

VOLKSGEIST AND UNIFORM CIVIL CODE

International Journal of Law and
Legal Jurisprudence Studies :
ISSN:2348-8212

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ABSTRACT:

Volkgeist as a concept believes in the origin of law from customs followed by people in different communities. It means the general or common consciousness or the popular spirit of the people. Savigny believed that law is the product of the general consciousness of the people and a manifestation of their spirit. On the other hand, uniform civil law code prescribes for a set of rules that are applicable to everyone irrespective of difference in customs followed by different communities. In the following article, both the concepts are explained and compared with reference to their status in India. I begins with explaining the concept of volkgeist as developed by Savigny and meaning of Uniform Civil Code. It then goes on to discuss the debate between the two and discrepancies existing in personal laws followed in India. It throws light on position of Supreme Court on the same by discussing various case laws.

RESEARCH METHODOLOGY:

Secondary data has been used. The study is descriptive and analytical in nature. Books and other have been primarily helpful in giving this project a firm structure. Websites, dictionaries and articles have also been referred.

INTRODUCTION:

The concept of the Volkgeist, or “the spirit of the Volk,” was developed by German philosopher Johann Gottfried von Herder (1744–1803). The application of Herder’s theory to law was made by German jurist and legal historian Friedrich Karl von Savigny. His central idea was that law is an expression of will of the people. It doesn’t come from deliberate legislation but arises as a gradual development of common consciousness of the nation¹. Volkgeist is a manifestation of the people; it animates the nation. Every Volk is, as an empirical matter, different from every other Volk, each

¹ Doherty Michele, Jurisprudence: The Philosophy of Law, 2nd edi., Old Bairy Press, London, p.g. 233

nationality characterized by its own unique spirit. Every people possesses its own cultural traits shaped by ancestral history and the experience of a specific physical environment, and mentally constructs its social life through language, law, literature, religion, the arts, customs, and folklore inherited from earlier generations². The Volk, in other words, is the family writ large. Laws, too, must be adapted to the spirit of each nation, for rules applied to one nation are not valid for another. The only legitimate governments are those that develop naturally among particular nations and reflect, in their differences from other polities, the cultures of the people they govern. Law is the unique creation of a race, a people, a Volk. Like language or values, it is the result of collective human action and reason over generations, not the result of human design.³

In contrast to this, Uniform civil code is a term referring to the concept of an overarching Civil Law Code. A uniform civil code administers the same set of secular civil laws to govern all people irrespective of their religion, caste and tribe. This supersedes the right of citizens to be governed under different personal laws based on their religion or caste or tribe. Such codes are in place in most modern nations. The common areas covered by a civil code include laws related to acquisition and administration of property, marriage, divorce and adoption.⁴

In this paper we compare and contrast both the concepts in relation to India.

The Concept of *VOLSGEIST*:

Savigny, the pioneer of historical school was born on February 21, 1779 in Frankfurt, Germany. He advocated that the meaning and content of existing bodies of law be analyzed through research into their historical origins and modes of transformation.⁵ He traced the development of law as a evolutionary process much before Charles Darwin gave his theory of evolution. It is for this reason; he is even said as “Darwinian before Darwin” for his contribution to apply the evolutionary principle to the development of legal system.⁶

Volkgeist is a term connoting the productive principle of a spiritual or psychic character operating in different national entities and manifesting itself in various creations like language, folklore, mores, and legal order.⁷ According to Savigny, the nature of any particular system of law, was the reflection of the “spirit of the people who evolved it”. Hence, in simple terms, Volkgeist means the general or common consciousness or the popular spirit of the people. Savigny believed that law is the product of the general consciousness of the people and a manifestation of their spirit. The basis of origin of

² Friedmann W., Legal Theory, 5th edi., Universal Law Publishing Co. Pvt. Ltd., Delhi, 2002, p.g. 213

³ <http://www.britannica.com/EBchecked/topic/525746/Friedrich-Karl-von-Savigny>

⁴ Tina M. Thomas, A Uniform Civil Code in India: the flaws of the personal law system and Goa as a model for a Common Law, International Affairs Journal, Vol 5, pg 7.

