DREAMING A CIVIL CODE: ENVISIONING THE POSSIBILITIES AND FUTILITIES OF UNIFORM FAMILY LAW

Shriram Rishi, Jindal Global Law School, Sonepat

ABSTRACT

The talk of a ‘uniform civil code’ has been part of Indian legal discourse for decades, with no solution to the various contradictions that exist in personal laws and family law at large. It is imperative to understand the historical context of why such a code is not necessarily uniform in nature but functions as a homogenizing tool that may upstage cultural practices of minorities. The argument may also center around the law giving primacy to either secularism and continuing with the current trend of divergent personal laws or to focus on gender justice due to the inherent patriarchal nature of some of those laws, thus upholding a demand for uniform gender-positive legislation. This paper attempts to bust such arguments and present a thesis on why successful uniform legislation is not possible at this point in Indian history while also attempting to offer a roadmap towards a future where uniform legislation becomes an accepted form of family but not due to the imposition of a majoritarian regime but through gradual social change where it may be readily accepted by all while still preserving the integrity of minority cultures. India, after all, is a nation of diversity and a singular civil code must acknowledge that to be a successful legislation.
I. The Impossibility of the Homogenous Civil Code

A. Introduction

When one raises the need for a ‘Uniform’ Civil Code, they are asking the wrong question. A Uniform Civil Code (hereon, UCC) is a blanket homogeneous statement, an oxymoron in a secular state. Even then, this paradoxical idea is enshrined in Article 44 of the Indian Constitution and the current BJP-led government has repeatedly emphasised on the UCC as part of their election manifesto under their ‘One Nation One Law’ policy. The Supreme Court has also repeatedly reiterated the need for uniform laws, skewering across various religious personal laws. The matter, thus, is now deeply entrenched in a nationalistic ideology that seeks to homogenise the cultural identities of various communities. Of course, the reason such a debate even has legs is due to the inequitable customs part of the personal laws that are in direct contradiction of the rights to equality. Personal laws often tend to discriminate against women, children and promote a heteronormative worldview and it is this problem that a UCC is touted as a solution for. But this liberal feminist approach comes at a grave risk of eroding the identities of minorities and ignoring the various intersectionalities that exist in the Indian society. To push for such a legislation is a futile exercise, in the same vein as one would imagine India suddenly becoming a meritocracy: fine on paper, but ignorant of the social inequities at large. In fact, this paper intends to argue that a homogeneous civil code is detrimental to the rights of women and only ends up perpetuating religious stigma and an oppressive-caste bourgeoisie Hindu worldview across the customs of the people of India. The second part of this paper intends to emphasize on a gradual modification of personal laws and raising community consciousness so as to naturally progress the legal development of laws to a point of equitable convergence so as to not make the law the means of social change but social change being the driver of justice, as one Michel Foucault would say.¹

B. The Precedent of Homogeneous Laws

It is imperative to look into the history of family law to understand how the need for codification arises. The first group to codify interpersonal customs was the British colonial government in India. Instead of making an attempt to understand the diverse nature of customs, the colonial government consulted various religious leaders to come to the conclusion of recognising four religions, Hindu, Muslim, Christian and Parsi. This brings to light how the inception of family law codification in itself was a homogeneous and misinformed attempt at equating unequals. This practise was replicated by the newly-formed Indian state in the 1950s when it introduced the Hindu Code Bills to codify Hindu personal laws. The bills are often credited as reformatory, primarily due to the measures against bigamy, but it is ignorant to not realise that they ended up homogenising various customary practises that did not fall into the ambit of Islam, Christianity or Zoroastrianism, ‘bringing them into conformity with what were assumed to be “Hindu” norms, but what were, in fact, North Indian, upper-caste practices.’ The bills didn’t take any radical action to make laws of inheritance equal, nor did they venture into the nature of Hindu marriage, only taking a ‘safe’ route of codifying countless customs into the ambit of ‘Hindu’. This is a historical precursor of what a UCC can be. In fact, some rules codified in the Hindu Code Bills ended up putting women worse off than other personal laws such as those of Islam where women have better inheritance and divorce provisions, given the contractual nature of the Muslim marriage. The Supreme Court is of the opinion that, ‘where more than 80 percent of the citizens have already been brought under the codified personal law there is no justification whatsoever to keep in abeyance, any more, the introduction of the 'uniform civil code' for all the citizens in the territory of India.’ This statement doesn’t emphasize the reformation of already existing Hindu laws, it emphasizes their extension to the remainder of the Indian population, spreading the bourgeoisie consciousness of those laws across the country. The Hindu Code Bills offer a clear glance into

---


3 Id.

4 Sarla Mudgal and Ors. v. Union of India and Ors. (1995) 3 SCC 635 (India).
how the Indian state enacts blanket codifications of personal laws in an oppressive and homogeneous way.

