal law unconstitutional. Furthermore, Article 15 also requires non-discrimination based on "sex", whereas Muslim Personal Law favours the man in many cases, especially in the issue of extra-judicial divorce and in the issue of polygamy. Equality before the law would essentially mean that Muslim women could take up to four husbands. These issues remained unresolved in the constitution. Unfortunately, the citizens of India have also been slow to recognise this flaw. Even women's groups, who actively protest the unequal treatment of women under the Personal Laws of Hindus and Muslims only call for equal laws and equal rights, but stay from calling for the same laws for everyone.

Further the passing of Hindu Code Bills in 1950s marked a turning point in the history of the Muslim Personal Law. Until this time, Muslim Personal Law had existed side by side with similar religious laws for Hindus and other religious groups. The Hindu Code Bills were a series of laws aimed at thoroughly secularizing the Hindu community and bringing its laws up to modern times, which in essence meant the abolition of Hindu law and the enactment of laws based on western lines that enshrined the equality of men and women, and other progressive ideas. The Hindu Marriage Act of 1955 extended to the whole of India except the state of Jammu and Kashmir. The effect of the Hindu Marriage Act was to prohibit polygamy amongst Hindus and to increase the right of the divorced wife to maintenance or alimony. The act applied to everyone in India except Muslims, Christians, Parsis, and Jews. Since Jews

[5] Report of Second Law Commission of India, 1833 as quoted in M.P Jain supra p. 640.

and Parsis are a very small minority and since Christians were governed under an already modern or progressive law, Muslims remained de facto the only large community with a distinct religious law that had not yet been fully reformed to reflect modern concepts.

But even among the Hindus also this passing of various Hindu laws does not able to protect the interests of Hindu females. In order to highlight blatant violations of justice that the personal law system permits, Flavia Agnes, a Mumbai based layer, argues that the Hindu Code Bills have provided ample scope for a Hindu man to escape from the criminal consequences of bigamous marriages. Reformed Hindu Code Bills prohibit polygamy. However, men have found that they can bypass this condition by converting to Islam and its personal law, which does not permit marriage to several women. The Sarla Mudgal case of 1995, for example, arose when a Hindu man converted to Islam in order to marry a second wife. Justice Singh's ruling highlighted the atrociousness of such a loophole[6]. Men can also engage in polygamous activity by taking advantage of the complexity of personal law. In the case of polygamy, the Hindu Code Bill outline rigid standards for proving marriage including proof of performance of homa and saptapadi (seven steps around the fire), the presence of a thakur (barber) and the chanting of the mangal ashtuk. However vary greatly from region to region. Those belonging to the reddy community of Railseelama, for example, use a yarn ceremony instead of saptapadi and homa. For some lower castes , it is expensive to secure a thakur or a Brahmin priest to chant the mangal ashtuk. Hence many of the customs outlined in the Hindu code Bills only apply to certain regions and to higher castes.

As a result of such specific regulations on marriage, it becomes increasingly difficult to prove polygamy by a husband if his various marriages are not even considered valid. This, in turn, leads to great injustice for wives and children. The complainant wife could lay upon herself the risk of invalidating her existing marriage. Moreover, if the second marriage is considered void, the second wife has no legal recourse. Any economic or financial benefits from the second marriage are confiscated. The paternity of the child of a second marriage if proved could only amount to its bastardization and not proof of bigamy by the father. Though this polygamy example highlights only a couple forms of injustice in the system of personal laws, it raises a serious consideration- it may be more useful to develop a general, uniform civil code for all religions in order to reduce the possibility of loopholes. A uniform civil code would allow for clarity within the Indian legal system. The legal maze is bewildering enough without retaining a wide permutation and combination of laws which create rights in some and take them away in another depending upon their religion[7].

Uniform Civil Code and Role of Judiciary

In the post-colonial India, the role of Judiciary in the implementation of uniform civil code is very appreciable. In fact it is the judiciary, which through its interpretations tries to bring the personal laws of different communities into one common mainstream and thus paved the way towards uniform civil code. The Judges of various High Courts and Supreme Court became the main instrument for bringing important gradual legal developments which also put its impact on the question of uniform civil code. Some of the important examples of Judiciary in this direction are as under:

[6] Flavia Agnes, 'Hindu Men, Monogamy and Uniform Civil Code' (1995) *Economic and Politically Weekly* at 3238-3244.
[7] Vasudha Dhagamwar, Towards the Uniform Civil Code (Mumbai: N.M Tripathi Ltd, 1989) at 71.

