Model Code on Indian Family Law

A comprehensive, gender-just, and inclusive family law regime

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About the Authors

This list contains the designation of the authors at the Vidhi Centre for Legal Policy:

Aditya Phalnikar, Ayushi Sharma, Kartavi Satyarthi, Mayuri Gupta, and **Rakshita Goyal** are Research Fellows

Aditya Prasanna Bhattacharya and **Namrata Mukherjee** are Senior Resident Fellows

Swapnil Tripathi is a Senior Associate Fellow

Anuradha Bhattacharya is, and **Aakanksha Mehta** was, a Project Fellow

Ritwika Sharma is a Lead

Arghya Sengupta is the Research Director

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Glossary

Binary Gender - A presumption that there are only two genders, namely man and woman.

Conjugal - A conjugal relationship is one where persons are legally married to each other or are in a common law marriage.

Cis-gender - A person whose gender identity corresponds with the sex assigned to them at birth.

Dyadic - Involving only two persons.

Gender - Gender is how society perceives persons, based on the norms, behaviours and roles associated with the sex assigned at birth There are three genders in law: transgender, woman and man.

Gender Identity - A person's subjective sense of fit with a particular gender category.

Heteronormative - The presumption that everyone is heterosexual.

Intersex – Persons who have innate sex characteristics that do not fit medical and social norms for female or male bodies.

LGBT+ - An acronym for lesbian, gay, bisexual, and transgender, and other identities that are not heterosexual or cis-gender.

Transgender - A person whose gender identity does not correspond with the sex assigned to them at birth.

Queer - Queer is an umbrella term that includes persons who are not cis-gender or heterosexual.

Sex - The sex status of a particular body is usually determined based on genetics, hormones and genitalia. Traditionally sex has included only male and female but also includes intersex persons.

Sexual Orientation - A person's enduring physical, romantic and/or emotional attraction to members of the same and/or opposite sex or gender.

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Context

A comprehensive, gender-just and inclusive family law regime

The marriage equality case[1] in the Supreme Court of India ('SC') has questioned the very fundamentals of a family as a union between man and woman.[2] Around 20 petitions have been heard by the Supreme Court in this matter. Prayers have included demands for amendments to the Special Marriage Act, 1954 ('SMA'), Hindu Marriage Act, 1955 ('HMA'), the Foreign Marriage Act, 1969 ('FMA') and the Citizenship Act, 1955 to recognise same sex/gender marriages, amendments to adoption laws to make them inclusive of LGBT+ parents, and legal recognition of atypical families beyond the marital conjugal union. While opposing the plea for marriage equality, the respondents have principally claimed that such large-scale changes to family law can only be rightfully made by the legislature and not courts of law. They have argued that a judicial reformulation of substantive law on family amounts to judicial overreach and violates the separation of powers.

Irrespective of the outcome of the case, it is now clear from the proceedings that marriage equality is the first step towards making families inclusive of persons of all gender identities and sexual orientations. Any judicial recognition of the constitutional right to marry has to be followed by a comprehensive reform of Indian family laws based on constitutional values of equality, non-discrimination and liberty.

Such a large-scale rewriting of Indian family law has been a consistent demand of the proponents of the Uniform Civil Code ('UCC'). The Constituent Assembly discussed the possibility of such a code but finally left it as a directive principle of state policy,[3] for Parliament to consider in the future. When Parliament did consider the matter, it codified Hindu marriage, adoption, and succession through the Hindu Code Bill.[4] The Hindu Code Bill however was met with staunch opposition from conservative Hindu quarters and was watered down considerably. The personal law of Muslims was not interfered with, and statutory provisions governing Christians and Parsis remained untouched.[5] As a result, today the institution of family in India is regulated by secular law,[6] personal laws[7] and customary laws[8]. Proponents of the UCC call for uniform laws on marriage, divorce, adoption, custody, and succession, irrespective of one's religion.

[1] *Supriyo @ Supriya Chakraborty & Anr. v Union of India* W.P.(C) No. 001011 / 2022.
[2] It needs to be noted that transgender persons can marry under the Hindu Marriage Act, 1955 as long as they are the opposite gender of their partner. (See, *Arun Kumar v Inspector General of Registration* (2019) 4 Mad LJ 503).
[3] Article 44 of the Constitution of India, "Uniform civil code for the citizens -- The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India".
[4] The efforts to reform Hindu law were initiated by the British administration prior to independence itself. Independent India's Parliament studied and relied on the Reports submitted during that time while preparing the Hindu Code Bill. See, Ramachandra Guha, *India After Gandhi The History of the World's Largest Democracy* (Picador 2017) 225; Chitra Sinha, *Debating Patriarchy: The Hindu Code Bill Controversy in India (1941–1956)* (OUP, 2012) 46; Saumya Saxena, *Divorce and Democracy: A History of Personal Law in Post-Independence India* (CUP 2022) 35.
[5] ibid.
[6] See Special Marriage Act, 1954; Juvenile Justice (Care and Protection of Children) Act, 2015.
[7] See Hindu Marriage Act, 1955; Christian Marriage Act, 1872; Law on Muslim Marriage (uncodified), Parsi Marriage and Divorce Act, 1936.
[8] See Hindu Marriage Act, 1955, ss 5(iv) and 29; Hindu Adoption and Maintenance Act, 1956, s 10; Customs are recognised in Muslim Law as well. See, Fyzee and T. Mahmood, *Outlines of Muhammadan Law* (OUP, 2008) 54.

In 2018, the 21st Law Commission ('LC') had released its Consultation Paper on 'Reforms of Family Law', wherein it had stated that a UCC is 'neither necessary nor desirable'.[9] It had instead recommended that personal law be codified and inequalities addressed via amendments.[10] The matter has now come to the limelight again with the 22nd LC reopening the process and inviting public comments on the issue.[11]

The 22nd LC's decision to revisit the UCC again at this juncture has been met with a plurality of views. While the ruling Bharatiya Janata Party ('BJP') has for long endorsed the UCC, framing it as a tool for national integration,[12] the response to it has varied across quarters. While some have extended support to the idea of a UCC in principle,[13] others have questioned the timing of it given the upcoming 2024 Lok Sabha elections.[14] Prominent figures from the women's movement have pointed out that the BJP's deployment of the UCC has little to do with ending gender discrimination[15] and is instead a part of the 'Hindu nationalist agenda'.[16] Several have also opposed a UCC on the ground that it threatens minorities and is an attack on pluralism.[17] The State of Uttarakhand has prepared a draft UCC which is yet to enter the public domain. News reports have speculated that this draft will serve as a template for the Union and proposes raising the age of marriage for women, abolishing polyandry and polygamy, ensuring equal share in property for women, and ending coparcenary rights for Hindu men in the Hindu undivided family.[18]

While remaining alive to the political dimensions of the UCC debate, it is critical to not lose sight of what a UCC was originally meant to be by the framers of the Constitution—a holistic reform of Indian family law. This is also the upshot of the marriage equality matter in the Supreme Court. While several positions on the UCC have been articulated including some principles on which such a code can be based,[19] there

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[9] *Consultation Paper on Reform of Family Law* (Law Commission 2018) 12 <http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf> accessed 12 July 2023.

[10] ibid.

[11] 'Uniform Civil Code: Law Commission Of India Decides Again To Solicit Views Of Public & Religious Organizations', (*Live Law*, 14 June 2023) <https://www.livelaw.in/top-stories/uniform-civil-code-law-commission-of-india-decides-again-to-solicit-views-of-public-religious-organizations-230648> accessed 19 June 2023.

[12] Smriti Ramchandran, 'PM Modi's endorsement brings UCC back into the spotlight' (*Hindustan Times*, 28 June 2023) <https://www.hindustantimes.com/india-news/pm-modi-hints-at-prioritizing-uniform-civil-code-bjp-s-long-standing-agenda-for-all-communities-and-faiths-in-india-101687892706966.html> accessed 12 July 2023.

[13] Yogendra Yadav, 'Opposition is wrong in resisting UCC. It's poor politics, runs against Constitution spirit' (*The Print*, 21 June 2023), <https://theprint.in/opinion/opposition-is-wrong-in-resisting-ucc-its-poor-politics-runs-against-constitution-spirit/1635438/#google_vignette> accessed 12 July 2023; 'Opposition is wrong in resisting UCC. It's poor politics, runs against Constitution spirit' (*Times of India* , 29 June 2023), <https://timesofindia.indiatimes.com/india/aap-backs-ucc-in-principle-congress-akalis-oppose-it/articleshow/101350832.cms> ; Rajesh Kumar Singh, 'Mayawati supports Uniform Civil Code but doesn't back BJP's 'politics'', (*Hindustan Times*, 2 July 2023) <https://www.hindustantimes.com/india-news/uniform-civil-code-latest-news-bsp-mayawati-reaction-lok-sabha-election-2024-bjp-congress-aap-101688279500644.html> accessed 12 July 2023; 'AAP says it supports the UCC 'in principle', pushes for consensus in execution', (*Indian Express*, 29 June 2023) <https://indianexpress.com/article/india/aap-supports-ucc-in-principle-cosensus-in-execution-8691933/> accessed 12 July 2023.

[14] 'India Political Highlights: UCC is central government's political move ahead of 2024 polls, says NCP's Praful Patel' (*Deccan Herald*, 8 June 2023), <https://www.deccanherald.com/national/national-politics/india-political-updates-bjp-narendra-modi-ucc-congress-aap-rahul-gandhi-mallikarjun-kharge-arvind-kejriwal-1231925.html> ; Nisha Anand, 'BJP hyping Uniform Civil Code issue to win Lok Sabha election: Congress leader' (*Hindustan Times*, 17 June 2023) <https://www.hindustantimes.com/india-news/uniform-civil-code-debate-bjp-congress-2024-lok-sabha-election-what-is-ucc-bill-101687018489470.html> accessed 12 July 2023 .

[15] Abhay Kumar, 'The UCC Bogey Is Raked Up for Muslim Bashing and to Serve Electoral Needs: Flavia Agnes' (*The Wire*, 27 June 2023) <https://thewire.in/rights/ucc-bogey-muslim-bashing-electoral-needs-flavia-agnes>.

[16] Nivedita Menon, 'UCC: A Law To Push Back Gender Justice' (*Outlook*, 31 May 2023), <https://www.outlookindia.com/national/whither-gender-justice–magazine-290774> accessed 12 July 2023.

[17] 'After PM's Uniform Civil Code push, Muslim law board's late-night emergency meet' (*India Today*, 28 June 2023), <https://www.indiatoday.in/india/story/pm-modi-uniform-civil-code-pitch-2024-polls-opposition-reaction-owaisi-congress-dmk-2398929-2023-06-28> accessed 12 July 2023.

[18] Sreeparna Chakrabarty, 'Amend personal laws to ensure gender justice, say activists' (The Hindu, 8 July, 2023) <https://www.thehindu.com/news/national/amending-personal-laws-is-the-better-way-to-ensure-gender-justice-than-a-ucc-womens-rights-activists/article67057350.ece> accessed 11 July 2023.

[19] 'Progressive UCC Draft: One Marriage, Divorce and Adoption Law, and Dissolution of HUF' (*The Wire*, 14 Oct 2017) <https://thewire.in/government/uniform-civil-code-draft-law-commission>; Saumya Uma, 'What a Gender Just UCC Can Look Like' (*The Wire*, 2 July 2023) <https://thewire.in/law/what-a-gender-just-uniform-civil-code-could-look-like> accessed 12 July 2023 (While recommendations for a gender just UCC have been made in this article, a draft code was not proposed).

is no draft of what a progressive, secular and gender just family law code can look like. Despite the constitutional vision of equality, liberty and dignity, family laws in India continue to discriminate against women, exclude queer persons and fail to account for the plurality of family arrangements.

A progressive family law reform exercise is necessary for ending discrimination against women, recognising queer persons as equals, protecting children and expanding the concept of family to a diversity of structures that exist. The **first part** of this paper outlines the background of this exercise by throwing light on the history of the UCC and the necessity of a family law reform exercise. It articulates the layered nature of the debate surrounding the UCC while making a case for a progressive and secular family law regime. It also explains the relationship between constitutional law and family law in India as it stands today and argues for a re-examination of the present legal position which prohibits judicial review of certain classes of family law. The **second part** of this paper comprises three chapters which provide a draft framework for three spheres of family law regulation: adult unions, parent-child relations, and succession. These chapters outline the theoretical context informing the proposed law for each of these areas and present draft provisions while outlining the principles informing them. Finally, the **third part** of the paper provides the consolidated form of the draft family law code discussed in the second part.

This paper provides a **first draft** of such a comprehensive, gender-just and inclusive family law code for India. Such a framework is informed by constitutional principles of equality, dignity, and liberty. It does away with gender unjust provisions, provides for inclusion of queer persons, and affirmatively protects the rights of vulnerable parties in a family. It also recognises alternative family structures that are social realities in India. In short, this is a draft code that can form the basis for future UCC and family law reform discussions in civil society and government.

The History of the Uniform Civil Code

Talk about the UCC re-emerged since the Bharatiya Janata Party **('BJP')** came into power at the Union in 2014 and now significantly in light of the 22nd LC inviting comments on it. Since its inception, the BJP and its predecessor the Jana Sangh have championed the UCC as a means of national unity. These arguments are not restricted to the BJP and go back to the Constituent Assembly. For instance, during a debate on Article 44 i.e., the directive principle of enacting the UCC, KM Munshi had called for unifying and consolidating the nation through a secular legislation. He had remarked, "*We are in a stage where we must unify and consolidate the nation by every means without interfering with religious practices. If however the religious practices in the past have been so construed as to cover the whole field of life, we have reached a point when we must put our foot down and say that these matters are not religion, they are purely matters for secular legislation.*"[20]

On the plank of gender justice, Munshi had remarked that if we consider personal law as part of religion, we will never be able to guarantee equality to women. He gave the example of discriminatory practices in Hinduism to justify the need for a UCC. He remarked, "*I know there are many among Hindus who do not like a uniform Civil Code, because they take the same view as the honourable Muslim Members who spoke last. They feel that the personal law of inheritance, succession etc. is really a part of their religion… Look at Hindu Law; you get any amount of discrimination against women; and if that is part of Hindu religion or Hindu religious practice, you cannot pass a single law which would elevate the position of Hindu women to that of men.*" [21] The argument of gender equality was supported by several women members of the Constituent

[20] Constituent Assembly Debates, Vol. 7 (23 November 1948) at 7.58.147, <https://www.constitutionofindia.net/debates/22-nov-1949/> accessed 12 July 2023 (hereinafter 'CAD 23 November 1948').
[21] ibid 7.58.149

Assembly.[22] Hansa Mehta championed the cause of the UCC basing it on the plank of national unity. She argued for adopting one civil code for the nation, provided that the code is at par with the most advanced personal laws in the country.[23] In fact, as part of the Fundamental Rights Sub-Committee, Mehta advocated for making the UCC a justiciable fundamental right.

These voices in support of the UCC were met with stiff opposition especially from the Muslim members who viewed it as an interference with religion and an act of tyranny.[24] Mohammad Ismail Khan termed any interference with personal laws as a violation of the principles of a secular state, arguing that a community's right to adhere to its personal law is a protected fundamental right in itself.[25] Mahboob Ali Baig Bahadur termed the implementation of the UCC as an act of the tyranny of the majority.[26] Bahadur also questioned the parameter of the uniformity of the Code and which religious system will serve as the basis of the new Code.[27] Dr. BR Ambedkar responded to the argument of unconstitutional interference by citing past precedent for legislative interference in matters of religion i.e., the Muslim Personal Law (Shariat) Application Act, 1937.[28] Munshi highlighted that the freedom of religion itself allows the state to make laws for regulating secular activities and social welfare, to justify state interference.[29] Supporters of the UCC argued that Article 44 was not tyrannical since enactment of a civil code is a practice prevalent in developed nations including advanced Muslim countries.

A survey of the debates in the Constituent Assembly highlights that the possibility of a UCC was heavily debated. However, once the exercise of codifying Hindu Law through the Hindu Code Bill was undertaken and completed, the issue of UCC became a Hindu-Muslim question. Many Hindu members felt that codifying only one set of personal laws as against all, was discriminatory.[30] This framing was only strengthened by the BJP's active championing of the cause of the UCC, although officially it has used the plank of national unity and gender justice. Based on a homogeneous understanding of nationalism,[31] the BJP and its predecessor the Jana Sangh championed the UCC as a means of resistance against what is framed as Muslim exceptionalism.[32] This refers to their perceived special treatment of Muslims by giving legal sanctity to Muslim personal law and not testing its provisions on the touchstone of the Constitution. For instance, the party's election manifesto in 1996, declared the adoption of a UCC which will foster a single Bhartiya identity amongst all religious groups and ensure gender justice.[33] Similarly, its 1998 manifesto declared that the party would promote legal and economic rights of women and not subject them to debilitating personal laws. It also declared that the LC will be entrusted with the task of formulating a UCC based on progressive practices from all traditions. This Code *inter alia* will give women property rights, ensure women's right to adopt, guarantee equal guardianship rights, remove discriminatory clauses in divorce laws and prohibit polygamy.[34] In an interview, Atal Bihari Vajpayee also

[22] Constituent Assembly Debates, Vol. 11 (22 November 1949) at 11.162.117, <https://www.constitutionofindia.net/debates/22-nov-1949/> accessed 11 July 2023.
[23] ibid 11.162.119
[24] Swapnil Tripathi, 'Religion, Reform and Khilji: Uniform Civil Code and the Constituent Assembly' (*Basic Structure Blog*, 13 December 2022) <https://thebasicstructureconlaw.wordpress.com/2022/12/13/religion-reform-british-and-khilji-uniform-civil-code-and-the-constituent-assembly/> accessed 11 July 2023.
[25] CAD 23 November 1948, at 7.58.137.
[26] ibid 7.58.137.
[27] ibid 7.58.136.
[28] ibid 7.58.163.
[29] ibid 7.58.145.
[30] Ramachandra Guha, *India After Gandhi: The History of the World's Largest Democracy* (Picador 2017) 231.
[31] Nivedita Menon, 'The Uniform Civil Code – the women's movement perspective', available at <http://feministlawarchives.pldindia.org/wp-content/uploads/Uniform-Civil-Code-%E2%80%93-the-women%E2%80%99s-movement-perspective-by-Nivedita-Menon-2014.pdf> accessed 12 July 2023.
[32] ibid.
[33] BJP Election Manifesto 1996, 252 <https://library.bjp.org/jspui/bitstream/123456789/261/1/BJP%20ELECTION%20MANIFESTO%201996.pdf > accessed 12 July 2023.
[34] BJP Election Manifesto 1998, 210 <https://library.bjp.org/jspui/bitstream/123456789/241/1/BJP%20ELECTION%20MANIFESTO%201998.pdf> accessed 12 July 2023.