C. The Fictitious Conflict of Secularism and Gender Neutrality

India recognizes itself as a secular state. The term literally translates to ‘not spiritual’ and in the context of the state, it means that the state has no religion. Unlike other secular regimes, India fashions itself as a state wherein it can interfere in matters of religion when religious practises interfere in matters of governance and the workings of secular practises, a sentiment backed by the Supreme Court. Therefore, even when Article 25 and 26 of the Constitution allow one to freely practise and preach their faith, the state can enact laws that alter the aspects of personal laws related to inheritance, succession and maintenance in pursuance of their ability to create secular laws, while still not interfering with customary practices of individual religions. But how can such uniform convergence be achieved without the state interfering in religious practices which pervade laws of inheritance and succession such as mitakshara, dayabhaga, Hindu Joint Family etc.? If a uniform code is made from scratch, these Hindu religious customs will be encroached upon by the state, the invasion is not just limited to minorities, but this question is not part of the discourse perpetuated by the ruling party in power, giving the impression that the UCC they envision does not have the intent of interfering with Hindu practises. The counter argument raised against this demand to question state intervention in religious customs is that when religious customs are unfair to one gender over the other, they open themselves up to state intervention, making this a dispute between religious freedom and the emancipation of women. To look at this in an isolated form is undialectical in nature and one must harken back to the Hindu Code Bills to analyse how the homogeneous codification process of these laws have never achieved equality. The supposedly reformative Hindu Marriage Act, 1955 codified the conjugal rights to restitution, kickstarting years of tryst wherein women were told that they couldn’t accept employment which would keep them

---


6 S.R. Bommai and Ors. v. Union of India and Ors. (1994) 3 SCC 1 (India).
away from their husbands.\textsuperscript{7} The Hindu Code Bills not only codified laws treating women as property of men, they ignored the lives, customs and experiences of all living below the ‘creamy layer’. The saptapadi Brahminical practises were emphasised, the struggles of the proletariat oppressed-caste woman were ignored, as shown in both the legislatures and the judiciary’s interpretation of the notion of conjugal rights in relation to employment. The politics of the Hindu Code Bills is also important to note because reforms were proposed, B. R. Ambedkar’s initial versions of the bill offered greater gender-justice, unlike the versions that ended up getting approved. The original versions were deemed too radical as they were written to do away with the coparcenary rights and the joint family system but public demonstrations were made in opposition of the Hindu Code Bills with the conservatives in the Parliament in vehement support of the protests against this variant of the Bills.\textsuperscript{8} To appease both these groups, the Hindu Code Bills were passed as compromised documents intended as appeasement towards these vocal conservatives while sacrificing the notions of equality and gender-justice Ambedkar’s versions had envisioned. With this context in mind and the ideological successors of those aforementioned conservatives in power, the logical conclusion here is that the Uniform Civil Code may end up as both the encroachment of the customs of minorities and the extension of the inequalities in Hindu personal law over the entirety of the Indian population. It is important to note how the binary nature of all these personal laws completely ignores the complications of gender identities and intersectionalities, will the current regime be able to simultaneously alter all personal laws to be inclusive of women’s rights while making them inclusive of other non-cisgender identities? It’s not difficult to ascertain that the UCC is not actually creating a conflict between the notions of secularism and gender equality, it works to undermine both when wielded by a bourgeoisie state.

\textbf{D. Convergence of Laws of Inheritance}

To believe that one can instantly jump from divergent personal laws to a Uniform Civil Code is nothing but an effort in futile idealism. The religious practises themselves need to be reformed

\textsuperscript{7} Kailash Vati v. Ayodhia Prakash (1977)79 PLR 216 (India).

\textsuperscript{8} Olivier Herrenschmidt, \textit{The Indians' Impossible Civil Code}, 50 EJST 309 (2009).
before convergence can be dreamt of. The reason for this is the vast differences in the nature of inheritance procedures even among singular personal laws. For example, the Hindu practice of coparcenary rights and the joint family system in mitakshara and dayabhaga. The two systems themselves are very different with mitakshara allowing only male coparceners while dayabhaga included at least the binary genders, mitakshara understood interest in property upon the birth of the coparcener while dayabhaga created no such interest and transfer only occurs upon the death of the father.\(^9\) Furthermore, the devolution of property for men and women are different in Hindu Succession Act, with the property of women devolving into the hands of their husbands family over their own,\(^{10}\) which is not the case for men. Therefore, even the self-acquired property of Hindu women is not safe from a patriarchal grip of her husband’s heirs. The Hindu Undivided Family is another unique anomaly in law thanks to personal laws, offering tax concessions and being misused to avoid paying taxes, per the state itself.\(^{11}\) Since the HUF is directly reliant on coparcenary rights for its existence, the entire problem is interconnected and changing one makes the other redundant. Now these in contrast with Muslim laws make for a very divergent scenario. Muslim law can be primarily divided into the one practised by Sunnis and one practiced by Shia’s even though this binary is ignorant of local traditions. Both branches have no notion of coparcenary or undivided families. While the sunnis follow a male-based doctrine of succession, the shias follow a staggered system of inheritance wherein all members of the family are divided into various classes and the husband and wife have a previously established share in the property. They have no concept of joint family property\(^{12}\) and treat all family members as ‘tenants-in-common’ instead of coparcenary rights emerging right from birth. The oppressive nature of these tendencies is prevalent in the fact that women cannot inherit agricultural land.\(^{13}\) The Christian personal laws, as enshrined in the Indian Succession Act, 1925, do not discriminate based on sex but do not offer


