

DE JURE NEXUS LAW JOURNAL

Author:

Shirsho Ghosh

Amity Law School, Amity University, Kolkata

3rd Year, BA; LL.B. (Hons.)

CODIFICATION: A WAY OF SYSTEMATISING THE LAW

ABSTRACT

Codification or the systematic reduction of legal matter or principles into codes of legislation has been into practice by legal institutions since time immemorial. In modern times the need for codification can be specifically felt as effective and reader-friendly codes of law need to be implemented to support the already lagging legal system in India. This paper focuses on the evolution of the practice of codification, its merits and demerits and seeks to answer the question, whether codification is at all necessary anymore or not.

Keywords-

Codification, body of law, early civilization, Justinian's code, modern codes, creative codes, consolidated codes, Law Commission.

INTRODUCTION

Codification refers to the systematic process and reduction of the whole body of law into a code in the form of enacted law.¹The full body of law might seem to be a difficult piece of legal literature beyond the comprehension of a layman. That is why codification of law is a necessary part of legislation as it is through codification that the common man gains awareness of law. Legislation is just the making of laws but it is codification that provides the common man the knowledge of these laws. According to the *Oxford Dictionary*, “Code is a systematic collection of statutes, body of laws, so arranged as to avoid inconsistency and overlapping.”

“*Ignorantia juris non excusat*” is a common legal maxim which means that the ignorance of law is no excuse at all. For the knowledge of law to reach one and all, codification is of utmost importance. Thus, it implies a systematic collection, compilation, arrangement and reduction of the law to its coherent form to make it a more clear and precise statement of general principles and rules.

So, the term codification denotes the creation of codes which are compilations of written statutes, rules, and regulations that inform the public of acceptable and unacceptable behavior.² It is the collection and systematic arrangement, usually by subject, of the laws of a state or country, or the statutory provisions, rules and regulations that govern a specific area or subject of law or practice.

When a part of law is codified it contains the whole source from which concerns that particular aspect of law. Thus, when a state codifies its criminal laws, the statutes contained within the new code supersede the laws that had been in place prior to such codification. This implies that codification replaces all distortions in previous laws and brings about a uniform set of laws and

¹ V.D. Mahajan, *Jurisprudence & Legal Theory*, p.168, 1987 (Reprinted, 2017, Eastern Book Company, Lucknow)

² *Codification*, The Free Dictionary, <https://legal-dictionary.thefreedictionary.com/codification> last seen on 20.10.2018

hence the previous laws are no longer specifically enforceable as they are covered under the new codes. This is a general principle of codification.

However there are exceptions to this as the Michigan Supreme Court in 1994 ruled that Dr. Jack Kevorkian could be prosecuted under Michigan common law for assisting patient with suicide, despite the absence of a statute that prohibits such action law in the Michigan's criminal code.³

HISTORY OF CODIFICATION AROUND THE WORLD

The history of codification around the world can be traced in the following phases:

1. Early Historic Times: The first known codification of laws is attributed to Ur-Nammu, the King of Ur, in the 25th Century B.C. Lipit Ishtar, king of Isin in ancient Sumer, formed a written code around 2210 B.C. Hammurabi, the monarch of Babylonia, codified laws in the eighteenth century B.C. The primary purpose of these codes was the establishment of justice.⁴

2. Ancient Greek and Roman civilizations: These civilizations continued the practice of codification, but this was not always helpful. Caligula, the Roman Emperor wrote the laws in small characters and hung them up on pillars to ensnare the public. Julius Caesar attempted to codify the law but failed to reduce the enormous body of Roman Law to its essentials.⁵

3. Code of Justinian: Emperor Justinian I of Rome was the first to successfully accomplish the challenge of completely codifying laws in his work *Corpus Juris Civilis* which means Body of Civil Laws. It was the legal authority of Rome in 533-34 A.D. It completely revised imperial laws, omitted obsolete, contradictory, and repetitive laws, and contained a digest of legal essays for guidance. This serves as a basic of Civil Law systems till date.⁶