justified the demand of UCC on grounds of gender equality. Vajpayee had remarked, "*The personal laws as they exist in India today, are in constant conflict with the very concept of equality among sexes and form the source of continuous discrimination against women in all areas of life. This is not the place to go into specific details, but suffice it to say that a civil society cannot allow women to be discriminated against in the name of religious practices*."[35]

Critics of the BJP have viewed the party's stance as the imposition of a majoritarian Hindu Law in the disguise of UCC.[36] However, the party has clarified that a UCC will not mean universal imposition of Hindu Law and best practices across communities will be identified.[37] To this effect, Vajpayee remarked, "*Uniform Civil Code does not mean imposing the Hindu Code on others but evolving a code based on the best traditions of every community*."[38] Similarly, during his presidential address to the party in 1996, LK Advani had suggested setting up a Law Commission which will study personal laws of all communities and thereafter draft a code based on their equitable elements.[39] This vision is reflected in the election manifestos issued by the party from time to time,[40] including the latest manifesto issued in 2019.[41] Even recently, the party spokesperson and leaders have reiterated that UCC is not a religion issue. For instance, Union Minister Rajnath Singh in 2021 remarked, "*common civil code will not be against any faith or religion*".[42] Similarly, former Union Minister Prakash Javadekar has remarked, "*UCC is not a religious issue but an issue or rights, dignity and justice to women*."[43] More recently, in response to concerns raised by the Nagaland government, the party indicated that Christians and tribal communities may be left outside the scope of the UCC.[44] However, such statements of an inclusive UCC have been viewed with suspicion by the political opposition.[45]

Several judgments of the Supreme Court have also emphasised the necessity of a UCC. The consistent position of the Supreme Court has been the need to draft a UCC in order to promote national integration – a position that has been criticised by the women's movement.[46] In *Mohd. Ahmed Khan v Shah Bano* ('*Shah Bano*'),[47] the Supreme Court expressed its discontent with the failure of the Union to introduce a UCC despite a directive principle to this effect. It observed, "*A common Civil Code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies*."[48] While it

[35] Sanjay Kaushik, *A.B. Vajpayee: An Eloquent Speaker and a Visionary Parliamentarian* (ABH Publishing 2005) 23.
[36] Rina Verma, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State* (OUP 2012).
[37] Kumkum Sangari, 'Politics of Diversity: Religious Communities and Multiple Patriarchies', (1995) 30(51) Economic and Political Weekly 3287.
[38] Sanjay Kaushik, *A.B. Vajpayee: An Eloquent Speaker and a Visionary Parliamentarian* (ABH Publishing 2005) 24.
[39] Rina Verma, *Postcolonial Politics and Personal Laws: Colonial Legal Legacies and the Indian State* (OUP 2012).
[40] BJP Election Manifesto 2014, 41 <https://library.bjp.org/jspui/bitstream/123456789/252/1/bjp_lection_manifesto_english_2014.pdf> accessed 12 July 2023.
[41] BJP Election Manifesto 2019, 37 <https://library.bjp.org/jspui/bitstream/123456789/2988/1/BJP-Election-english-2019.pdf> accessed 12 July 2023; The manifesto reads, "*BJP believes that there cannot be gender equality till such time India adopts a uniform civil code, which protects the rights of all women, and the BJP reiterates its stand to draft a uniform civil code, drawing upon the best traditions and harmonizing them with the modern times*."
[42] Neha Shukla, 'BJP committed to promise of Uniform Civil Code: Rajnath Singh', (*The Times of India*, 17 March 2021) accessed 12 July 2023.
[43] Express News Service, 'Uniform Civil Code not a religious issue, but issue of rights, justice to women: Prakash Javadekar' (*The Indian Express*, 30 June 2023) <https://indianexpress.com/article/cities/hiruvananthapuram/uniform-civil-code-not-religious-but-rights-justice-women-prakash-javadekar-8694019/> accessed 11 July 2023.
[44] Devesh Kumar, 'Christians, Tribals likely to be exempted from UCC – Centre assures Nagaland' (*Livemint* 7 July 2023) <https://www.livemint.com/news/india/christians-tribals-likely-to-be-exempted-from-ucc-centre-assures-nagaland-11688725777702.html> accessed 11 July 2023.
[45] Manjo CG, 'Uniform Civil Code: Congress leads charge against govt plans, but another spoke in Opposition unity wheels' (*Indian Express*, 20 June 2023) < https://indianexpress.com/article/political-pulse/uniform-civil-code-cong-leads-charge-against-govt-plans-8665056/> accessed 11 July 2023; PTI, 'Uniform Civil Code undesirable at this stage: Congress' Jairam Ramesh' (*Business Standard* July 1 2023) <https://www.business-standard.com/politics/uniform-civil-code-undesirable-at-this-stage-congress-jairam-ramesh-123070100627_1.html> accessed 11 July 2023.
[46] Working Group on Women's Rights, 'Civil Codes and Personal Laws: Reversing the Options', available at <http://feministlawarchives.pldindia.org/wp-content/uploads/61.pdf> accessed 11 July 2023.
[47] AIR 1985 SC 945.
[48] ibid [35].

acknowledged the challenge with bringing together persons of different faiths on a common platform, it emphasised the necessity of the UCC to ensure constitutional values were realised.

In *Sarla Mudgal v Union of* India ('*Sarla Mudgal*'),[49] while referring to *Shah Bano*, Justice Singh noted, "*Article 44 (directive principle calling for a UCC) is based on the concept that there is no necessary connection between religion and personal law in a civilised society.*"[50] While Justice Singh requested the Parliament to take a fresh look at the issue and directed the Union to file an affidavit apprising the Supreme Court of the steps taken in this regard, his brother judge, Justice Sahai was of the opinion that the UCC should be drafted only when society is ready for it. He advised the government to vest this task with the Law Commission which must bring a comprehensive legislation on the issue.

Subsequently in *ABC v The State (NCT of Delhi)*,[51] involving a guardianship claim by a Christian woman, the Supreme Court while noting the unfulfilled constitutional expectation for a UCC observed, "*India is a secular nation and it is a cardinal necessity that religion be distanced from law. Therefore, the task before us is to interpret the law of the land, not in light of the tenets of the parties' religion but in keeping with legislative intent and prevailing case law*."[52]

These normative justifications for the UCC, offered both by the Supreme Court as well as by the BJP, have been critiqued by the women's movement. For instance, feminist academic and activist Nivedita Menon has argued that the packaging of the UCC as a tool for national integration is flawed. She argues that the discourse around national integration is premised on the homogenising push of the Hindu Code and overlooks the fact that the idea of the 'nation' itself is constructed through an assertion of voices that enjoy systematic power at the exclusion of those on the margins.[53] She adds that contrary to perception, Hindu law was not reformed, but merely codified. This codification was achieved through the erasure of a diversity of 'Hindu' laws and in the process did away with several liberal customary practices that benefited women.[54]

However, distinct from this integrationist basis for the UCC, the need for reform of personal laws to undo gender unjust provisions has also been emphasised. Dr. Ambedkar who was of the view that it should be permissible for the State to intervene in the domain of religion to ensure social justice argued that failing to ensure this would truncate progress.[55] Dr. Ambedkar's politics was also reflected in his decision to resign from the cabinet in response to the Hindu Code Bill being watered down and split into four separate laws in response to stiff opposition from conservative Hindu quarters.

A need for a secular code was a critical demand of the women's movement in the decades immediately following the enactment of the Constitution.[56] However, the conflation of the rationale of national integration with gender justice meant that, over time, consensus on the issue amongst secular and feminist quarters became illusory. The *Shah Bano* decision, which became the lightning rod for the Hindu majority to take aim at the Muslim minority, marked a shift in the women's movement. It led to a sense of unease as what was "self-evidently beneficial for women in the form of common, secular, national laws (was) also equally self-evidently articulated as a communal demand".[57] Several sections of the

[49] AIR 1995 SC 1531.
[50] ibid [31].
[51] AIR 2015 SC 2569.
[52] ibid [10]. Similar demands have been made in the following cases: *John Vallamattom and Anr. v. Union of India*, (2003) 6 SCC 611; *Jose Paulo v Maria Luiza* (2019) 20 SCC 85; *Satya Prakash Meena v Alka Meena*, C.R.P. 1/2021 (Delhi HC).
[53] ibid.
[54] ibid.
[55] ibid.
[56] *Report of the Committee on the Status of Women in India*, (Government of India 1974) 142 available at <https://pldindia.org/wp-content/uploads/2013/04/Towards-Equality-1974-Part-1.pdf>.
[57] 'Is Gender Justice Only a Legal Issue? Political Stakes in the UCC' (1997) 32(9) Economic and Political Weekly 453.

women's movement, while agreeing on the necessity for a secular gender just family law regime, warned against legislative reform in a communally charged climate.[58] Recently, in light of the 22nd LC inviting comment on the UCC, it has been recommended that codifying and amending personal laws to make them gender just may be a better step than a UCC.[59] Others argued this may not be possible as such an exercise may be opposed by community heads.[60]

By throwing light on the different positions of All India Democratic Women's Association ('AIDWA'),[61] Majlis[62] and People's Movement for Secularism ('PMS')[63] regarding the UCC, Ratna Kapur points to the fact that the rise of a majoritarian right has made feminist support for the UCC a complicated matter.[64] Kapur argues that ultimately when it comes to women's rights and gender equality, there is no way to avoid controversy. As the issue of women's equality within the private sphere of the family has been contentious, the majoritarian right will oppose such attempts on the ground that they threaten the family.[65] At the same time, the appropriation of feminist engagement with the UCC by the majoritarian right will inevitably lead to minority communities feeling suspicious of reform attempts from outside these communities.[66] This concern of co-option by the majoritarian right has been echoed by other feminist scholars as well.[67] It has been pointed out that the polarisation around the UCC has compelled some feminists to take a pro-personal law position or become 'pragmatically paralysed'.[68]

Scholar Abida Samiuddin notes the tensions that the UCC presents for the Muslim minority in India. She emphasises that the project for national integration can be achieved only by ensuring plurality of identities, and while the ultimate objective of reform is to arrive at an egalitarian society, it is critical that such initiative comes from within communities. She argues that Muslim personal law has sufficient scope to incorporate goals of social justice and points out how various realms of Shariah family law including marriage, divorce, maintenance make room for feminist reform.[69] Such a politics is also reflected in the movement for the abolition of the triple talaq with the Bharatiya Muslim Mahila Andolan, a rights-based civil society organisation that works on rights of Muslim women, being at the forefront of this movement.[70]

In addition to the argument for reform being informed by voices within the concerned community, the Working Group on Women's Rights ('WGMR') has also critiqued the UCC for its ideological deployment of uniformity. They have pointed out that deeming the UCC as a vehicle of national integration through

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[58] ibid.
[59] Sreeparna Chakrabarty, 'Amend personal laws to ensure gender justice, say activists' (The Hindu, 8 July, 2023) <https://www.thehindu.com/news/national/amending-personal-laws-is-the-better-way-to-ensure-gender-justice-than-a-ucc-womens-rights-activists/article67057350.ece> accessed 11 July 2023.
[60] ibid.
[61] The AIDWA initially supported the UCC but were of the opinion that it was critical to remove the UCC from the climate of communal propaganda that had descended on it. It also advocated for gradual reform for strengthening women's rights through piecemeal legislation and supported drastic reform of personal law.
[62] Majlis was not in favour of the UCC and recognised how the UCC had come to be associated with an attack on what was framed by the Hindu right as 'Muslim exceptionalism'. Majlis favoured a two-prong approach. First, specific legislations that addressed the immediate issues being faced by women. Second, law reform from within the community.
[63] PMS critiqued both the UCC as it was a mechanical attempt at integration as well as the aspiration for reform from within the community as such an approach denies women the very rights the community claims namely – 'autonomy, self-determination and access to resources.'
[64] Ratna Kapur, 'The UCC: Feminist Interventions?', available at <http://feministlawarchives.pldindia.org/wp-content/uploads/18.pdf> accessed 11 July 2023.
[65] ibid.
[66] ibid.
[67] Nandini Gandhi and others, 'Drafting Gender Just Laws', (1996) 31(43) Economic and Political Weekly 2858.
[68] ibid.
[69] Abida Samiuddin, 'Muslim Community: Identity Crisis and Probability of a Uniform Civil Code' <http://feministlawarchives.pldindia.org/wp-content/uploads/22.pdf?> accessed 11 July 2023.
[70] Akshat Agarwal, Diksha Sanyal and Namrata Mukherjee, 'Queering the Law: Making Indian Laws LGBT+ Inclusive – Family', Vidhi Centre for Legal Policy, 8 <https://vidhilegalpolicy.in/wp-content/uploads/2020/06/Manual_queer_family-compressed.pdf> accessed 11 July 2023.

uniformity was based on the principle of community rather than citizenship i.e., uniformity in personal law and not in social life. [71] Second, they point to judicial discourse which frames oneness and loyalty to the nation being compromised if different minority groups follow different family laws. The UCC is routinely invoked in cases involving minority personal law, such as *Shah Bano* and *Sarla Mugdal*, but not when confronted with inequities in Hindu personal law.[72] This leads to the presumption that Hindus have reformed themselves whereas minorities continue to retain 'special privileges' through personal law.[73] It must be noted that the AIDWA which had initially supported the call for a UCC, retracted on this position after *Sarla Mudgal*. The WGMR too went on to propose, that while a comprehensive package of gender just legislation[74] must be the default option, people should have the option to be governed by personal law, if they choose to, as well as revoke such choice.[75]

Personal Laws and the Constitution

In addition to the political arguments concerning the UCC and the criticism of sex discrimination that continues in the domain of personal laws, there are legal arguments which support the need for a secular, gender just and inclusive family law regime. Under the existing family law regime in India, personal law enjoys partial protection from a challenge on grounds of violation of fundamental rights. These laws can only be tested for a violation of Part III of the Constitution if the said practice has been codified by legislation. However, if the practice is not codified or is merely customary in nature, it enjoys immunity. This position of law emerged from the early case of Bombay High Court in *State of Bombay v Narasu Appa Mali*[76] ('*Narasu*').

To elaborate, Article 13 of the Constitution stipulates that laws which are inconsistent with or in derogation of fundamental rights are void, to the extent of that inconsistency. Clause (1) of the Article in particular includes 'laws in force' which were operative before the commencement of the Constitution.[77] The Court in *Narasu* dealt with the question whether 'laws in force' includes custom or usage. Chief Justice Chagla observed that 'custom or usage' is included in the definition of 'laws in force'. However, both the Judges (Chagla and Gajendragadkar JJ.) concluded that 'custom or usage' does not include personal law which cannot be tested under Article 13. In effect, personal laws were immune even if they violated any of the rights enshrined in Part III of the Constitution. The position of law in *Narasu* has not been overturned by the Supreme Court.[78] Subsequently, the Supreme Court watered down this requirement and held that in case the personal law is modified or abrogated by a statute, it must satisfy the test of Article 13.[79] In *Shayara Bano v Union of India*[80] ('*Shayara Bano*') while assessing the constitutional validity of the practice of triple talaq, Nariman J. (writing for himself and Lalit J.) applied this position of law and held that the Muslim Personal Law (Shariat) Application Act, 1937 ('Shariat Act') had codified the practice of triple talaq and hence, it could be tested on the anvil of Part III of the Constitution.[81]

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[71] Working Group on Women's Rights, 'Civil Codes and Personal Laws: Reversing the Options', available at <http://feministlawarchives.pldindia.org/wp-content/uploads/61.pdf> accessed 11 July 2023.
[72] ibid.
[73] ibid.
[74] ibid.
[75] ibid.
[76] *State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84.
[77] Clause 3(b) defines 'laws in force' in the following manner:
"laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
[78] *Krishna Singh v Mathura Ahir* (1981) 3 SCC 689; *Maharshi Avdhesh v. Union of India* (1994) Supp (1) SCC 713.
[79] *Krishna Singh v Mathura Ahir* (1981) 3 SCC 689 [17].
[80] *Shayara Bano v Union of India* (2017) 9 SCC 1.
[81] Nariman J., observed at para 19, "As we have concluded that the 1937 Act is a law made by the legislature before the Constitution came into force, it would fall squarely within the expression "laws in force" in Article 13(3)(b) and would be hit by Article 13(1) if found to be inconsistent with the provisions of Part III of the Constitution, to the extent of such inconsistency."

The immunity granted to personal law due to *Narasu*, has been critiqued by the Courts and scholars alike. As early as 1971, the Kerala High Court in *Assan Rawther v Ammu Umnia*[82] doubted the correctness of *Narasu*. In *Saumya Ann Thomas v Union of India*,[83] the Kerala High Court observed that in a secular republic, personal law alone should not be exempt from the sweep of Article 13 and Part III of the Constitution. It called for reconsidering the judgment in *Narasu*. However, the Supreme Court has failed to reconsider *Narasu* despite being presented with the opportunity to do so and has left it for another day.[84] For instance, in *Shayara Bano*, Nariman J., called for re-looking the case in future. Similarly, Chandrachud J., in *Indian Young Lawyers' Association v State of Kerala*[85] doubted the correctness of *Narasu* and termed it against the transformative vision of the constitution.[86] A similar question has arisen in the current marriage equality case as to whether gender violative personal laws can be held violative of fundamental rights.

