

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 9 | Issue 4

2026

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Constitutional Pluralism: Codifying the Future Indian Identity

JAIVERDHAN SINGH* AND ASTHA ANUPY**

ABSTRACT

This paper examines the constitutional, cultural and jurisprudential dimensions of the future application of personal law in India. It traces the debates in the Constituent Assembly on a uniform civil code and considers the most recent development, the enactment of such a code in Uttarakhand. The analysis addresses the persistent conflict between individual freedom and state-led secular reform, and examines the practical difficulties a single code would face across a diverse society in which, as survey evidence suggests, communities live tolerantly but separately. The argument advanced is that religion, culture and law are closely intertwined in India, so that an attempt at complete uniformity is impracticable and may unsettle the identity of the civilisation itself. That argument is developed through the record of earlier legislation, in particular the Special Marriage Act 1954 and the difficulties it has encountered. The paper also identifies the need for reform of rules of personal law that have not been revisited by the legislature. It then sets out an alternative to the impasse over a uniform civil code, namely the codification of the personal law of each community on the model of the Hindu Code Bill, and considers the advantages such codification would bring, contending that codification is the more faithful means of giving effect to the principle of unity in diversity on which India rests.

Keywords: uniform civil code, codification, personal law, Article 44, Article 25, legal pluralism, Hindu Code Bill, grundnorm, religious freedom, Uttarakhand

I. INTRODUCTION

Article 44 of the Constitution of India provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.¹ The provision sits in Part IV, and by force of Article 37 it is not enforceable by any court, although the principle it lays down is declared fundamental in the governance of the country.² The aspiration behind it is a single body of rules governing marriage, succession, inheritance and adoption, displacing the personal laws in the expectation of national integration, gender justice and equality before the law.

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¹ INDIA CONST. art. 44.

² INDIA CONST. art. 37.

Debate on such a code began in the colonial period, when the administration pressed the case for uniformity in the general law while leaving personal law to the communities. The question was taken up again in the Constituent Assembly, where K. M. Munshi and B. R. Ambedkar argued for a uniform civil code. Munshi questioned whether succession and inheritance belonged to religion at all, telling the Assembly that the framers wished to “divorce religion from personal law, from what may be called social relations or from the rights of parties as regards inheritance or succession”, and warning that if those subjects were treated as religious tenets, equality for women could never be achieved.³

The counter-arguments were pressed with equal force. Naziruddin Ahmad moved the focus from aspiration to the practical difficulty of enacting a secular code in a religiously observant country. B. Pocker Sahib Bahadur and Mahboob Ali Baig Sahib Bahadur argued that the freedom to follow personal law was itself part of religious freedom. Mohammad Ismail Khan, moving a proviso that no group or community should be obliged to give up its own personal law, put the objection at its highest: the right to follow personal law, he said, “is part of the way of life of those people who are following such laws; it is part of their religion and part of their culture”, and “this secular State which we are trying to create should not do anything to interfere with the way of life and religion of the people”.⁴

The amendments were defeated, but the absence of consensus told. The uniform civil code was placed among the directive principles of state policy rather than the fundamental rights, and so became a goal held out to future legislatures rather than a legal obligation.

In 2024, some seventy-five years later, Uttarakhand became the first State to give a uniform civil code statutory form. The drafting committee constituted by the State Government proceeded on the view that civil law and personal law are distinct rather than continuous, and that separating them serves national unity.⁵ That premise is the same one on which Article 44 rests.

Because a uniform code operates by displacing the religious practices that order everyday life, the Uttarakhand statute offers the first opportunity to study what such displacement involves. Questions have been raised about its validity and about its consequences for the federal distribution of legislative power. The State Government expected statewide codification and

³ Constituent Assembly Debates on the Draft Constitution, art. 35 (Nov. 23, 1948) (statement of K. M. Munshi), <https://www.constitutionofindia.net/debates/23-nov-1948/> (last visited Aug. 28, 2026).

⁴ Constituent Assembly Debates, *supra* note 3 (statement of Mohammad Ismail Khan).

⁵ Uniform Civil Code Uttarakhand, *About Us*, <https://ucc.uk.gov.in/about-us> (last visited June 11, 2025).

uniformity of civil rules; the response from some communities was to announce challenges to the legislation in the High Court and the Supreme Court.⁶

The uniform civil code therefore turns on an unresolved tension between personal liberty and the reach of the State as a social reformer, and on the prior question whether the State has the administrative capacity to give effect to such a code at all. Consensus proved difficult to build in Uttarakhand, where the 2011 Census records the non-Hindu population at about seventeen per cent.⁷ The wider question, whether the country is prepared to set religious practice aside in the civil sphere, remains open.

II. RELIGION, CULTURE AND LAW IN INDIA

Culture is the shared behaviour, belief, value and tradition of a group; religion is a system of faith and worship that supplies meaning and purpose. The sharp separation of the two is largely a European construction and travels poorly to India.⁸ Where European thought has been able to hold religion and culture apart, Indian civilisation absorbed its cultural inheritance into religious practice, and the two have developed together, shaping how individuals live and think. Because religious practice is widely believed to have a divine source, culture in India acquires something of the same standing.

The subcontinent is an amalgamation of cultures in which successive religious traditions found room to enter the mainstream. Individual lives are ordered by what the tradition treats as right. This is a culture of great antiquity, intertwined with the formation of India as a nation-state, and correspondingly influential in individual lives.

