THE STORY OF A CIVIL CODE

MANY LAWYERS in India may be amazed if it is suggested that it is not only practicable but even advisable that the Union Territories of Pondicherry and Goa, Diu and Daman should have legal systems different from the one which obtains in the rest of India. Unification of laws is desirable; but should unification be achieved by depriving a minority of states of their own system of laws ? When a uniform civil code is contemplated, what has to be sought to be achieved is unification through harmonisation, leaving intact as much of the personal laws as possible, without, however, creating conflicts, but at the same time enacting provisions of law which the consensus of the general community regards as fair and equitable. For instance, in a uniform civil code in India, there can be a stipulation prohibiting unilateral repudiation of marriage by any of the spouses.

The object of this brief note is to point out that it is not in any way preposterous to suggest that a region in a country may have a system of laws different from that prevalent in other parts of the country. It is familiar knowledge that the Scots follow, in the main, the civil law system, in spite of their union with England dating back to 1701. A more interesting example is that of Louisiana, one of the fifty states in the United States of America, for in this territory an attempt was made to introduce the common law system, but as the people there did not take kindly to the common law, the attempt totally failed.

The colony of Louisiana in North America was founded by France on the eve of the 17th century. From its very beginning the colony was governed by royal charters which introduced the laws and customs of France as the law of the colony. Some time before the signing of the Treaty of Paris in 1763, the French ceded Louisiana to Spain. In spite of Louis XV's desire to continue the French law in force in the colony even after the cession, the Spaniards introduced their own law. Until 1801 Louisiana remained a Spanish colony. Though it was restored to France that year, the French took prossession of it only on November 30, 1803. This was with the sole purpose of transferring it to the United States, as the territory had already been sold to the United States by Napoleon by a treaty of April 31, 1803.

After the transfer to the United States, Claiborne, the first Governor of the territory, attempted to introduce into Louisiana the system of law which was in operation in the other parts of the United States. This attempt to introduce the common law was strongly resisted by the people of Louisiana. The story of the resistance is told by John T. Hood, Jr. :

> Many inhabitants of Louisiana, already displeased over the arbitrary powers conferred by Congress on the President and his appointees

> in the territory, became alarmed when they learned that the newly appointed American officials intended to institute the common law system. Their experience with Spanish judicial proceedings had left them with little or no respect for the courts, and they were afraid of the common law system, where the decisions of the courts became law, and where they would be required to search through English jurisprudence to determine what laws applied. They preferred to continue to be governed by the laws of Spain, with which they were familiar, where all enforceable laws were required to have some statutory origin, and where the decisions of the courts did not assume the status of laws, but were considered merely as judicial interpretations of statutory provisions.[1]

The revolt of the colonists of Louisiana against the introduction of the common laws had its desired result. The United States Congress divided Louisiana into two territories and the lower portion was called the Territory of Orleans. The first legislature for the territory which was established by an Act of Congress on March 2, 1805 set about solving the problem of applicable law. In 1806, the legislature passed an Act which provided that the Territory of Orleans should be governed by Roman and Spanish laws which were in force at the time of the transfer of Louisiana to the United States. Claiborne vetoed this Act whereupon the legislature adopted a resolution for adjournment assigning as a reason that the best Acts of the legislature had been vetoed by the Governor. A number of members of the legislature published a manifesto[2] calling for the dissolution of the General Assembly on account of the Governor's veto. A few days later, on June 7, 1806, the assembly adopted a resolution appointing James Brown and Louis Moreau-Lislet to prepare a civil code for the Territory of Orleans. Their compilation, modelled after the Code Napoleon, or the draft (*projet*) of that code, with Roman and Spanish law elements thrown in, was adopted by

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1. John I. Hood, Jr., The History and Development of the Louisiana Civil Code, 33 *Tulane Law Review* 7 at 9 (1958-59).

2. A few of the statements in the manifesto are of abiding interest. One of them reads :

> We certainly do not attempt to draw a parallel between the civil law and the common law ; but, in short, the wisdom of the civil law is recognised by all Europe ; and this law is the one which ninteen-twentieths of the population of Louisiana know and are accustomed to from childhood, of which law they would not see themselves deprived without falling into despair....