Narasu grants personal laws an impregnable status that even the Constitution cannot break. Many of these laws are discriminatory, outdated and do not fit with the tenets of the Constitution or the current social milieu. Indira Jaising has rightly argued that *Narasu* has been responsible for denying women their fundamental rights. She writes that, "*personal laws have become an island within the Constitution which stops at their doorstep*".[87] The immunity granted to personal laws is a judicial act and should ideally be withdrawn by the Court itself by striking down *Narasu*. Alternatively, codification of personal law through a new Code will fix the peculiarity created by *Narasu* as being statutory law it will need to comply with Part III of the Constitution. The need for codification to undo *Narasu* has been supported by the Law Commission,[88] scholars[89] and other women organisations as well. For instance, as per a survey conducted by the Bharatiya Muslim Mahila Andolan 83% respondents believed that codification of Muslim personal law would help protect women's rights.[90] As Menon argues, the concept of unqualified rights of communities to their cultural identity is not acceptable as such a proposition legitimises sex discrimination in the name of religion and culture.[91]

Comprehensive Protection of Families: A Case for Reform

This paper provides a first draft of what a comprehensive, gender-just and inclusive family law regime in modern India could look like. This is a surprising gap in the publicly available literature on this subject. In

[82] *Assan Rawther v Ammu Umnia* 1971 KLT 684.
[83] *Saumya Ann Thomas v Union of India* 2010 SCC OnLine Ker 5197.
[84] The Court had the opportunity to reconsider Narasu in *Shayara Bano*. In fact, Kurien J., during the hearings had orally remarked "the time to exorcise the Ghost of Narasu Appa is now". In *Shayara Bano*, the Attorney General (hereinafter 'AG') inter alia argued that the decision in Narasu was reached through an apparent misconstruction and personal laws ought to be examined from the touchstone of fundamental rights especially in light of the goals of gender justice and dignity of women. The AG argued that the idea behind preserving 'personal laws' was safeguarding the plurality and diversity of India. However, the sustenance of diversity cannot be at the cost of denying women their status and gender equality. These arguments were rejected by Khehar J., (writing for himself and Nazeer J.) who observed that Narasu was binding law. Nariman J., (writing for himself and Lalit J.,) did not go into the correctness of *Narasu*.
[85] *Indian Young Lawyers' Association v State of Kerala* (2019) 11 SCC 1.
[86] ibid [397].
[87] Indira Jaising, 'The Ghost of Narasu Appa Mali is stalking the Supreme Court of India' (*The Leaflet*, 28 May 2018) < https://theleaflet.in/specialissues/the-ghost-of-narasu-appa-mali-is-stalking-the-supreme-court-of-india-by-indira-jaising/> accessed 11 July 2023.
[88] Consultation Paper on Reform of Family Law (Law Commission 2018) 12 <http://www.lawcommissionofindia.nic.in/reports/CPonReformFamilyLaw.pdf> accessed 11 July 2023; It must be noted that the Law Commission, in this report, had rejected the UCC as a recommendation.
[89] Farrah Ahmed, 'The Problem with Personal Law in India' in S. Choudhry & J. Herring (eds.), *The Cambridge Companion to Comparative Family Law* (Cambridge 2019) 225.
[90] Justin Jones, 'Towards a Muslim Family Law Act? Debating Muslim women's rights and the codification of personal laws in India', (2020) 28(1) Contemporary South Asia 1.
[91] Nivedita Menon, 'The Uniform Civil Code – the women's movement perspective', <http://feministlawarchives.pldindia.org/wp-content/uploads/Uniform-Civil-Code-%E2%80%93-the-women%E2%80%99s-movement-perspective-by-Nivedita-Menon-2014.pdf> accessed 11 July 2023.

1996, the Human Rights Law Network, Forum Against Oppression of Women, Lawyers Collective and the Kashtakari Sanghatana organised a workshop on 'Drafting Gender Just Laws' in Bombay. The objective of this workshop was not to draft a UCC but to reform family laws to make them gender just. This could be achieved either via amendments to personal law and/or secular laws or an optional code. The proponents of the UCC, on the other hand, to the best of our knowledge, have never drafted such a code.[92]

In light of the marriage equality petitions and the push for a UCC, we believe it is critical to articulate what a progressive and secular family law code can look like. This is part of an effort to bring the conversation back to the issue of an inclusive and gender just family law within the framework of the Constitution to facilitate meaningful public consultation.[93] It also answers several fundamental questions of the nature of Indian family law asked by the judges of the Supreme Court in the marriage equality case. Here it is critical to clarify the draft code does not present itself as a majoritarian UCC. Instead, it provides for a progressive, secular and gender just draft family law code informed by the principles of the constitution as well as key demands for reform raised by secular feminist and queer movements. On the basis of consultations and feedback, it can be modified as necessary.

Marriage equality is but the first step for queer inclusion within family law. Family laws continue to be informed by the presumption that only heterosexual conjugal intimacies are worthy of recognition and assume that gender exists only in the binary of male and female.[94] The proposed draft code marks a shift from such a framework by recognising the right to family for persons of all sexual orientations and gender identities as well as a-typical families. It does so by recognising the right of all persons to marry as well enter into legally recognised non-conjugal intimacies, to acquire parenthood and share parental rights with other persons independent of their relationship with them, and by extending the right to intestate succession to a diversity of family structures.

The draft Code does not disturb existing customary law and maintains status quo with respect to them. Specifically, it does not delve into the customary law and practices followed in states listed in the Sixth Schedule of the Constitution, Article 371A, Article 371G and by members of the Scheduled Tribes. It repeals personal law to the extent of irreconcilable inconsistencies between what is proposed in the Code and personal laws. The Code proposed by this paper seeks to function as a framework that assists meaningful public discussion leading up to a progressive family law code for 21st century India.

Framed in this way, this draft family law Code is not an attempt to equalise various personal laws, or "pick and choose" best practices from each of them. This is how the formulation of a UCC has often been viewed leading to apprehensions of the cultural identity of minorities being erased through forced homogeneity. Instead, this draft family law Code sets out the contents of a gender just, queer inclusive and progressive legal family law framework. It does so by: (1) reconceptualising the idea of the modern

[92] Several members of the BJP and like-minded political parties have introduced Private Member Bills in parliament either asking to constitute a committee to prepare and implement the UCC; or make Article 44 a justiciable right; or have drafted a brief code without delving into the nuances of the issue. See, The Constitution (Amendment) Bill, 2009 (Bill No. 23 of 2009) moved by Yogi Adityanath (Lok Sabha); The Uniform Civil Code Bill, 2019 (Bill No. 266 of 2019) moved by Krupal Tumane (Lok Sabha); Uniform Civil Code in India Bill, 2020 (Bill No. II of 2020) moved by Kirori Lal Meena (Rajya Sabha); The Uniform Civil Code Bill, 2021 (Bill No. 40 of 2021) moved by Sushil Kumar Singh (Lok Sabha).

[93] Ratna Kapur, 'The UCC: Feminist Interventions?', <http://feministlawarchives.pldindia.org/wp-content/uploads/18.pdf> accessed 11 July 2023.

[94] On numerous occasions during the hearings the judges have asked whether it is possible to limit the scope of the petition to an interpretation of the SMA alone, without getting into other statutes or uncodified personal law. On one occasion, the Chief Justice noted that a simple reading up or reading in the SMA will not answer the question of what a Hindu male spouse would get in case of his Hindu husband's death even if marriage equality is recognised. On another, Justice Bhat enquired how one would account for same sex/gender partners in the Indian Succession Act, 1925 for the purpose of inheritance given the same operated on the premise of only heterosexual marriages being legitimate unions in the eyes of the law. All these questions recognise the limitations of judicial reinterpretation and the need for comprehensive legislative action.

family; (2) laying down the principles that govern such family relationships and the role of the state in the family; (3) translating these principles into legal provisions.

Principles for a Modern Family

A comprehensive modern family law regime marks a shift from existing family law in four distinct ways. First, it moves away from the binary idea of male and female and the heteronormative presumptions that inform family laws. Family laws as they stand today presume that there are only two genders. This can be witnessed in certain regimes for successions wherein gender, which is deemed to include only male and female, determines succession rights.[95] Post the Supreme Court's decision in *NALSA v Union of India*,[96] which recognised that transgender persons have fundamental rights, there are three genders in law namely: transgender persons, women, and men. Further, in light of *Navtej Johar v Union of India*[97] and the current marriage equality case, it is critical to ensure that family laws include non-heterosexual persons within their ambit. This can be achieved by recognising queer marriages as well as removing other prohibitions on queer persons from forming families.

Second, the proposed draft Code is based on constitutional principles of equality, non-discrimination and gender justice and not personal law principles intrinsic to any religion, as is the case today. A large number of family laws such as those pertaining to natural guardianship as well as the age of marriage continue to be informed by patriarchal values and deny women equal status. The draft Code does away with such provisions and affirmatively protects women's economic rights by recognising the concept of matrimonial property[98] – a demand that has come from certain sections of the women's movement.

Third, the draft Code does away with excessive state regulation in the name of preserving the sanctity of family. It does so by repealing the concept of prohibited degrees[99] as well as provisions such as restitution of conjugal rights[100] and introduces irretrievable breakdown of marriage as a ground for divorce. The common conceptual premise underlying these changes is the principled identification of those areas of family life where state intervention is warranted.

Finally, the draft Code makes space for a plurality of family structures which are not recognised in law. It seeks to achieve this by introducing the concept of stable unions, which make space for non-conjugal intimacies, and by expanding parenthood as well as the class of people who can hold parental responsibilities and rights vis-à-vis children even if they are not legal parents.

The draft Code recognises that the common core of all families is a set of mutually interdependent relationships based on love, care and respect. The purpose of family law in a modern state is to create

[95] See Indian Succession Act, 1925.
[96] *NALSA v Union of India* AIR 2014 SC 1863.
[97] *Navtej Johar v Union of India* (2018) 10 SCC 1.
[98] Presently, in India, there is no statutorily defined regime of matrimonial property. Separation of assets regime of matrimonial property has been applied to division and distribution of matrimonial property, following the common law doctrine in the United Kingdom. However, separation of assets of the parties to a marriage does not take into consideration the fact that there is an inherent inequality in the rates of growth of the individual properties of the spouses in a heterosexual marriage. Women in heterosexual marriages often contribute to the growth in the husband's property and assets, during the course of marriage, through household labour ensuring smooth functioning of the domestic and professional lives of the husband. This factum remains unaccounted for in a scheme where property is owned separately and exclusively by the party acquiring it. Accordingly, considering marriage as a shared partnership, partial community of property has been proposed as a regime for distribution and division of matrimonial property.
[99] Two persons are said to be within the degrees of prohibited relationships if they are related to each other by consanguinity or affinity. The degrees of prohibition are generally defined under every personal law in a different manner. As per the Special Marriage Act, 1954, marriage within prohibited degrees of relationships is considered to be void ab initio, except in cases where a custom governing at least one of the parties permits such a marriage. The objective of such prohibition is to prevent incestuous marriages and generally stems from health and biological concerns.
[100] Doing away with 'Restitution of Conjugal Rights' is also informed by the principle of liberty.

and enable such relationships. This can happen if family law is based on the principles of equality, liberty and dignity, and inclusion, which are the cardinal corners of the Constitution.[101] Specifically, in the context of family law, these principles may be understood as follows:

1. **Equality and Non-Discrimination** - Equality requires relationships in a family being based on mutual care and reciprocity and not gendered roles or discriminatory practices. A concomitant duty falls on the state to ensure that it recognises such equality and a duty between partners *inter se* to treat the other equally. It must be remembered that intimacies of marriage, including the choices which individuals make, ordinarily lie outside the control of the state and it should not treat people differently based on the choices made.[102]

2. **Liberty and Dignity** - Liberty has both negative and positive connotations. Negative liberty is 'freedom from interference, coercion and restraint'[103] to enable one to do what one pleases without hindrance. Positive liberty is about enabling freedom and empowering individuals.[104] Liberty has also been viewed as the route through which a dignified life is rendered possible.[105] Further, while the premise of the rational autonomous subject exercising liberty rights has been critiqued by feminist scholarship,[106] they continue to be central to choices one makes in relation to family. This includes the right to choose one's partner[107] whether within or outside the marriage,[108] free from State imposed restrictions and social approval of such intimacies,[109] as well as decisional autonomy in other domains of family life.[110] The realisation of liberty rights may also require an affirmative obligation on the State to create enabling circumstances to allow for exercise of such right.[111] This is particularly the case when the exercise of a liberty right renders the individual(s) vulnerable to societal violence and sanction, as is the case with inter-caste and same sex/gender relationships. A progressive family law regime must be free of liberty restrictions that do not serve a legitimate state interest.

3. **Inclusion:** Inclusion is an important facet of substantive equality.[112] Substantive equality demands an ability to participate on equal terms in community and society, and consequently the taking of active measures to integrate individuals.[113] In the context of the family, such inclusion needs to be ensured through the recognition of groups that are presently excluded from the scope of laws granting recognition, rights and protections. Judicial decisions recognising rights of transgender persons have already indicated the necessity of reforming laws to ensure that the rights of transgender persons are protected[114] and have interpreted marriage laws to be inclusive of them.[115]

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[101] *Navtej Johar v Union of India* (2018) 10 SCC 1 [4].
[102] *Shafin Jahan v Asoka K.M.* (2018) 16 SCC 368 [85].
[103] Steven J Haiman, 'Positive and Negative Liberty', (1992) 68 Chicago Kent Law Review 81.
[104] Diana Coole, 'Constructing and Deconstructing Liberty: A Feminist and Post-Structuralist Analysis, Political Studies (1993) 41(1) Political Studies 90.
[105] *Joseph Shine v Union of India* (2019) 3 SCC 39.
[106] Natalie Stoljar, 'Feminist Perspectives on Autonomy' (*SEP* May 2 2013) <https://plato.stanford.edu/entries/feminism-autonomy/> accessed 11 July 2023.
[107] *Navtej Johar v. Union of India* (2018) 10 SCC 1 [419].
[108] *Shafin Jahan v. Asoka K.M.* (2018) 16 SCC 368 [75].
[109] ibid.
[110] *Justice K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1 [141].
[111] *Shakti Vahini v. Union of India* (2018) 7 SCC 192 (In the context of honour killings of inter-caste couples, the Supreme Court stated that the choice of a life partner was a constitutional right guaranteed by Articles 19 ('free speech and expression') and 21 ('life and liberty'), and once recognised, must be protected. Consequently, an infringement of a right to marry, was a constitutional violation. The Court then went on to recommend that the legislature bring about a law on honour killings and issued binding directions to State Governments to protect inter-caste couples through preventive, remedial and punitive measures. The Court in *Shakti Vahini* did not stop at recognising an adult's right to choose one's partner but went a step further by imposing an affirmative obligation on the State to protect such right. The affirmative protection of such a right was deemed key to its exercise.
[112] Sandra Fredman, 'Substantive Equality Revisited', (2016) 14(3) International Journal of Constitutional Law 712.
[113] ibid 731-732.
[114] *NALSA v Union of India* AIR 2014 SC 1863 [75].
[115] *Arun Kumar v Inspector General of Registration* (2019) 4 Mad LJ 503.

> Similarly judgments such as *Navtej Johar* have not only decriminalised homosexuality but have recognised a right to intimacy for all. It is critical for a modern family law to include persons who have been left out of their protective ambit to ensure equality is realised beyond access to marriage. One way of achieving inclusion of diverse gender and sexual identities is by using 'gender inclusive' drafting. Such drafting is cognisant of the reality of the heteronormative and patriarchal family in India that necessitates greater protection of women, while ensuring that persons of all gender identities and sexual orientations find recognition in the law. Consequently, our proposed draft family law Code retains gendered language in certain provisions, while ensuring that the family is inclusive of all gender identities beyond the binary of man and woman.

In this regard, it is important to clarify that these principles serve two purposes—first, they are the building blocks for a family where members owe a duty of love, care, and respect towards each other. They also provide legitimate grounds for the state to regulate adult unions, parental unions, and succession to make them inclusive as well as liberty, equality, and dignity-enhancing. Each of these three categories—adult unions, parental unions, and succession— have a dedicated chapter and a set of provisions informed by the above-mentioned principles. While these are provisions relating to substantive law, no procedural law recommendations are made. This is not to say that these are not required but rather that they constitute a different exercise and must be taken up elsewhere.[116]

Chapter 1: 'Adult Unions' proposes a framework for the recognition and regulation of different kinds of Adult Unions. In an effort to account for the changing notions of family and marriage, a dual framework for marital and non-marital unions is recommended. The proposed framework for marital unions recommends reforms in the form of revision of the minimum age of marriage, registration of marriage, recognition of no-fault grounds of divorce and a fair and equitable matrimonial property regime. The framework for non-marital unions aims to redirect the focus from the centrality of conjugality to mutual love, care and dependence. It recommends recognition of non-conjugal relationships and plurality of family structures while keeping in view the social context informing intimate relationships in India.

Chapter 2: 'Parent Child Relations' recommends reforms to laws on parent-child relations. Towards this end it provides for an expansion of parenthood rights for all, independent of a person's marital status, gender identity and sexual orientation and extends legal recognition to social parenthood i.e. parenthood defined by intent to parent as opposed to mere genetic or martial link. It recommends a shift from the outdated concept of natural guardianship and parental authority and provides for a progressive and gender-just framework on 'parental responsibilities and rights'. Such a framework also accounts for the diversity of caretaking arrangements beyond the married heterosexual conjugal unit and grants legal legitimacy and protection to such family structures. Second, it recommends amendments to laws in relation to court appointed guardians to bring it up to date, as well as adoption, surrogacy and assisted reproductive technology to ensure that a diversity of parent-child relations are protected.

Chapter 3: 'Succession' proposes a framework on succession and inheritance. The proposed framework eliminates prevalent gender discrimination in state-level laws. It abolishes the concept of coparcenary property and Hindu Undivided Families in property law, extends the benefit of intestate succession to different kinds of family structures, i.e. those not based solely on ties through blood and marriage, and recognises the concept of digital wills. Finally, it enables all persons to whom the deceased owed a duty of care to apply to the court for maintenance if they have not been otherwise provided for.

The marriage equality case is historic not only because it gives the Supreme Court an opportunity to ensure that groups that were once deemed criminal by law are now recognised as equal citizens but also

[116] Srimati Basu, *The Trouble with Marriage: Feminists Confront Law and Violence in India* (University of California, 2015).

because it provides citizens with an opportunity to engage with the goal of a just family law regime to ensure substantive equality for all. Further, considering the concomitant political push for a UCC, it is critical to present a secular and gender just model that serves as a site for public debate on family law reform and how it can realise the constitutional guarantees of equality, liberty and dignity. If the draft family law code can provide the foundation for a meaningful debate, it will have served its purpose.

Commentary

Chapter 1: Adult Unions

Chapter 2: Parent-Child Relations

Chapter 3: Succession

Chapter 1: Adult Unions

Introduction

This Chapter on Adult Unions is divided into two parts - the framework for marriage and the framework for stable unions. The framework for marriage deals with the regulatory setup surrounding marital unions. It has further been divided into three sub-Parts. The first sub-Part lays down the essentials for a valid marriage, including conditions for a valid marriage, the process for registration of a marriage, and conditions for void and voidable marriages. The second sub-Part deals with matrimonial remedies in the form of divorce and judicial separation. The third sub-Part lays down a regime for matrimonial property, proposing a default regime for the governance of division and distribution of matrimonial property. The framework for stable unions is aimed at the recognition and regulation of such intimacies that may go beyond the traditional notions of families and may be non-marital, non-conjugal or non-natal in nature. Additional points for consideration that have not been directly incorporated in the draft provisions, but must be kept in mind and addressed, have been indicated as 'Notes for Consideration' under the relevant provisions.