Habit turned philosophy into practice. The Bhakti and Sufi movements reimagined religion as something other than doctrine, converting its teaching into a moral and ethical structure that guided daily conduct.⁹

The development of scripts such as Brahmi, of the Vedic corpus and the early Tamil and Pali literatures, and of art, music, dance and architecture, proceeded alongside religious

⁶ *Will Challenge UCC Implementation in Uttarakhand in High Court, SC: Jamiat*, THE HINDU (Jan. 28, 2025), <https://www.thehindu.com/news/national/uttarakhand/will-challenge-ucc-implementation-in-uttarakhand-in-high-court-sc-jamiat/article69149223.ece>.

⁷ OFFICE OF THE REGISTRAR GEN. & CENSUS COMM'R, INDIA, *Census of India 2011: Population by Religious Community, Uttarakhand* (2011). The five notified minority communities together account for 16.90% of the State's population; the non-Hindu population, including those who did not state a religion, is 17.03%.

⁸ Brent F. Nelsen & James L. Guth, *Confessional Cultures and European Identity: Religion, Ideology, and Economics*, 14 RELIGIONS 271 (2023).

⁹ Vishwanath V. M., *Bhakti and Sufi Movements: Spiritual Synthesis in Medieval Indian Society*, 1 INDIAN STREAMS RSCH. J. (Issue III, Apr. 2011), <https://oldisrj.lbp.world/UploadedBDData/6650.pdf>.

development.¹⁰ The political history of the subcontinent has likewise been organised in part around caste and religious identity. These factors developed within a moral structure that religious belief established and that they in turn reshaped.

A. Faith as a marker of identity

A Pew Research Center study of religion in India found that Indians of different faiths report a strong commitment to tolerance while living, in Pew's phrase, "religiously segregated lives".¹¹ Cultural and philosophical development across the subcontinent has proceeded in parallel, but the practices and traditions that mark daily life differ community by community.

Marriage illustrates the point. In India marriage fixes an individual's position in society, through the gender roles it carries and through the resources that inheritance and succession allocate. It is also the basis of community membership. Work on inter-religious and inter-caste marriage has estimated that only about two per cent of marriages in India are between people of different religions.¹² Pew's findings point the same way: religious identity functions in India not merely as a form of belonging but as a link to ancestry and culture,¹³ and the course of an individual life from birth to death is ordered by religious observance.

That is the difficulty a uniform civil code faces. The law that governs family life still draws its authority from personal law, which is religious in origin. India describes itself as a civilisational state drawing on historical tradition and philosophy; a uniform code would cut that connection without necessarily supplying a workable substitute. Social reform seldom succeeds in isolation from the values of those it governs.

B. The Special Marriage Act 1954 and the limits of an optional secular code

One of the earliest attempts at a secular law of marriage was the Special Marriage Act 1954.¹⁴ The Act was intended to simplify a diverse body of practice by laying down a single procedure for marriage, and for the succession that follows from it, irrespective of religion. The State's working assumption about a uniform civil code is similar: that the personal laws can be gathered

¹⁰ DIRECTORATE OF DISTANCE & CONTINUING EDUC., UTKAL UNIV., *History of India, Paper VIII*, https://ddceutkal.ac.in/Syllabus/MA_history/paper-8-N.pdf (last visited June 14, 2025).

¹¹ PEW RSCH. CTR., *Religion in India: Tolerance and Segregation* 11 (June 29, 2021) ("Indians, then, simultaneously express enthusiasm for religious tolerance and a consistent preference for keeping their religious communities in segregated spheres – they live together separately.").

¹² K. Das, K. C. Das, T. K. Roy & P. K. Tripathy, *Dynamics of Inter-Religious and Inter-Caste Marriages in India* (Population Ass'n of Am. Annual Meeting Paper, 2011) (reporting an overall inter-religious marriage rate of 2.1% from National Family Health Survey 3 data, 2005-06). Accord Srinivas Goli, Deepti Singh & T. V. Sekher, *Exploring the Myth of Mixed Marriages in India: Evidence from a Nation-Wide Survey* tbl.4, at 19 (IUSSP XXVII Int'l Population Conf. 2013).

¹³ PEW RSCH. CTR., *supra* note 11, ch. 5 (Religious Identity).

¹⁴ The Special Marriage Act, 1954, No. 43 of 1954 (India).

into one statute. That assumption treats the Special Marriage Act as the model. After some seventy years, however, the Act has not displaced personal law, and its application at the points where it meets personal law has produced uncertainty rather than clarity.

The difficulty was illustrated when the Madhya Pradesh High Court declined protection to an interfaith couple who wished to marry under the Special Marriage Act, on the footing that the marriage would be irregular under Muslim personal law. The order was criticised on the ground that recourse to the secular statute ought not to have been conditioned on the personal law the parties were seeking to avoid.¹⁵

The procedure the Act lays down has itself been challenged. In *Dhanak of Humanity v. State of NCT of Delhi*, pending before the Delhi High Court, the constitutional validity of sections 5 to 9, which require thirty days' public notice of an intended marriage and provide for objections, is in issue on grounds that include privacy.¹⁶ The petition has not been decided, and nothing in it can yet be treated as a holding.

Litigation of this kind exposes vagueness in the statutory scheme, latitude in its interpretation, and an inability to absorb the consequences that follow from its use. Recourse to the Act appears limited relative to marriages solemnised under the personal laws, and it has repeatedly come into conflict with them.¹⁷

The State assumes that a uniform civil code will cure what ails the Special Marriage Act. But the Act is optional, and a uniform code would be compulsory, and the comparison therefore does not carry the weight placed on it. When the code was enacted in a State as small as Uttarakhand, the Scheduled Tribes were excluded from its operation because of the conflict with their own customs.¹⁸ Comparable exclusions may be expected on a national application. Segregation of personal law would survive the enactment of a uniform code, and the conflicts now seen under the Special Marriage Act would persist.

