

## ALL THAT IS UNIFORM IS NOT GOLD: UCC IN GOA AND INDIA'S PREDICAMENT

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### INTRODUCTION

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The history of the relationship between State and religion in various corners of the world has been a fascinating one: which has seen the two intermingle and diffuse into one, and has also seen the two institutions viciously turning against one another. Sometimes, the two have colluded to consolidate power; while at other times, they have wrested for power and strived for dominance. There have been several battles fought and many sacrifices made, but till date, there stands no universal victor and perhaps, there will never be. The views as to the relationship between the two, therefore, have also been varying— ranging from St. Augustine's proclamation of a State as a God-ordained institution<sup>1</sup>, to the Galesian Theory of Two-Swords which supported separation between the temporal powers of the State and the ecclesiastical powers of the Church. Machiavelli, however, seemed to ignore the outwardly idealistic differences between the two institutions and recognized them as tools of attaining and maintaining power over society. This identification of religion as a tool to govern the society puts religion in league with law, and though many noble things may be said about the need for, and the ends of, law, it would be naive to suggest that it is not one of the most powerful tools to control a society. Thus, the tug of war between the State and religious institutions necessarily spilled over to the legal field, with both wishing to assert dominance. According to the Theory of Two Swords, however, the fields over which these two institutions could exercise power were distinct and while the State was free to make laws for all temporal concerns, religion made the laws to govern the spiritual world. This arrangement was much like a compromise between the two institutions, with the necessary corollary that one institution would not infringe upon the exclusive domain of the other. With time, the Western world underwent, what some call, a privatization of religion as per which each individual was free to follow his or her own religious beliefs with little or no interference from the State, unless it was absolutely necessary for the State to intervene in the public interest.

However, there has always existed a significant difference between the Western experience as to State-religion interaction, and the South Asian experience. This difference was predominantly due to the lack of a church-like institutional centre of religious power, as well as the existence of multiple religious factions, with none being in a position to completely dominate the others. In the Indian-subcontinent, various dynasties and rulers

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<sup>1</sup> Herbert A. Deane, *THE POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE* 221 (New York: Columbia University Press, 1963).

ruled over various parts of the region through time, and while the rulers had their own religious ideologies, no ruler successfully imposed their religion on their subjects, so as to ever achieve a homogenous religious community. This is, however, not to say that religion played no role in the polity of the subcontinent, and it must be said that religion continues to play a crucial part in even the present day politics of all the countries in the Indian subcontinent. In fact, religion played the primary role in the Two-Nation Theory which divided British-India upon independence. Currently, South Asia harbours great diversity in religion and while Hindus from India and Nepal form a majority, Islam is the second-most popular religion in the region. In addition to the above, South Asia also contains a fair representation of Buddhists, Jains, Sikhs, Christians and Zoroastrians. However, just like the rest of the world, South Asia too developed notions of secularism, at least till the extent that a considerable few wished that the State did not impose a religion, or interfere in the religious beliefs and practices of the people. These wishes, however, have not come to fruition in all the countries. Thus, Pakistan is proclaimed to be an Islamic Republic with notions of Islamic Law, or Shariat, pervading through its very constitution. The Constitution of Bangladesh also names Islam as the State religion, though it also establishes secularism as a fundamental principle. Nepal is set to end its short stint at secularism and return to being a Hindu State. India, however, has espoused secularism from its very inception as an independent nation, and the features of the same have always been part of the Constitution, though, the term 'secularism' was added to the Preamble by the 42<sup>nd</sup> Amendment only in 1976. The Indian Constitution does not only refrain from recognizing any religion as official, but it goes a step further by ensuring the freedom of conscience and the right to freely profess, practise and propagate any religion.<sup>2</sup> This is a fundamental right guaranteed by Part-III of the Indian Constitution, which also contains other provisions to protect the religion or language of minority communities, and allowing every religious denomination or sub-denomination, to establish and maintain institutions for religious and charitable purposes.<sup>3</sup> These provisions were inculcated to allay the fears of minority communities, especially the Muslim population which had remained in India and had witnessed the horrors of a bloody and ruthless partition. Despite the Constituent Assembly's reluctance to interfere in religious affairs of the citizens, the members were aware of the impediment to national unity and progress caused by strong religious identities and archaic religion-based laws. Thus, the Constituent Assembly recognized the need for a Uniform Civil Code (UCC) which would make all persons truly equal before the law, as the same laws would govern all. This, however, faced stiff opposition and as a result, the Constitution did not mandate UCC but retained it as a Directive Principle which, albeit unenforceable in courts, was to forever enshrine the intention of the Constituent Assembly to move toward a society where religion is privatized and the same laws govern all communities.

