LAW AND SOCIAL COHESION: A CHRONOLOGICAL OVERVIEW FROM INDIA PERSPECTIVE

Sheshadri Chatterjee[*]

ABSTRACT

Conception of social cohesion is a long-debated issue. Arrival of clear conception of social cohesion has been frustrated due to existence of multiple definitions sociologically and psychologically. However, society consists of group of people manifesting the thinking of the people as a reflection of the society. To ensure the smooth running of a society with its members tightened with fellow feelings some restrictions (what are not to be done) and allowances (what are to be done) are to be maintained for which legal framework is of dire necessity. Whatever might be the clear meaning of social cohesion, it is ascribed with social bindings and social needs. This has given rise to need of some formulation of legal frameworks for observance of Vidhis and Nishedhas. In Indian perspective, from early days society of Hindus framed Hindu Laws and Muslims when came to rule over India framed Muslim Laws based on Islam and on Societal customs. Thus, Personal Laws came. Even the British rulers had to honor the Personal Laws for maintenance of social cohesion. After independence, the needs of the society gave rise to framing of different laws congenial for the society and subsequent amendments made owing to changed societal demands. This article deals with how, in India, till the present scenario, the ingredients of social cohesion motivated the law-making authorities for framing laws conducive to the societal demands.

[*] **National Law University Delhi**

INTRODUCTION

Custom of a society originates from the strength of bonding among members of the society which is nothing but cohesion. Social cohesion can be construed to be the root of establishment of customs in the society. Society always possesses belief and confidence on the system of religion which it is commonly said as Dharma. A society would relish the color of opulence and progress if there exists smooth blending of customs and Dharma.

* LLM (Pro) First Semester Student, National Law University Delhi, Dwarka, New Delhi, India. Email: sheshadri.academic@gmail.com

If the custom and Dharmaof members of a society have no conflict, social cohesion is tightened. However, it must be accepted that system of customs and maintenance of rituals of Dharmamay not always contribute progressive advancement of a society. But that system of Dharmaand system of customs if found to have helped progress of a society, it would help forming a progressive system in the society which is required to be followed by the members and for compelling the members of that society to follow those, some Vidhis (which are to be followed) and Nishedhas (what are not to be followed) are structured in the form of some regulations which are nothing but laws. Hence, law and social cohesion are safely construed to be complementary to each other. The sense of social cohesion is not static, but, it goes on changing in terms of change of social system as well as in terms of change of needs of the society.[1]In this Article, we will take a holistic attempt to conceptualize how from the olden days in India, social cohesion did help to shape Hindu Laws, Muslim Laws in Hindu period, and in subsequent Muslim period respectively and how the British in their tenure of their rule showed their reactions to honor or to dishonor these personal laws of Hindus and of Muslims relating to system of the society ascribed by social cohesion. From studies, it transpires that Dharmameans nothing but to be honest to perform duties.[2]From conception of religion which has contribution to tighten the bonding of the society, the sense of general law originates, and custom of the society yields personal laws with variation of the general laws in consonance with social cohesion. Both Hindus[3]and the Muslims[4] adhered to this system. During British rule (1600-1947) also honoring social cohesion and for avoiding social dislocations, presumably, the British rulers were found not so arrogant to impose their English Laws though they took futile attempt to do so by establishing Mayor's Courts in

different parts of India.[5,6]These all have been discussed in this article in an encapsulated form. We have also tried to throw light even after the social scenario and framing of laws during post-independence era and during modern time.

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[1]S. Budge, 'Group cohesiveness revisited' (1981), 5 Group, 10.

[2]Medhatithi was a learned commentator of Manusmriti in ninth century A.D. He was a great master

of Pruva Mimansa and Uttara Mimansa (Vedanta) and harmoniously interpreted the text.