¹⁵ *Bizarre Judgment: On the Madhya Pradesh High Court's Order*, THE HINDU (June 7, 2024) (editorial), <https://www.thehindu.com/opinion/editorial/bizarre-judgment-on-the-madhya-pradesh-high-courts-order/article68259173.ece>.

¹⁶ *Dhanak of Humanity v. State of NCT of Delhi*, W.P. (C) No. 4217 of 2019 (Delhi H.C.) (pending), heard with *Nida Rehman v. State of NCT of Delhi*, W.P. (C) No. 6947 of 2020.

¹⁷ *Over 60,000 Marriages Registered in Delhi in Last 3 Years: Data*, TIMES OF INDIA (Dec. 12, 2022), <https://timesofindia.indiatimes.com/city/delhi/over-60000-marriages-registered-in-delhi-in-last-3-years-data/articleshow/96179251.cms>.

¹⁸ The Uniform Civil Code of Uttarakhand, 2024, § 2, No. 3 of 2024 (Uttarakhand). The operative formula appears in Uniform Civil Code, Uttarakhand Rules, 2025, r. 2, made pursuant to § 2, which excludes “the members of any Scheduled Tribes within the meaning of clause (25) of Article 366 read with Article 342 of the Constitution of India and the persons and group of persons whose customary rights are protected under Part XXI of the Constitution of India.”

III. AREAS OF PERSONAL LAW AWAITING LEGISLATIVE REFORM

While this debate continues, particular groups remain governed by rules of personal law that the legislature has not revisited. The Law Commission of India, which in 2018 concluded that a uniform civil code was neither necessary nor desirable at that stage, took the view that the better course was to address specific discriminatory rules within each personal law rather than to replace the personal laws altogether.¹⁹ The paragraphs that follow set out, on that footing, the questions that have been identified as calling for attention.

Muslims constituted 14.2 per cent of India's population at the 2011 Census.²⁰ Apart from the matters covered by the Dissolution of Muslim Marriages Act 1939, the Muslim Women (Protection of Rights on Divorce) Act 1986 and the Muslim Women (Protection of Rights on Marriage) Act 2019, Muslim personal law in India is largely uncodified, and its content is therefore established case by case. Several of its rules have been challenged, and the challenges have had mixed outcomes.

The clearest change has been to instantaneous triple talaq. In *Shayara Bano v. Union of India* the Supreme Court set aside *talaq-e-biddat* by a majority of three to two, although the majority rested on no common reasoning: Nariman and Lalit JJ. held the practice manifestly arbitrary and struck down section 2 of the Muslim Personal Law (Shariat) Application Act 1937 to the extent that it recognised the practice, while Kurian Joseph J. reached the same result on the ground that the practice was contrary to the Quran and so bad in law.²¹ The six-month injunction and the direction to Parliament to legislate were proposed by Khehar C.J. and Nazeer J., who were in the minority, and had no operative effect.²² Parliament subsequently enacted the Muslim Women (Protection of Rights on Marriage) Act 2019, which voids and punishes the pronouncement of *talaq-e-biddat* but does not touch any other form of talaq.²³

¹⁹ LAW COMM'N OF INDIA, *Consultation Paper on Reform of Family Law* (Aug. 31, 2018) (concluding that a uniform civil code is "neither necessary nor desirable at this stage" and recommending instead that discriminatory rules within each personal law be addressed).

²⁰ OFFICE OF THE REGISTRAR GEN. & CENSUS COMM'R, INDIA, *Census of India 2011: C-01 Population by Religious Community* (2011) (Muslims, 172,245,158 persons, 14.2% of the total population of 1,210,854,977).

²¹ *Shayara Bano v. Union of India*, (2017) 9 SCC 1 (India). The order of the Court records that "by a majority of 3:2 the practice of 'talaq-e-biddat' – triple talaq is set aside." Nariman J. (for himself and Lalit J.) held the practice violative of Article 14; Kurian Joseph J. declined to test the 1937 Act against Article 14 and held instead that "what is bad in theology is bad in law as well."

²² *Id.* (Khehar C.J., dissenting, for himself and Nazeer J.) (proposing, under Article 142, a six-month injunction and a direction to the Union to consider legislation). The proposal formed no part of the majority and is without operative effect.

²³ The Muslim Women (Protection of Rights on Marriage) Act, 2019, §§ 2(c), 3, 4, No. 20 of 2019 (India) (defining "talaq" as *talaq-e-biddat* or any similar form having the effect of instantaneous and irrevocable divorce). The Act does not extend to *nikah halala* or to polygamy.

Other questions remain open. A petition challenging polygamy, *nikah halala*, *nikah mutah* and *nikah misyar* under Articles 14, 15 and 21 was referred to a Constitution Bench in March 2018 and, so far as the reported record shows, has not been decided.²⁴ In referring it the Court recorded that these practices had not been decided in *Shayara Bano*. *Nikah halala* is the rule that a woman divorced irrevocably may remarry her former husband only if she has in the meantime married another man and that marriage has itself come to an end; the intervening husband is any man, and not, as is sometimes suggested, a religious functionary.