Key Features
Part I: Framework for Marriage
Sub-Part 1: Essentials for a Valid Marriage
• Provides for an inclusive framework of marriage which recognises marriage between all persons irrespective of their gender or sexuality. • Provides for a uniform minimum age of marriage for all persons irrespective of their gender. • Brings the conditions regarding the mental capacity for a valid marriage and for claiming voidability in line with the Mental Healthcare Act, 2017. • Provides a straightforward and short process for registration of all marriages. • Provides statutory recognition to relationships which are in the nature of marriage and codifies protections by providing the right to maintenance.
Sub-Part 2: Matrimonial Remedies
• Moves towards no-fault theory of divorce by recognising 'irretrievable breakdown of marriage' as a ground for divorce. • Simplifies the process of seeking divorce by mutual consent by removing the cooling-off periods. • Eliminates the remedy of restitution of conjugal rights to uphold the principles of liberty and autonomy.
Sub-Part 3: Maintenance and Matrimonial Property
• Protects the rights of parties to a marriage *inter se* each other by providing a robust scheme of maintenance during the subsistence of marriage and post dissolution. • Enables the courts to grant equitable and just maintenance orders based on a set of illustrative factors. • Introduces the Partial Community of Assets Regime to account for the interests of both the parties to a marriage and specifically to safeguard the interests of vulnerable parties.
Part II: Framework for Stable Unions
• Introduces the framework for recognition of alternative family structures in the form of 'Stable Unions' to account for all modern and atypical relationships.

- Extends the right to maintenance to Stable Unions.
- Enables the Stable Union Partners to nominate each other as legal representatives.

3. Definitions for this Chapter.- [117]

(1) In this Act, unless the context otherwise requires,–

(a) "**Acknowledgement Letter**" means a document issued by the Marriage Officer under sub-section (2) of section 25;

(b) "**Certification of Registration**" means a certificate issued by the Marriage Officer under section 6 or section 8 of this Code;

(c) "**court of competent jurisdiction**" means -
(i) in areas where a family court has been established in accordance with section 3 of Family Courts Act, 1984, the family court; or,
(ii) in areas where a family court has not been established in accordance with section 3 of Family Courts Act, 1984, the district court within the local limits of whose original civil jurisdiction,–
I. the marriage was solemnised;
II. the respondent, at the time of the presentation of the petition resides;
III. the Parties to the Marriage last resided together; or,
IV. the petitioner at the time of the presentation of the petition resides;

(d) "**intimation**" means notification of the existence or the intention to be in a stable union to the Marriage Officer, in accordance with the procedure specified under section 25 of this Code;

(e) "**marriage**" means a marriage solemnised or registered under this Code;

(f) "**Marriage Officer**" means a person appointed and designated as a Marriage Officer by the State Government for the whole or any part of the State, by notification in the Official Gazette;

(g) "**Memorandum of Marriage**" means a document containing the details specified in Form A, submitted to the Marriage Officer for the purpose of registration of Marriage in accordance with section 5 of this Code;

(h) "**parties to the marriage**" means any two persons who have solemnised their marriage in accordance with the conditions specified under section 4 of this Code;

(i) "**Register of Marriage**" means an electronic, digital or paper document or book kept by the Marriage Officer for the purpose of maintaining records of marriages registered before them; and

(j) "**spouse**" in relation to a party to a marriage or relationship in the nature of marriage, means

[117] Sections 1 and 2 of the Code are the preliminary provisions (short title, extent, commencement, and definitions).

the other party to the marriage.

(2) Notwithstanding anything contained in clause (h) of sub-section (1) of this section, the Central Government or the State Government, may, from time to time, through notification, amend the definition of "spouse" to include stable union partners, for the purposes specified in section 27 of this Code.

Part I: Framework for Marriage

Sub-Part 1: Essentials for a Valid Marriage

Issue: Who can be party to a marriage?

Objective:
To make the institution of marriage accessible and inclusive for all persons.

Context:
The current family law framework in India views marriage as a dyadic heterosexual union between cis-gendered people. While there are no explicit prohibitions, the existing laws have inherent limitations which make the institution of marriage inaccessible to queer individuals. All family laws employ gendered qualifications and conditions to enter into a valid marriage. For instance, the Special Marriage Act, 1954 specifies the minimum age for valid solemnisation of marriage as 18 for 'female' and 21 for 'male'.[118] Similarly, the Hindu Marriage Act, 1955 uses the words 'bride' and 'bridegroom' to specify the minimum age requirements.[119] The provision for prohibited relationships under the Special Marriage Act, 1954, relies on the male and female family line to define the degrees of prohibition.[120] Furthermore, both these laws and other personal laws like the Indian Christian Marriage Act, 1872,[121] the Divorce Act, 1869[122] and the Parsi Marriage and Divorce Act, 1936[123] also employ gendered terms like 'man', 'woman', 'husband' and 'wife' in various provisions.

These laws are based on the presumption that marriage is exclusively a union between a man and a woman and fail to recognise all other diverse forms of relationships that do not align with these traditional marital norms. Consequently, individuals who do not identify within these binaries are denied the right to marry and the recognition, protection and access to all those social and economic rights conferred to spouses. Further, due to the non-recognition of queer marriages, queer couples often resort to informal arrangements such as live-in relationships[124] and Maitri Karars,[125] which heightens their vulnerabilities by making them susceptible to unnecessary interference and harassment at the hands of

[118] The Special Marriage Act, 1954, s.4(c).
[119] The Hindu Marriage Act, 1955, s.5(iii).
[120] The Special Marriage Act, 1954, s.2(b) read with Schedule 1.
[121] For instance, Section 60 of the Indian Christian Marriage Act, 1872 uses the terms 'man' and 'woman'.
[122] For instance, Section 10 of the Divorce Act uses the terms 'husband' and 'wife'.
[123] For instance, Section 3(1) of the Parsi Marriage and Divorce Act, 1936 uses the terms 'male' and 'female'.
[124] Surabhi Shukla, 'The L Word- Legal Discourses on Queer Women' (2020) 13 National University of Juridical Sciences Law Review <http://nujslawreview.org/2020/10/05/the-l-world-legal-discourses-on-queer-women/> accessed 11 July 2023.
[125] 'Rights in Initimate Relationships- Towards an Inclusive and Just Framework of Women's Rights and the Family' (Partners for Law in Development 2010) <https://feministlawarchives.pldindia.org/wp-content/uploads/RIR-Report.pdf> accessed 11 July 2023;Omkar Khanderkar, 'Same-Sex Couples in India Are Using a Gujarati Practice to Get "Married"' (*Livemint*, 10 October 2020) <https://lifestyle.livemint.com/news/talking-point/same-sex-couples-in-india-are-using-a-gujarati-practice-to-get-married-111601876888126.html>; Suraj Sanap, Vivek Divan, and Unmukt Gera, 'HAPPY TOGETHER: Law & Policy Concerns of LGBTQI Persons and Relationships in India' (The Centre for Health Equity, Law & Policy 2021) <https://www.c-help.org/pb-happy-together-law-pol-lgbtqi-rln> accessed 11 July 2023.

their natal families and the society at large and to power differentials within the relationship. There are various cases where queer couples had to resort to court protection to safeguard their life and liberty.[126]

Thus, the non-recognition of queer marriages and exclusion on the ground of sexual orientation is not only discriminatory[127] but is also violative of their right to choice of partners,[128] right to privacy,[129] right to freedom of expression[130]and the right to autonomy and dignity.[131] Keeping in view the social realities, the jurisprudential developments and the mandate of recognising self-determined gender identities,[132] there is a need to make the institution of marriage accessible and inclusive for all irrespective of their gender or sexual identities and to broaden the scope of social and legal protections.

Proposed Step:
In order to make the institution of marriage inclusive and accessible to all, gender-neutral terms should be used. The term 'spouse' should be used instead of husband and wife, and the term 'person' should be used instead of man, woman, male and female.

Issue: What should be the minimum age for a valid marriage?

Objective:
To revise and equalise the age of marriage for all persons.

Context:
The Hindu Marriage Act, 1955 specifies the minimum age for valid solemnisation of marriage as 18 for women and 21 for men.[133] A similar eligibility standard is set under the Christian,[134] Parsi,[135] and Secular Law.[136] Under Muslim Personal Law, a person becomes eligible for marriage upon the attainment of puberty, and the age of puberty has been presumed to be 15[137] years.[138] The Child Marriage Restraint Act, 1929, prescribed the minimum age of marriage as 14 for women and 18 for men which was subsequently raised to 15 for women in 1949.[139] The Act was again amended in 1978 to raise the minimum age to 18 and 21 for women and men respectively. The Prohibition of Child Marriages Act, 2006 has retained the same age till now.[140]

The discourse around the determination of the legal age for marriage has been intrinsically linked to the age for consent. Historically, the legal age for marriage has either been set equal to or close to the age of consent, with both being hinged upon the biological maturity of women.[141] Given that marriage has traditionally been seen as a site of procreation and sexual relations, factors such as puberty and the

[126] *Afeefa & Anr. v The Director General of Police & Ors.* WP(C) No. 21974 of 2023 (V); *Sultana Mirza v State of Uttar Pradesh* WRIT(C) No. - 17394 of 2020; *Poonam Rani v State of Uttar Pradesh* WRIT(C) No. 1213 of 2021; *Adhila v Commissioner of Police & Ors.* WP(CRL.) No. 476 of 2022.
[127] *National Legal Services Authority v Union of India* (2014) 5 SCC 438; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.
[128] *Shafin Jahan v Asokan KM*, (2018) 16 SCC 368.
[129] *K.S. Puttaswamy v Union of India*, (2018) 1 SCC 809.
[130] *Shakti Vahini v Union of India* (2018) 7 SCC 19.
[131] *Navtej Singh Johar v Union of India*, (2018) 10 SCC 1.
[132] *National Legal Services Authority v Union of India* (2014) 5 SCC 438.
[133] The Hindu Marriage Act, 1955, s 5(iii).
[134] The Indian Christian Marriage Act, 1872, s.60.
[135] The Parsi Marriage and Divorce Act, 1936, s 3(i)(c).
[136] Special Marriage Act, 1954, s 4(c).
[137] A person can be contracted in marriage even before the attainment of puberty but with the consent of guardians.
[138] Mulla, *Principles of Mahomedan Law*, (Lexis Nexis, 23rd ed., 2021) 403-404.
[139] Child Marriage Restraint Act, 1929, s 2(a).
[140] Prohibition of Child Marriage Act, 2006, s 2(a).
[141] Moropant Vishwanath Joshi, 'Chapter IX, Choice of Remedies, Report of the Age of Consent Committee' (1929) <https://indianculture.gov.in/rarebooks/report-age-consent-committee-1928-1929> accessed 11 July 2023.

ability to consummate marriage heavily influenced the determination of the minimum age.[142] The primary focus of age of marriage legislations has been to address the concerns associated with early consummation of marriage.[143] Consequently, there has been little to no focus on the intellectual capacity necessary to provide an informed consent to marriage.

Furthermore, it is evident that there has been a consistent disparity in the minimum age for women and men under most of these laws. This disparity is rooted in traditional gender norms and stereotypes backed by no scientific evidence. As women are presumed to be homemakers and men to be breadwinners, there has been a tacit assumption that men were to be given sufficient time before marriage to complete their professional education. Moreover, it was incorrectly presumed that women have different rates of intellectual development than men and thus mature earlier. This disparity, as pointed out by the Law Commission, has perpetuated the stereotype that wives must necessarily be younger than their husbands.[144] Such gender-based disparity is discriminatory and directly impinges upon the right to equality of women.[145]

To address this discrimination and to curb child marriages, there have been recommendations to increase the minimum age for women from 18 to 21.[146] The Prohibition of Child Marriage (Amendment) Bill, 2021, also reflected this upwards revision in age.[147] The recommendation is grounded on the hope that it would deter child marriages and provide women with opportunities to complete their education and become independent. However, such an approach could be counterproductive and might not achieve its intended impact. Upward revision of age would directly impinge upon the agency and autonomy of women and would restrict their right to marry.[148] Moreover, it will lead to an increase in the prosecution of young adults for early marriages, expanding the scope of criminality.

Proposed Step:
The minimum age of marriage should be 18 years for all persons. It is presumed that a person acquires mental, physical and psychological maturity by the age of 18 and the same is reflected through the age of majority as prescribed under the Majority Act, 1875.[149] Every individual should be entitled to exercise their free will, autonomy and agency on the attainment of majority, which includes making the decision to marry. Equalising the minimum age of marriage by downward revision for all persons shall also uphold the international standards[150] set by the Child Rights Convention[151] and the Convention on Elimination

[142] Ishita Pande, *Sex, Law and the Politics of Age- Child Marriage in India, 1891-1937* (Cambridge University Press 2020)- The author in this book has questioned the use of age stratification to govern the intimate lives of individuals. She questions how puberty be designated by an exact age and whether age is a suitable criterion for measuring consent and capacity.
[143] Ishita Pande, *Sex, Law and the Politics of Age- Child Marriage in India, 1891-1937* (Cambridge University Press 2020).
[144] 'Consultation Paper on Reform of Family Law' (Law Commission of India 2018) <https://archive.pib.gov.in/documents/rlink/2018/aug/p201883101.pdf> accessed 11 July 2023.
[145] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1- If any ground of discrimination, whether direct or indirect, is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex.
[146] Jagriti Chandra, 'Task Force on Age of Marriage for Women' The Hindu (18 January 2021) <https://www.thehindu.com/news/national/task-force-on-age-of-marriage-for-women-submitted-report-to-pmo/article33601834.ece>.
[147] The Prohibition of Child Marriage (Amendment) Bill, 2021, <https://prsindia.org/billtrack/the-prohibition-of-child-marriage-amendment-bill-2021> accessed 11 July 2023.
[148] *Shafin Jahan* v *Asokan KM*, (2018) 16 SCC 368.
[149] Section 3, The Majority Act, 1875.
[150] Angela Melchiorre, 'A Minimum Common Denominator? Minimum Ages for Marriage Reported under the Convention on the Rights of the Child' (Submission on child, early and forced marriage Women's Human Rights and Gender Section, OHCHR) <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/AngelaMelchiorre.pdf> accessed 11 July 2023
[151] Committee on Rights of Child, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, December 2016, <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-20-2016-implementation-rights> accessed 11 July 2023.

of Discrimination Against Women.[152] Further, keeping in view the social realities, declaring child marriages as being void *ab initio* shall create unintended consequences and therefore the marriage shall be voidable at the option of either of the parties who were under the age of 18 at the time of marriage.

Issue: What should be the law on the number of spouses one can have at the same time?

Objective:
To make the conditions for a valid marriage uniform and to safeguard the marital rights of women.

Context:
Bigamy is prohibited and punishable under the Special Marriage Act, 1954[153] as well as the Hindu Marriage Act, 1955.[154] A marriage between two persons where any of the parties is already married, is void.[155] Indian Christian Marriage Act, 1972, prescribes that none of the parties to a marriage should have a living husband or wife for a valid certification of marriage.[156] Similarly, under Parsi law, all Parsis are prohibited from contracting any marriage in the lifetime of their wife or husband, whether they are Parsi or not.[157] Under Muslim law, polygyny is permissible but polyandry is prohibited.[158]The Quran and Hadith allow for polygamy but only under highly restricted conditions.[159] A muslim man is allowed to contract up to four marriages at a time. If a fifth marriage is contracted while the other marriages are in subsistence, the last marriage is considered to be irregular[160] under Hanafi law and void under Shia law[161]. It is prescribed in the Quran that a man may take up to four wives only if he is able to maintain them and treat all of them equally.[162] Therefore, while not expressly prohibited, polygamy is discouraged under Islamic law and jurisprudence.[163]

There has been a consistent call for prohibiting polygamy and establishing monogamy as a mandate across all religions.[164] Prescription of monogamy was extensively debated during the Constituent Assembly discussions on Hindu Code Bill. While there were various constitutional and religious arguments to support the mandate of monogamy, alleviation of gender inequality and injustice was the focal argument. Hansa Mehta stressed on the fact that the disrespect, forceful marriages and other atrocities committed on women could be controlled with the introduction of monogamy.[165] Similarly, Sucheta Kriplani highlighted that in order to ensure the ideal of equality, the state should not have

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[152] UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, 1994, <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/DownloadDraft.aspx?key=ICEnwWR8rbeJM8O1ALabP2PupPVGxdaEqKb0tyqx7QfJMXMmTRrLZ+7HMSOoCNRJOBZsP85/kUlvD9NSGzJ0qw> accessed 11 July 2023.
[153] Special Marriage Act, 1954, s 44 r/w Indian Penal Code, 1860, ss 494 & 495.
[154] Hindu Marriage Act, 1955 s.17 r/w Indian Penal Code, 1860 ss 494 & 495.
[155] Special Marriage Act, 1954, s 24(1); Hindu Marriage Act, 1955, s.5(1).
[156] Indian Christian Marriage Act, 1872, s 60(2).
[157] Parsi Marriage and Divorce Act, 1936, ss 4(1) and 4(2).
[158] Mulla, *Principles of Mohamedan Law* (23rd edn, Lexis Nexis, 2017) section 391.
[159] 'An-Nisa', Chapter 4, Holy Quran, translation <https://tanzil.net/#trans/en.sahih/4:1> accessed 11 July 2023
[160] An irregular marriage (*fasid*) is one where the marriage by itself is not unlawful but is unlawful in relation to some condition which can be rectified.
[161] Dinshaw Fardunji Mulla, *Principles of Mohamedan Law* (23rd edn, Lexis Nexis 2017).
[162] 'An-Nisa', Chapter 4, Holy Quran, translation *available at*- https://tanzil.net/#trans/en.sahih/4:1.; Tahir Mahmood, *Family Law in India* (1st edn, Eastern Book Company).
[163] Tahir Mahmood, *Family Law in India* (1st edn, Eastern Book Company).
[164]'Consultation Paper on Reform of Family Law' (Law Commission of India 2018) <https://archive.pib.gov.in/documents/rlink/2018/aug/p201883101.pdf> accessed 11 July 2023; 'Preventing Bigamy via Conversion to Islam – A Proposal for Giving Statutory Effect to Supreme Court Rulings' (Law Commission of India 2009) 227 <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081053-2.pdf> accessed 11 July 2023; *Sameena Begum v Union of India*, (2018) 16 SCC 458; *Shayara Bano v Union of India*, (2017) 9 SCC 1.
[165] Parliamentary Debates, Vol. I, Discussion On The Hindu Code After Return Of The Bill From The Select Committee (11 February, 1949) 6 pm <https://mea.gov.in/Images/attach/amb/Volume_14_01.pdf> accessed 11 July 2023.

different sets of moralities for men and women and thus prescription of monogamy is a step in the right direction.[166]

This disapprobation against polygamy mainly stems from the fact that polygamy creates an asymmetry of power within a union and is oppressive for women.[167] Moreover, since polygamy as practised in India is exclusively exercised by men, the system is structurally inegalitarian.[168] Polygamous marriages are generally entered into by the husbands without the consent of their wives which not only deprives them of their agency and autonomy but further leads to abandonment and economic deprivation. In a recent survey of 250 women conducted across 10 states,[169] it was found that in majority of the cases, the wives' consent was not sought[170] and in most cases, the wife was not even informed about the second marriage.[171] Furthermore, the study highlighted that more than half of the women in polygamous marriages suffered from mental health issues and psychological distress.[172] Studies have also shown that women in polygamous marriages are extremely susceptible to violence by their intimate partner.[173]

While it is true that a mere prescription of monogamy as a mandate cannot be the ultimate solution to alleviate the oppression of women, as even monogamous relationships can be asymmetrical and oppressive,[174] it could be a critical first step to ensure equality within marriages.