In *State of Bombay v. Narasu App Mali*,[8] the Bombay prevention of Hindu Bigamous Marrigages Act, 146 was challenged. The Act had imposed severe penalty on Hindu for contracting a bigamous marriage. In this case the validity of the abolition of the polygamy in particular community was also challenged. The then Chief Justice of Bombay High Court J. M.C. Chagla observed that one community might be prepared to accept the social reforms, another community may not yet be prepared for it. Article 14 does not lay down that the State legislature may not be right while deciding to bring about the social reforms by stages and stages may be territorial or they may be community wise. J. Gajendradgkar opined that the classification made between Hindus and Muslims for the purpose of legislation was reasonable and did not violate the equality provision contained in Article 14 of the Constitution. He observed that the validity of Hindu Bigamous Marriages Act has been challenged particular on two grounds. It is first contended that the personal laws applicable to the Hindus and the Mohammadans to the union of India are subject to the provisions contained in part III of the Constitution and they would be void to the extent to which these provisions are inconsistent with the Fundamental Rights. Further these personal laws allow only polygamy and not polyandry so it was also argued that these laws also discriminate against women only on the ground of sex. If that is so the provisions of the personal laws that permit polygamy, they are against the provisions contained in the Article 15(1) or in other words after the commencement of constitution the bigamous marriages amongst the Hindus as well as the Mohammedans, they were not valid or void. So in this case the Court did not only uphold the validity of the legislation it also emphasised that the said legislation was a step to secure the Uniform Civil Code.

In the case of Mrs. *Zohra Khatoon v. Mohd. Ibrahim*,[9] A substantial question of law was raised and the High Court of Allahabad which cancelled the orders of the maintenance allowance passed by the Magistrate on the grounds the when the divorced proceedings start from the female side under the dissolution of Muslim Marriage Act 1939, in those cases wife cannot claim maintenance from her former husband neither under the Muslim law nor under Sec. 125 of Cr.P.C. Ultimately the Supreme Court overruled the decision of the High court on the ground that it is based on the wrong interpretation of the Clause1(b) of the explanation to section 125 under this clause the wife continues to be wife even though she has been divorced her husband or has otherwise obtained divorce and has not remarried.

Similarly in the case of *Sarla Mudgil v. Union of India*,[10] J. Kuldip Singh also put emphasis on the need of uniform civil code and judgement delivered by him is again a step towards uniform civil code. The questions involved in this case are that whether a Hindu husband, married under Hindu law, by embracing Islam can solemnize a second marriage? Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage qua the first wife who continues to be Hindu? Whether the apostate husband would be the guilty of offence under Sec. 494 of Indian Penal Code? Supreme Court observed that a marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouse converts and the other refuses to do so. Where a marriage took place under Hindu law the parties acquire a status and certain rights

[8] AIR 1952, Bombay, 84.

[9] AIR 1981 SC 1243.

[10] (1995) 3 SCC 635.

by the marriage itself under law governing the Hindu marriage and if one of the parties is allowed to dissolve the marriage by adopting and enforcing a new personal law, it would tantamount to destroying the existing rights of the other spouse who continues to be a Hindu. We, therefore hold that under the Hindu Personal Laws as it existed prior to its codification in 1955, a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage. Thus the second marriage performed by the husband is void marriage and he is liable for the offence of bigamy.

Further the most important case which created a lot of hue and cry among the Muslims is *Mohd. Ahmed Khan v. Shah Bano Begum*[11]. In this case the husband appealed against the judgement of the Madhya Pradesh High Court directing him to pay to his divorced wife Rs 179 per month, enhancing the paltry sum of Rs 25 per month originally granted by the Magistrate. The parties had been married for 43 years before the ill and elderly wife had been thrown out of her husband's residence. For about two years the husband paid maintenance to his wife at the rate of Rs. 200 per month. When these payments ceased she petitioned under section 125 of Cr. P.C. The husband immediately dissolved the marriage by pronouncing a triple talaq. He paid Rs 3000 as deferred mahr and further sum to cover arrears of maintenance and maintenance for the iddat period and he sought thereafter to have the petition dismissed on the ground that she had received the amount due to her on divorce as per the Muslim law applicable to the parties. The important feature of the case was that the wife had managed the matrimonial home for more than 40 years and had borne reared five children and was incapable of taking up any career or independently supporting herself. At that later stage of her life, remarriage was an impossibility in that case. The husband a successful Advocate with an approximate income of Rs 5000 per month provided Rs 200 per month to divorced wife, who had shared his life for half a century and mothered his five children and was in desperate need of money to survive.