The age at which a marriage may be contracted is also unsettled. The Prohibition of Child Marriage Act 2006 fixes minimum ages of eighteen for women and twenty-one for men, and the Protection of Children from Sexual Offences Act 2012 applies without reference to religion, but whether the 2006 Act displaces the personal-law rule permitting marriage on attaining puberty has divided the High Courts and is pending before the Supreme Court.²⁵ On maintenance, the position has moved a considerable distance from *Shah Bano*: the Muslim Women (Protection of Rights on Divorce) Act 1986 was construed in *Danial Latifi v. Union of India* as requiring a provision extending beyond the period of *iddat*,²⁶ and in 2024 the Supreme Court held that section 125 of the Code of Criminal Procedure remains available to a divorced Muslim woman.²⁷ On intestate succession, the rule that a daughter takes half the share of a son is among the matters the Law Commission identified for reconsideration.²⁸

The law applying to Christians is spread across the Indian Christian Marriage Act 1872, the Divorce Act 1869 and the Indian Succession Act 1925. Much of the criticism directed at this body of law, including that in the Law Commission's report of 1960,²⁹ has been overtaken by legislation and should no longer be repeated. The Indian Divorce (Amendment) Act 2001 recast section 10 of the 1869 Act so that the grounds of dissolution are now available on a petition presented "either by the husband or the wife" in identical terms, and section 10(2) gives the wife a further ground that is not available to the husband; the older rule, under which a wife had

²⁴ *Sameena Begum v. Union of India*, W.P. (C) No. 222 of 2018 (India) (order of Mar. 26, 2018) (referring to a Constitution Bench challenges to polygamy, *nikah halala*, *nikah mutah* and *nikah misyar*, and recording that "these concepts have not been decided by the Constitution Bench" in *Shayara Bano*). The petition remains pending; status is stated as at the sources last consulted.

²⁵ The Prohibition of Child Marriage Act, 2006, § 2(a)-(b), No. 6 of 2007 (India); The Protection of Children from Sexual Offences Act, 2012, No. 32 of 2012 (India). Whether the 2006 Act overrides the personal-law rule permitting marriage on puberty has divided the High Courts and is pending before the Supreme Court.

²⁶ *Danial Latifi v. Union of India*, (2001) 7 SCC 740 (India).

²⁷ *Mohd. Abdul Samad v. State of Telangana*, (2025) 2 SCC 49 (India) (decided July 10, 2024) (holding § 125 of the Code of Criminal Procedure, 1973, available to a divorced Muslim woman notwithstanding the Muslim Women (Protection of Rights on Divorce) Act, 1986).

²⁸ LAW COMM'N OF INDIA, *supra* note 19.

²⁹ LAW COMM'N OF INDIA, *Report No. 15: Law Relating to Marriage and Divorce Amongst Christians in India* (Aug. 19, 1960). The report predates the Indian Divorce (Amendment) Act, 2001, and its criticisms of § 10 have been overtaken by that Act. *See also* LAW COMM'N OF INDIA, *Report No. 164: The Indian Divorce Act, 1869* (1998).

to establish adultery coupled with an additional matrimonial offence, no longer stands.³⁰ Sections 36 and 37 provide for alimony pending suit and for permanent alimony,³¹ and the general provision for maintenance in criminal proceedings applies without regard to religion,³² so a Christian woman is not left without a remedy. In intestate succession the Act divides the estate equally among the children without distinction of sex,³³ and the discriminatory Travancore rule ceased to apply once the Supreme Court held in *Mary Roy v. State of Kerala* that Christians in that region are governed by the Act of 1925.³⁴ A residual preference does survive in section 42, under which the father of an intestate who leaves no lineal descendant succeeds ahead of the mother.³⁵ The other distinguishing feature is the waiting period: section 10A, inserted in 2001, requires two years of separation before a petition for divorce by mutual consent, against one year under the Hindu Marriage Act 1955, although the Kerala High Court has read that period down.³⁶

Parsis and Jews are the smallest of the communities recorded separately in the 2011 Census, numbering 57,264 and 4,429 respectively.³⁷ Parsi law is contained in the Parsi Marriage and Divorce Act 1936 and in the Parsi provisions of the Indian Succession Act, and here too the position has moved: the amendment of 1991 replaced the earlier rule under which a son took four times a daughter's share, so that section 51 now divides the estate of a Parsi intestate among the surviving spouse and each child in equal shares.³⁸ What remains unresolved is the definition of a Parsi. The Law Commission has noted that the children of a Parsi father and a non-Parsi mother are treated as Parsis, that the children of a Parsi mother and a non-Parsi father are not,

³⁰ The Divorce Act, 1869, § 10, No. 4 of 1869 (India), as substituted by the Indian Divorce (Amendment) Act, 2001, No. 51 of 2001. The 2001 Act also omitted the word "Indian" from the short title. Section 10(2) permits a wife also to petition on the ground that the husband has been guilty of rape, sodomy or bestiality.

³¹ The Divorce Act, 1869, §§ 36-37, No. 4 of 1869 (India).

³² The Bharatiya Nagarik Suraksha Sanhita, 2023, § 144, No. 46 of 2023 (India), replacing The Code of Criminal Procedure, 1973, § 125. The section applies irrespective of religion and its Explanation includes a divorced woman who has not remarried.

³³ The Indian Succession Act, 1925, §§ 33, 37, No. 39 of 1925 (India).

³⁴ *Mary Roy v. State of Kerala*, AIR 1986 SC 1011 (India) (holding the Travancore Christian Succession Act repealed by the Part B States (Laws) Act, 1951, and Christians in that region governed by the Indian Succession Act, 1925). The Court decided the case on that statutory ground and expressly left the constitutional challenge undecided.

³⁵ The Indian Succession Act, 1925, §§ 42-46, No. 39 of 1925 (India) (father of an intestate leaving no lineal descendant preferred to the mother).