This paper attempts to analyse the feasibility of UCC in a multi-cultural and religiously diverse nation like India, and also seeks to examine whether UCC is an end in itself, or if

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<sup>2</sup> INDIA CONST. Art.25.

<sup>3</sup> *Id.* at Art.26.

it is possible to meet the societal ends without embarking upon the tempestuous journey of establishing a uniform code. In order to achieve the above, the meaning of UCC has been elucidated, followed by a brief analysis of the potential legal implications of enforcing such a code. The paper culminates with an analysis of Goa's uniform civil code, undertaken to better understand whether uniform personal laws are an end in itself, and to realistically examine whether the same is necessary or possible.

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## THE MEANING OF UNIFORM CIVIL CODE (UCC) IN INDIA

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The idea of a uniform civil code has been mooted and debated across the country ever since independence. Article 44 of the Constitution of India declares that "*the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.*"<sup>4</sup> If the words are taken at face value, it entails a uniform code governing all civil rights, duties and liabilities. The scope of such a code would be vast as it would contain all laws which do not deal with offences and criminal liability. However, apart from the personal laws, all the civil laws in force in India are already uniform, i.e. they do not differentiate between various religious communities. These include the laws governing contracts, torts, labour welfare, business enterprises, etc. Personal laws, on the other hand, vary across religions and communities. Thus, the establishment of a uniform civil code would simply affect the personal laws and this is the reason why, for long, the topic of a uniform civil code has been directly related to uniform personal laws. This, however, is an arduous task since religion has been and continues to remain a sensitive topic across the country and people often react strongly on face of even a shadow of interference over their religious beliefs and practices. Another crucial aspect which must be duly considered is that the interference of State in the religious affairs of its people is not usually conducive to a secular democracy, since, it is hard to determine when the State crosses its boundaries and advertently or inadvertently ends up alienating one community or the other.

For long, the State has been entrusted with the secular activities of public life, while the religious institutions have had largely unfettered control over the non-secular realm of spirituality and the person. The interference of State in religious affairs has been limited to passive regulation as necessary to maintain order in society and to bring about public welfare. Any encroachment by the State in the citizen's religious affairs would take away the essentially secular nature of its functions and may lead to an alarming situation endangering the very politico-social fibre of the country. These considerations aside, the Constitution makers still went on to insert Article 44 to the Constitution making it a Directive Principle fundamental in the governance of the country. Thus, the constitutional intent is clear insofar as the founding fathers intended to allow State interference till the extent that a uniform civil code be introduced in the country to equally regulate all citizens, irrespective of their religions, in matters of marriage, divorce, adoption, inheritance, and the likes: currently regulated by the religious scriptures and practices of the various religions. While this would surely not mean that all religious communities should seize to

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<sup>4</sup> *Id.* at Art.44.

perform rituals and observe customs which they have been following for centuries, but it implies that certain rights and obligations would have to be followed by all persons despite their religion. For instance, this may mean that all marriages must be registered as per procedure set out for the marriage to be considered valid, and the minimum age of marriage may be uniform across religions. This does not prevent persons from performing customs and rituals considered necessary by the religious community for a marriage, it just ensures that the customs are followed as per certain reasonable restrictions of age, consent, etc. which are necessary to protect both public and private interests. Such a code may lay down certain uniform qualifications and regulations related to adoption, or may guarantee certain rights to divorced spouses. This may also entail a common set of grounds for divorce and separation or maintenance. The idea of a UCC is not to obliterate varied religious practices, but simply to reduce the dogmatism of religions while providing for a society which can share more common ground between communities. UCC has always been about bringing the diverse society closer together so that all can enjoy the equal position in society and as such, is fundamental in a democracy. It was for this reason that the first Prime Minister of India, Jawaharlal Nehru, a true Democrat at heart, was so insistent on a UCC and even though he was strongly opposed, he managed to install Article 44 into the Constitution so as to symbolically set out the premise for a UCC in the future.