4. Colonial Era: The first attempts of codification in the later-medieval world were seen in the American colonies. In 1611, Virginia became the first colony to codify laws. Massachusetts wrote the Liberties of Massachusetts Colony of New England in 1641, and the Laws and

³ People v. Kevorkian, 447 Mich. 436, 527 N.W.2d 714

⁴ <https://legal-dictionary.thefreedictionary.com/codification> last seen on 20.10.2018

⁵ <https://scholarship.law.cornell.edu/cgi> last seen on 20.10.2018

⁶ <https://schoolworkhelper.net> last seen on 20.10.2018

Liberties of Massachusetts in 1648. Connecticut published the Book of General Laws in 1650. In 1665, Long Island and Westchester, New York, adopted their own set of laws relating to property and procedural laws.

5. Towards the Modern Era: The liberation struggles in France and the United States emphasized that codification by legislators would enforce the law which was made by public will as opposed to previous system of laws which were made by judges. In 1804, the Code Civil was enacted by France which later became the Code Napoleon during Napoleon's reign.⁷

6. Religious Laws: Many ancient codified laws were actually examples of codification of religious laws. The Torah for example was considered a codification of the Jewish law. The Islamic Sharia Law is another example of codified religious law.⁸

LEGACY OF CODIFICATION IN INDIA

From the Vedic times in India, codification of laws has been customary in the society. Several codes like the Code of Manu, Codes of Yajnavalkya, Brihaspati, Narada and Parashar bear testimony to this fact. The Manusmriti is treated as the first book of law in India. According to Manu "*Dharmo Rakshati Rakshitah*" which means law (*dharma*) protects those, who themselves protect the law.⁹ However, various scholars are of the opinion that the purpose to call it a "law book" was a vested interest of the British to rule the Hindus.¹⁰

In India, the first Law Commission was appointed with Lord Macaulay as its Chairman under the provisions of the Charter Act of 1833. It drafted several codes such as the Indian Penal Code, the Civil Procedure Code and the Indian Limitation Act. The Charter Act of 1853 set up the second Law Commission under which the Indian Penal Code, the Criminal Procedure Code and some other Acts were passed. Law Commissions were again set up in 1861 and 1879 under which criminal law, civil law and procedural laws were codified. After India's independence in 1947,

⁷<https://historyworld.net>PlainTextHistories> last seen on 21.10.2018

⁸*Codified Law*, <https://study.com>academy>codified-law> last seen on 21.10.2018

⁹Manusmriti, Chapter-8, Verse-15.

¹⁰Decolonizing the Hindu Mind: Ideological Developme<https://historyworld.net>PlainTextHistories> last seen on 21.10.2018

the Indian Law Commission was appointed which made voluminous recommendations on various aspects of law in India.¹¹ The first Law Commission of independent India was established in 1955 with Mr. M.C. Setalvad, as its Chairman. Since then 21 Law Commissions have been set up in India, each for a three year term and headed by a chairman.¹²

The 21st Law Commission of India was established in 2015, with former Supreme Court judge Balbir Singh Chauhan as its chairman.¹³ The reports presented by this commission include the Protection of Children (Inter-Country Removal and Retention) Bill, 2016, the Criminal Law (Amendment) Bill, 2017 etc.¹⁴ However the best example of codification since independence would be the drafting of the Indian Constitution. The Constituent Assembly comprising of representatives from among the length and breadth of the country, sat together and drafted the Constitution which took 2 years, 11 months and 18 days and was completed on 26th November, 1949, and which came into effect from 26th January, 1950.¹⁵

NECESSARY CONDITIONS FOR CODIFICATION

Certain conditions are considered necessary for the codification of law.¹⁶ According to Roscoe Pound, the following important conditions lead to codification:

- i) The exhaustion for the time being of the possibilities of juristic development of existing legal materials, or where the legal institutions have become completely mature, or where the country has no juristic past, the non-existence of such material.
- ii) The unwieldiness, uncertainty and archaic character of the existing law.
- iii) The development of an efficient organ of legislation. The need for one uniform law in a political community whose several subdivisions had developed or received divergent local laws.