Thus, the principal question for consideration before this Court was the interpretation of Section 127(3)(b) of Cr.P.C. that where a Muslim woman had been divorced by her husband and paid her mahr, would it indemnify the husband form his obligation under the provisions of Section 125 of Cr.P.C. A five-Judge Bench of this Court reiterated that the Code of Criminal Procedure controls the proceedings in such matters and overrides the personal law of the parties. If there was a conflict between the terms of the Code and the rights and obligations of the individuals, the former would prevail. This Court pointed out that mahr is more closely connected with marriage than with divorce though mahr or a significant portion of it, is usually payable at the time the marriage is dissolved, whether by death or divorce. This fact is relevant in the context of Section 125 of Cr.P.C. even if it is not relevant in the context of Section 123(3)(b) of Cr.P.C. Therefore, this Court held that it is a sum payable on divorce within the meaning of Section 127(3)(b) of Cr.P.C and held that mahr is such a sum which cannot ipso facto absolve the husband's liability under the Act.

There was a big uproar thereafter and Parliament enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986. Perhaps this Act was passed in a hastily manner with the intention of making the decision in Shah Bano case ineffective. But the object of enacting the Act, as stated in the Statement of Objects and Reasons to the Act, is that this Court , in Shah Bano case held that Muslim law limits the husband's liability to provide for maintenance of the divorced wife to the period of iddat, but it does not contemplate or countenance the

[11] AIR 1985 SC 945.

situation envisaged by Section 125 of the Code of Criminal Procedure, 1973 and, therefore, it cannot be said that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance beyond the period of iddat to his divorced wife, who is unable to maintenance herself.

The Constitutional validity of this Act was challenged in the case of *Danial latifi and another v. Union of India*.[12] Here it is necessary to analyze the provisions of the Act to understand the scope of the same. The preamble to the Act sets out that it is an Act to protect the rights of Muslim women who have been divorced by or have obtained divorce from their husbands and to provide for matters connected therewith or incidental thereto. A divorced woman is defined under Section 2(a) of the Act to mean a divorced woman who was married according to Muslim law and has been divorced by, or has obtained divorce from her husband in accordance with Muslim law; "iddat period" is defined under Section 2(b) of the Act to mean, in the case of a divorced woman-

(1) three menstrual courses after the date of divorce, if she is subject to menstruation.
(2) three lunar months after her divorce, if she is not subject to menstruation.
(3) if she is enceinte at the time of her divorce, the period between the divorce and the delivery of her child or the termination of her pregnancy whichever is earlier.

Section 3 and 4 of the Act are the principal sections, which are under attack before us. Section 3 opens up with a non obstante clause overriding all other laws and provides that a divorced woman shall be entitled to-

(a) a reasonable and fair provision and maintenance to be made and paid to her within the period of iddat by her former husband.
(b) where she maintains the children born to her before or after her divorce, a reasonable provisions and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children.
(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law.
(d) all the properties given to her before or at the time of marriage or after the marriage by her relatives, friends, husband and any relative of the husband or his friends.

Section 5 of the Act provides for option to be governed by the provisions of Sections 125 to 128 of Cr.P.C. It lays down that if, on the date of the first hearing of the application under Section 3(2), a divorced woman and her former husband declare by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, they would prefer to be governed by the provisions of Sections 125 to 128 of CrP.C., and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly.

A comparison of these provisions with Section 125 of Cr.P.C will make it clear that requirements provided in Section 125 and the purpose, object and scope thereof being to prevent vagrancy by compelling those who can do so to support those who are unable to support themselves and who have a normal and legitimate claim to support are satisfied. If that is so, the argument of the petitioners that a different scheme being provided under the Act which is equally or more beneficial on the interpretation placed by us from the one provided under the Code of Criminal Procedure deprive them of their rights, loses its

[12] (1995) 3 SCC 635.

significance. The object and scope 125 of Cr.P.C is to prevent vagrancy by compelling those who are under an obligation to support those who are unable to support themselves and that object being fulfilled, we find it difficult to accept the contention urged on behalf of the petitioners. Even under the Act, the parties agreed that the provisions of Section 125 of Cr.P.C. would still be attracted and even otherwise, the Magistrate has been conferred with the power to make appropriate provisions for maintenance and therefore what could be earlier granted by a Magistrate under Section 125 of Cr.P.C. would now be granted under the very Act itself. This being the position, the Act cannot be held to be unconstitutional.