The manifesto also stated that the debate in the Chamber of Representatives and the veto of the Governor would seem to raise "the presumption that there is a secret intention of throwing us, despite ourselves, into the frightful chaos of the common law"; quoted in Hood, *id.* at 11-12.

the General Assembly on March 31, 1808, as 'Digest of the Civil Laws'.[3] This digest is generally referred to as the Civil Code of 1808. This code continued to be in force in Louisiana when it became a state in 1812. In 1817, however, the Supreme Court of Louisiana handed down a decision[4] which held that the civil code, which was a digest of civil laws, had not excluded the application of laws not included or mentioned in it. The effect of the decision was to bring about a revival of the Spanish law which was considered to have been in force in the colony. The General Assembly in 1819 instructed Moreau-Lislet and Henry Carlston to translate those parts of *Las Siete Partides*, the Spanish Civil Code of 1348, as were held to have been in operation in the state. When the publication of the translation did not solve the problem, the assembly appointed a commission of three members to revise the civil code. The commission's draft was adopted in 1825. Speaking of this civil code, Sir Henry Maine said :

> Of all the republication of Roman law, (it) is the one which appears the clearest, the fullest, the most philosophical and the best adopted to the exigencies of modern society.[5]

Although the Code of 1825 was revised in 1870, after the civil war, no substantial changes were made, except that articles relating to slavery were repealed and a few Acts passed after 1825 were incorporated.[6]

A very pertinent comment made by Sherman about the Louisiana code is relevant to the situation in India. He says :

> No codification of American law can be successfully accomplished which ignores the Louisiana Code—perhaps the best of all the modern codes throughout the world.[7]

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3. Claiborne did not veto the adoption of this code, though he stated that his object still was "to assimilate our system of Jurisprudence as much as possible to that of the several States of the Union" (his letter of October 7, 1808 to the Secretary of State). Four days later he wrote to Judge J. White ,

> For myself I am free to declare the pleasure it would give me to see the Laws of Orleans assimilated to those of the States generally, not only from a conviction, that such Laws are for the most part wise and just, but the opinion I entertain, that in a Country, where a unity of Government and Interests exists, it is highly desirable to introduce throut the same Laws and Customs.

4 Claiborne Papers 225, quoted in Hood, *id.* at 13.

4. *Cottin* v. *Cottin*, 5 Mart. (O.S). 93 (1817).

5. *Village Communities in the East and West*, quoted in L. Oppenheim, *The Civil Law* 12 (1960, mimeographed).

6. L. Oppenheim, *id.* at 14.

7. 1 *Roman Law in the Modern World*, quoted in L. Oppenheim, *id.* at 15.

In the Indian context, if we should be fair to all the people sought to be governed by a uniform civil code, we may have to resuscitate many of the provisions of the French and the Portuguese civil code which were in operation in two union territories in the country. According to Panka Prakshaalananyaaya, it cannot be considered particularly salutary for us to repeal a law and then re-enact it, except that such a procedure will keep busy a few law officers, including some draftsmen, though perhaps not our parliamentarians to any considerable extent. If the latter had cared to apply their mind to the proposed extension of various laws to the Union Territories of Pondicherry and Goa, Diu and Daman, one could unhesitatingly maintain that many of the laws would not have been so absent-mindedly extended to them.

It may be too late for Pondicherrians to resist the introduction of the common law in their territory. But it is never too late to amend. The laws extended to the union territory, as well as those enacted there, may be amended to bring them in harmony with the principles and procedure of the civil law. These amendments of the extended enactments may be made not only in their application to the territory of Pondicherry, but also in their application to the whole territory of India, if, in a comparative evaluation of the laws, the amended laws are found fairer, more equitable, or, in particular, more in tune with the genius of the people who are to be governed by them. It would appear the civil law system is more attuned to the genius of the Indian people than the common law of England which, as the East India Company observed nearly three centuries ago, "is peculiar to this Kingdom and not adopted in any kind to the Government of India and the nature of these people, as we...have found by long and useful experience"[8]

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8. Letter Books, 8 *Factory Records* 265. See J. Minattur, Legal Systems in British Indian Settlements, 15 *J.I.L.I.* 582 (1973).

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