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## IMPLICATIONS OF UCC

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The establishment of a Uniform Civil Code would mean a complete overhaul of the functioning of the personal law system in the country and the change will not only be far-reaching, but will affect the entire Indian society since it will affect the everyday lives of all persons in the country. Unlike laws relating to taxation, businesses, companies, financial institutions, etc, the personal laws have a direct impact on the regular life of every citizen. Over and above all this, personal laws necessarily have a religious overtone which leads to strong feelings about such laws since these are not only enforced by the State sanctions but are believed to be accompanied by divine authority. This means, many tend to believe that the State has no role to play in religion and in fact, is incapable of possessing any authority over the same. It is a widespread belief that the temporal powers of the State cannot, and should not, encroach upon all that is strictly spiritual. Thus, an overhaul of the personal laws would be difficult and is likely to meet stiff resistance and defiance from several individuals, especially since India has for long been a religiously sensitive country. Even if an enactment is passed to the effect, it is likely to be very difficult to enforce the law unless the social conscience is at sync with the law. Laws which are not supported by the society at large becomes unenforceable and such a law which is unenforceable, as Austin rightly said, is no law at all. The failure of the laws relating to prohibition of dowry is a great example to show the fate of a law to which the psyche of the society does not conform. Thus, to bring about the UCC, social acceptance is most crucial.

Another concern is the act of codifying the various personal laws together, despite their varied tenets. Thus, while a Hindu marriage is considered a sacrament, a Muslim marriage is more contractual. The practise of dower is an essential feature in a Muslim marriage, but

no such practise exists in other religions. To harmonize the two completely different types of marriages having distinct natures in a single code without trampling the practices and religious freedoms of any of the two communities is a challenging task. One way around this predicament would be to provide flexibility in the code itself allowing parties to abide by their customs, or making a provision subject to custom to the contrary. This has been common practice in cases of personal laws wherein the rights of minority communities or sub-communities have been protected by giving supremacy to customs over enactments. An example of such flexibility is seen in S. 7 of the Hindu Marriage Act, 1955 which allows marriages to be solemnized in accordance to any customary rites and ceremonies of either party thereto.<sup>5</sup> However, this degree of freedom might make the UCC itself a nullity as it may end up changing nothing and allowing personal laws derived from scripts and teachings considered holy and practised as customs to continue. The idea behind the UCC is to create a semblance of uniformity, which is not possible if too much flexibility is given. For instance, Islam lays down several types of divorce, each administered differently and under different circumstances, while Hindus have known only one kind of divorce granted by the judiciary on satisfaction of certain conditions. The extent to which UCC can establish uniformity without aggrieving any religious community or their sentiments is a fine line which is nearly impossible to determine, yet, the UCC cannot go on to ram down the fundamental right provided by the Constitution to freely profess, practise and propagate their religion. If the UCC is truly uniform, it will necessarily violate the rights of communities. On the other hand, if it has too much flexibility, the whole exercise becomes meaningless as the religious identities would continue to be fostered and legally recognized, defeating the whole purpose of establishing a society where the civil and criminal rights, duties and obligations of each citizen is equal. The challenge is, thus, a challenge of reconciling plurality with uniformity.