\(^{10}\) The Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956, s. 15.


inheritance privileges to relations via adoption. The Parsi personal law, in its current iteration, tends to treat men and women equally in matters related to inheritance and succession but this is complicated by the endogamous nature of the Parsi community. While the children of a Parsi father and a non-Parsi woman will be recognized as part of the community, the same cannot be said when the roles are reversed. In fact, Parsi women cease to be recognized as Zoroastrians if they marry outside the community. This also translates to her children not being eligible to inherit property in accordance with Parsi personal law. The purpose of this brief analysis is to highlight how divergent the personal laws are at this point and how each group has come to value different problematic notions that are completely unrelated to the problems of the other community but tend to be rooted in patriarchal misogyny. To map out convergence for the future, one has to first eradicate the existing issues and the invasive nature of the patriarchy to organically transition to uniform laws. At this point, convergence is not possible.

II. Moving Towards a Civil Code

A. The Premise

In an ideal society where the constructs of gender are no longer relevant, perhaps the presence of uniform laws is possible. But it has been established that the Indian state cannot be trusted to make a Civil Code that prioritises the experiences of individuals at various intersectionalities and is considerate of the inequity in society, while carefully walking over the eggshells of religious freedom. The current regime’s proposal of the UCC is an attempt to spread the vices of Brahmanical patriarchy across the personal laws of all religions, not a reform of family law at large. With this in mind, a uniform civil code seems like a malicious suggestion and reform of personal laws, Hindu included, with piecemeal legislation seems like a more gradual and natural approach to achieving equality in family law. But if one must indulge in the activity of drawing

---


15 Law Commission, supra note 9, at 176.
up a model-yet-realistic UCC, the idea has to be rooted in an opt-in policy. The proposal hereon is thus of a Uniform Civil Code that offers irreligious rules and policies rooted in purely Constitutional morality while still maintaining pre-existing personal laws. This does not mean that those personal laws should be left as they are, the aim should be to offer an escape route for individuals from the hegemony of religious personal laws in the form of a civil code open to all while still emphasizing on personal law reform. Once personal laws are transformed to a point where their misogynistic tendencies are curbed, either the opt-in UCC becomes redundant or the personal laws ‘wither’ away due to a lack of utility. In both the scenarios, the goal of gender justice prevails and solves the purpose of the entire exercise of creating a UCC in the first place. This approach prevails over the approaches of creating either a uniform law or a ‘separate-but-equal’ approach, both of which are displayed in different parts of the Goan Civil Code.

B. Precedent of Opt-In Legislature

It is imperative to understand that a blanket law trying to cater to all religions is a futile exercise because as demonstrated previously, the divergent nature of these laws cannot be converged instantly. The Goa Civil Code, touted as a successful example of a Uniform Civil Code is in fact, rife with problems. It tries to cater to the beliefs of all religions and in doing so, allows for limited polygamy among Hindus\(^\text{16}\), allows divorce among Hindus only by way of adultery by the wife, establishes unequal provisions for adoption and undermines the rights of ‘illegitimate’ children. Women’s groups in Goa confront various incidents of bigamy by fraud and since the Goan Civil Code has no provisions to curb this, bigamy continues to prevail.\(^\text{17}\) The reasons for the failures of the Goan Civil Code are rooted in the colonial nature of its writers, the Portuguese simply tried to cater to all the religious groups in their colony. The Indian state would end up doing the same if it tries to create a blanket Civil Code. Instead, the precedent for opt-in legislation already exists in India in the form of the Special Marriages Act, 1954 (hereon, SMA). This act offers a contrast in

\(^\text{16}\) The Portuguese Civil Code, 1867, No. 29, 1940, Art. 3.