³⁶ The Indian Divorce Act, 1869, § 10A, No. 4 of 1869 (India) (inserted in 2001; two years' separation); cf. The Hindu Marriage Act, 1955, § 13B, No. 25 of 1955 (India) (one year). The Kerala High Court read the two-year period down to one year in *Saumya Ann Thomas v. Union of India*, 2010 (1) KLT 869 (India). The statute has not been amended.

³⁷ OFFICE OF THE REGISTRAR GEN. & CENSUS COMM'R, INDIA, *Census of India 2011: C-01 Appendix, Other Religions and Persuasions* (2011) (Parsi/Zoroastrian, 57,264 persons, 0.0047% of the total population; Jews, 4,429 persons, 0.0004%).

³⁸ The Indian Succession Act, 1925, § 51, No. 39 of 1925 (India), as substituted by the Indian Succession (Amendment) Act, 1991, No. 51 of 1991.

and that a Parsi woman who marries outside the community is treated as ceasing to belong to it, with the result that her children cannot inherit from a Parsi intestate; the Commission recorded that this needs to be remedied.³⁹ The Jewish community has no codified law of marriage or divorce at all, and the courts have applied uncoded Jewish religious law to Jewish matrimonial disputes; intestate succession, by contrast, falls under the general provisions of the Indian Succession Act, from which Jews are not excepted.⁴⁰

The demands of the present situation suggest that attention would be better directed to workable alternatives than to the merits of a uniform civil code in the abstract. A debate conducted in the language of imposition should give way to something the communities concerned can accept. Codification of personal law, balancing individual belief against the claims of social reform, offers a settlement capable of bringing this long argument to a close.

IV. ARTICLE 25 AND CODIFICATION AS A ROUTE TO REFORM

Codification of personal law draws its constitutional warrant from Article 25, which secures freedom of conscience and the right freely to profess, practise and propagate religion, while expressly preserving the power of the State to make law providing for social welfare and reform. The distinction the article draws between religious practice and the secular activity associated with it is what allows the legislature to reform personal law without displacing religion itself.⁴¹ Ambedkar's remark that he measured the progress of a community by the degree of progress women had achieved was directed at the position of women within the Hindu community, and it informed the Hindu Code Bill. Hindu society in the 1950s was, on the reformers' assessment, in need of a deliberate push, and the codification supplied it.

That push came when Parliament codified the essential incidents of Hindu marriage and succession together with a set of social reforms. The legislature consolidated a diverse body of practice into a legal foundation on which later practice would rest, while introducing provisions that were new to the community.⁴²

The effect was close to what Ambedkar had sought for the least advantaged within the Hindu population, and for women in particular. The rights of women within the family expanded at a time when family structure was governed by rigid gender roles. The codification left the

³⁹ LAW COMM'N OF INDIA, *supra* note 19, para. 5.141.

⁴⁰ The Indian Succession Act, 1925, § 29, No. 39 of 1925 (India) (excepting Hindus, Muslims, Buddhists, Sikhs and Jains, but not Jews, from Part V); *see In re Sarah Ezra*, AIR 1931 Cal 560 (India) (Part V of the Act applies to members of the Jewish community).

⁴¹ INDIA CONST. art. 25.

⁴² The Hindu Marriage Act, 1955, No. 25 of 1955 (India).

sacramental character of Hindu marriage intact while introducing divorce, which Hindu law had not previously recognised.

Codification also opened the way to later measures such as the Dowry Prohibition Act 1961⁴³ and the amendment of 2005 to the Hindu Succession Act 1956, which made daughters coparceners by birth on the same footing as sons.⁴⁴ It struck a balance between religious and individual rights, so that the community did not experience the reform as an imposition while the rights of particular groups were nonetheless secured. That approach was intelligible to those it governed in a way that an abstract uniform code is not.

The laws of religion that bear on family life stand in need of revision as society changes. Codification of Hindu law reached nearly eighty per cent of the population⁴⁵ and took effect over time rather than by a single act of compulsion; the example can be extended. Codifying the personal laws of the other communities would accommodate the rights of those who have been left out, supply clear definitions where custom is now indeterminate, and encourage reform from within.

V. BALANCING RELIGIOUS AUTONOMY WITH SOCIAL JUSTICE THROUGH CODIFIED PERSONAL LAW

Women's participation in paid work in India remains low across communities. The fourth National Family Health Survey recorded 24 per cent of women aged 15 to 49 as currently employed, with a further 6 per cent having worked at some point in the preceding twelve months.⁴⁶ The survey does not publish employment by religion, so the comparison between communities cannot be drawn from it directly. What can be said is that the rights Hindu women acquired in property, together with the change in gender roles that followed the codified law of marriage and divorce, widened their access to public life.

In the 1950s the law on guardianship, adoption and the status of children born outside marriage was indeterminate, and the stigma attaching to these questions left such rights as existed largely unused. Codification gave them definite content and, over time, shifted attitudes with it.

A. Evidence from the codification of Hindu personal law

The case for codification rests on what changed in society after the Hindu Code Bill.

⁴³ The Dowry Prohibition Act, 1961, No. 28 of 1961 (India).

⁴⁴ The Hindu Succession (Amendment) Act, 2005, § 6, No. 39 of 2005 (India); see *Vineeta Sharma v. Rakesh Sharma*, (2020) 9 SCC 1 (India).

⁴⁵ OFFICE OF THE REGISTRAR GEN. & CENSUS COMM'R, INDIA, *supra* note 20 (Hindus, 966,257,353 persons, 79.8% of the total population).