[3]V. Kumar, 'India as Alberuni saw it' <https://www.infinityfoundation.com/ mandala/h _es/h_es_kumar- v_alber_frameset.htm>

[4]Muslim Rule in India <http://www.islamcan.com/islamic-history/muslim-rule-in-india.shtml>

[5]British colonial periods - Colonial Rule (1858 – August 1918) http://www. gatewayforindia. com/history/ british_history3.htm

[6]British Rule in India (1600-1947) <http://www.flowofhistory.com/ units/eme/18/FC123>

Cohesion of the societies found compelling law-making authorities in India to frame laws to tighten the social cohesion of the Indian society for progress and betterment. In this context, it has been rightly stated by Oliver Wendel Holme that, 'The law embodies the story of nations development through centuries and to know what it is, one must know what it has been, and what it tends to become'.[7]

INTERPRETATIONS OF COHESIVENESS

Social cohesion is such a subject as it is associated with long term interests of study by researchers, especially for those who are used to have nurtured sociology and social psychology. Now, the word 'cohesion' simply means connection or collaboration in abroad sense. However, many scholars have defined cohesiveness in many ways depending on the contexts. Such types of existence of different contextual definitions of cohesiveness has stood on the way to clearly conceptualize the sense of cohesion. It is associated with the sense of bonding. That society is construed to be more rigid and united which possesses strong sense of social cohesion. Social cohesion is instrumental to establish homogeneity in the society. By conceptualizing social cohesion, the investigators have developed methods to study social cohesion basing on their theoretical assumptions covering their own discipline. In sociological perspective, the structure

of a society provides the framework which helps to study and to synthesize behavior of a social group and specialties of organizations.[8]In judging social cohesion in the perspective of social psychology, cohesiveness is construed to be one of the attributes operating principally within small group.[9] It has been opined[10] that 'It could be argued that the terms cohesion and group are tautological; if a group exists, it must be cohesive to some degree. Thus, it is probably no surprise that even in collectives where minimal group characteristics are present, manifestations of cohesion are evident'. Discussions in reaching consensus for a universally accepted definition of social cohesion have been made, but to no effect. It is seemed that the cohesiveness can be perhaps best conceptualized by identifying and realizing the various consequences when it is absent.

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[7]See, A.N. Saha, Marriage and Divorce, (1996), 1, Eastern Law House, Calcutta.

[8]1. P. E. Mudrack, 'Defining group cohesiveness: A legacy of confusion' (1989), 20(1) Small Group Research, 37 and N. E. Friedkin, 'Social cohesion' (2004), 30, Annual Review of Sociology, 409.

[9]M. A. Hogg, The Social Psychology of Group Cohesiveness: From Attraction to Social Identity, (1992), (New York: New York University Press).

[10]A. V. Carron & K. S. Spink, 'The group size-cohesion relationship in minimal groups' (1995), 26(1), Small Group Research. 86.

There is no universal prescription available to have transparent idea as to how we can create cohesiveness in a society, how it is possible to nourish it and what is the idea by which it can be sustained. Social cohesiveness is an abstract idea and it can be felt appreciably by a member of a group when, for any reason or other, he alienates himself from that group.[11]Cohesiveness can be felt and realized but cannot be stated by the help of combinations of some words. Feelings of cohesiveness can be perceived following actions adopted in negative way as has been discussed above. You can feel the sense of cohesion of a society when you find it to be absent or you can feel the sense of cohesion of a society when you migrate from that society.

HINDU PERIOD: LAW AND SOCIAL COHESION

Society consists of some groups and each group contains some members. Society and groups were formed from the sense of Dharma, that is, religion. We have heard the names of Hindu

Society, Muslim Society, Christian Society and so on. The word, Dharma, has been originated from the root known as Dhru. Again, in English, 'Dhru' is interpreted as, 'to hold'.[12]For keeping a society intact through social cohesion, no doubt, Dharma plays an important role. The sense of Dharma is associated with the sense of good or bad, sense of right or wrong, sense of justice or injustice. However, Dharma covers the sense of 'Vidhis' (what are to be done) and 'Nishedhas' (what are not to be done). These 'Vidhis' and 'Nishedhas' carry the sense which has given rise to that what can be conceptualized as social cohesion.[13,14]Many scholars opined that the principal ingredients of social cohesionare Dharma and law,[15] in earlier stages though the Hindu sages used to not have differentiated law and Dharma. In the later stage, this idea has been modified. The scholars used to have opined in those days that sense of Dharma is manifested from the sense of religiousness and from religious issues along with moral observance.[16]Initially, there is no sense of 'state' in earlier days. Then the state was in the form of Saptangas

[11]M. Galanter, (1981), Cohesiveness in the "Large Group": A psychobiological perspective, in H. Kellerman (Ed.) Group Cohesion: Theoritical and Clinical Perspectves, 413-427, New York: Grune & Stratton.