¹¹Supra1

¹²*Early Beginnings* available at www.lawcommissionofindia.nic.in last seen on 28.10.2018

¹³<https://currentaffairs.gktoday.in>

¹⁴*Status of Law Commission Reports* available at www.legalaffairs.gov.in/sits/default/files

¹⁵*Indian Constitution at Work*, NCERT, 2007, reprinted 2014 p.14-22.

¹⁶Supra1

KINDS OF CODIFICATION

The codes are of different types which can be classified as follows:

i) **CREATIVE CODE:** A creative code is one which makes a law for the very first time without any reference to any other law. It is simply, law making by legislation. This is a type of codification where a new law takes birth and hence is a direct source of law. The Indian Penal Code, 1862 falls under this category.

ii) **CONSOLIDATING CODE:** This is a type of code which consolidates the whole law- statutory, customary or precedent- on a particular subject and declares it. This is usually done to a very complex or repetitive law in order to simplify and summarize it. The Code of Justinian falls under this category, as well as the Indian Transfer of Property Act, 1882.

iii) **COMBINE CODE:** This type of code is both creative as well as consolidating. It may take a new law or consolidate an already existing law on a particular subject. The legislations on the Hindu Law fall under this category.

De Jure Nexus

LAW JOURNAL

MERITS OF CODIFICATION

Citing the various characteristics and features of codification it can be very well implied that there are numerous merits of it. The greatest merit of codified law lies in its simplicity, certainty, rationality and uniformity. It eliminates the chances of personal discretion in deciding cases.¹⁷

Some of the major advantages of codification are as follows:

- Codification is extremely necessary in a country like India having such a huge population. **Law once codified can be easily read**, understood and accessed by the people at large who are originally governed by those laws. Thus, codification gives the knowledge of laws to those who are bound by them and even those who don't have access to legal literacy. For example, students of commerce can easily understand the

¹⁷*Studies in Jurisprudence and Legal Theory* by Dr. N.V. Paranjape, Seventh Edition, 2015, p.313

Mercantile Law of the land by studying the Indian Contract Act, 1872. They need not be law students for that matter. The rules of evidence can be easily understood by studying the Indian Evidence Act, 1872 and so on.

- A significant advantage of codification is that the **evils of judicial legislation** can be eliminated as far as possible. It means that less and less of the law is left to be interpreted by the judiciary. This is extremely important in our country as Macaulay opined that judge-made laws in a country having an absolute government and lax morality are of no use. Sir James Stephen is of the opinion that properly designated legislation is the only solution to fallacies in the legal system and that laws to be left to interpretation of the judges is like *“to try to put out the fire by pouring oil upon it.”*
- Another advantage of codification is that it helps to **preserve the customs** which are suited to the people of a country. Customs refer to practices followed and performed by the people since time immemorial. Proper codification of law can codify these customs as well and bring them to the forefront of the legal society. This will also preserve the customs which are prevailing in a society which are already suited to the needs of the people. An example of this is the codification of the rites of the Hindu marriage in the Hindu Marriage Act, 1955. The Section 7 (2) of the act provides for the inclusion of *Saptapadi* (Seven Steps of Marriage) during a Hindu marriage ceremony which is also a prevailing custom among the community.¹⁸
- Codification is also necessary to bring about **a sense of unity** in the country. Codifying the uncodified laws into a clear body of statutes not only makes judging cases easily for the judiciary but also for the common masses to be aware of the law of the land. It also reduces the cost of litigation and saves labour. It also helps to settle various previously prevailing disputes of courts on which none are able to agree. It would also instill a sense of awareness of the rights and duties which would all together bring about peace, unity and uniformity among the people at large.
- Codification brings about **simplicity in law**. By codification, law is also **logically arranged** in a coherent form and there is no chance of conflict arising among different provisions of law. Codification also brings stability in the society. Stability is an