⁴⁶ INT'L INST. FOR POPULATION SCIS. & ICF, *National Family Health Survey (NFHS-4), 2015-16: India* tbl.3.6.1, at 72 (2017). The report does not tabulate employment by religion.

Figures drawn from the 1961 Census, the last to tabulate marriages by community, are commonly reported as showing polygynous marriage at 5.8 per cent among Hindus and 5.7 per cent among Muslims, with the highest incidence, about 15 per cent, among tribal communities.⁴⁷ By 2019-21 the fifth National Family Health Survey recorded polygyny among Hindus at 1.3 per cent, against a national figure of 1.4 per cent.⁴⁸ Codified Hindu law contributed to that decline by making bigamy an offence and rendering the second marriage void. The prohibition gave women a remedy and, beyond the remedy, altered what the society expected.

The proportion of divorces initiated by women in India has risen, in line with a wider trend. That is of some significance in a tradition that did not originally recognise divorce at all and now extends it to women on the same terms as men. Divorce remains uncommon, for reasons that include disparity in education between the sexes and social stigma, but the existence of the right has given women a choice they did not have.

Access to public space and to resources once reserved to men followed. Female literacy in India rose from 8.86 per cent in 1951, measured across all women,⁴⁹ to 68.3 per cent among Hindu women aged 15 to 49 by 2015-16.⁵⁰ The two figures are not a like-for-like series, since the earlier one is not disaggregated by religion, but the direction of change is not in doubt.

Codified Hindu law played a substantial part in protecting women's dignity and in unsettling the gender roles the society had assigned them. Over time that change moved the country onto a different trajectory, on which the State has been able to reconcile welfare objectives with a traditional identity rooted in religious practice.

The change was not confined to one group. Attention shifted in time to others left out by religious rule, among them children born outside marriage, who had neither property rights nor social security and stood at the margin of the family. Codification set out to end their disability, giving them rights in property and a legal identity.⁵¹

⁴⁷ Figures attributed to the Census of India 1961 and widely reported; see Rohan Venkataramakrishnan, *Muslim Women and the Surprising Facts About Polygamy in India*, SCROLL.IN (July 8, 2014), <https://scroll.in/article/669083/muslim-women-and-the-surprising-facts-about-polygamy-in-india>. The underlying Census publication could not be traced.

⁴⁸ Harihar Sahoo, R. Nagarajan & Chaitali Mandal, INT'L INST. FOR POPULATION SCIS., *Polygyny in India: Levels and Differentials* tbl.4 (Rsch. Brief No. 21, June 2022), https://www.iipsindia.ac.in/sites/default/files/Research_Brief_No21_Polygyny.pdf.

⁴⁹ MINISTRY OF STATISTICS & PROGRAMME IMPLEMENTATION, *Women and Men in India 2017* tbl.3.1 (2017) (female literacy rate of 8.86% in 1951, all women, citing the Census of India).

⁵⁰ INT'L INST. FOR POPULATION SCIS. & ICF, *supra* note 46, tbl.3.3.1, at 63 (68.3% of Hindu women aged 15-49 literate; 68.4% of all women).

⁵¹ The Hindu Marriage Act, 1955, § 16, No. 25 of 1955 (India) (legitimacy of children of void and voidable marriages); see also The Hindu Succession Act, 1956, No. 30 of 1956 (India).

Adoption was reworked under the same programme. Adoption in ancient India was sacramental, completed by the *datta homam*, the offering of clarified butter into the fire, and directed at the continuation of the line and the performance of religious rites through a male child; daughters could not be adopted.⁵² The Hindu Adoptions and Maintenance Act 1956 recast it around the welfare of the child, permitting the adoption of daughters and allowing a woman to adopt in her own right.⁵³

Codified Hindu law has in this way displaced a set of older assumptions and accommodated the conditions of modern life. Civil and family law changes continuously, and it is through that branch that development is reconciled with inherited wisdom. The flexibility of these statutes is what allows such change to spread.

Where custom and religious identity intersect with the legal system, codification supplies clarity and a shared direction. Hindu personal law shows that codification converts an indeterminate body of religious rule, open to arbitrary interpretation, into something accessible and amendable. The legal system can then respond to social change without abandoning the cultural framework people recognise.

B. The constitutional tension between uniformity and individual faith

The debate begun in the Constituent Assembly has run for more than seventy-five years without resolution. Religion is a public form of cohesion, while secularisation proceeds from individualism, and the problem has two faces. The first is that the public character of civil law is challenged by imagining it as something that can be practised individually. The second is an insistence that citizens set aside religious commitments in favour of a neutrality that the Constitution does not in terms require.

The competing pulls appear in the Constitution itself, in the relation between Article 14 and Article 25.⁵⁴ Article 14 guarantees equality before the law and the equal protection of the laws; Article 25 protects freedom of religion, subject to public order, morality and health and to the State's power to legislate for social reform. Codification is the course that can give effect to both. The State would leave individuals free to practise their religion while laying down baseline provisions by statute, and equality would be secured within them.

⁵² Tanisha Garg, *The Critical Analysis of the Evolution of the Adoption Laws in India*, 3 INDIAN J. INTEGRATED RSCH. L. (Issue IV, 2023), <https://ijirl.com/wp-content/uploads/2023/07/THE-CRITICAL-ANALYSIS-OF-THE-EVOLUTION-OF-THE-ADOPTION-LAWS-IN-INDIA.pdf>.

⁵³ The Hindu Adoptions and Maintenance Act, 1956, No. 78 of 1956 (India).

⁵⁴ INDIA CONST. arts. 14, 25.