[12]M.S. Pandit, Outlines of Ancient Hindu Jurisprudence, (1989), 5, N.M. Tripathi Private Limited, Bombay.

[13]Duhaime, 'Social Cohesion and Living Conditions in the Canadian Arctic: from Theory to Measurement.', (2004),66, Social Indicators Research.

[14]S. Dick, 'What Do We Know About Social Cohesion: The Research Perspective of the Federal Government's Social Cohesion Research Network.' (2003), 28, The Canadian Journal of Sociology,1.

[15]See, G. H. Singh, The Hindu Code, (1973) 1, Law Publishers. 5.

[16]Yajnavalkya Smriti is arranged in three Chapters: Achara, Vyavahara and Prayaschitta. See, Kuppuswami, Justice Alladi, Mayne's Treatise on Hindu Law & Usage, (1996), 6, Bharat Law House, New Delhi.

(seven limbs) keeping King at the Head with other six limbs like, Council of Ministers, Treasury, Capital, Realm, Group of Army and others. The duty of the King was to administer sense of justice, he was never considered as source of law.[17]Dharmashastra was construed to be source of

law focusing full credence on system of custom which is one of the ingredients of social cohesion. This idea came from Vedic Jurisprudence.[18] However, in those days Hindus following Dharmashastra used to have given more stress on the sense of social cohesion which was considered with the sense of custom. Dharmashastra implies, 'Under Hindu system and Law, clear proof of usage will overweigh the written text of law'.[19]Hence on those days, the so-called 'Hindu Law' comes out from the mixed sense of Dharma and custom. Dharma gives principal laws whereas custom gives variation according to the norms of social cohesion which is commonly called 'Personal Law'.[20]

MUSLIM PERIOD: LAW AND COHESION

In 711 A.D., Arab Muslimsunder the leadership of Bin Kashim first came to invade India in Sindh area. Thereafter, in 1000 A.D. Sultan Mahmood also came to invade India and left after massive looting. In this way Muslim regime gradually started infiltrating and eventually vanquishing the then Hindu king in 1206 A.D., Kutubuddin Ibock, for the first time, established Muslim regime in India. Mughal dynasty started. However, it is important to note that the intension of Muslims was not only to rule the India and to pile up their wealth, but their intention was also to establish their Muslim religion in India. However, from the initial stage of Muslim Sultanate, their outlook was quite different from Hindus.[21] Muslim was believer of the doctrine that religion is law and law is religion. Extracted from this sense, Muslim laws were framed. Muslim rulers believed in Shariah Law.[22]The Muslim rulers felt that it would not be possible by them to impose Muslim laws originating from belief of Islam (Koran) in Hindu society since in that case there is apprehension of occurrence of dislocation and disturbance of social cohesion in the Hindu society which might be inimical for the Muslim rulers to rule India peacefully.

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[17]See, Kuppuswami, Justice Alladi, Mayne's Treatise on Hindu Law & Usage, (1996), Bharat Law House, New Delhi 7, at 10.

[18]See, A. E., Bhaskar, Vedic Jurisprudence, (1998), Hind Law Publications, Pune, note 9 at 18.

[19]Collector of Madura v. Mootoo Ramalinga, (1868) 12 MLA 397.

[20]S. Jamil, A Critical Appraisal of Hindu Law, at https://www.indiafoundation.in/a-critical-appraisal-of-hindu-law/

[21]See, R.B. Tripathi, Some Aspects of Muslim Administration, (1972), Central Book Depot, Allahabad.

[22]See, A.B.M. Habibullah, The Foundation of Muslim Rule in India', (1971), Central Book Depot, Allahabad, 269.