⁵ <http://www.britannica.com/EBchecked/topic/525746/Friedrich-Karl-von-Savigny>, , last visited on 22nd August, 2012

⁶ Paranjape N.V., Studies in Jurisprudence and Legal Theory, 4th edition., Central Law Agency, Allahabad, 2006 , 32.

⁷ <http://www.jahsonic.com/Volkgeist.htm>

law is to be found in *Volkgeist* which means peoples' consciousness or will and consists of traditions, habits, practice and beliefs of the people. his theory served as a warning against hasty legislation and introduction of revolutionary abstract ideas on the legal system unless they mustered support of the popular will, *Volkgeist*.

Savigny's central idea was that law is an expression of will of the people. It doesn't come from deliberate legislation but arises as a gradual development of common consciousness of the nation.⁸ To him, legal system was a part of culture of a people. Hence, law wasn't the result of an arbitrary act of legislation but developed as a response to the impersonal powers to be found in the peoples' national spirit.

Laws aren't of universal validity or application. Each community develop its own legal habits, as it has peculiar language, manners and constitution. He insists on the parallel between language and law. Neither is capable of application to other people and countries. The *Volkgeist* manifests itself in the law of the people: it is therefore essential to follow up the evolution of the *Volkgeist* by legal research.⁹

Savigny felt that "a proper code [of law could only] be an organic system based on the true fundamental principles of the law as they had developed over time."¹⁷ Savigny's method stated that law is the product of the *Volkgeist*, embodying the whole history of a nation's culture and reflecting inner convictions that are rooted in the society's common experience.¹⁰

In his words-

"The foundation of the law has its existence, its reality in the common consciousness of the people. We become acquainted with it as it manifests itself in external acts, as appears in practice, manners and customs. Custom is the sign of positive law."- Savigny.¹¹

Hence, Savigny clearly believes custom as the source of law and *Volkgeist* (common consciousness) as the ultimate foundation of any legal system.

In India, almost all personal laws relating to marriage, divorce, maintenance and Inheritance are based on this principle.

UNIFORM CIVIL CODE

Article 44 of the Indian Constitution requires the State to secure for its citizens a Uniform Civil Code throughout the territory of India. The term 'civil code' is used to cover the entire body of laws governing rights relating to property and personal matters such as marriage, divorce, maintenance, adoption and inheritance. The object of this code is to enhance national integration by eliminating

⁸ Doherty Michele, *Jurisprudence: The Philosophy of Law*, 2nd edition, Old Bairy Press, London, p.g. 233.

⁹ Friedmann W., *Legal Theory*, 5th edi., Universal Law Publishing Co. Pvt. Ltd., Delhi, 2002, p.g. 213.

¹⁰ JOHN P. DAWSON, *THE ORACLES OF THE LAW* 196, 198-201, 203, 206-07, 227-28, 231, 240-41, 450-52, 454-60 (1968). Cited in http://www.law.fsu.edu/journals/transnational/vol11_2/knudson.pdf

¹¹ Lamsal Narayan Prasad, *Bidhisasthra*, 7th edi., Pairawi Prakasan, Kathmandu 2063, p.g. 38.

contradictions based on ideologies. It aims to bring all communities on a common platform on matters which are currently governed by diverse personal laws. It also aims to remove the various discrepancies presented by the personal laws.