C. Judicial observations on codification

The absence of codification has complicated adjudication. Divergence between local custom and constitutional principle has produced inconsistent outcomes in the family courts. The courts have noticed the problem, and Article 44 has been the subject of judicial comment on several occasions. In *Mohd. Ahmed Khan v. Shah Bano Begum*, holding that a divorced Muslim woman is a wife for the purposes of section 125 of the Code of Criminal Procedure 1973, Chandrachud C.J. observed that it was a matter of regret that Article 44 had remained a dead letter, and that a common civil code would help the cause of national integration by removing disparate loyalties to laws with conflicting ideologies.⁵⁵ In *John Vallamattom v. Union of India*, striking down section 118 of the Indian Succession Act 1925 as violative of Article 14, Khare C.J. said that it was a matter of regret that Article 44 had not been given effect to, that Parliament was still to frame a common civil code, and that such a code would help the cause of national integration by removing contradictions based on ideologies.⁵⁶

The reach of these observations should not be overstated. In *Sarla Mudgal v. Union of India*, which held that a Hindu husband who converts to Islam and marries again without dissolving his first marriage commits an offence under section 494 of the Indian Penal Code 1860, the Court requested the Government to take a fresh look at Article 44 and directed only that an affidavit be filed indicating the steps taken.⁵⁷ In *Lily Thomas v. Union of India* the Court recorded expressly that *Sarla Mudgal* had issued no direction for the enactment of a common civil code, and that the judges had done no more than express their views on the facts before them.⁵⁸ Article 44 remains what Article 37 makes it, a principle addressed to the legislature and not enforceable in court. Successive legislatures have likewise recorded dissatisfaction with the want of a consolidated law.

A vacuum created by the absence of reform, together with limited public attention to these questions, has amplified the perceived need for a uniform civil code. The State has tended to underestimate the place religion occupies in the lives of those it governs, and has proceeded on the assumption that secular law can simply be preferred to religious provision.

⁵⁵ *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556, para. 32 (India).

⁵⁶ *John Vallamattom v. Union of India*, (2003) 6 SCC 611, para. 44 (India) (Khare, C.J.). Section 118 of the Indian Succession Act, 1925, was declared unconstitutional as violative of Article 14 alone; the challenges under Articles 15, 25 and 26 were rejected.

⁵⁷ *Sarla Mudgal v. Union of India*, (1995) 3 SCC 635, paras. 37-38 (India) (decided May 10, 1995).

⁵⁸ *Lily Thomas v. Union of India*, (2000) 6 SCC 224, paras. 45, 66 (India).

That assumption has left the discussion of the future of personal law where it began. Progress for some communities has stalled in consequence. Codification would give the courts a structure to work with and would help secure the delivery of justice irrespective of religious identity.

VI. PERSISTENT CHALLENGES AFTER CODIFICATION

A. Interfaith marriage and conflict with the Special Marriage Act

Codification clarifies, but it also draws boundaries, and boundaries may obstruct interfaith marriage. Interfaith marriage is at present governed by the Special Marriage Act, whose application has been uneven. The courts have repeatedly had to reconcile the Act with the personal laws, an exercise made possible only by the indeterminacy of the latter. The statute has not achieved its purpose across the range of situations Indian society presents, and it functions largely through judicial interpretation.⁵⁹ The object of codifying personal law is not to separate communities but to provide a determinate answer for every identity and belief, interfaith marriage included, consistently with constitutional morality.

Three problems may be anticipated. The first concerns intestate succession where the marriage is solemnised under the Special Marriage Act. Section 21 of that Act applies the Indian Succession Act 1925 to the property of parties married under it,⁶⁰ which may displace the personal law of succession that would otherwise govern each spouse and their families. One answer would be a provision enabling an interfaith couple, at the time of marriage, to call on their families to execute a will specifying their respective shares, the obligation to be discharged within three months of the marriage.

The second concerns guardianship of the children of interfaith couples. That question has been left largely to judicial discretion under the Guardians and Wards Act 1890, which directs the court to the welfare of the minor,⁶¹ and the outcome has not always reflected it. A possible answer is a mandatory declaration by the parents nominating a guardian in the event of their death, made within three months of the child's birth and accompanied by an attested consent from the person nominated.

The third is the present practice of manoeuvring between uncoded personal law and the Special Marriage Act as a way of resolving conflicts as they arise.⁶² That practice produces

⁵⁹ Alok Kumar & Namita Vashishtha, *Harmonizing Diversity: Challenges in Unifying Marriage and Divorce Laws in India*, 5 SHIMLA L. REV. 213, 218 (2022), <https://www.hpnlu.ac.in/PDF/554dfc18-895c-46c4-81f4-9d0e6c6c043e.pdf>.

⁶⁰ The Special Marriage Act, 1954, § 21, No. 43 of 1954 (India) (applying the Indian Succession Act, 1925, to the property of parties married under the Act).

⁶¹ The Guardians and Wards Act, 1890, § 17, No. 8 of 1890 (India) (directing the court to the welfare of the minor).

⁶² Kumar & Vashishtha, *supra* note 59, at 218.

confusion rather than a durable remedy. Codification of personal law, together with amendment of the Special Marriage Act along the lines suggested, would answer both: the amendments would remove the principal sources of conflict in succession and guardianship, and codification would close the space in which the manoeuvring occurs.

B. A grundnorm for a plural legal landscape

The religious traditions of India developed in different periods and under different philosophical, political and economic influences, and each has diversified internally. That internal diversity is an obstacle to codifying the personal law of any one of them. The same objection was raised against the Hindu Code Bill, on the ground that a simplified statute could not accommodate the variety of Hindu practice.