Thus, in those day, the Muslim rulers used to have followed Muslim laws to be applied to the Muslim society since they knew that Muslims are blindly believers of Islam. In this way, social cohesion appreciably influenced the then society in the Muslim period which is evident from their sense of non-interference policy.

BRITISH RULE IN INDIA: LAW AND SOCIAL COHESION

The British rulers were very much pragmatic and in matters relating with administration of justice,[23]the British rulers used to have respected, at least in the initial stage of their ruling in India, social cohesion. Consequently, they did not interfere in Hindu laws and in Muslim laws originating from their respective sense of religion and custom. The British ruler knew that for both Hindus and Muslims, their respective customs were sources of their respective personal laws. However, the British rulers used to have accepted those personal laws originating from the valid customs of Hindu and Muslim societies.[24,25]The British rulers being very much practical in administering justice used have considered laws and customs in the light of relevant provisions of Government of India Act, 1935, especially in matters related with inheritance and succession.[26]

THE BRITISH RULE IN INDIA AND MAINTAINANCE OF NEUTRALITY

The British rulers did not reject the personal laws of Hindus and of Muslims since they had the origin from Hindu customs and Muslim customs respectively which, the British ruler knew, are the ingredients of Hindu society as well as of Muslim society.[27] The British rulers felt that it would not be prudent for them to disturb the social fabrics of Hindus and Muslims. [28,29]

[23]M.H. Morley, Administration of Justice in British India, (1858), 193.

[24]S. Akhtar and A.Naseem, Personal Laws and Uniform Civil Code, (1998),3.

[25]T. Mahmood, Muslim Personal Law: Role of the State in the Subcontinent, (1977),1.

[26]In cases with inhabitants of Calcutta, Madras and Bombay in matters relating with inheritance and intestate succession, the High Courts of Calcutta, Madras and Bombay held similar views. When in adjudicating matters concerned, the Courts held that adjudication will be made with the common personal law if both the contesting parties follow the same personal law. But, if the contesting parties have different personal laws, the Courts held that such personal law is to be followed which is followed by the defendant.

[27]See, M.P., Jain, Outlines of Indian Legal History, (2005) 580 Wadhwa and Company, Nagpur.

[28]A. Abrol, 'Codification of the Personal Laws during British Rule in India - An Appreciable Attempt', (1991), 1, J of Supreme Court of India, 6.

[29]See, D.K. Srivastava, 'Personal Law and Religious Freedom', (1976) 18, J of Indian Law Institute, 556.

Thus, the British rulers were found to be believers of maintenance of neutrality so far as acceptance of Hindu laws and Muslim laws by them are concerned during their regime in India.[30]However, things began to change as the British rulers enhanced their rigidity at the root during their rule in India. They started thinking to impose their English Laws to the natives[31]with the idea that it will bring betterment to the Hindus and Muslims to bring discipline in their legal jurisprudence. With this conception, they established Mayor's Courts at Bombay, Madras and in Fort William in Kolkata.[32] But, application of English laws to the natives through Mayor's Courts brought in disturbances in the social fabrics of Hindu and Muslim societies posing a great disturbance to the British rulers to rule India peacefully because of which they ordered that Mayor's Courts would only adjudicate those disputes concerning to Europeans residing in India and if the natives agree to be tried of their disputes through Mayor's Courts, only then those will be settled. In this way the British rulers throughout their rule in India maintained their neutrality.

EARLY POST-INDEPEND PERIOD: LAW AND SOCIAL COHESION

India became independent in the year 1947. At that time, the society needed to regulate marriage and divorce of Hindus[33]for protection to women. In consonance of this societal needs, the then Minister of Law, H.V. Pataskar stated, 'Without economic independence and for property right for women the provision of divorce was not only not going to be of any use to them but would

operate against their interest'.[34]As a result, the Hindu Marriage Act, 1955[35]and Hindu Succession Act, 1956 were appropriately framed. All these modifications and framing of laws improved intestate succession of Hindus.[36]In matters concerning to personal laws, the Hindu Adoption and Maintenance Act, 1956 was enacted which, without covering interests of Adibasis, covered interests of other sections of the societies. However, ironically, despite of many attempts to codify and reconcile enactments during this period, the independent India failed to establish 'Uniform Civil Code' as

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[30] M. A. Tiar, 'The Evolution of Personal Law in India and Sudan', (1984), 26 J of Indian Law Institute, 445, at 446.