¹⁸ The Hindu Marriage Act, 1955 (25 of 1955)

important essential of the society in these changing times. It allows people to confide in the legal institutions and make legal transactions. Codification of laws also helps planned development as it brings uniformity in the society, polity and economy.¹⁹



De Jure Nexus

LAW JOURNAL

¹⁹*Codification of Law* by Rohit Kumar, 14.04.2018 available at <https://lawjugaad.com> last seen on 29.10.18

DEMERITS OF CODIFICATION

Codification has various demerits as well. The primary opposition by writers and philosophers to codification has been centering the rigidity of laws that become codified. Some of the primary disadvantages are listed below:

- Codification brings rigidity in the legal system. Writers like V.D. Mahajan are of the opinion that it “*cramps and impedes the free and natural growth of law.*”²⁰ This means that once the law is codified, all scopes of interpretation or growth of the law stops then and there. The only possible development that can take place is an amendment to the existing law which is governed by a dire need of a change. There is always a need for flexibility in law. Law can never be rigid and static. It has to be dynamic in nature as law has to keep on changing with the changing needs of the society. According to Roscoe Pound “*Law must be stable yet it cannot stand still.*” This means that the legal order needs to be both stable as well as flexible and that there is no scope for rigidity. Cockburn propounds that unwritten law might have numerous demerits but one of its greatest merits is that its elasticity enables it to adapt to the differing needs of society in different times.
- Contracts in India are governed by the Indian Contract Act of 1872 which was codified in 1872. However in recent times especially in the era of “*Digital India*”, most of the contracts take place online in the form of **E-contracts**. But there is no provision in the Indian Contract Act which deals with E-contracts and this makes the judgments of E-contracts subject to interpretation of the judiciary. This is so because when this law was being codified, no idea of internet contracts existed.
- Jurists like Pallock, Paton and Savigny have opposed codification of laws. Savigny said that codification obstructs the natural growth of law and gives rise to several defects in the legal system such as rigidity. He also put forward that in history, the necessity of codification was never felt when laws were uncodified in the early societies.²¹

²⁰ Supra 1

²¹ Supra 17

- A stipulated code leads to the regimentation of the lives of the people. A code is uniform for the whole society and thus **it fails to cater to the varied needs of the different sections** of society, their sentiments, convictions, aspirations, customs and traditions etc. This leads to fulfillment of the needs of some at the cost of negligence and ignorance of the needs of the others. Codification does bring uniformity in the society but this uniformity takes a toll on the individuality and liberty of various sections of the society.
- As codification is the work of several persons there might arise incoherence and discrepancies in the formed codes. However this may be detected by employing competent persons in the task of codification.
- Codification of law makes the laws simple and **this in turn exposes the lacunas in law**. This might enable the perpetrators of crime to get the knowledge of law, find loopholes in it and commit crimes within those parameters. According to Savigny a code makes the defects of law obvious and thereby encourages the knaves to take advantage of them.
- Codes create rights and duties for the people, however this may create confusions or at times be unjust and unfair as the previous rights and duties might be overwritten by new ones which supersede them as it is a general characteristic of codes. This naturally disturbs the legal fabric creating confusions and uncertainty.
- Some critics of codification are of the opinion that the codes in Germany and France have failed to do their jobs prescribed. However they are opposed as others opine that codification of laws is extremely successful in countries like India. Here a great amount of codification has taken place and new laws are being codified with time.
- Finally a significant demerit of codification is that no code can be complete and self-sufficient. As laws are never static, the need for new codification keeps on arising with time. Thus, codes once made, need to be kept on revising from time to time which becomes laborious and expensive. Codification also limits the powers of judiciary in deciding the fate of a case as, much of the law is already defined and interpreted by the legislative authorities.

VIEWS OF PHILOSOPHERS ON CODIFICATION

Writers, jurists, philosophers and legislators have had different views about codification of laws. Some of them commend this while others deny its importance.