Keeping in view the current realities,[175] the possibility that people might still enter into multiple marriages must be accounted for. Due to the current regime where the second marriage is considered void *ab initio*, the second wife may be deprived of recognition and left without maintenance. The wife is subjected to exclusion and social ostracisation. In such cases, the courts must continue to recognise the rights of women by giving a broad interpretation of the term 'wife'.[176] With the mandate of monogamy in place, it is hoped that the courts continue to exercise their discretion towards ensuring the fulfilment of the rights of women in such cases.

Proposed Step:
Monogamy is being prescribed as the mandate. Any marriage between two persons, where at the time of marriage, either of the parties has a living spouse, should be declared void.

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[166] Parliamentary Debates, Vol. I, Discussion On The Hindu Code After Return Of The Bill From The Select Committee (11 February, 1949) 6 pm <https://mea.gov.in/Images/attach/amb/Volume_14_01.pdf> accessed 11 July 2023.
[167] *See generally:* Thom Brooks, 'The Problem with Polygamy' 37 Philosophical Topics <https://www.jstor.org/stable/43154559> accessed 11 July 2023
[168] 'Towards Equality: Report of the Committee on Status of Women in India' (Ministry of Education and Social Welfare 1974) <-https://pldindia.org/wp-content/uploads/2013/04/Towards-Equality-1974-Part-1.pdf> accessed 11 July 2023- There are only a few tribes such as the Khasi and Toda which has the customary practice of polyandry.
[169] Dr. Noorejahan and Zakia Soman, 'Status of Women in Polygamous Marriages and Need for Legal Protection' (Bhartiya Muslim Mahila Andolan) <https://notionpress.com/read/status-of-women-in-polygamous-marriages-and-need-for-legal-protection/paperback> accessed 11 July 2023.
[170] 90% of the cases.
[171] 76% of the cases.
[172] 51% of the cases.
[173] Harihar Sahoo, R. Nagarajan, and Chaitali Mandal, 'Association of Polygyny with Spousal Violence in India' (International Institute for Population Sciences 2022) <https://www.iipsindia.ac.in/sites/default/files/Polygyny_and_Spousal_Violence.pdf> accessed 11 July 2023.
[174] Shayna M. Sigman, 'Everything Lawyers Know About Polygamy Is Wrong' (2006) 16 Cornell Journal of Law and Public Policy <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1105&context=cjlpp> accessed 11 July 2023- The author analysed the individualised harm to women who were subjugated as wives and the societal harm to the liberal and democratic state. The author concluded that both these harms are overstated. The subjugation of women is not specific to polygamous marriages. It is a common reality across all forms of marriages. The author further concluded that there is no causal relation between polygamy and societal degradation.
[175] 'Towards Equality: Report of the Committee on Status of Women in India' (Ministry of Education and Social Welfare 1974) <-https://pldindia.org/wp-content/uploads/2013/04/Towards-Equality-1974-Part-1.pdf> accessed 11 July 2023- Although polygamy is already prohibited under most of the personal laws, it is actively practised amongst a fraction of Hindus and certain tribes; 'Report of the High Level Committee on Status of Women in India' (Ministry of Women and Child Development 2015) <https://wcd.nic.in/documents/hlc-status-women> accessed 11 July 2023.
[176] *Badshah v Urmila Badshah Godse* (2014) 1 SCC 188; *Chanmuniya v Virendra Kumar Singh Kushwaha* (2011) 1 SCC 14.

4. Conditions for a valid marriage.-

A Marriage between any two persons, irrespective of their sex, gender or sexual orientation, may be registered under this Code if, at the time of the marriage, the following conditions are fulfilled, namely-

(i) neither party has a spouse living;

(ii) neither party-

(a) is incapable of giving valid consent due to a mental illness, whether incurable or of a persistent or intermittent nature, that significantly impairs their ability to provide valid consent;

(b) though capable of giving valid consent, has been experiencing such health conditions that significantly impair their ability to give informed consent, understand the nature of marriage, or fulfil the responsibilities of marriage;

(iii) both parties have completed the age of 18 years.

Explanation- For the purposes of sub-clause (a) of clause (ii) of this section, "mental illness" shall have the same meaning as provided under sub-section (s) of section 2 of the Mental Healthcare Act, 2017.

Notes For Consideration

Degrees of prohibited relationship

The provision on degrees of prohibited relationship was introduced to check the practice of performing incestuous marriages. However, in this section, such a provision has been deleted since marriage and conjugality within prohibited degrees are already regulated by social customs and moralities within different sections of society. Thus, the main intent behind removing this provision is to shift the concept of prohibited degrees outside the sphere of state regulation since it is believed that no further state intervention is required.

Issue: What should be the process for registration of marriage?

Objective:
To provide a framework for the registration of marriages with minimal state and third-party intervention.

Context:
Marriages in India are predominantly solemnised through processes prescribed under personal laws or as per the customary rites and ceremonies. Personal laws such as the Parsi Marriages and Divorce Act, 1936[177] and the Indian Christian Marriages Act, 1872[178] prescribe registration as part of the solemnisation process. Similarly, the solemnisation of special marriages under the Special Marriage Act, 1954[179] is through registration by the Marriage Officer. The Hindu Marriage Act, 1955[180] contains a provision for registration, but it is not a mandate. The provision enables the State Governments to

[177] Parsi Marriages and Divorce Act, 1936, s.6.
[178] Indian Christian Marriages Act, 1872, Parts III & IV.
[179] Special Marriage Act, 1954, chapters II, III.
[180] Hindu Marriage Act, 1955, s 8.

prescribe the rules for registration. Pursuant to the decision of the Supreme Court in *Seema v Ashwani Kumar*,[181] various states have made legislations[182] providing for compulsory registration of marriages.

There has been a consistent demand for making the registration of marriages mandatory, mainly to address the concerns of power imbalances and gender inequality within the institution of marriage. There are various cases where women are denied the rightful status of 'wife' due to the lack of proof of marriage.[183] Willful deceit to enter into bigamous marriages continues to be a roadblock wherein the second marriage is deemed to be void, leaving women without any economic support.[184] The 270th Law Commission Report highlighted that there are various cases where women are duped into marriages without fulfilling the conditions of a valid marriage which ultimately leaves the wives with no legal recourse.[185] Similarly, child marriages continue to be a significant issue. Registration of marriages can be a step to ensure that the conditions for a valid marriage are met.

A provision on registration of marriage, however, needs to be informed by the socio-cultural realities in India and the significant lack of infrastructure and information divide. Registration might not be possible in remote areas and extensive mobilisation of state machinery would be required to achieve universal registration of marriages. Moreover, information asymmetry in the country may lead to solemnization of marriages being considered as the final form of marriage by the parties, further leading to loss of benefits and protections arising from marriage. Accordingly, at this stage, this draft provision does not include a prescription of mandatory registration. However, for the registration framework to produce its intended impact, it is imperative to create awareness amongst the population and to enhance state capacity for the smooth functioning of the process. It is envisioned that the State Governments shall take relevant steps to create awareness about the necessity of registration and provide mechanisms to make registration accessible for all. It is hoped that awareness generation towards the need for registration would move our social reality to a place where universal registration may be achieved.

Proposed Step:
While registration of marriage is necessary, it is crucial to ensure that the process does not lead to undue interference and encroachment into the privacy of individuals. The current 'notice and objection' regime[186] under the Special Marriage Act serves as a notable instance of excessive intrusion, especially in case of inter-faith, inter-class or inter-caste marriages. The requirement of public display of notice of marriage and the right to raise an objection has become an unwarranted tool of harassment and intimidation. Regular petitions are filed in the courts praying for police protection from natal families objecting to a marriage.[187] Further, as observed by J. Chandrachud in the marriage equality case, the

[181] (2006) 2 SCC 578.
[182] Punjab Compulsory Registration of Marriages Act, 2012; Delhi (Compulsory Registration of Marriage) Order, 2014; Haryana Compulsory Registration of Marriages Act, 2008; Meghalaya Compulsory Registration of Marriages Act, 2012; Uttarakhand Compulsory Registration of Marriage Act, 2010; Tamil Nadu Registration of Marriages Act, 2009; Rajasthan Compulsory Registration of Marriages Act, 2009; Mizoram Compulsory Registration of Marriages Act, 2007.
[183] *Kangavalli v Saroja* 2001 SCC OnLine Mad 527- The court observed that "non-registration of marriages has landed many women in a relationship which while extracting from her, all the duties of a wife, leaves her with neither the right under law, nor the recognition in society. In addition, the Hindu male is able to contract a second marriage without any fear. In a divorce proceeding or in a proceeding under the Bigamy Prevention Act, the Hindu male can admit or deny the first or the second marriage depending on his whim and fancy. This puts the woman who is denied the status, in a vulnerable position. If registration were compulsory, even assuming that in spite of this, the Hindu male contracts a second marriage and registers it, at least the second wife will have as proof, the document to show that the marriage was registered between her and the man. Therefore, prosecution for bigamy will be made easy."
[184] N*aurang Singh Chuni Singh v Smt. Sapla Devi* 1968 SCC OnLine All 116- The second marriage was held to be void and the second wife was denied any form of maintenance.
[185] 'Compulsory Registration of Marriages' (Law Commission of India 2017) 270 <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081640-1.pdf> last accessed 11 July 2023
[186] Special Marriage Act, 1954, ss 5-8
[187] *Shaista Parveen Alias Sangeeta v State of Uttar Pradesh* WRIT(C) No.- 27234 of 2020; *Mizba Khan v State of Uttar Pradesh* WRIT (C) No.- 19482 of 2020.

notice and objection scheme defers the right to marry at a time of one's choosing and therefore acts as a hindrance in realising fundamental rights.

The suggested framework incorporates a simple registration process which entails submission of a memorandum of marriage to the Marriage Officer. The Marriage Officer has been empowered to refuse registration only on limited technical grounds.

5. Process for Registration of Marriages under this Act.-

(1) Every marriage shall be registered with the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than 7 days;

(2) The parties to the marriage shall submit a Memorandum of Marriage in person in the format as set out under Form A.

(3) The Memorandum shall be accompanied by proof of age of both parties.

(4) The Memorandum shall be signed by both the parties and two witnesses before the Marriage Officer.

FORM A

The Memorandum of Marriage shall contain the following details:

I. Particulars of the Parties

(a) Names of the Parties;

(b) Date of Birth of the Parties;

(c) Present and Permanent Address of the Parties/ Contact Information/Address of Marital Home of the Parties (Applicable only in case of Marriages Solemnised Otherwise)

(d) Date of Solemnisation of Marriage (Applicable only in case of Marriages Solemnised Otherwise)

(e) Proof of Solemnisation of Marriage (Applicable only in case of Marriages Solemnised Otherwise)

(f) Signatures of both the Parties; and,

(g) Declaration affirming the consent and truthfulness of information submitted.

II. Particulars of the witnesses

(a) Names of the witnesses;

(b) Address of the witnesses;

(c) Relationship with the Parties; and,

(d) Signatures of the witnesses.

6. Procedure to be followed upon receipt of Memorandum.-

(1) On satisfaction of the truth of the information submitted in the Memorandum of Marriage and the completion of the procedure specified in section 5 of this Code, the Marriage Officer shall record the particulars in the Register of Marriage maintained by the Marriage Officer within 3 days from the date of submission of Memorandum.

(2) The Marriage Officer must issue a Certificate of Registration, in such form and manner as may be prescribed by the State Government, within 15 days from the date of registration of Marriage.

(3) Certificate of Registration shall be conclusive proof of the validity and existence of Marriage.

7. Refusal to register.-

(1) The Marriage Officer shall not refuse to register the Marriage except on the following grounds-

(i) The Memorandum does not contain all the information as prescribed in the form; or

(ii) The parties do not fulfil one or more of the conditions as specified under section 4 of this

Code.

(2) The Marriage Officer shall intimate the parties about the refusal within 7 days from the date of submission of Memorandum of Marriage.

(3) Where the refusal is on the ground specified under clause (i) of sub-section (1), the Marriage Officer shall give the parties an opportunity to rectify the insufficiency within 7 days from the date of intimation given under sub-section (2).

(4) If the parties successfully rectify the Memorandum of Marriage, the Marriage Officer shall register the Marriage in accordance with section 6 of this Code.

8. Registration of marriages solemnised otherwise.-

(1) Any marriage celebrated in any other form, whether before or after the commencement of this Code, may be registered under this Code, subject to the fulfilment of conditions as specified under section 4 of this Code.

(2) The marriage shall be registered as per the same processes as prescribed under sections 5, 6 and 7 of this Code.

(3) Performance or non-performance of any form of ceremonies of marriage will have no bearing upon the eligibility for registration of marriage solemnised otherwise.

Issue: How can relationships in the nature of marriage be legally recognized?

Objective:
To recognise and to provide legal and social protection to parties in relationships resembling marriage.

Context and Proposed Step:
The existing legislative framework only recognises such heterosexual unions that are legally solemnised as marriages. However, there are various cases where two people may be cohabiting together as a married couple without formally registering their relationship or performing the religious ceremonies and rites. These relationships often have all the characteristics of a marriage such as emotional and financial interdependence, shared household, children and may consider themselves as equivalent to married couples in terms of commitment and responsibilities.

Such relationships have been recognised by the courts through the doctrine of presumption of marriage.[188] The Courts have also granted rights such as the right to maintenance and inheritance to partners in such relationships. Courts have used guiding factors such as the marital status of the parties; duration of the relationship; how the couple holds itself out to society[189]; if the relationship is for sexual purposes only[190]; whether the couple has a shared household; status of financial arrangements; status of children and domestic arrangements[191] to determine if a relationship is in the nature of marriage. These guiding factors, however, are often given stereotypical interpretations informed by the traditional notions of marriage and are thereby subject to the individual moralities of courts. Relationships that do not align with these expectations fall outside the purview of recognition and this leads to exclusion. It reinforces the idea that relationships resembling traditional marriages are the only legitimate family structure and a precondition to accessing certain rights.

[188] *Badri Prasad v Director of Consolidation* 1978 SCC (3) 527 - A strong presumption arises in favour of wed-lock where the partners have lived together for a long spell as husband and wife; *S.P.S. Balasubramanyam v Suruttayan*, 1992 Supp (2) SCC 304 - If a man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Evidence Act that they live as husband and wife and the children born to them will not be illegitimate.
[189] *D. Velusamy v D. Patchaiammal* (2010)10 SCC 469.
[190] *D. Velusamy v D. Patchaiammal* (2010)10 SCC 469 -The court observed that "If a man has a 'keep' whom he maintains financially and uses mainly for sexual purposes and/or as a servant it would not, in our opinion, be an relationship in the nature of marriage."
[191] *Indra Sarma v V.K.V. Sarma* (2013) 15 SCC 755.

Therefore, while such relationships are judicially recognised, there is a need to provide statutory recognition and fixed guiding factors which can be used by the Courts to grant recognition, especially in the interest of protection of vulnerable parties in such relationships. The application of these guiding factors should be informed by a modern and equitable understanding of how a marriage between equals would look like.

9. Relationship in the nature of marriage.-

(1) A court of competent jurisdiction may recognise two persons to be in a relationship in the nature of marriage on the basis of one or more of the following factors:
(i) cohabitation and shared household for a reasonable period of time
(ii) domestic arrangements including sharing of household responsibilities;
(iii) financial dependence or interdependence;
(iv) portrayal to the society;
(v) mutual support and personal care; or
(vi) responsibility for the care, custody and maintenance of any child.

Explanation - For the purposes of clause (vi) of sub-section (1) of this section, 'care' shall have the same meaning as provided under sub-clause (d) of section 1 of Chapter II.

(2) In cases where a union has been recognised to be a relationship in the nature of marriage in accordance with sub-section (1), the parties shall be -
(i) entitled to maintenance in accordance with section 16 and section 17 of this Code;
(ii) entitled to inherit from each other in accordance with the rules provided under Chapter III of this Code;
(iii) subject to the matrimonial property regime as specified under section 20 of this Code.

Issue: What should be the grounds on which a marriage could be void?

Objective:
To make grounds of void marriage uniform keeping in mind the emergence of modern family structures.

Context:
Grounds of void marriage differ under various personal laws. The Hindu Marriage Act, 1955, The Indian Divorce Act, 1869 and the Special Marriage Act, 1954 stipulate that if both the parties to the marriage fall under prohibited degrees of relationship, or have entered into bigamous marriages, then the marriage between the parties would be void in the eyes of law.[192] Additionally, the Special Marriage Act, 1954 considers a marriage void if either of the parties is incapable of giving valid consent owing to unsoundness of mind, or is unfit for procreation owing to a severe form of mental disorder or is subject to recurrent attacks of insanity.[193] The Act also considers a marriage void if the bridegroom has not completed 21 years of age and the bride has not completed 18 years of age.[194] The Divorce Act, 1869 renders a marriage between two Christians void if one of the parties was impotent at the time of the

[192] Hindu Marriage Act, 1955, s 11; Indian Divorce Act, 1869, s 19; Special Marriage Act, 1954, s 24.
[193] The Special Marriage Act, 1954, s 24(1) r/w s 4(b).
[194] The Special Marriage Act, 1954, s 24(1) r/w s 4(c).

marriage.[195] Parsi Law only regards bigamy and impotence as grounds of void marriage.[196] Under Muslim Sunni Law, *batil* marriages are void for consanguinity, affinity or fosterage.[197] Furthermore, under all personal laws, any marriage between two persons of different religious identities is held to be *void ab initio*.

Proposed step:
Taking into consideration modern family structures, the grounds common across all personal laws may be integrated under one provision. Moreover, the grounds of void marriage shall be applicable to all, regardless of gender.

10. Void marriages-

Any marriage registered under this Code shall be null and void and may be declared so, by a decree of nullity on a petition presented by either of the parties to the marriage before a court of competent jurisdiction, if any of the conditions specified in clauses (i) and (ii) of section 4 of this Code have not been fulfilled.