the approach to family law in the sense that it offers individuals to opt-in for a civil form of marriage beyond the apparatus of religion. “The Special Marriage Act was enacted to enable a special form of marriage for any Indian national professing different faiths or desiring a civil form of marriage”\(^\text{18}\) and “is one of the earliest endeavors towards a Uniform Civil Code.”\(^\text{19}\) While the SMA may not be perfect in its execution, incurring incidents of mob violence and harassment from religious extremists, that is more on the failure of the Indian state in curbing violence and hate crime, though section 5 of the SMA could be amended to reduce such incidents. The SMA has eventually been successful in providing space for inter-faith marriages beyond the purview of personal laws which restrict such activities by recommending conversion. Indian religions emphasize endogamy and the SMA breaks this monotony with its equal provisions for men and women without a need for conversion to either party’s religion. Even though the SMA in itself is still open to criticism and should be critically analysed before being used as part of an opt-in civil code, it is a clear example of the success of opt-in legislation while still keeping the personal laws around. This is not without its limitations because contrary to as this paper proposes, the personal laws have not withered away to organically establish the SMA as the only practised provision for marriage. This is both contingent upon the arduous process of marriage as laid down in the SMA which often causes trouble to the parties intending to marry as well as the minimal reform in personal laws. It is also worth noting that the SMA may try to distance itself from religion, but it fails to distance itself from the gender binary. The SMA’s positives offer a hope for an opt-in civil code but its limitations are lessons to be learned before drafting such a code.

C. The Question of Multi-cultural Practices

This proposed form of a Civil Code circumvents the issues discussed in Part I regarding Article 25 of the Constitution. But the problem which then surfaces is to acknowledge the diversity in personal laws, with different groups representing their interests historically. The merits of this civil

---

\(^\text{18}\) Pranav Kumar Mishra & Anr. vs Govt. Of NCT of Delhi, Habeas Corpus WP No. 748 of 2009, decided on 8-04-2009.

code is that similar to the SMA, it does not have to be an attempt in appeasing all such parties but offer a clear civil solution to the legal side of marriage, succession, inheritance and maintenance. The SMA relies on the Indian Succession Act for matters related to successions but given its discriminatory nature towards adoptions and its relation to Christian personal law, this proposed Civil Code would rather offer gender neutral provisions for all these aspects of family law. By not offering any invasion of custom related to marriage etc., this civil code would attempt to not interfere in the lives of individuals who wish to respect their religious practices while still following a civil law. The aim here would be to separate custom from law, that doesn’t invalidate those customs, it just takes away their legal sanction. The Goan Civil Code offers an example here wherein Christian marriages are conducted in accordance with custom but after receiving a No Objection Certificate from the Registrar. This process is different from the SMA that emphasizes bureaucratic paperwork over the social relation of marriage. Similar to the Goan Civil Code, matters of inheritance, succession and maintenance can very much be based on complete equality between partners with no notions of coparcenary, undivided family, male-based succession or misogynistic endogamy as previously highlighted. An area which the SMA fails in is its punitive measures against members of undivided families marrying via the SMA. It ends up severing the individual marrying via the SMA from the Hindu Undivided Family, putting their inheritance in question. This proposed civil code would have to protect the interests of the individuals who opt-in instead of putting the prospects in danger like the SMA ends up doing for members of the HUF. If one hopes to see this opt-in law become the most preferred form of family law, it must protect individual interests instead of creating financial difficulties for them. It must acknowledge the various personal laws in practise and offer measures wherein the interests of individuals are positively protected while not replicating the severing nature of the SMA. In the case of inheritance for example, members should be entitled to their interests in the HUF and should receive their share while that property, once in their titleship, would follow the civil code’s egalitarian norms of devolution instead of the Hindu Succession Act’s. This will, of course, fail to protect the interests in scenarios where the personal laws rob the equal rights of individuals such as those of Muslim women in matters pertaining to agricultural land or non-binaries in general. This failure is

---

the cost of a gradual transition process attempting to not infringe upon the religious rights of individuals, rights which are created and protected in furtherance of a hetero-patriarchy. In the backdrop of this failure is the prospective future where such situations would not arise and this civil code would naturally come to be accepted and practiced.

D. Conclusion

It is evident that aiming for a uniform civil code from the hands of a bourgeois Indian state is a pointless exercise. The nature of capitalism is such that hoping for reform via law is nothing but mere idealism as the apparatus of oppression is much more complicated than that. It is critical to strive for systemic change and raise community consciousness first if one hopes to have effective legislation. A common civil code is a nationalistic endeavour, yes, but the rights of innumerable identities are attached to it and those cannot be sacrificed at the altar of religious freedom. It took the imperial forces in France fourteen years to craft and implement an acceptable civil code. For a democratic India, it might take much longer but one cannot wait for that revolution to come to their doorsteps. Public participation, reformatory movements and even oft-trivialized exercises such as writing this paper are drops that comprise the forecasted rainfall of revolution.

21 Herrenschmidt, supra note 8, at 312.