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### CASE STUDY OF THE GOA CIVIL CODE: A CRITIQUE

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The Portuguese Civil Code was enacted in the year 1867 and by a decree, on 18 November 1869, the Civil Code of 1867 was extended to the Overseas Provinces of Portugal. The Portuguese ruled Goa for 400 years and when finally, Goa was annexed to the Union of India, the Portuguese left behind a uniform civil code applicable to all residents of Goa irrespective of their religion. This was unlike the rest of India where the personal laws differ for every religion and there is a lack of comprehensive codification of the law. After 1961 all Portuguese era laws were repealed by the Indian Parliament, except the Portuguese Civil Code of 1867 which continues to remain in force in Goa even now even though the Portuguese Civil Code of 1966 has replaced the old code in Portugal. By virtue of the Goa, Daman and Diu (Administration) Act 1962, all laws in force in the erstwhile territories of Portugal annexed into India as Goa and Daman and Diu, including the Civil Code, were kept in force. Accordingly, they became internal laws of the new Union Territories. This code, when brought into force, covered all civil liabilities of persons residing in Goa

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<sup>5</sup> The Hindu Marriage Act, 1955, No.25, Acts of Parliament, 1955 (India) at S.7.

including matters related to marriage, marital property, divorce, maintenance, adoption, inheritance and succession, etc. Since then, some legal acts of the Indian Union concerning Civil Law matters, such as the Indian Contract Act 1872 and the Indian Transfer of Property Act 1882, were extended to Goa, Daman and Diu and the corresponding provisions of the Civil Code were repealed. The remaining provisions of the Code, notably those concerning Family and Succession Law, Property Law (except its transfer) and Tort Law, are however still in force in Goa, Daman and Diu.<sup>6</sup>

Some of the provisions of this code are unique insofar as similar provisions are not seen anywhere across India. For instance, according to the code, all property owned by a spouse or acquired after marriage are jointly held by the couple and in case of a divorce, each spouse is entitled to half of the total property jointly held during marriage. However, the Goan law allows prenuptial agreements modifying or limiting the property holding or the entitlement. Thus, a couple may enter into a prenuptial agreement stating that the wife shall have no right over the property owned by the husband before marriage is solemnized in case of a divorce. Such prenuptial agreements entered into just before marriage cannot be modified or revoked upon marriage. The Income Tax Act recognizes the joint holding of property by husband and wife in case of Goa and treats them as a single unit for matters of taxation.

Another distinguishing provision is that according to the Code, no parent can completely disinherit their children from succeeding to their property. At least half of the parent's property must be divided equally among the children and this cannot be contravened even through a testament. Akin to the idea of uniformity, no personal law is given special position under the Code and Muslims are not allowed to follow Shariat diktats. For instance, a Muslim man in Goa cannot practise polygamy or give verbal divorce.<sup>7</sup> Also, no marriage according to the Code becomes valid till it is registered with the civil marriage registration system in place in Goa, while the nature of marriage is strictly contractual.<sup>8</sup> A salient provision therein is about the registration of Births and marriages being made mandatory and only such registered facts to be an admissible proof thereof. Also the birth and marriage registrations have been declared as the juridical foundation base to determine juridical status and hence the identity of the Goans. Other features include the purely secular nature of marriage registration, wherein any two persons of opposite sex, including foreigners, can marry here while retaining their personal religious and other background affiliations. The field of conflict of laws in marriages between persons of different nationalities has also been provided for.

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<sup>6</sup> Dário Moura Vicente, *The Civil Code in Portugal and Goa: Common Heritage and Future Prospects* (Nov. 18, 2017, 7:20PM), <http://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Vicente-Dario-Moura-The-Civil-Code-in-Portugal-and-Goa-Common-Heritage-and-Future-Prospects.pdf>.

<sup>7</sup> Vivek Jain & Shraddha Gupta, 'Uniform and Civil', *The Statesman* 15 May, 2014.

<sup>8</sup> Sanjay S/O. Fondu Bhandare v. Mrs. Lina W/O. Sanjay Bhandare, Karnataka HC in WP NO 81958 OF 2013.