[31]B.N. Pande, The Introduction of English Law into India, (1967), 28, Asia Publishing House, Bombay, India.

[32]T.K. Banerjee, Herbert Cowell's History and Constitution of the Courts and Legislative Authorities in India, (2008), 12, R. Cambray & Co. Private Ltd., Kolkata.

[33]See, Derrett, The Codification of Personal Law in India: Hindu Law, (1957), 189, Indian Y.B of Int. Affairs.

[34]See, Rajagopaul, G.R., 'The Story of the Hindu Code', (1975), 17, J of Indian Law Institute, 551.

[35]See, The Hindu Marriage Act, 1955, at <https://highcourtchd.gov.in/hclscc/subpages /pdf_files/ 4.pdf>

[36]See, P. Mukherjee and L. R. Saraswati, Levels and Patterns of Social Cohesion and Its Relationship with Development in India: A Woman's Perspective Approach at <https:// www.oecd.org /dev/pgd/46839502.pdf>

envisaged under Article 44 of the Constitution of India though in the case of Sarala Mudgal, Justice Kuldip Singh requested the Government of India to think afresh in terms of that Article 44.[37,38] It is important to note that in terms of Article 13(1) of the Constitution of India, the personal laws in force before commencement of the Constitution of India were not declared void in terms of decision of Supreme Court of India in terms of case of Narasa Appa Mali.[39]Thus, cohesion of the society has an appreciable contribution for structuring enactments even in this early post-independence era of India.

MODERN INDIA: LAW AND SOCIAL COHESION

The modern Indian societies are mainly based on Information and Communication Technology. All the transactions commercial or otherwise are taking place in online platform. Even, the latest technological innovation like Internet of Things (IoT) is knocking at our doors. In this changed internet environment, ceaseless flow of data of multipurpose nature are being stored, exchanged in this platform. But, this huge flow of data is inevitable bringing chance of data breach, jeopardizing the privacy and as such society needs to provide appropriate measures to address the situation, so far, the right to privacy was not covered in the Constitution of India in the explicit form. Cases of privacy infringements were settled by different judicial decisions by Constitutional benches. However, through a latest judgment of Supreme Court of India[40] passed on 24 August 2017 by the full bench of Supreme Court of India, the right to privacy been declared as a fundamental rightin the light of Article 21 of the Constitution of India as well as concerning to other Articles of part III of the Constitution of India with some restrictions (it has not been declared as absolute right). For protection of privacy of data, the Information Technology Act, 2000 has been introduced being empower by Article 248 of the Constitution of India read with the decision of Supreme Court of India.[41]

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[37]M.S Ratnaparkhi, Uniform Civil Code, An Ignored Constitutional Imperative, 54(1st ed.) Atlantic Publishers and Distributers.

[38]S. Mudgal, President, Kalyani and others v. Union of India and others [1995] AIR SC 1532, Para 37 and 38, at 1539.

[39]State of Bombay v. Narasuappamali, [1952] AIR Bombay 84.

[40]K.S. Puttaswamy and others v Union of India and others [2012] SC WP (Civil) No. 494.

[41]The Union of India v H.S. Dhillon [1972] AIR SC 1061.

Again, government of India has already brought in Privacy bill, 2011.[42]The demand and the need of the modern Indian society for data privacy and for punishing the delinquents engaged in data thefts, the Information Technology Act, 2000 has duly been amended during 2008. Social cohesion in Muslim community is still following system of 'tin talak' though it has no legal sanction. Thus, still in modern times it is seen that in some issues, system of society confronts social cohesion with having direct controversy with force of law. Another section 498A in Indian

Panel Code has been inserted to address oppressions on married women. Society has experienced, how, presumably being pressurized by the wives, the sons are not looking after their old ailing parents. To address this, the society forced the law-making authorities to enact law like Protection of Women from DomesticViolence Act, 2005. To make the children literate, being the need of the society, Right of Children to free and Compulsory Education Act, 2009 has been introduced.[43] In this way, we have experienced that with the change of social system relating to social cohesion many laws have been repealed, many laws have been amended to the desired extent. It is thus clear that to ensure social cohesion, some Nishedhas (restrictions) are required to be imposed and those may only be achieved by regulating the system through framing some appropriate enactments.

