

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 3

2021

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Uniform Civil Code: India's Unrealistic Dream

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ABSTRACT

India is a diverse country with various religions and personal laws governing their application. However, with respect to each religion and their applicable laws, there are certain fallbacks which have prominently come into light, emphasizing a large question of implementation of a Uniform Civil Code in India meeting interests of each religion. This manuscript encompasses all such aspects from a functionalist perspective and the perspective of the inheritance laws ranging from Hinduism, Islam, Christianity, Goa Civil Code and other relevant legislations. Furthermore, the manuscript deals with the issue of how a model UCC should be represented for an effective governance and thereby provides for certain important comments and suggestions which must be kept in mind for its proper implementation. Such suggestions consider the issues put forth by eminent scholars on such issues and provides for future guidance.

Keywords: *customs/culture, religion, inheritance/succession, law commission, equality, matrilineal and patrilineal system, opt-in model.*

I. INTRODUCTION

India is a very diverse country with multiple personal laws that apply to the religions present here. However, many of those religious laws are inherently discriminatory due to patriarchal customs, to combat this the makers of the Constitution envisioned implementing a Uniform Civil Code (UCC) for all the citizens of our country and hence wrote Article 44 of the Constitution.³ However, it is extremely difficult to implement the UCC in our country because it hampers diversity and will not be effective as the people of India will not respect it as a law. This paper shall elaborate on how the UCC is extremely difficult to implement in India in its first half from the perspective of inheritance laws only. In its second half the authors shall create a model UCC assuming that someday UCC will be implemented.

The paper will discuss the viability of a UCC by looking into the sociological theory of

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³ INDIA CONST. art. 44

structural functionalism. Structural functionalism is a framework that sees society as a complex system whose parts work together to promote solidarity and stability.⁴ In other words, every part of the society works like an organ to keep it stable and functioning. The functional theory states that a society is held together by social consensus or acknowledgement,⁵ i.e., the institutions of society, which is the law in this case, has authoritative value only if the people acknowledge it or agree with it. We can see the importance of customs by using this theory. Customs are a habitual course of conduct observed uniformly and voluntarily by people, these are long established conventions of the society. Since customs originate from times immemorial⁶ and are social conventions they have become deeply rooted by social consensus. Looking at them from the perspective of the functionalist theory of law, these customs have become unquestioned laws respected by the society, which is observed in the codified legislations, one of them being the concept of *paraya dhan* in Hindu law.

II. THE ROLE OF CUSTOM AND RELIGION ACTING AS A BARRIER

Customs are deeply rooted with the culture and traditions of a locality or religion. And if there is a law which refutes the custom upon applying the functionalist perspective, we see that this law either will not be followed or the intent behind it will not be fulfilled. This can be best explained with an example: the rural Hindus have a very patriarchal society and so men are considered as the owners of property and have been given more importance in inheritance rights and property management. This can be seen in the older versions of the Hindu Succession Act (HSA) where widows had limited property rights and only men could be the Karta and Coparcener.⁷ However, with the 2005 Amendment, women are considered equal to men⁸, but this law may not keep up with the cultures in some Hindu families. This can be observed via two practices which prevail in the society. Firstly, there has been a voluntary transfer of property rights by women to the male members of their natal family in fear of straining their relationship with their families or being rejected by the community as per study conducted by the Landesa Rural Development Institution in the state of Andhra Pradesh, Bihar and Madhya Pradesh.⁹ Secondly, the community reaction post such amendment has led to an increase in testamentary succession of property through oral wills which has led the daughters and other

⁴ JOHN J MACIONIS & LINDA MARIE GERBER, *SOCIOLOGY*, (7th Canadian ed. Pearson Prentice Hall, 2011)

⁵ *Id.*

⁶ The Hindu Succession Act, 1956, No. 30, Acts of Parliament, 1956, § 3 cl. (1) (d).

⁷ KUSUM & POONAM PRADHAN SAXENA, *INTRODUCTION LAWS OF INTTESTATE AND TESTAMENTARY SUCCESSION IN INDIA* (LexisNexis India, 2020).

⁸ The Hindu Succession (Amendment) Act, 2005, No. 39, Acts of Parliament, 2005, § 6.

⁹ Dr. Ashok K. Sircar & Sohini Pal, *What is preventing Women from Inheriting Land? A study on the implementation of the Hindu Succession (Amendment) Act 2005 in the Three States in India*, Landesa Rural Development Institute, 6 (2014).

female members not eligible for inheritance.¹⁰ This is because Hindu law allows a person to transfer all their property to one person and this be used to deprive the woman from her inheritance.¹¹ The male members have been granted with such an option to not include them in the inheritance through wills, implying non-application of the 2005 Amendment. This is due to the fact that testamentary succession is not regulated via the HSA rather via the Indian Succession Act (ISA).