According to **Savigny**, if an age is able to produce a good code, no code is at all necessary in that case. He opines that the work of a codifier can be done togetherly by jurists, lawyers and private expositors. However it cannot be denied that such expositors lack the authority and certainty and that the judicial authority is not bound to follow them.

According to **Salmond**, *“The advantages of enacted law so greatly outweigh its defects that there can be no doubt as to the ultimate issue of its rivalry with the other forms of legal development and expression. The whole tendency in modern times is towards the process known since Bentham as codification.”*

According to **Portalis**, *“Whatever is done, positive laws can never entirely replace the use of natural reason in the affairs of life. The needs of society are so varied, social intercourse is so active, men’s interests are so multifarious, and their relations so extensive, that it is impossible for legislators to provide for everything.”*²²

According to **Paton**, codification petrifies the law at the stage at which it is codified and there is a little scope for applying it to new situations unless it is amended or modified. Similarly **Justice Cardozo** observed that *“the law like the traveler must be ready for tomorrow. It must have principle of growth.”*²³

According to **Chalmers**, *“All the continental nations have codified their laws and none of them show any sign of repenting on it. On the contrary, most of them are now engaged in remodeling and amplifying their existing Codes.”*²⁴

²² Supra 1

²³ Supra 17

²⁴ Supra 1

CONCLUSION

To conclude, it can be stated that the demerits of codification are magnified and exaggerated and that they are raised because of the misconception that codification means the fixation of laws rigidly on one hand and the complete abolition of customary and case laws.²⁵ Codification in reality bridges the gap between the arbitrariness of laws and complete rigidity of laws by bringing a centrist solution to the extreme dichotomies. Most importantly, codification enables the common man to be acquainted with the laws of his land which govern him. It imbibes a kind of legal education in the society. It also has to be kept in mind that codification as a necessary part of legislation gives an indispensable source of law which is not exclusive of the precedents. Codified laws or legislation and case laws or precedents are mutually inclusive of each other, they are two sides of the same coin and go hand in hand. In a world without case laws, enacted laws lose their meaning, while without the latter, the former becomes a cruel joke. However, codification is a part and parcel of the legislative system whereas case laws act as a supplement to the enacted laws during the resolution of a dispute. The entire body of civil wrongs or 'Torts' based on English common law is a set of uncodified laws based on precedents. There lies great need of codification of torts as often landmark case laws vary from each other in ratio. It can be very well said that one simply cannot do away with codification in order to legislate as it is the soul and spirit of law-making.

²⁵ Supra 1

BIBLIOGRAPHY

- V.D. Mahajan, *Jurisprudence & Legal Theory*, p.168, 1987 (Reprinted, 2017, Eastern Book Company, Lucknow)
- *Codification*, The Free Dictionary, <https://legal-dictionary.thefreedictionary.com/codification> last seen on 20.10.2018
- People v. Kevorkian, 447 Mich. 436, 527 N.W.2d 714
- <https://legal-dictionary.thefreedictionary.com/codification> last seen on 20.10.2018
- [https://scholarship.law.cornell.edu>cgi](https://scholarship.law.cornell.edu/cgi) last seen on 20.10.2018
- <https://schoolworkhelper.net> last seen on 20.10.2018
- *Codified Law*, <https://study.com>academy>codified-law> last seen on 21.10.2018
- Manusmriti, Chapter-8, Verse-15.
- Decolonizing the Hindu Mind: Ideological Development available at <https://historyworld.net>PlainTextHistories> last seen on 21.10.2018
- *Early Beginnings* available at www.lawcommissionofindia.nic.in last seen on 28.10.2018
- *Status of Law Commission Reports* available at www.legalaffairs.gov.in>sits>default>files
- *Indian Constitution at Work*, NCERT, 2007, reprinted 2014 p.14-22.
- The Hindu Marriage Act, 1955 (25 of 1955)
- *Codification of Law* by Rohit Kumar, 14.04.2018 available at <https://lawjugaad.com> last seen on 29.10.18
- *Studies in Jurisprudence and Legal Theory* by Dr. N.V. Paranjape, Seventh Edition, 2015, p.313