The fact that Goa is the only State in India to have some sort of a Uniform Civil Code has made it very common for persons fighting in favour of UCC to cite the example of Goa while demanding a similar code for the rest of India. However, very few people remarking on the Goa Family Law have actually analysed the provisions, or in fact, read it. It is perhaps shocking that while most Goa residents may know the fundamental tenets of the code which regulates their lives and know of the mutual rights and obligations of husbands and wives or are familiar with the basic provisions of divorce, very few have actually read the code itself. One of the most important reasons for the same is the fact that a comprehensive translated version of the entire code was, until recently, not even available and the code was available only in Portuguese, which progressively less persons residing in Goa understand. The lawyers and judges have, for long, worked using truncated translations of parts of the code which are most commonly used or required.<sup>9</sup>

Apart from this huge drawback of accessibility of the code, the question arises, how uniform is the uniform civil code really?

Firstly, the Code divides marriages into three categories-

- Marriage between Catholics conducted at a Catholic Church.
- Marriage between Catholics not conducted at a Catholic Church.
- Marriage between Non-Catholics.

While the registration of marriage is to be done at the civil registry for the latter two categories, in case of the first category, the registration is routed through the Church which sends a copy its marriage registry to the Civil Registry and that itself is considered sufficient proof of marriage. A marriage conducted in the Catholic Church follows the Canon Law of Catholic Marriage and this is over and above the Code.<sup>10</sup>

Civil marriages refer to Hindu and other non-Canonical marriages. These first require registration of the 'intent-to-marry' by the two parties, and subsequently the marriage itself takes place in the presence of the Civil Registrar, who makes a record of the marriage. Only after these two procedures are complete does the marriage have civil effects. Catholics can also opt for the civil form of marriage, instead of a canonical marriage. But, in practise, it is not that simple, due to societal and other pressures since marriages of Catholics opting for what is commonly known as civil marriages are not recognised by the Church. Couples marrying under this provision are considered to be 'living in sin' by the rest of their community. Thus, the situation in reality becomes similar to the rest of India wherein there exists personal law, with an option to have a truly civil marriage akin to a marriage under the Special Marriage Act, 1954. This is a difference drawn on the basis of religion, and

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<sup>9</sup> *Portuguese Civil Code Becomes Accessible, is Translated to English*, The Times of India (Nov. 17, 2017, 10:00PM), <http://timesofindia.indiatimes.com/articleshow/50843876.cms>.

<sup>10</sup> Pamela D'Mello, COMMON PERSONAL LAW IN GOA- A CRITIQUE 513-522, Muslim India (New Delhi).

amounts to the operation of a personal law for Catholics in Goa, which is recognised by the State.<sup>11</sup>

The Catholics marrying in the church are excluded from divorce provisions under the civil law and must abide by canon law which does not allow for divorce in case of marriages consummated between two Catholics as it is considered to be a indissoluble sacrament. What the Church does allow though is judicial separation, or so- called annulment of the marriage, which is based on the assumption that the marriage has not taken place or not been consummated. Decisions on this are taken not by any civil court, but by the Ecclesiastical Court of the Church itself. It may be also noted that the grounds for annulment available to Catholics and divorce granted to others is rather different from each other. In 1974, the provision of the 1946 Marriage Decree denying divorce was judicially struck down in *E. Nunes of Bicholim v. P Nicolau Fernandes of Mercês*<sup>12</sup> for being ultra vires of the Indian Constitution. The judicial verdict has still not been given legislative recognition, though. Thus the right to divorce for many Catholics rests tenuously on a judgement, that itself could be reversed. Under the Civil Law, divorce is permitted on grounds which range from adultery by either party, to illtreatment, absence without notice for over four years, prolonged incurable mental illness, divorce by mutual consent, incurable contagious diseases or sexual aberrations, freely consented-to separation for ten consecutive years for whatever cause, or even the chronic vice of gambling, while under the Customs and Usages for Hindus, divorce is permitted only on the grounds of adultery by the wife.<sup>13</sup> Another great travesty which exists in the Code is that it permits polygamy under certain conditions, the conditions itself being exceptionally sexist and unacceptable in the modern world. Imperial Portugal, while it controlled Goa, passed a decree on December 16, 1880 titled "Codigo de Usos e Costumed de Goa' (or the Code of Usages and Customs) which continues to remain in force as part of the statute book. This decree, in addition to the Portuguese Civil Code of 1867 recognized and codified traditional usages and customs of the Hindus residing in the territory of Goa after Hindu groups petitioned the colonial administration. This, as per Article 2, allowed Hindus to marry according to their religious rites while having the same status in law as a catholic and civil marriage. Over and above this, Article 3 allowed polygamy by Hindu men in case their wife had no progeny at all till the age of 25 years or had no male issue till the age of 30 years or being of lower age, if 10 years had lapsed from the last pregnancy, as well as on separation as per any legal ground in case there is no male issue. This however needed to be proved in court and also, in case of no issue till 25 years or on the ground of having no male issue till 30 years of age or within 10 years of previous pregnancy, the wife's consent was to be given in a public deed so as to allow a second marriage while the previous subsisted.<sup>14</sup> The aforementioned provisions still continue to exist as law, though the same are rarely used in present times.