Moreover, the communities do not recognize that women possess the right to inherit land or property and even if women inherit land, they do not get an equal share in the property unlike how the 2005 Amendment has now specified. This is primarily to do with the concept of *paraya dhan* where the woman is considered to be a part of her husband's family and instead of giving a share of land to the daughter, the natal family transfers a lot of resources to the husband's family at the time of marriage as dowry. This example explains that even though the 2005 Amendment has granted equality between the men and the women of a family, as per the functionalist theory of law, the community does not respect it resulting in non-adherence to such laws, rather they will employ methods to skirt such inheritance laws.

Moreover, a Uniform Civil Code will only be applicable in the country if it is respected by the people of India. Otherwise, it will also have its share of problems in the implementation of the law like the Goa Civil Code. The Goa Civil Code applies to all its residents where men and women and husband and wife have an equal share in the property.¹² The Portuguese Civil Code operating in Goa provides a much more nuanced approach as there is an inherent mismatch in upholding the law in its full spirit, as a result of which the reality has been quite contrary to what the Act has sought to achieve. This has been empirically stated by Shaila D'Souza on Goa Civil Code where the law on paper is quite contrary as compared to the practice prevailing in reality¹³. In a practical sense, women are still kept at a vulnerable state whereby a majority of them are duped with the marriage registration process.¹⁴ Many women are unaware of their rights and all the property is managed by the male members of the family, considering the husband mostly¹⁵. Every decision in relation to the property is taken care of by the husband

¹⁰ Rachel Brùle, *Gender Equity and Inheritance Reform: Evidence from Rural India*, WORDPRESS, (Dec. 12, 2020, 4:20PM) 17, https://www.rachelbrule.files.wordpress.com/2012/09/brule_paper1_final.pdf

¹¹ Lucy Carroll, *Daughter's Right of Inheritance in India: A Perspective on the Problem of Dowry*, 25 MODERN ASIAN STUDIES, 791-809 (1991).

¹² The Goa Succession, Special Notaries and Inventory Proceedings Act, 2012, No.36, Acts of the Parliament, 2012.

¹³ Shaila Desouza, *'Just' Laws are not enough*, IN WOMEN'S LIVELIHOOD RIGHTS 277 (Sumi Krishna ed. 2007).

¹⁴ *Id*; Namitha Kohli, *All in the family: Goa Civil Code a model for the rest of the country?*, HINDUSTAN TIMES, (Dec. 12, 2020, 4:33PM), <https://www.hindustantimes.com/india-news/all-in-the-family-is-the-go-a-civil-code-a-model-for-the-rest-of-the-country/story-4ImvwP0OrAST2hUnsZxtiL.html>

¹⁵ Shaila Desouza, *supra* note 14.

without the wife's consent except the alienation of the property. Operating in such practical realities of life, an implementation in regard to the whole country becomes an important question. The community does not respect the intention behind the Goa Civil Code in granting equality to the family members and have starkly deviated from the intended purpose. Though the notion and model of the Goa Civil Code is quite a positive and progressive looking legislation and has been appraised of, however owing to such fallbacks, it becomes important to note that while in a state if such problems have been noticed, then implementing for the country would have much more ramifications which could mean a sham for the law for the implementation, making the UCC not desirable. In other words, while the Goa Civil Code is an attempt in forming the UCC, it is a failure in its implementation as it did not receive the acknowledgement of the communities as per the functionalist theory of law.

The Law Commission had also initiated a consultation regarding the implementation of the UCC by stating it as 'neither necessary nor desirable' for India and instead claimed that the discriminatory practices conducted should not be covered behind the guise of personal laws.¹⁶ It supported the motion of codification for personal laws for legal consistency within the communities and not between the communities. With respect to minority religions like Islam, the Government is also hesitant to change their personal laws. The Supreme Court has clearly acknowledged this in the case of *Khuran Sunnath Society & Ors. v. Union of India* that the government will not change minority laws unless a sizable cross section of their society demands it.¹⁷ The court has not defined what a "sizable cross section" entails, so it is unlikely to see any change in such laws.