CONCLUSION

As already discussed that social cohesion gives food for reflection to the law- making authorities to address the latches through framing of enactments or by amending existing laws. Law and social cohesion appear to be complementary to each other in this dynamic society. The contour of entire legal system is found unable to come out beyond the periphery of ingredients tightening the cohesion of the society. It is the conclusion originating from the study of sociology.[44] Hindus, Muslims, Parsis, Christians, Buddhists, Sikhs and so on have their own religious scriptures and from these, their personal laws have been framed with variation in consonance with customs of the societies.

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[42]See, The Privacy Bill 2011 in India: A Bill to provide for the right to privacy to citizens of India and regulate the collection, maintenance, use, and dissemination of their personal information and provide for penalization for violation of such right and for matters connected therewith or incidental / hereto.

[43]See, Right of Children to Free and Compulsory Education Act, 2009. <http://lawmin.nic.in/ld/P-CT/2009/The%20Right%20of%20Children%20to%20Free%20and%20Compulsory%20Education%20Act,%202009.pdf>

[44]D. Stanley, 'What Do We Know About Social Cohesion: The Research Perspective of the Federal Government's Social Cohesion Research Network.' (2003), 28(1), The Canadian Journal of Sociology.

But, it is a fact that Adivasis have no religious scriptures of their own. Their entire laws are based on their customs and usage. Such being the scenarios, it is necessary to see that the social cohesion of the Adibasis is not weakened because in that case their customs would suffer a lot and as a result, the personal laws of them will be jeopardized causing an unfortunate result in their society, especially in terms of Article 13 read with Entry 5 of list III of Seventh Schedule of the Constitution of India. The drawbacks of section 498A of I.P.C. wherein the unscrupulous wives are taking advantage of this law to blackmail their husbands are required to be plugged up and for this appropriate authority is required to be cautious to stop the misuse of this section. The law-making authorities of India are required to be more vigilant regarding legitimate needs and demands of the society so that conflict between societal needs and recital of laws and their enforcements can be mitigated to establish appropriate rule of law in the country. Last but not the least, an example is given here how demand of the society compels the authority to amend laws. In Right to Education Act, 2009, children up to 14 years will not have to face any examination (up to class VIII), that is, system of pass or fail. It has been felt by the society that it is deteriorating the standard of education. Consequently, it is learnt that during winter season of Parliament, 2017, the law is being amended to the desired extent bringing the system of pass and fail. Another instance as to how societal demands compelled the authority to frame stringent laws deserves special mention. After sad Nirvaya incidents[45] during 2012, the Government of India has been compelled to amend Sections 375 and 376 of Indian Penal Code and for extending proper protection to the girls below 18 years against sexual molestations brought in POCSO Act[46] where the burden of proof lies on the accused to the effect that he/they is/are innocent, and the punishment was extended up to life imprisonment. Same incidence occurred in G.D. Birla Center for Education in Kolkata on 30 November 2017 when a girl of 4 years old has been sexually molestedreportedly by two teachers of that school and the authority has got weapon to castigate the accused stringently with the help of POCSO Act. Thus, issues of society have helped framing appropriate enactments as is observed even from olden days till the modern time to keep social cohesion.

[45.]See, The Protection of Children from Sexual Offences Act, 2012. <http://indiacode.nic.in/amendmentacts2012/The%20Protection%20of%20Children%20From%20Sexual%20Offences%20Act.pdf>

[46]Tina P. Lapsia.(2015). "Impact of the "Nirbhaya" Rape Case: Isolated Phenomenon or Social Change?"University of Connecticut DigitalCommons@UConn. <http://opencommons.uconn.edu/cgi/viewcontent.cgi?article=1458&context=srhonors_theses>