***Issue:* What should be the grounds for voidable marriages?**

Objective:
To make grounds of voidable marriage uniform keeping in mind the emergence of modern family structures

Context:
Grounds of voidable marriage under the Hindu Marriage Act, 1955 are non-consummation of the marriage owing to wilful refusal or impotence of one of the parties to the marriage, inability to give consent due to unsoundness of mind, inability to procreate owing to a severe form of mental disorder, recurrent attacks of insanity or pregnancy before marriage.[198] The Special Marriage Act, 1954 has similar grounds for voidable marriage but contains an additional ground that renders a marriage voidable if the consent of either party to the marriage was obtained by fraud or coercion. Under Muslim *Hanafi* law, *fasid* or irregular marriages are considered as voidable marriages.[199] Irregular marriage is a union which confers legitimacy on the children of marriage but does not amount to a lawful marriage.[200] Any marriage which is conducted without witnesses, with a woman undergoing iddat, with two sisters or contrary to the rules of unlawful conjunction, with a fifth wife, or which is prohibited by reason of difference of religion, is a *fasid* marriage under Muslim *Hanafi* law.[201] Under Muslim *Shia* law, there is no concept of irregular marriages.

In relation to child marriage, it is pertinent to mention that the Prohibition of Child Marriages Act, 2006 regards child marriage as voidable at the option of the child.[202] Presently, there is an inconsistency in the treatment of child marriage under the Prevention of Child Marriages Act, 2006 and the Special Marriage

[195] The Indian Divorce Act, 1869, s 19(1).
[196] The Parsi Marriage and Divorce Act, 1936, ss 4 and 30.
[197] Dinshaw Fardunji Mulla, *Principles of Mohamedan Law* (23rd edn, Lexis Nexis 2017), sections 253, 260-262, 264.
[198] The Hindu Marriage Act, 1955, s 12.
[199] J. N. D Anderson, 'Invalid and Void Marriages in Hanafi Law' (2009) 13 Bulletin of the School of Oriental and African Studies 35 <https://doi.org/10.1017/S0041977X00083506> accessed on 11 July 2023; Flavia Agnes, *Family Law II: Marriage, Divorce and Matrimonial Litigation* (1st edn, Oxford University Press 2011).
[200] Asaf A A Fyzee, *Outlines of Muhammadan Law* (5th edn, Oxford University Press 2008).
[201] Dinshaw Fardunji Mulla, *Principles of Mohamedan Law* (23rd edn, Lexis Nexis 2017), sections 254 -259, 264 & 267.
[202] The Prohibition of Child Marriage Act, 2006, s 3.

Act, 1954 which treats child marriage as void. While there have been repeated demands to make all child marriages void *ab initio*[203],such a move might be counterproductive and lead to unintended consequences such as abandonment, vagrancy and economic deprivation of the child bride. Factual realities suggest that child marriage still remains an inherent custom of certain sections of the society[204] and therefore it is important to keep child marriage voidable at the option of the child to accord protection to minor married girls and ensure that they are provided with adequate financial support and other rights that flow from a marriage. [205]

Another ground for a marriage to be voidable is impotence or wilful refusal to consummate a marriage. This ground focuses on sexual intercourse as the core of a marriage. This draft Code however is attempting to undertake an evolved understanding of marriage as a holistic concept, involving companionship and a space to create personal relations in the nature of a family. While consummation and sexual intercourse is an essential aspect of most marriages, modern marriages, especially involving queer identities, seek to shrink the focus on sexual intercourse. Therefore, in this draft Code, a step-down is envisaged such that absence of sexual intercourse or procreation due to impotence or wilful refusal is not a ground to question the validity and valid existence of the marriage itself. Impotence or wilful refusal to consummate marriage might however be a ground for divorce due to irretrievable breakdown of marriage.

Proposed step:
Taking into consideration the modern family structures, grounds common across all personal laws may be integrated under one provision. The grounds of voidable marriage shall be available to all, regardless of gender.

11. Voidable marriage.-

(1) Any marriage under this Code shall be voidable and may be annulled by a decree of nullity at the instance of either of the parties if,—
(i) such party was under the age of 18 at the time of marriage; or
(ii) either of the parties refuses to cohabit with the other party; or
(iii) if their spouse was pregnant at the time of Marriage through another person and the fact of the pregnancy was not known at the time of Marriage; or
(iii) the consent of such party to the Marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872.

(2) A petition under clause (i) of sub-section (1) may be filed at any time, but before the expiration of a period of 5 years from the date of attaining majority by the petitioner.

[203] 'Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Alied Laws' (Law Commission of India 2008) 205 <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081072-1.pdf> accessed 11 July 2023 - The Law Commission put forward some suggestions to combat the issue of child marriage in india. It specifically mentioned that marriage below 16 years of age shall be made void; HAQ: Centre for Child Rights, 'Child Marriage in India: Achievements, Gaps and Challenges Response to Questions for OHCHR Report on Preventing Child, Early and Forced Marriages for Twenty-Sixth Session of the Human Rights Council' <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/HAQCentreForChildRights1.pdf> accessed 11 July 2023.

[204] 'Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Alied Laws' (Law Commission of India 2008) 205 <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081072-1.pdf> accessed 11 July 2023.

[205] Rajeev Seth and others, 'Social Determinants of Child Marriage in Rural India' (2018) 18 The Oshner Journal 390 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6292470/> accessed 11 July 2023 - Studies suggest that social norms influence intergenerational norms and lead to uninformed decision-making and child marriage.

(3) The court shall not grant a decree of nullity under clause(iii) of sub-section (1) if,—
(i) proceedings have not been instituted within 1 year after the fact of pregnancy was known; or,
(ii) the petitioner has with their free consent lived with the other party to the marriage after the fact of the pregnancy was known.

(4) The court shall not grant a decree of nullity under clause (iv) of sub-section (1) if,—
(i) proceedings have not been instituted within 1 year after the coercion had ceased or, as the case may be, the fraud had been discovered; or
(ii) the petitioner has with his or her free consent lived with the other party to the marriage after the coercion had ceased or, as the case may be, the fraud had been discovered.

Sub-Part 2: Matrimonial Remedies

Issue: What should be the fault-based grounds of divorce?

Objective:
To ensure that gender-just and uniform grounds are available for dissolution of marriage.

Context:
The fault theory of divorce has been developed in India following divorce laws in the United Kingdom.[206][207] Section 13 of the Hindu Marriage Act, 1955, section 10(1) of the Indian Christian Marriage Act, 1872, section 32 of the Parsi Marriage and Divorce Act, 1936, section 2 of the Dissolution of Muslim Marriages Act, 1939, and, section 27 of the Special Marriage Act, 1954, provide the fault-based grounds for divorce. Certain laws provide for separate grounds for divorce exclusively available to women.[208] These provisions are derived from considerations in other realms of law including criminal law and welfare legislations.

Proposed Step:
Grounds common across all personal laws may be integrated under one provision. The proposed provision changes the phrase "husband or wife" to "any party to a marriage", thus making the grounds for divorce available to all, regardless of gender.

12. Grounds for dissolution of marriage.-

(1) Any party to a marriage may file a petition for dissolution of marriage by a decree of divorce before a court of competent jurisdiction on the ground that the other party:
(i) has, after the commencement of marriage, had voluntary sexual intercourse with any person other than the spouse;
(ii) has deserted the applicant for a continuous period of 2 or more years, immediately preceding the petition for divorce;
(iii) has treated the applicant with cruelty;
(iv) has been absent and not been heard of as being alive for a period of 7 years or more by those persons who would naturally have heard of it, had that party been alive;
(v) has been suffering from a venereal disease in a communicable form, for a period of 1 or more years immediately preceding the petition for divorce;
(vi) has been sentenced to imprisonment for an offence for a term exceeding 7 years or more;
(vii) is in an intimated stable union with another person, or
(viii) has been suffering from a mental illness, whether incurable or of a persistent or intermittent nature, that significantly impairs their ability to maintain a harmonious marital relationship.

Explanation 1: For the purpose of this sub-section, "desertion" means desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish

[206] Malavika Rajkotia, *Intimacy Undone: Marriage, Divorce and Family Law in India* 88 (Speaking Tree Publishers 2017).
[207] Before the Matrimonial Causes Act of 1857, divorce in the UK was governed by ecclesiastical courts. The 1857 Act allowed for civil divorce on the fault-based grounds of adultery, cruelty or desertion. While men could obtain divorce on the ground of adultery *simpliciter*, women were required to prove an additional wrong such as cruelty or desertion in order to claim adultery as a ground for divorce. Later, Matrimonial Causes Act, 1973 consolidated and brought in amendments to the law on matrimonial proceedings and officially introduced 'irretrievable breakdown of marriage' as a ground for divorce.
[208] Special Marriage Act, 1954, s 27(1A), Hindu Marriage Act, 1955, s 13(2), Divorce Act, 1869, s 10(2).

of such party, and includes the wilful neglect of the petitioner by the other party to the Marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

Explanation 2: For the purposes of clause (vii) of this sub-section, "mental illness" shall have the same meaning as provided under sub-section (s) of section 2 of the Mental Healthcare Act, 2017.

(2) Either of the parties to a marriage may file a petition for dissolution of marriage by a decree of divorce before a court of competent jurisdiction on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of 1 year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties, under section 15 of this Code.

Issue: What should be the no-fault grounds of divorce?

Objective:

To allow agency and autonomy to parties in seeking the dissolution of marriage.

Context:

Divorce by mutual consent is recognised by the Hindu Marriage Act,1955, Special Marriage Act,1954, Indian Christian Marriage Act, 1872, Parsi Marriage and Divorce Act, 1869 and under Muslim Personal law as *Khula* and *Muba'arat*.[209] Moreover, divorce has been granted by the Courts on multiple occasions on the ground that the marriage has irretrievably broken down.[210] The cooling off period prescribed in section 13B of the Hindu Marriage Act for a petition of divorce by mutual consent has also been interpreted to be discretionary if the marriage has broken down irreparably under exceptional circumstances. In *Amardeep Singh v Harveen Kaur*,[211] it was held by the Supreme Court that the cooling off period required in a mutual consent divorce petition can be waived by the court where the proceedings have remained pending for long in the courts, these being cases of exceptional situations. In certain situations, marriage between parties reaches an irreparable stage due to varying reasons including irreconcilable differences.[212] This needs to be recognised as a social reality.

Solely focusing on fault-based grounds suffers from a range of systemic and administrative issues. For example, "cruelty" as a ground for divorce while used most extensively in modern divorce jurisprudence, does not have an exhaustive definition. While it is understandable that it is not possible to have an accurate, objective definition of "cruelty" in law, parties seeking divorce are forced to rely on the broad nature of the term and consequent interpretation of courts to bring claims that do not fall squarely within other fault-based grounds of divorce.[213] The undue focus on fault-based grounds can lead to immense hardships in cases where two parties to a marriage do not wish to live together but are not able to obtain a divorce due to failure to prove fault or because the other spouse refuses to grant consent to divorce

[209]Hindu Marriage Act, 1955, s 13B; Special Marriage Act, 1954, s 28; Indian Divorce Act, s 10A; Parsi Marriage and Divorce Act, 1936, s 32B.
[210] *Mansi Khatri v Gaurav Khatri* 2023 SCC OnLine SC 667, *Sukhendu Das v Rita Mukherjee* (2017) 9 SCC 632, *Munish Kakkar v Nidhi Kakkar* (2020) 14 SCC 657, *R. Srinivas Kumar v R. Shametha* (2019) 9 SCC 409, *Naveen Kohli v Neelu Kohli*, (2006) 4 SCC 558.
[211] (2017) 8 SCC 746.
[212] Malavika Rajkotia, *Intimacy Undone: Marriage, Divorce and Family Law in India* 100 (Speaking Tree Publishers 2017).
[213] Malavika Rajkotia, *Intimacy Undone: Marriage, Divorce and Family Law in India* 100 (Speaking Tree Publishers 2017).

out of spite or pressure from society.[214][215]Further, while courts have recognised irretrievable breakdown to be a ground for divorce in certain cases,[216] in other cases courts tend to impose personal moral considerations of preservation of marriage.[217]

The 71st Law Commission of India Report recommended that irretrievable breakdown of marriage should be recognised as a ground for dissolution of marriage in and of itself.[218] Recently, in the case of *Shilpa Sailesh v Varun Sreenivasan*,[219] the Constitutional Bench of the Supreme Court while upholding the power of the Supreme Court to grant divorce on ground of irretrievable breakdown of marriage under Article 142 of the Constitution, held that grant of divorce on the grounds of irretrievable breakdown is not a matter of right but a discretion which is to be exercised with great care and caution, and accordingly, provided a non-exhaustive list of factors to serve as judicial precedent in deciding divorce cases based on irretrievable breakdown of marriage. These factors have also been referred to in the process of drafting of this provision.

Proposed Step:

Accordingly, in these sections we seek to provide either of the parties to a marriage an option to file a petition for divorce based on the ground of irretrievable breakdown of marriage. The grant of the decree of divorce is subject to consideration of certain factors by the court as evolved through judicial interpretation.[220] Considering the power dynamics in heterosexual relationships, certain concerns may be raised with respect to grant of divorce arguing that irretrievable breakdown of marriage as a ground may encourage a party to walk out of a marriage as a means to avoid responsibilities of emotional and financial care and support towards the other partner. To address this concern, the Marriage Laws (Amendment) Bill passed by the Rajya Sabha in 2013,[221] incorporated a provision requiring a court to consider the fact of whether grave financial hardship may be caused to the spouse, as one of the factors while considering a petition for divorce on this ground. However, adding external considerations like financial and economic position of parties may lead to counterintuitive outcomes akin to the issues relating to fault based grounds of divorce, highlighted above.

The concept of irretrievable breakdown of marriage is being proposed in this Code in order to allow enhanced autonomy to the parties to a marriage, to end a marriage they do not wish to be a part of. Accordingly, the maintenance provisions in Sub-part-3 of this draft Code have been strengthened and comprehensively formulated to expressly consider the economic interests of the party who may suffer

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[214] Malavika Rajkotia, *Intimacy Undone: Marriage, Divorce and Family Law in India* 82 (Speaking Tree Publishers 2017).
[215] In the case of *Anil Cherian Polachirackal @ Anil Nainan v Asha K. Thomas* Mat. Appeal No. 76/2020, decided on 27 July 2022, the Kerala High Court, referencing *Beena v Shino G. Babu*, 2022 SCC OnLine Ker 778, observed: "If one of the spouses is refusing to accord divorce on mutual consent after having been convinced of the fact that the marriage failed, it is nothing but cruelty to spite the other spouse. No one can force another to continue in a legal tie and relationship if the relationship deteriorates beyond repair. The portrayal of such conduct through manifest behaviour of the spouse in a manner understood by a prudent, as 'cruelty' is the language of the lawyer for a cause before the court. There is no useful purpose served in prolonging the agony any further and the curtain should be rung at some stage."
[216] *Ashok Hurra v Rupa Bipin Zaveri* (1997) 4 SCC 226; *Naveen Kohli v Neelu Kohli* (2006) 4 SCC 558.
[217] *Savitri Pandey v Prem Chandra Pandey* (2002) 2 SCC 73: "No party can be permitted to carve out the ground for destroying the family which is the basic unit of society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties."
[218] 'The Hindu Marriage Act, 1955 – Irretrievable Breakdown of Marriage as a Ground of Divorce' (Law Commission of India 1978) 71 <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022080518.pdf> accessed 11 July 2023.
[219] *Shilpa Sailesh v Varun Sreenivasan*, 2023 SCC OnLine SC 544.
[220] *Shilpa Sailesh v Varun Sreenivasan* 2023 SCC OnLine SC 544; *Ashok Hurra v Rupa Bipin Zaveri* (1997) 4 SCC 226; *Naveen Kohli v Neelu Kohli* (2006) 4 SCC 558; *K Srinivas Rao v D.A. Deepa* (2013) 5 SCC 226.
[221] Marriage Laws (Amendment) Bill, 2013, clause 3 - this clause seeks to insert section 13D in the Hindu Marriage Act, 1955: "13D. (1) Where the wife is the respondent to a petition for the dissolution of marriage by a decree of divorce under section 13C, she may oppose the grant of a decree on the ground that the dissolution of the marriage will result in grave financial hardship to her and that it would in all the circumstances, be wrong to dissolve the marriage."

grave financial hardship as a result of the dissolution. Additionally, a regime of partial community of property is being proposed in order to safeguard the economic welfare of the parties to the marriage as well as to deter abandonment through divorce.

13. Divorce by mutual consent.-

(1) A petition for dissolution of marriage by a decree of divorce may be presented to the court of competent jurisdiction by both the parties to the marriage together, on the following grounds:
(i) that they have been living separately for a period of 1 year or more,
(ii) that they have not been able to live together, and
(iii)that they have mutually agreed that the Marriage should be dissolved.

(2) The court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

14. Irretrievable breakdown of marriage.-

(1) A petition for dissolution of marriage by a decree of divorce may be presented to the court of competent jurisdiction by one or both the parties to the marriage, at any point after a period of 1 year from the date of marriage, on the ground that the marriage has broken down irretrievably with no hope of reconciliation.

(2) While adjudicating a petition filed under sub-clause (1), the court must take into consideration the following factors:
(i) the period of time for which the parties cohabited after marriage and last date of cohabitation;
(ii) any past or ongoing legal proceedings between the parties and the cumulative impact of such proceedings on the personal relationship;
(iii) past or ongoing attempts to settle the disputes through intervention of the court, through mediation or out-of-court settlements;
(iv) maintenance of children; and
(v) any other factual considerations that the court may deem relevant during the course of the proceedings.[222]

15. Grounds for judicial separation.-

(1) A petition for judicial separation may be presented to the court of competent jurisdiction by either of the parties to the marriage on any of the grounds specified in section 12 of this Code, and the court, may decree judicial separation, on being satisfied with respect to the following things:
(i) the truth of the statements made in such petition, and
(ii) there is no legal ground why the application should not be granted.

(2) Where the court grants a decree for judicial separation, the petitioner shall not be obligated to cohabit with the respondent.

(3) The court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and

[222] Factors illustrated by the Constitutional Bench of the Supreme Court in *Shilpa Sailesh v Varun Sreenivasan*, 2023 SCC OnLine SC 544.

reasonable to do so.

Notes For Consideration

Restitution of conjugal rights

Restitution of conjugal rights ('RCR') has been a subject of debate for a significant period of time. Hindu Marriage Act provides for RCR under section 9, Special Marriage Act provides for RCR under section 22 and the Indian Divorce Act provides the same under section 32. These sections provide that where a party to a marriage has without reasonable cause withdrawn from the society of the other, the other party may file a petition before Court for restitution of conjugal rights. In its effect, the provision plays out to allow one party to a marriage to impose cohabitation on the other party with the sanction of the Court. While the provisions are housed in gender-neutral terms, the remedy continues to have grave ramifications for women, in light of the gendered power dynamics in India, by forcing them to cohabit in what might be severely hostile conditions.[223] The continuance of the remedy of RCR undermines bodily integrity and sexual autonomy of individuals, especially women and goes against the Constitutional principles of equality, dignity and privacy.[224] In *T. Sareetha v Venkata Subbaiah*,[225] the Andhra Pradesh High Court held section 9 of the Hindu Marriage Act to be unconstitutional and violative of Articles 14 and 21 of the Constitution. While in the subsequent decision of *Saroj Rani v Sudarshan Kumar Chadha*,[226] the Supreme Court disagreed with this view and upheld the validity of RCR, the same has continued to be contested in feminist discourse and jurisprudence. The Law Commission of India in its Consultation Paper on Family Law Reforms highlighted that the forced nature of cohabitation through RCR must be discouraged socially and also reflected in law and recommended deletion of provisions relating to restitution of conjugal rights in all personal laws.[227] Accordingly, the remedy of restitution of conjugal rights is being omitted in this draft Code.