Even the Bharatiya Muslim Mahila Andolan (BMMA) has been tirelessly asking for a change in Muslim law and codification to bring in clarity and fuel some progressiveness such as removing the glaring inequality in Muslim inheritance where the daughters only get half a sons inheritance.¹⁸ It can be observed that such codification has been implemented in majority of the countries such as Turkey, Egypt, Bangladesh and Pakistan and thus, it is believed by the BMMA for India to have such codification too. Though the claims of BMMA were totally appropriate for codification, it is believed that they were not in line with a demand for uniformity of laws as per UCC. The claims of BMMA were in stark contrast to what the UCC intends as recognized by the Law Commission i.e., to say that the BMMA envisions the

¹⁶ Law Commission of India, *Consultation Paper on Reform of Family Law*, GOVERNMENT OF INDIA, 7 (Dec. 12, 2020, 4:36PM), <https://lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf>

¹⁷ *Khuran Sunnath Society & Ors. v. Union of India*, 2015 SCC OnLine Ker 13643, page 9

¹⁸ Justin Jones, *Towards a Muslim Family Law Act? Debating Muslim women's rights and the codification of personal laws in India*, 28, *Contemporary South Asia*, 1 (2020).

codification in lieu of consistency within the community and as a constitutional necessity. BMMA intends to preserve Muslim law while the UCC has no such intention and instead intends to apply a secular law universally. This does not represent the purpose of UCC to state the regulations on operation of different personal laws between various communities.

India is a very diverse country with multiple personal laws and customs depending on the religion and culture. As stated above, customs are deeply rooted into the society and a sudden introduction of a law such as the UCC would be a setback as it would ignore all the customs and personal laws which would be erroneous as it will not be acknowledged. The forthcoming paragraphs provide a comparison with the existing laws which are different from each other to state the compromise on the various cultures and diversity prevailing in India due to the implementation of UCC making it unsuitable for the whole nation.

It is observed that amongst all the inheritance and succession laws existing in the country, there has been an inherent mismatch of rights in all the personal laws. Upon comparison, the most prominent issue of gender equality and inclusiveness of various communities emerge as the focal points. While the Goa Civil Code, Parsi Law and Christian Law already do not distinguish male and female, half blood, full blood and uterine blood, other personal laws such as Hindu Law have specific restrictions in relation to the above points. Though with the Amendment of HSA 2005, daughters have been provided with an equal right to succession, there still exists restriction over consanguinity.

III. IGNORANCE OF CULTURE VIA ENSURING UNIFORMITY

If the UCC is implemented in India, then it will not be cogent with the other customs present in the different cultures of India. There are social structures that will be shaken to its foundations by implementing such a system. Multiple states have different laws and provisions in their personal law as it is suitable for their culture however, if there is a central legislation like the UCC overshadowing all the state and religion specific cultures and customs, then the public will not acknowledge this as a just and proper law.

Considering the vast nature of Hindu laws and its applicability in India, it is observed that there are various exceptions and rules which have been carved out by the States in light of the Central Legislations. These exceptions and amendments are in light of the various customs and traditions which operate in such States and thus, require different processes as opposed to what is stated in Central Legislation. To illustrate this, as per the Hindu law on intestate succession with respect to Paternal Grandmother in presence of both sons and grandsons, there has been a divide between the states regarding the treatment of distribution of property. High Courts of

Patna¹⁹ and Calcutta²⁰ have held it to be a ‘NO’ state where no interest of the property is to be devolved whereas High Courts of Bombay²¹ and Allahabad²² have been a ‘YES’ states granting the devolution upon the person who asks for such partition.²³ Furthermore, as per the HSA, there are multiple provisions itself for which there have been State Amendments to cater to their own customs and traditions. A law like UCC thus, would lead to such abruptment of uniformity structure which is considered its ultimate motive and purpose.

Expanding from the above points, the matrilineal system also becomes relevant here. Matrilineal system empowers the women to have an authoritative power and are considered to be the head of all the decision making in a family which is opposite to the usually observed system dominated by male members. The matrilineal system was prevalent amongst the Nairs in Kerala, Garo, and Khasi in the north-eastern parts of India.²⁴ Though the scope of the matrilineal system has been limited to very few areas as mentioned above, the implementation of UCC would have severe ramifications in ensuring an ignorance and non-recognition of such cultures.

With regards to testamentary succession, majority of the personal laws including Hindu, Christian, Parsis and any other religion except Muslim have been covered under the ISA, however it is the Muslims whereby the restriction of the right to will one’s property exists which is limited to one-third.²⁵ Though this was an aspect which could have been effectively subsumed under the UCC model, however due to this major exception, things do not remain the same.