Uniform Civil Code and Prospective Aspect:

From the above discussion it is amply clear that in India, the method of operating a uniform law without having a codified Uniform Civil Code has gradually developed under our very noses over several decades. But most Indians and also most academicians have not noticed this and the Indian state have had its own agenda for not telling people clearly what it was doing. Still, these are not accidental haphazard developments. The Indian state has apparently acted purposefully, albeit silently and surreptitiously, cautiously and gradually harmonising the various Indians personal laws along similar lines without challenging their status as separate personal laws. The Indian experience shows that this development does not require the admittedly dangerous radical step of a newly implemented uniform enactment in family law for all citizens. Rather, India has devised a strategy of carefully planned minor changes over a long span of time, actually an intricate interplay between judicial activism and parliamentary intervention, which has left the various bodies of personal law as separate entities. Post-modern India, therefore, seems to have found a rather exciting solution to the conundrum of legal uniformity which well be a suitable model for many other countries.

As a result of this carefully planned strategy, the various Indian personal laws now look more like each other than ever, but they are still identifiable in terms of “ETHIC” AND “RELIGIOUS” IDENTITY AS Hindu, Muslim, Parsi, and Christian law not only by their titles, but also in substance. The fact that Indian Muslim law was not subjected to codification (as many Hindu nationalists have continued to demand) which pleased and reassured the Muslims, but it did not save Indian Muslim personal law from being affected by the post-modern reconstruction process. Rather incautionally, in fact, Indian Muslims themselves demanded separate personal law after the Shah Bano decision. We know today that they speedily got from Rajiv Gandhi’s government what they wanted, namely a separate Muslim law enactment that appeared to exempt Muslim from the general law regulations of criminal Procedure code, 1973. But the substance of that law, as we should have understood from many High Court cases since at least 1988 was not really different in material respects from the secular provisions of the 1973 Code which Muslims wanted to evade.

Essentially, Indian Muslims fell out of the frying pan into the fire by demanding a new separate law: Under section 3(1)(a) of the 1986 Act, a divorcing Muslim husband now became liable to potentially much higher maintenance payments to his ex-wife that under section 125 of the Criminal Procedure Code with its then upper limit of 500 Rupees, (at the time when the Act of 1986 was passed, because now this upper limit is also removed from Sec.125 of Cr. P. C.) which is barely a few British pounds, or a few more Euros, per month. The full extent of this clever legal engineering was buries rather than openly admitted in the many words of the Indian Supreme Court in the notable Danial Latifi case of 2001. This decision was promulgated after 15 years of sitting on this initially hotly-debated constitutional petition, unit September 2001, thus at a strategic moment, just two weeks after 9/11. The Court held that Shah Bano case had been good law, thus reinforcing the general

social welfare principle that Indian ex-husbands have to maintain their ex-wives until they die or remarry. Further, it was held that it remained perfectly legitimate for Indian law to make reasonable classifications between citizens by promulgating a separate Act for reasonable classifications between citizens by promulgating a separate Act for Muslim only. Thirdly-and this could have caused Muslim riots, but did not do so two weeks after 9/11-it was firmly held that Indian Muslim husbands remained under an obligation to maintain their ex-wives, as laid down in section 3 of the 1986 Act already explained and held by many High Court decisions by that time[13].

Conclusion

Careful reading of these cases, thus, teaches that the Indian Constitution with its wider social welfare agenda would not and could not tolerate principled total exemption from social welfare agenda when matters of Muslim personal laws were at stake. Thus, outwardly, it only appears as though Muslim Personal law in India has remained largely uncodified Shariat law. In reality, it has been just as much subject to the skilful combined efforts of India's Judiciary and Parliaments to harmonise all Indian personal laws without abolishing the personal law system. So the Indian State tiptoed slowly and carefully around the issue of legal reforms, cleverly manipulative like an ancient Indian ruler inspired by the traditional Indian science of governance (arthasatra). Ancient lessons about outwitting one's adversaries, here a potential inner enemy, had to be most skilfully employed. Indian Muslim law could not be allowed to remain outside the Constitutional umbrella, but it also could not be abolished. So it actually helped the post-modern Indian state that Muslims, in an incautious moment, had demanded a separate statutory law for themselves. They promptly got it, but not on their terms, as we now know.

[13]Werner Menski, 'The Uniform Civil Code Debate in Indian Law: New Development And Changing Agenda' (2008) 9(3) *German Law Journal*, at 212-213.