THE DEBATE

The essence of Savigny's Volksgeist was that a nation's legal system is greatly influenced by the historical culture and traditions of the people and growth of law is to be located in their popular acceptance. Since law should always confirm to the popular consciousness i.e. Volksgeist, custom not only precedes legislation but is also superior to it.¹² It is opposed to the basic concept of Uniform Civil Code. Though the substantive laws of crime, commerce, economy etc are now governed by secular law based on the principles of 'justice, equity and good conscience', personal religious laws continue to operate in the private domain of citizens. Certain personal laws, especially of the Hindus, have been codified (i.e. incorporated into statutes) accompanied by certain amendments in light of the compulsions of modern times, while others continue to apply to the respective religious groups in their long-established, traditional forms. The debate surrounding personal religious law that has been influenced by historical culture and the need for a uniform civil code constitutes a key concern in the concept of secularism and religious freedom in India. Article 25 of the Constitution guarantees to every person the freedom of conscience and the right to profess practice and propagate religion. Article 26 of the Constitution guarantees to every religious denomination the right to manage its own affairs in the matters of religion. The ones against this are of the view that the system of Uniform Civil Code is bound to violate these rights.¹³

The whole debate can be summed up by the judgement given by Justice R.M. Sahai. He said,

"Ours is a secular democratic republic. Freedom of religion is the core of our culture. Even the slightest of deviation shakes the social fiber. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms are not autonomy but oppression. Therefore, a unified code is imperative, both, for protection of the oppressed and for promotion of national unity and solidarity."¹⁴

Discrepancies in Personal Laws:

A brief description of discrepancies present under various personal laws is as follows:

Marriage: The right of all men and women of certain to marry through free consent and with complete freedom in the choice of a spouse is recognized internationally. However, Indian personal laws are found wanting in this aspect. **Muslim** law, for instance, appears to recognize the right of a guardian to contract his minor ward into marriage. It also allows polygamy. Under **Hindu law**

¹² http://findarticles.com/p/articles/mi_gx5229/is_2003/ai_n19150038/

¹³ en.wikipedia.org/wiki/Uniform_civil_code_of_India , last visited on 22nd August, 2012

¹⁴ Sarla Mudgal v. Union of India, AIR 1995 SC 1531

(Hindu Marriage Act, 1955) too, it is not the mere absence of consent but the obtaining of consent by *fraud* or *force* or vitiation of consent by proved unsoundness of mind that renders the marriage void.¹⁵

Divorce: The most remarkable, and most discriminatory, feature of **Islamic** law of divorce is the recognition of the concept of unilateral divorce, wherein the husband can divorce his wife unilaterally, without any cause, without assigning any reason, even in a jest or in a state of intoxication, and without recourse to the court and even in the absence of the wife, by simply pronouncing the formula of repudiation.¹⁶

Maintenance: Under **Hindu law**, a wife has a right to be maintained during her lifetime as per the provisions of the Hindu Adoptions and Maintenance Act, 1956. In what can be called an attempt to reinforce the conservative idea of a Hindu wife, an "unchaste" wife is not entitled to separate residence and maintenance. As far as **Muslim law** is concerned, many interpretations of the shari'a do not grant divorced women a right to maintenance from their former husband's beyond the three-month waiting period following the divorce, called the *iddat* period.¹⁷

There are many discrepancies in laws relating to inheritance, guardianship etc. Therefore a system of Uniform Civil Code is favoured which aims at removing these and moving towards national integration. The UCC is all about National Integration. It does not talk about abolition of any religious identity. The Supreme Court has time and again talked about having a uniform civil code as per Article 44 of the Constitution.

POSITION OF SUPREME COURT:

Mohammad Ahmed Khan v. Shah Bano Begum¹⁸: The Supreme Court first directed the Parliament to frame a UCC in the year 1985 in this case. Here, a penurious Muslim woman claimed for maintenance from her husband under Section 125 of the Code of Criminal Procedure after she was given triple talaq from him. The Supreme Court held that the Muslim woman have a right to get maintenance from her husband under Section 125. The Court also held that Article 44[3] of the Constitution has remained a dead letter. The then Chief Justice of India Y.V. Chandrachud observed that:

"A common civil code will help the cause of national integration by removing disparate loyalties to law which have conflicting ideologies."

¹⁵ www.goforthelaw.com/articles/fromlawstu/article14.htm, , last visited on 21st August, 2012

¹⁶ Ibid.