Considering the above-mentioned reasons, it becomes imperative to state the importance of diversity which currently exists in Indian society and have been highly valued by the communities following such cultures. Each personal law has its own rules and regulations governing them which has been starkly different from other personal laws. Deviation from the Central legislations and accommodation of rules pertaining to each community has been one of the norms of the current legislations, however, for a UCC, there has to be an interference with such diverse cultures and traditions which we believe cannot take place. Such an implementation as stated above, would hinder, and disrupt the community peace and social-

¹⁹ Krishna Lal v. Nadeshwara, AIR 1918 Pat 91.

²⁰ Budry Roy v. Bhagwat, (1882) ILR 8 Cal 649.

²¹ Jamnabai v. Vasudev, (1930) ILR 54 Bom 417.

²² Sheo Narain v. Janki, (1912) ILR 34 All 505.

²³ Kusum & Poonam Pradhan Saxena, *supra* note 8, ch. 10.

²⁴ U.R. von Ehrenfels, *Matrilineal Joint Family Patterns in India*, 2, Journal of Comparative Family Studies 54, (1971).

²⁵ KUSUM & POONAM PRADHAN SAXENA, *supra* note 8, ch. 15.

economic development.

After considering the above arguments it is pertinent to note that since the current personal law is discriminatory in nature and violates Article 14-18.²⁶ Implementing UCC in the country will modify the religious and local customs to an overarching Central Legislation which will disregard all of it, but it will not violate the right to religion under Article 25 and 26²⁷. This is because the provisions modified are not essential parts of their religion but customs which are archaic practices. Changing the inheritance law does not bar an individual from professing or propagating their religion. However, that does not advocate its effectiveness; the only way the government can successfully implement the UCC is to slowly change the customs and the notions of society to establish equality between the concerned parties.

IV. A MODEL UCC DRAFT

As explained above, we believe that a UCC should not operate within the current state of the nation. However, if we assume the existence of UCC in India, we believe that in the forthcoming paragraphs, the following aspects should be incorporated for a UCC to operate.

The Model UCC should follow the constitutional principles of equality as per Articles 14-18. The UCC should not differentiate parties within gender. This has been taken from the approach of Mayur Suresh as in questions of inheritance what matters the relationship between the deceased is and the one claiming the inheritance²⁸. The reason why personal laws like the HSA differentiate between the gender of an individual is for the sake of discriminatory rights. The UCC should be gender neutral and so should not mention terms like male or female descendant and ascribe special rights to them. As a result, the LGBTQ community is also automatically included in inheritance, this is because their identity and rights have been recognised post the NALSA Judgement²⁹ and Navtej Singh Johar Judgement³⁰ which cannot be more emphasized and thus, there emerges an imminent need for legal reforms on such aspects. This fulfills the dire need for succession rights which was brought out in the case of *Sweety v. General Public*.³¹ Furthermore, the question of Matrilineal and Patrilineal succession disappears as well. Unlike the Hindu Law where the society is patrilineal i.e., the property transfers through the husbands and sons, the inheritance will be equally divided such as all the heirs of the family shall get an

²⁶ INDIA CONST. art. 14 – 18.

²⁷ *Id.* at art. 25 and 26

²⁸ Mayur Suresh, *Possession is 9/10ths of the Body: Law, Land and Hijra Identity*, LAW LIKE LOVE 378 (Arvind Narayan, Alok Gupta ed., 2011).

²⁹ National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

³⁰ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

³¹ *Sweety v. General Public*, AIR 2016 HP 148.

equal share and even the mother's side will also be on the same footing. Therefore, laws like the order in Schedule II of the Act should not be considered.

For a Model UCC, the notions of equal share distribution should also apply. This necessarily implies that the specific allocation of shares as observed for intestate succession under personal laws such as Shia and Sunni schools of law under Muslim law.³² Each participant eligible for inheritance, should not be allotted a specific share nor anyone should be restricted to the category of residuary as observed in Muslim Rules of succession. This leads to the fulfilment of the principles of equality.

Further, the notion of prioritization of agnates over cognates should be avoided while drafting the UCC which is done so by not mentioning any genders in the Act. This is because as observed in Hindu laws as well as Muslim laws, the maternal side are not kept at an equal footing as the paternal side. In Muslim law, this is quite evident via the use of Residuaries and also with respect to the situation involving grandfather and grandmother. There exists a notion of true Grandfather and true Grandmother whereby succession is prioritized to those having related to the paternal line (True Grandfather and Grandmother) over those related to the maternal line (False Grandfather and Grandmother). In Hindu law with respect to Section 15 of the HSA³³, the decision of *Mamta v. Bansi* also becomes relevant since it clearly states no justification for keeping the paternal family at a higher pedestal than the maternal family.³⁴ It clearly violates the provision of discrimination as enshrined under Article 14 and 15 of the Constitution. Similarly, as per Section 15, there is a prioritization given for a daughter's matrimonial home over her own family for a Hindu female dying intestate.³⁵ However, this does not stand true for a son dying intestate where the family of his wife is not considered. It has been also noticed that illegitimate children are not considered in inheritance of the deceased person. The UCC will ensure that illegitimate children of the deceased will also have a right to the property of the deceased. This will be irrespective of the relationship between the parents of the illegitimate child/children.