[223] Saumya Uma, 'Wedlock or Wedlockup: A Case for Abolishing Restitution of Conjugal Rights in India' (2021) 35 <https://doi.org/10.1093/lawfam/ebab004> accessed 11 July 2023.
[224] Saumya Uma, 'Wedlock or Wedlockup: A Case for Abolishing Restitution of Conjugal Rights in India' (2021) 35 <https://doi.org/10.1093/lawfam/ebab004> accessed 11 July 2023.
[225] 1983 SCC OnLine AP 90.
[226] (1984) 4 SCC 90.
[227] 'Consultation Paper on Reform of Family Law' (Law Commission of India 2018) <https://archive.pib.gov.in/documents/rlink/2018/aug/p201883101.pdf> accessed 11 July 2023.

Sub-Part 3: Maintenance and Matrimonial Property

MAINTENANCE

Issues:

1. Who will be responsible for providing maintenance during the subsistence and after the dissolution of the marriage?
2. How should the Court determine the quantum of maintenance to be provided to the spouse during marriage and on the dissolution of marriage, ensuring the protection of vulnerable parties?

Objective:

1. To prevent destitution and vagrancy during the marriage and post dissolution of marriage;
2. To provide factors for determination of quantum of fair maintenance by the court; and
3. To preserve the same status of living after marriage, as it was, before the marriage and provide for equality of status of parties to a marriage.

Context:

Maintenance may be granted during the course of any proceedings (including divorce or separation), during the subsistence of marriage or on the dissolution of marriage. Section 37 of the Special Marriage Act provides for permanent alimony and maintenance stipulating that the husband is required to pay a gross or monthly or periodical sum to the wife as maintenance, having regard to her own property, if any, her husband's property and ability, the conduct of the parties, and other circumstances of the case.[228] Section 25 of the Hindu Marriage Act provides both the husband and the wife a provision to apply for maintenance in court, based on the same factors as provided under the Special Marriage Act.[229] Section 37 of the Indian Christian Marriage Act gives the district court the power to order grant of maintenance by the husband to the wife according to his own financial ability.[230] Under Muslim personal law and Muslim Women (Protection of Rights on Divorce) Act, it is provided that a Muslim woman is entitled to a provision of fair maintenance made during the *iddat* period after divorce and to the payment of *mehr* agreed to be paid to her at the time of marriage.[231]

Further, under the Hindu Marriage Act, section 24 provides for maintenance *pendente lite*, or maintenance during the course of the proceedings, if the husband or wife has insufficient or no independent income for his or her support and for the expenses of the proceedings.[232] Similarly, section 36 of the Special Marriage Act provides for the same right of maintenance *pendente lite* to the wife exclusively.[233]

Section 18 of Hindu Adoption and Maintenance Act provides the right to the wife to be maintained by the husband during the subsistence of marriage.[234] Under Muslim personal law and the Dissolution of Muslim Marriages Act, 1939, failure on the part of the husband to maintain the wife is a ground for divorce. [235]

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[228] Special Marriage Act, 1954, s 37.
[229] Hindu Marriage Act, 1955, s 25.
[230] Indian Christian Marriage Act, 1872, s 37.
[231] Muslim Women (Protection of Rights on Divorce) Act, 1986, s 3; Mulla, Principles of Mahomedan Law, 23rd ed., ss 257(2) & 279.
[232] Hindu Marriage Act, 1955, s 24.
[233] Special Marriage Act, 1954, s 36.
[234] Hindu Adoption and Maintenance Act, 1956, s 18.
[235] Dissolution of Muslim Marriages Act, 1939, s 2(ii).

Courts have, over time, considered a range of factors while considering an application for grant of maintenance.[236] The existence of a plethora of decisions with different factors for calculation of maintenance amount creates a lot of ambiguity and leaves the fate of the parties to excessive discretion of the judge. This provision is an endeavour to bring uniformity and certainty in the considerations examined by the court.

Proposed Step:
In these sections, we seek to provide both the parties to the marriage a right to maintenance by application to the court during the course of any proceedings or at the time of dissolution of marriage. Factors elaborated in various Supreme Court decisions have been taken into account in stipulating a non-exhaustive list of factors that the court must consider while adjudicating on such application for grant of maintenance.[237] In prescribing these factors, an attempt is being made not to limit the purpose of grant of maintenance to prevention of destitution but to expand it to incorporate an equal sharing of the fruits of marriage.[238] Additionally, these factors have been expressly formulated with the intent of safeguarding the interests of a party that may be severely affected with financial distress as a result of dissolution of marriage.

Court proceedings in maintenance and divorce cases may persist for a significant amount of time, often even translating into multiple years. In the meantime, until a final order is passed and maintenance is awarded, the party claiming maintenance is likely to be subjected to grave financial hardships.[239] Such hardships become increasingly pronounced in cases where children are involved. Financial distress may also affect the ability of the party to contest the litigation in an efficient manner. This was acknowledged by the Supreme Court in the case of *Savitri v Govind Singh*,[240] where the Apex Court observed that in order to enjoy the fruits of the proceedings, the applicant has to be alive until the date of the final order, and in a large number of cases that is possible only if an order for payment of interim maintenance is made. Accordingly, provision has also been made for grant of maintenance by the court during the course of the proceedings.

Beneficial provisions for maintenance of the wife during the subsistence of marriage have been retained in order to prevent financial inclusion or abandonment of the wife during the subsistence of the marriage. While it is recognised that these exclusive rights must be available in a gender-neutral manner, the retention of gendered provisions is informed by socio-cultural realities of the country and an endeavour to preserve protections and benefits evolved through years of research in women's rights movements.[241] It is believed that these must be continued. These provisions may be extended to be gender-neutral in future.

In the Marriage Equality case hearings ,it was pointed out that the provisions for maintenance under the Special Marriage Act are not gender-neutral and therefore, fall short in the case of non-heteronormative

[236] *Rajnesh v Neha* (2021) 2 SCC 324; *Jasbir Kaur Sehgal v District Judge Dehradun* (1997) 7 SCC 7; *Kulbhushan Kumar v Raj Kumari* (1970) 3 SCC 129; *Kalyan Dey Chowdhury v Rita Dey Chowdhury Nee Nandy* (2017) 14 SCC 200.
[237] *Rajnesh v Neha* (2021) 2 SCC 324 , *Jasbir Kaur Sehgal v District Judge Dehradun* (1997) 7 SCC 7; *Kulbhushan Kumar v Raj Kumari* (1970) 3 SCC 129; *Kalyan Dey Chowdhury v Rita Dey Chowdhury Nee Nandy* (2017) 14 SCC 200.
[238] Agnes F, 'Maintenance for Women Rhetoric of Equality'' (1992) 27 Economic and Political Weekly 2233 - Agnes argues that divorce laws are structured in a way that the economic security that a marriage promises is retained as the attractive proposition, disincentivising women from seeking divorce easily, since dissolution of marriage will lead to loss of such economic security. It is argued that since the state was forced to recognise the poverty that comes along with divorce and desertion, a meagre dole in the form of maintenance was statutorily provided literally to keep the woman's body and soul together.
[239] Agnes F, *Family Law Vol. II: Marriage, Divorce and Matrimonial Litigation*, 85 (Oxford University Press).
[240] *Savitri v Govind Singh Rawat* (1985) 4 SCC 337.
[241] Agnes F, 'Maintenance for Women Rhetoric of Equality' (1992) 27 Economic and Political Weekly 2233
; Agnes F, 'India's Family Laws Are Discriminatory. That's Why Judges Shouldn't Be "Neutral" on Gender.' <https://thewire.in/women/indias-family-laws-are-gender-blind-judges-shouldnt-be-afraid-to-question-them> accessed 11 July 2023.

marriages. Accordingly, under the proposed provision, parties to a marriage may file an application for maintenance, regardless of gender. While the provision uses gender-neutral language, certain safeguards have been introduced taking into consideration the social realities and power dynamics of Indian society, especially affecting women in heterosexual relationships. Therefore, factors such as, protection of vulnerable parties, preservation of the status of living, and compensation for disadvantages faced for being part of the relationship have been introduced as relevant factors for the consideration of the court. These factors, in the context of the social setup in India, affect women in significantly higher proportions than men, in heterosexual relationships.[242][243] Currently, there is a limited understanding of power dynamics in non-heteronormative relationships and hence, the provisions that operate as safeguards may be availed by all.

16. Permanent alimony and maintenance.-

(1) At the time of passing any decree of judicial separation or divorce or at any time subsequent to such decree, or on the dissolution of a Stable Union, any court exercising jurisdiction under this Code may, on an application made by either of the parties to the marriage, order that the respondent shall pay to the applicant for their maintenance and support, such gross, monthly or periodical sum, as the court may deem to be just.

(2) An order for payment of sum for maintenance and support under sub-section (1), may be made for any term not exceeding the life of the applicant.

(3) Payment in pursuance of any order made under sub-section (1) may be secured by a charge on the immovable property of the respondent, if necessary.

(4) While determining the amount of maintenance to be granted under sub-section (1), the court must take into consideration the following factors:[244]
(i) duration of the relationship;
(ii) the respondent's own income and other property, if any;
(iii) the income and other property of the applicant;
(iv) the needs of the applicant;
(v) applicant's liabilities, financial responsibilities or responsibility to maintain dependants;
(vi) the age and employment status of the parties;
(vii) the residential arrangements of the parties;
(viii) any illness or disability;
(ix) any contributions made by the applicant during the subsistence of the relationship, which may have given rise to a sustained benefit for the relationship and/or an economic disadvantage for the applicant;
(x) protection of vulnerable parties;
(xi) preservation of the status of living as it existed during the subsistence of marriage; and
(xii) any other circumstances of the case, that the court may deem relevant.

Explanation: For the purpose of this sub-section:
(i) "contributions made" shall include any action which seeks to contribute to the

[242] Nicole Kapelle & Janene Baxter, 'Marital Dissolution and Personal Wealth: Examining Gendered Trends across the Dissolution process', Journal of Marriage and Family, 83(1) (February 2021); Yoko Niimi, 'Are Married Women Really Wealthier than Unmarried Women? Evidence from Japan', Demography (2022) 59 (2): 461–483; R. Krishnakumar, 'Married women's share in urban workforce stagnant, says paper', *Deccan Herald*, (Bengaluru, 7 January, 2023).
[243] Jyoti Thakur & Reimeingam Marchang, 'Locating Married Women in Urban Labour Force: How India is Faring in 21st Century', Working Paper 540, Institute for Social and Economic Change; Jyoti Thakur, 'Married Women in Urban Workforce in India: Insights from NSSO Data' (2018) 11 Urdhva Mula.
[244] These factors were identified by the Supreme Court in the cases of *Rajnesh v Neha* (2021) 2 SCC 324 , *Jasbir Kaur Sehgal v District Judge Dehradun*, (1997) 7 SCC 7. *See also*, criteria laid down by the UK Supreme Court in *Radmacher v Granatino* [2010] UKSC 42 & *Miller v Miller* clubbed with *McFarlane v McFarlane* [2006] UKHL 24; [2006] 2 AC 618.

welfare of the deceased person and/or their family, such as acquiring, conserving, or improving the property of the deceased person and/or their family, looking after the home or caring for the family; and

(ii) "economic disadvantage" shall include making a substantial financial contribution and/or foregoing an independent income, independent ability to accumulate wealth, growth in career and profession, or such other disadvantages that the court may determine arising out of the relationship.

(iii) "dependants" mean and include the following:

(a) parents;
(b) minor children;
(c) adult children unable to maintain themselves; and,
(d) widowed daughter-in-law, so long as not re-married;

(5) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, modify or rescind any such order in such manner as the court may deem just.

(6) If the court is satisfied that the party in whose favour an order has been made under this section has re-married, it may at the instance of the other party, modify or rescind any order made under sub-section (1) in such manner as the court may deem just.

(7) At the time of registration of marriage under section 5 or section 8 of this Code, the parties to the marriage may make a provision for payment of *Mehr* on separation or dissolution of marriage, in the Memorandum of Marriage.

Explanation: For the purposes of this sub-section, "*Mehr*" means a fixed reasonable sum of money agreed to between the parties to the marriage to be paid by a husband to the wife, as a gross sum or on a periodical basis.

(8) An application filed under this section is without prejudice to the rights of women to claim maintenance under section 125 of the Code of Criminal Procedure, 1973, the Protection of Women from Domestic Violence Act, 2005 or any other law for the time being in force.

17. Maintenance during the course of proceedings.-

(1) In any proceeding under this Code, where it appears to the court that either of the parties to the marriage has no independent income sufficient for their support and the necessary expenses of the proceeding, it may, on the application of such party, order the respondent to pay to the petitioner, a reasonable sum as support and expenses of the proceedings, on a weekly or monthly basis.

(2) The application for payment of maintenance during the course of the proceedings, in accordance with sub-section (1), shall, as far as possible, be disposed of within 60 days from the date of service of notice on the respondent.

(3) While adjudicating an application under sub-section (1) of this section, the court must take into consideration the following factors:
(i) the status of the parties,
(ii) the capacity of the respondent to pay maintenance,
(iii) whether the applicant has any independent income sufficient for his or her support, and
(iv) any other factors that the court may deem relevant.

18. Maintenance during the subsistence of marriage.-

A wife in a marriage, may file a petition before a court of competent jurisdiction, at any time during the subsistence of marriage for payment of such gross, monthly or periodical sum by the husband to the wife, for her maintenance and support during the subsistence of the Marriage, if the wife is being excluded from a shared mutual enjoyment of the marital home and associated resources.

19. Custody of children.-

(1) A court of competent jurisdiction under this Act may, from time to time, make orders, for deciding the joint or separate custody of children.
(2) In adjudicating matters under sub-section (1), the court must take into consideration the best interests of the child under section 51 of this Code, the intelligent preferences of the child, and comply with the duties of the court enlisted under section 52 of this Code.

Explanation: For the purposes of this sub-clause (1), the determination of the "best interests of the child" would be based on the factors as specified in section 51 of Chapter II of this Act.

(3) Despite anything contained in sub-section (1), a court of competent jurisdiction may make, revoke, suspend or vary, all such orders and provisions with respect to custody made by an order under sub-section (1), on an application filed by either of the parties.
(4) A court of competent jurisdiction under this Act may, from time to time, make orders for maintenance and education of minor children, taking into consideration the factors as specified under sub-section (4) of section 43 of this Code.

MATRIMONIAL PROPERTY

Issues:

1. What matrimonial property regime should be prescribed in law as the default regime?
2. What will be the status of property acquired or inherited prior to marriage and during the subsistence of marriage under the default matrimonial property regime?
3. What will be the status of debts and obligations incurred prior to marriage and during the subsistence of marriage under the default matrimonial property regime?
4. How will property be divided at the time of dissolution of marriage?

Objective:

To provide a clear and comprehensive legal mechanism of division and distribution of property on marriage in accordance with the principle of shared partnership in marriage.

Context and Proposed Step:

Presently, India follows the English doctrine of separation of assets on marriage.[245] It has been argued that under the separation of assets regime of matrimonial property, women as non-financial contributors to the family, are at an unfair disadvantage considering that title to properties purchased during the subsistence of a heterosexual marriage rarely vests in women.[246] It has been estimated in a World

[245] Vijender Kumar, 'Matrimonial Property in India: Need of the Hour' (2015) 57 Journal of the Indian Law Institute 500; Jhuma Sen, 'Matrimonial Property Rights: Is India Ready for a law?' 1 Journal of Indian Law and Society (2009).
[246] Jhuma Sen, 'Matrimonial Property Rights: Is India Ready for a law?', 1 Journal of Indian Law and Society (2009); Flavia Agnes, 'His and Hers', 47(17) Economic and Political Weekly (28 Apr, 2012); Vijender Kumar, 'Matrimonial Property in India: Need of the Hour' (2015) 57 Journal of the Indian Law Institute 500.

Economic Forum Annual Meeting that women own less than 20% of the world's land.[247] The UN Women Communications and Advocacy section, in an analysis of what the 17 UN Sustainable Development Goals mean to women, enlists equitable ownership and use of property, and property titles as some of the points of focus for the 2023 goals of ensuring sustainable consumption and production patterns and end of poverty.[248] The most common mode of acquisition of property for women in India is through inheritance.[249] In absence of express property rights, women are left at the mercy of the spouse and courts through the provision of maintenance. In the case of *BP Achala Anand v S Appi Reddy*,[250] the Supreme Court urged the legislature to bring in a law to protect women's interest in matrimonial residential property. Recently, in the case of *Kannain Naidu v Kamsala Ammal*, the Madras High Court acknowledged the contribution of the wife towards the properties acquired by the husband either directly or indirectly not only in money or in money's worth but also the contribution made by looking after the home and taking care of the family.[251] It was held that if acquisition of assets is made by joint contribution (directly or indirectly) of both the spouses for the welfare of the family, both are entitled to an equal share.[252] Scholars have also argued that ownership of property in the form of land or house, significantly reduces the risk of marital violence for women.[253] Property ownership can both deter violence and provide an escape if violence occurs.[254] It is argued that the sooner in their lifespan, women own land, the better it is for their social and economic well-being.[255]

Accordingly, in this Chapter, the regime of partial community of property is being introduced, providing that assets acquired by the parties during the subsistence of marriage be joint and equally divided amongst the parties at the time of dissolution of marriage. Through the provision of community of property, it is envisaged that the contributions of the party contributing to the marriage in non-financial ways in the form of domestic responsibilities towards the functioning of the marriage and family are accounted for.[256] In the socio-economic setup of the world and especially India, non-financial contributors to a family largely tend to be women, devoting a significantly disproportionate quantity of resources towards unpaid care work.[257] This proposal of community of property is based on the principle

[247] Monique Villa, 'Women own less than 20% of the world's land. It's time to give them equal property rights' (World Economic Forum 2017) <https://www.weforum.org/agenda/2017/01/women-own-less-than-20-of-the-worlds-land-its-time-to-give-them-equal-property-rights/>; *See also*, 'Women and Sustainable Development Goals' (United Nations Entity for Gender Equality and Empowerment of Women) <https://sustainabledevelopment.un.org/content/documents/2322UN%20Women%20Analysis%20on%20Women%20and%20SDGs.pdf> accessed 11 July 2023

[248] 'Women and Sustainable Development Goals' (United Nations Entity for Gender Equality and Empowerment of Women) <https://sustainabledevelopment.un.org/content/documents/2322UN%20Women%20Analysis%20on%20Women%20and%20SDGs.pdf> accessed 11 July 2023

[249] 'Property Ownership and Inheritance Rights of Women for Social Protection - the South Asia Experience, Synthesis Report of Three Studies', (International Centre for Research on Women 2006) <https://www.icrw.org/wp-content/uploads/2016/10/Property-Ownership-and-Inheritance-Rights-of-Women-for-Social-Protection-The-South-Asia-Experience.pdf> accessed 11 July 2023; See also, Bina Agarwal et al., "How many and which women own land in India? Inter-gender and Intra-gender gaps", 57(11) The Journal of Development Studies (2021).