¹⁷ airwebworld.com/articles/index.php?article=1075, last visited on 22nd August, 2012

¹⁸ AIR 1985 SC 945

Sarla Mudgal v. Union of India¹⁹: In this case, the question was whether a Hindu husband, married under the Hindu law, by embracing Islam, can solemnise second marriage. The Court held that a Hindu marriage solemnized under the Hindu law can only be dissolved on any of the grounds specified under the Hindu Marriage Act, 1955. Conversion to Islam and Marrying again would not, by itself, dissolve the Hindu marriage under the Act. And, thus, a second marriage solemnised after converting to Islam would be an offence under Section 494 of the Indian Penal Code.

John Vallamattom & Anr. V. UOI²⁰: The Supreme Court's latest reminder to the government of its Constitutional obligations to enact a UCC came in July 2003 when a Christian priest knocked the doors of the Court challenging the Constitutional validity of Section 118 of the Indian Succession Act. The priest from Kerala, John Vallamattom filed a writ petition in the year 1997 stating that Section 118 of the said Act was discriminatory against the Christians as it imposes unreasonable restrictions on their donation of property for religious or charitable purpose by will. The Court struck down the Section declaring it to be unconstitutional. Chief Justice Khare stated that: "We would like to state that Article 44 provides that the State shall endeavour to secure for all citizens a uniform civil code throughout the territory of India. It is a matter of great regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies."

Thus, as seen above, the apex court has on several instances directed the government to realise the directive principle enshrined in our Constitution and the urgency to do so can be inferred from the same.

In India, only Goa has adopted the system of Uniform Civil code so far. Commenting that the dream of a UCC in the country finds its realisation in Goa, former Chief Justice of India Y.V. Chandrachud had once expressed hope that it would one day "awaken the rest of bigoted India."²¹

CONCLUSION:

The country's personal laws that are largely based on Volksgeist are not enough to govern the communities now. The laws have various fallacies and need reform. Uniform Civil Code is the best possible solution. Whenever there is a talk of formulating a Uniform Civil Code in the country, some minority fundamentalist organizations come together protesting that it poses a threat to their religious identity. It means an attempt to inculcate the best from all the communities and religions, both minorities as well as majority. The Code shall not endanger the freedom of religious minorities in any way.²²

¹⁹ AIR 1995 SC 153

²⁰ AIR 2003 SC 2902

²¹ Mohammad Ahmed Khan v. Shah Bano Begum, AIR 1985 SC 945

²² www.goforthelaw.com/articles/fromlawstu/article14.htm, last visited on 21st August, 2012

UCC is not opposed to secularism or will not violate Article 25 and 26. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilised society. Marriage, succession and like matters are of secular nature and, therefore, law can regulate them. No religion permits deliberate distortion. The UCC will not and shall not result in interference of one's religious beliefs relating, mainly to maintenance, succession and inheritance. This means that under the UCC a Hindu will not be compelled to perform a nikah or a Muslim be forced to carry out saptapadi. But in matters of inheritance, right to property, maintenance and succession, there will be a common law.

Justice Khare, in a recent case²³, said: "It is not a matter of doubt that marriage, succession and the like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution."

Between the Supreme Court's mixed response and the legislature's wariness, the implementation of a national common Civil Code seems to be a distant dream. It is only enlightened public opinion that will help fulfill it. Communal divides, vote-bank politics, staunch fundamentalism are currently barriers to its realization but with time and tolerance they can be overcome. What must be perceived as a matter of defining an individual's rights deteriorates instead, into a "majority versus minority" issue. The welfare of the community as a whole must be considered instead of a particular class or sect. No doubt, the realization of a common Civil Code is a tough job, given the vast ideological diversity. But a uniform civil law is necessary in order to be truly secular. It is our collective duty as a modern society to rise above cultural and religious differences and give effect to this constitutional mandate which is 60 years overdue.

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²³ John Vallamattom v. Union of India AIR 2003 SC 2902