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<sup>11</sup> *Position of Women in Goan Society*, IRB-Immigration and Refugee Board of Canada (Nov. 17, 2017, 11:30PM), [https://www.ecoi.net/local\\_link/179996/282536\\_en.html](https://www.ecoi.net/local_link/179996/282536_en.html).

<sup>12</sup> *E. Nunes of Bicholim v. P Nicolau Fernandes of Mercês*, AIR 1974 Goa 46.

<sup>13</sup> *Supra* Note 11.

<sup>14</sup> M.S. Usgaoncar, 1 FAMILY LAWS OF GOA (1979), Vela Associates, Goa.



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## CONCLUSION

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Thus, in conclusion, it may be stated that the uniform civil code of Goa is hardly uniform. Some of the major drawbacks discussed above may be summarized as follows:

- The Code is in Portuguese which very few lawyers or judges of present times are fluent in, and though some truncated translations of commonly used parts of the code exist, the first proper translation into English has been made only recently and is not popularly available.
- The Code distinguishes between types of marriages and forms 3 distinct categories.
- The marriages conducted at the Catholic Church do not need to directly register with the Civil Registry and the same is routed through the Church. Such marriages take place as per Canon Law, thus, establishing personal laws with an option for Catholics to have a civil marriage.
- The divorce provisions differ and while several grounds exist in case of civil marriages, only the ground of adultery by wife is available for Hindus. As per Canon Law, divorce is not allowed in case a catholic marriage is solemnized and though a judgment of the HC has held such a restriction as unconstitutional, no legislative changes have been made to affect the same.
- The Code allowed limited polygamy by Hindu men and the code justifies polygamy in case of absence of a male child till wife reaches 30 years of age or 10 years passes since last pregnancy, or in case no child is born till the wife reaches 25 years of age, as well as some other circumstances.

Thus, the Civil Code of Goa is far from perfect and though the State government in 2005 had formed a Committee to draft a new code, and as per its recommendations, a part of the proposed code was introduced in the Assembly long back as 2005, it was only in August 2016 that the bill was passed as Goa Succession, Special Notaries and Inventory Proceeding Act, 2016, which seeks to replace the Portuguese Civil Code on the subject of succession, inventory and notarial law to meet the present day requirements, and to make it workable.<sup>15</sup> No significant progress in this regard has been reported, but the experience of UCC in Goa makes one thing abundantly clear, it is not sufficient that a single code regulate all. The ends of law may be achieved even without adopting a uniform code and the State-Religion separation formula used in the West may not apply well in a superbly diverse nation like India, where religion continues to play a dominant role in all spheres of life. However, the right path is not a forceful imposition of uniformity, devoid of due consideration for the welfare of all communities. Neither would a namesake uniform code with inbuilt flexibilities retaining community-based differences serve any purpose but of a political gimmick. Thus, one must seriously consider whether the best way to go forward is to push for modernization and reform in all personal laws, instead of stirring up a hornet's nest.

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<sup>15</sup> Prakash Kamat, *Goa Passes Bill to Replace Portuguese Succession Law*, The Hindu (Nov. 18, 2017, 8:00PM), <http://www.thehindu.com/news/national/other-states/goa-passes-bill-to-replace-portuguese-succession-law/article8955082.ece>.