Similarly, in Christian law there has been a hierarchy established for lineal ascendants for succession in cases where no lineal descendants are alive where a preference to father has been given over mothers.³⁶

Moreover, there should be no role for any specific limitation of application for succession. This

³² Kusum & Poonam Pradhan Saxena, *supra* note 8.

³³ The Hindu Succession Act, *supra* note 7, § 15.

³⁴ Mamta Dinesh Vakil v. Bansi S. Wadwa, LNIND 2012 BOM. 748.

³⁵ The Hindu Succession Act, *supra* note 9, § 15.

³⁶ The Indian Succession Act, 1925, No. 39, Acts of Parliament, § 41.

comes via the existence of four-generations rule in Hindu Law. No other personal laws have such a limitation on the application of succession relating to generations. Thus, for a UCC to be implemented, such rules should not be incorporated.

The UCC must be suitable to other religions as well. Our model UCC deals with inheritance law which must be cogent with the marriage and business law of different religions. In Hindu Law where HUFs are also a business venture, the UCC will add the doctrine of notional partition which says that it will be deemed that the deceased asked for a partition immediately before their death. Afterwards, their share of the property shall be added to their already existing separate property and distributed equally between the heirs and the person's marriage or live-in partner.

Lastly, with respect to succession of Hindu law, it is seen that there has been a distinction done for individuals eligible for succession as per the Schedule. Class I heirs are preferred to Class II heirs where it is seen that many individuals such as son's daughter's son, son's daughter's daughter, daughter's son's son, daughter's son's daughter, daughter's daughter's son and daughter's daughter's daughter are not prioritized. We believe that for a Model UCC to operate, the distinction should be made as per branch whereby within the same branch all the descendants should be entitled to a share in the property who will be classified as Category I. Among them, the immediate descendants shall be eligible to claim inheritance and if they are predeceased then the doctrine of representation should apply.

If there exist no descendants, then priority should be given to the ascendants who are classified under Category II. Those belonging outside the same branch line should be kept as Category III for the absence of Category I and II members would entitle such members from Category III to a share for the deceased's property. The members of Category III will include the siblings of the ascendants of the deceased.

To illustrate this, let's say that there exists a Grandfather 'A' having three sons, S1, S2 and S3 who each have their own sons and daughters. If S1 dies, then the succession as per UCC should operate as if all the descendants of S1 would be entitled to an equal share in property. This would entitle the wives too and if any of the daughters or sons of S1 are pre-deceased, then if their children existed it would devolve accordingly as per the doctrine of representation and if only husband or wife exists, then it would devolve upon them. The ascendants of S1 notwithstanding paternal or maternal ascendants should be considered only if no descendants are present i.e., they are pre-deceased. This further extends to the fact where if the ascendants are pre-deceased, then outside the branch individuals would be considered.

With respect to testamentary succession, the UCC must prepare for the public trying to skirt the laws if they dislike it or are resistant to change. The above answer anticipated with the example that people may write wills to ensure their property goes as their religion and custom demands it. For example, a Muslim may write a will stating that his son will get twice the property as his daughter or some people may not transfer any property to their daughter to follow patriarchal norms. To counter such escape of the law, we take inspiration from the Muslim inheritance law which sets a limit to how much property one can give away through testamentary succession. Through this, we can ensure that the UCC can guarantee the descendants some share in the property.

According to many scholars, there have been methods of providing for effective implementation of UCC, most importantly regarding the opt-in model for individuals after attaining adulthood. Considering the purpose of UCC for mass application for people in India, this does not emerge as a suitable option since as stated above, individuals might not opt for such a system at all which would lead to side-lining of the UCC and would have an ineffective output. The UCC should be mandatory for all people of India otherwise it will be a meaningless legislation.

V. CONCLUSION

Diversity in a country while has its benefits also has its detriments. Based on the above data and theories expounded we see that while the UCC might be a just law respecting all religions and cultures equally and following our constitutional principles enshrined under Article 14-18, it cannot be practically implemented in the society because it will not be respected by the diverse population of our country. However, if the UCC has to be implemented in our country then it must be inclusive of all the people in this nation, be fair and just follow the constitutional principles and should leave little to no room for people to skirt the law as it will make its creation and enforcement null.