Hindu practice does vary widely across regions, in tradition, custom, belief and source. The legislature nonetheless brought that range within a single framework. Section 7 of the Hindu Marriage Act 1955 provides that a marriage may be solemnised in accordance with the customary rites and ceremonies of either party, and treats the *saptapadi* as decisive only where the rites in question include it.⁶³ Communities that do not follow those rites are therefore not obliged to adopt them. The statute operates as a common norm binding on all Hindus while leaving room for divergent practice.

Law develops through deliberate processes to meet the needs of those it governs, but its validity ultimately rests on ideas already accepted. Kelsen's pure theory locates that foundation in the *Grundnorm*, the basic norm presupposed as the source of validity for every other norm in the system.⁶⁴ The basic norm is not itself validated by any legal norm; it is an extra-legal phenomenon usually attributed to social usage, custom, tradition or a shared acceptance of the order's authority. In India that role has been played by the Constitution. What is proposed here is the articulation of a comparable foundational norm for the civil law, drawn from the experience of the codified Hindu personal laws.

C. Codification and tribal communities

A uniform civil code has been the only plan the State has advanced in eight decades to address the persistence of older moral rules in modern India. The relationship between tribal communities and the authorities has, however, been marked by distrust, and that was visible when the code was enacted in Uttarakhand. Section 2 of the Uniform Civil Code of Uttarakhand

⁶³ The Hindu Marriage Act, 1955, § 7, No. 25 of 1955 (India). Section 7(1) refers to the customary rites and ceremonies of either party; § 7(2) treats the *saptapadi* as completing the marriage only where the rites in question include it.

⁶⁴ HANS KELSEN, PURE THEORY OF LAW 193-95 (Max Knight trans., Univ. of Cal. Press 1967).

2024 excludes members of the Scheduled Tribes within the meaning of Article 366(25) of the Constitution, and persons whose customary rights are protected under Part XXI.⁶⁵ The exclusion avoided a confrontation, but it also raises a question about how the communities left outside are to be reached.

Scheduled Tribes accounted for 8.6 per cent of India's population at the 2011 Census.⁶⁶ Limited social and economic security and low literacy have left them with little presence in public life, and change in customary practice has been correspondingly slow. In the fifth National Family Health Survey, 2.4 per cent of currently married Scheduled Tribe women aged 15 to 49 reported that their husband had another wife, against 1.4 per cent nationally. Measured across the whole population rather than by tribe, the rate was 6.1 per cent in Meghalaya and 3.7 per cent in Arunachal Pradesh, and exceeded 10 per cent in five districts, among them East Jaintia Hills and Kra Daadi.⁶⁷ Analysis of the previous round of the survey has found spousal violence reported more often in polygynous than in monogamous unions, at about 40 per cent against 33 per cent.⁶⁸

Cooperation between the State and these communities on statutory provision built on an agreed foundational norm, for instance a prohibition of polygamy that leaves other customs undisturbed, would serve the interests of the women affected. Codification resting on such a norm is a more promising course than the protective exclusion that has so far produced little movement.

VII. CONCLUSION

The circumstances of independence and the years that followed left the country cautious about whether a developed India could remain true to its diversity. That caution persists among those who treat uniformity as the only route to social improvement. Yet compulsion of that kind meets resistance, and the result is that particular groups are removed from the common pool of development rather than brought into it.

The codification of Hindu personal law is best understood as a continuing experiment in which diversity and development have advanced together. Using the notion of essential practice, the

⁶⁵ The Uniform Civil Code of Uttarakhand, 2024, *supra* note 18, § 2.

⁶⁶ OFFICE OF THE REGISTRAR GEN. & CENSUS COMM'R, INDIA, *Primary Census Abstract, India and States/Union Territories 2011* (2011) (Scheduled Tribes, 104,545,716 persons, 8.6% of the total population).

⁶⁷ Sahoo, Nagarajan & Mandal, *supra* note 48, tbls.1-2, 4.

⁶⁸ Margubur Rahaman, Avijit Roy, Nanigopal Kapasia & Pradip Chouhan, *Spousal Violence in India: Does Risk of Spousal Violence Higher Among Polygynous Unions?*, 8 COGENT SOC. SCIS. art. 2103945 (2022) (reporting overall spousal violence at 39.9% in polygynous and 32.6% in monogamous unions, on National Family Health Survey 4 data).

codified Hindu law built a bridge across the traditional diversity of Hinduism, and community development was founded and sustained on it. That experience can serve as a precedent.

Western accounts have generally described growth as linear, with qualitative change achieved by shedding the past. That account has been increasingly questioned in Asia and Africa, where the lives of the population remain rooted in regional belief.

In 2006 an India Today survey asked young Indians how they understood development. The responses favoured law that stays rooted in custom while remaining responsive to change, and the survey was reported under the description “managed modernity and tradition with a twist”.⁶⁹

India has generally moved towards progress while remaining attached to its culture, and has envisaged that progress through contextual change grounded in diversity and democracy. The survey indicates the shape of a solution: laws of marriage, succession, divorce and family that answer to lived conditions and are neither wholly liberal nor wholly conservative.

⁶⁹ Dilip Bobb, *Best of Both Worlds*, INDIA TODAY (Feb. 20, 2006) (reporting an India Today-AC Nielsen-ORG-MARG survey), <https://www.indiatoday.in/magazine/cover-story/story/20060220-young-indians-want-managed-modernity-and-tradition-with-a-twist-survey-785908-2006-02-19>.