[250] *BP Achala Anand v S Appi Reddy* (2005) 3 SCC 313.

[251] *Kannaian Naidu v Kamsala Ammal @ Bhanumati* S.A. No. 59 of 2016, decided on 21 June 2023.

[252] *Kannaian Naidu v Kamsala Ammal @ Bhanumati* S.A. No. 59 of 2016, decided on 21 June 2023.

[253] Bina Agarwal & Pradeep Panda, 'Toward Freedom from Gender Violence: The Neglected Obvious', 8(3) Journal of Human Development (2007); See also, 'Property Ownership & Inheritance Rights of Women for Social Protection - The South Asia Experience; Synthesis Report of three studies' (International Centre for Research on Women, 2006) <https://www.icrw.org/wp-content/uploads/2016/10/Property-Ownership-and-Inheritance-Rights-of-Women-for-Social-Protection-The-South-Asia-Experience.pdf> accessed 11 July 2023.

[254] Bina Agarwal & Pradeep Panda, 'Toward Freedom from Gender Violence: The Neglected Obvious', 8(3) Journal of Human Development (2007).

[255] Bina Agarwal et al., 'How many and which women own land in India? Inter-gender and Intra-gender gaps', 57(11) The Journal of Development Studies (2021).

[256] Arvind K Abraham, 'Case for a standalone law to deal with matrimonial property', *The Leaflet* (April 5, 2022) <https://theleaflet.in/case-for-a-standalone-law-to-deal-with-matrimonial-property/> accessed 11 July 2023.

[257] Indian women spend eight times more hours on unpaid care work than men. *See*, Mitali Nikore, 'Building India's Economy on the Backs of Women's Unpaid Work: A Gendered Analysis of Time-Use Data', ORF Occasional Paper No. 372, Observer Research Foundation (October 2022); *See also*, Pushpendra Singh & Falguni Pattanaik, 'Unfolding Unpaid Domestic Work in India: women's constraints, choices and career', 6(11) Palgrave Communications (2020). An article studying the relationship between marriage and wealth in Japan found that if wealth is measured as personal net worth, Japanese women are in a vulnerable financial position

of marriage as a shared partnership where labour of each party contributing to the marriage is reflected in the rewards and growth achieved through the marriage. Reference has been made to the Goan Portuguese Civil Code,[258] French Civil Code,[259] Brazilian Civil Code[260] and South African Matrimonial Property laws[261].

20. Partial community of assets.-

(1) Parties to the marriage under this Code will be subject to the partial community of assets regime of matrimonial property.
(2) Under the regime of partial community of assets, the assets of the parties acquired at the time of or during the subsistence of marriage are communicated and treated as joint matrimonial property.
(3) The following types of assets will be communicated into the joint matrimonial property:
(i) immovable property acquired during the subsistence of the marriage, even if the title is in the name of one of the spouses;
(ii) movable property acquired for the purposes of joint use of the parties; or,
(iii) movable or immovable property acquired by the parties as a gift at the time of or during the subsistence of Marriage for the joint enjoyment of the parties;
(iv) financial assets acquired during the subsistence of the marriage.
(4) The following types of assets will be excluded from communication into the joint matrimonial property:
(i) any assets acquired by either of the parties before the date of marriage,
(ii) any assets inherited by either of the parties before or at the time of Marriage or during the subsistence of marriage, by donation or succession,
(iii) any assets acquired by a party as gift for the separate exclusive use of such party,
(iv) goods acquired for the personal and exclusive use of either of the parties to marriage, and
(v) *stridhana* acquired by a woman for her exclusive ownership and use.
(5) Ownership, possession and administration of the joint matrimonial property shall lie jointly with both the parties to marriage.
(6) Neither of the parties to marriage shall have the right to alienate joint matrimonial property without the consent of the other spouse under the partial community of assets regime.
(7) Any of the parties to marriage may file a petition before the court of competent jurisdiction for the determination of whether an asset is communicated to be part of the joint matrimonial property.

21. Communication of debts under the partial community of assets regime.-

(1) Obligations incurred prior to marriage will not be communicated under the partial community of assets regime;
(2) Obligations arising out of acts that may be unlawful under any law for the time being in force, will not be communicated under the partial community of assets regime;
(3) Any obligations incurred during the subsistence of the Marriage or prior to Marriage, by act

even after marriage, which is at least partly driven by married women's career disruptions arising from their family responsibilities. *See*, Yoko Niimi, 'Are Married Women Really Wealthier than Unmarried Women? Evidence from Japan', 59(2) Demography (2022): 461–483).
[258] Portuguese Civil Code, 1867 (Goa).
[259] Code Civil, 2016 (France) <http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf> accessed on 12 July 2023.
[260] Código Civil, Law No. 10.406 of January 10, 2002 (Brazil).
[261] Matrimonial Property Act, 1984 (South Africa).

or contract of both the parties, or by either of the parties with the written consent of the other party, will be communicated into the joint matrimonial property.

(4) The assets exclusively owned by the party incurring the obligation, will be chargeable for the payment of debts incurred by the party prior to the marriage.

Explanation: "exclusively owned" means any assets excluded from communion, as specified in sub-section (4) of section 20 of this Code.

(5) The assets exclusively owned by the party incurring obligation, will be chargeable for the payment of debts contracted without the written consent of the other party, before or during the subsistence of Marriage.

(6) In the absence of exclusive assets of the party for payment of debts specified in sub-sections (4) and (5), the moiety in the joint matrimonial property of the party incurring the obligation, may be charged for payment of debts incurred by the party prior to the Marriage.

22. Division of property on dissolution of marriage.-

(1) Assets communicated into the joint matrimonial property during the subsistence of Marriage will be presumed to be equally divided amongst the parties to marriage at the time of dissolution of marriage.

(2) Where parties to marriage have filed a petition to obtain a decree of divorce under sections 12, 13 or 14 of this Code, the parties must also file an application to the court exercising jurisdiction, for the final determination of titles and division of matrimonial property in accordance with sub-section (1).

(3) Any extraordinary circumstances requiring deviation from the scheme of division of matrimonial property provided in sub-section (1) of this section may be considered by the court, at its discretion, in deciding an application under sub-section (2).

Explanation: For the purposes of this sub-section "extraordinary circumstances" may mean and include the following:

(i) difference in the growth of the exclusive property of both the parties;
(ii) compensation for disadvantages faced for being part of the relationship;
(iii) needs of the parties;
(iv) residential arrangements of the parties;
(v) protection of vulnerable parties;
(vi) maintenance and residence of children; or,
(vii) any other factors that the court may deem relevant to ensure equitable distribution of property.

23. Division of property on death.-

(1) On death of either of the Parties to the Marriage, the assets communicated into the joint matrimonial property will be divided equally and the surviving spouse will be entitled to their share in the same manner as on dissolution of Marriage.

(2) The share of the deceased spouse will be inherited in the manner specified in Chapter III of this Act.

Notes for Consideration

Opting-out from the default scheme of division of matrimonial property

The matrimonial property regime prescribed in this section is the default regime and no option has been provided to the parties to decide the division of property on marriage amongst themselves. This has been proposed keeping in mind the power dynamics of heterosexual relationships and the years of neglect of the labour put in by women as non-earning members of the family. However, a need to uphold greater autonomy may be felt in this form of the scheme of distribution of matrimonial property and it is beneficial to look at the option of providing the parties an alternate mechanism of division and distribution of matrimonial property. An opt-out provision may therefore be introduced, allowing the parties to choose not to be governed by the partial community of property regime. The applicable regime, in this case, would be the separation of assets regime, as presently followed. Additionally, at the stage of final determination of titles under the separation of assets regime, certain guiding factors may be provided to the court, on the basis of which, the court may deviate from the rules of the separation of assets regime and divide the matrimonial property taking into consideration, principles of gender equality, needs of the parties, efficiency and compensation for the differences in growth of assets. One mechanism to effectively divide property may be through the accrual system, as followed in South Africa, where the difference in growth of property of both the parties is divided equally amongst the parties.

Part II: Framework for Stable Unions

Introduction

This part of the paper attempts to recognise such relationships that are outside the bounds of marriage and natal families but are based on mutual love, care and dependence. Such relationships shall be classified as 'Stable Unions'[262] and shall cover -

a. Intimacies that are outside the realm of kinship and marriage and may or may not be conjugal in nature; and
b. Non-marital cohabitation arrangements where the parties may want to have a flexible but committed conjugal relationship and cohabit together without getting the status of marriage.

The framework proposes a simple intimation process. The objective behind requiring intimation is to grant legitimacy and recognition to such relationships and not to increase state intervention or regulation within the personal affairs of the partners. Intimation and its acknowledgement may enable the parties to access certain social benefits provided by the State. The acknowledgement of intimation shall act as a conclusive proof of union.

Issues:

1. What should be the legislative framework for recognising Stable Unions?
2. What should be the rights and obligations arising out of Stable Unions?

Objectives:

1. To provide statutory recognition to non-traditional families and relationships.
2. To vest certain rights and obligations arising out of such relationships.

Context:

The existing family law framework accords primacy and recognition to relationships by blood, marriage or adoption. Such recognition is based on the traditional understanding that 'family' is necessarily a conjugal unit centred around a heterosexual married couple. Mutual love, care and dependence is presumed to flow from this family unit, and thus rights and obligations are also to be vested within this unit. This understanding, however, is not representative of the social realities. There are diverse forms of relationships that may be non-marital, non-conjugal or non-natal but based on mutual love, care and affection. These relationships function as families in all its form and substance but are still not recognised by the law.

Chosen Families Formed by Queer Individuals

Persons belonging to queer communities are often subjected to violence at the hands of their natal families.[263] There are various studies which have highlighted that such violence takes the form of physical abuse, mental harassment, forced medical treatments, corrective rapes, kidnapping, abduction and wrongful confinement.[264] Therefore, queer individuals tend to detach themselves from their natal

[262] The term "Stable Unions" is borrowed from Article 1723 of the Brazilian Civil Code which recognises a stable union as a family entity when there is continuous and lasting cohabitation established with the objective of constituting a family.
[263] *S. Sushma v Commissioner of Police* 2021 SCC OnLine Mad 2096; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.
[264] 'Centering Familial Violence in the Lives of Queer and Trans Persons in the Marriage Equality Debates: A Report on the findings from a closed door public hearing', People's Union for Civil Liberties 2023 <https://www.sapphokolkata.in/public/media_pdf_file/1681735321.pdf> accessed on 12 July 2023; Bina Fernandez, *Humjinsi: A Resource Book on Lesbian, Gay and Bisexual Rights in India* (India Centre for Human Rights and Law, 1999), <http://www.unipune.ac.in/snc/cssh/humanrights/07%20STATE%20AND%20GENDER/20.pdf> accessed on 12 July 2023 ; Suraj Sanap, *et al*; 'Happy Together: Law & Policy Concerns of LGBTQI Persons and Relationships in India', Centre for Health, Equity, Law and Policy, 2021, <https://www.c-help.org/pb-happy-together-law-pol-lgbtqi-rln> accessed on 12 July 2023.

families and form their own chosen families. Such relationships can be romantic in nature or can be non-intimate relationships purely based on mutual love, care and dependence.[265][266]The failure of the law to recognise such chosen families has led to restrictions in accessing such rights and entitlements that by default, only vest through marriage. This lack of recognition also denies queer individuals the right to designate a person of their choice to make decisions on their behalf in matters such as guardianship, estate planning, healthcare decisions etc. As the law only acknowledges relationships by blood, marriage or adoption, the decision making power by default vests with the natal family, which may always act in best interest of the individual involved. This systemic exclusion heightens the vulnerability of queer individuals and deprives them of their fundamental rights.

Non-Marital Cohabitation

Both heterosexual as well as queer persons are increasingly opting for non-marital cohabitation as an alternative family structure.[267] While there is no legislation which explicitly recognises cohabitation as a matter of right, the judiciary has progressively attempted to recognise the right to cohabit through various decisions. In the case of *Payal Sharma* v *Superintendent of Nari Niketan, Agra*[268], the Allahabad High Court observed that a man and a woman could live together even without getting married. Similarly, in the case of *S. Khushboo* v *Kanniammal*[269], it was observed by the Supreme Court that live-in relationships should not be looked at through the lens of criminality. Further, in *Madhubala* v *State of Uttarakhand*, the High Court observed that a same-sex couple would have a right to live together out of a wedlock[270]. While such judicial decisions are a step in the right direction, the lack of legislative guidance acts as a hindrance in accessing rights and entitlements.

Therefore, keeping in view the existence of alternate family structures, there is a need to revisualise and redefine how families are recognised by the law. The movement towards recognition of such non-traditional families and vesting them with rights and obligations can be seen the world over. For instance, the Belgian Civil Code recognises formal cohabitation as a legal family arrangement between major persons of the same or opposite sex[271] and the parties are vested with inheritance rights.[272] Tasmania's Relationships Act, 2003, has provisions for recognising varied forms of personal relationship[273] A personal relationship has been classified as a significant relationship or a caring relationship.[274] Significant relationships have been defined as a relationship between two adults who are a couple but have not been married or related by family whereas caring relationships are relationships other than significant relationships or marriage based on domestic care and support.[275] Countries like the United

[265] See, Keitki Ranade, 'Home Growing Up Gay in Urban India Chapter Living Life as a Queer Person: Role of Intimate Relationships in Consolidation of Identity' in *Growing Up Gay in Urban India- A Critical Psychosocial Perspective* (Springer, 2018) < https://link.springer.com/chapter/10.1007/978-981-10-8366-2_5>; Suraj Sanap, *et al*; 'Happy Together: Law & Policy Concerns of LGBTQI Persons and Relationships in India', Centre for Health, Equity, Law and Policy, 2021,<https://www.c-help.org/pb-happy-together-law-pol-lgbtqi-rln> accessed on 12 July 2023.

[266] Amrita Nandy, *Against the Common Sense of the 'The Family': Motherhood and Choice*, 256- 262 (Zubaan Publications, 2017) - The author in this book highlighted that there are various queer individuals who are friends but adopt and raise a child together.

[267] Queer couples have been using Maitri Karars to formalise their cohabitation arrangements. *See*, AIDS Bhedbhav Vidrohi Andolan, 'Less than Gay: A citizen's report on the status of homosexuality in India', (1991), *available at*- https://s3.amazonaws.com/s3.documentcloud.org/documents/1585664/less-than-gay-a-citizens-report-on-the-status-of.pdf accessed on 12 July 2023.

[268] AIR 2001 All 254.

[269] AIR 2010 SC 3196.

[270] *Madhubala v State of Uttarakhand*, 2020 Cri LJ (NOC 268) 82- The court further observed that consensual cohabitation between two adults of the same sex cannot in our understanding be illegal far or less a crime because it's a fundamental right which is being guaranteed to the person under article 21 of the Constitution of India, which inheres within its ambit and it is wide enough in its amplitude to protect an inherent right of self determination with regards to one's identity and freedom of choice with regards to the sexual orientation of choice of the partner.; *Chinmayee Jeena v State of Orissa*, 2020 SCC OnLine Ori 602; *Paramjit Kaur v State of Punjab*, 2020 SCC OnLine P&H 994.

[271] Article 1475, Belgian Civil Code, 2007.

[272] Article 1477, Belgian Civil Code, 2007.

[273] Relationships Act, 2003 (Tasmania).

[274] Relationships Act, 2003 (Tasmania), s 6.

[275] Relationships Act, 2003 (Tasmania), ss 4&5.

Kingdom[276], South Africa[277] and Brazil[278] have separate laws for recognition of Civil Unions and Partnerships.

There is a need to facilitate every individual's right to forge their own family ties without compromising on access to other rights and entitlements. As observed by J. Chandrachud in the case of *Deepika Singh v Central Administrative Tribunal*[279], "Familial relationships may take the form of domestic, unmarried partnerships or queer relationships. These manifestations of love and of families may not be typical but they are as real as their traditional counterparts. Such atypical manifestations of the family unit are equally deserving not only of protection under law but also of the benefits available under social welfare legislation."

Proposed Step:
In the marriage equality case, Advocate Vrinda Grover, representing the petitioners, argued that all queer individuals, specifically transpersons are often subjected to violence at the hands of their natal families. In the absence of any recognition to chosen families, these individuals have no option but to rely on their abusive natal families. Therefore the present understanding of family should be changed to a new imagination of marriage and relationship that places its foundation on love, care and respect that does not come from natal families. Further, Advocate Jayna Kothari, arguing for the petitioners, urged that the right to family for all persons must be recognised under Article 21. Reference was made to the fact that transpersons already have families and adoption is common amongst these families but such family structures are not recognised under law.

The proposed framework of Stable Unions aims to recognise all such non-traditional families and vest them with rights and entitlements. Additionally, the framework provides the right to nominate the Stable Union Partner for the purposes of claiming benefits through social-welfare legislations and to empower them to act on behalf of and in the best interests of their partner. The factors for recognition as advanced under this framework does not focus on the conjugality, existence of cohabitation or shared household but on mutual love, support and care. This is done with the objective of making space for the whole spectrum of relationships that might exist between queer as well heterosexual individuals. .

24. Stable Unions.–

Any two persons shall be recognised to be in a Stable Union, through intimation to the Marriage Officer in the manner prescribed under section 25 of this Code, subject to the fulfilment of the following conditions:
(i) both persons have completed the age of 18 years;
(ii) both the persons have been providing each other or intend to provide each other with mutual support and personal care for a reasonable period of time; and,
(iii) both persons do not have a subsisting stable union with any other person.

25. Intimation process for Stable Unions.-

(1) Any two persons intending to be recognised as being in a stable union, may intimate the Marriage Officer of the district in which at least one of the parties to the union has resided for a period of not less than 7 days, through an application in the format as prescribed in Form

[276] Civil Partnerships Act, 2004 - recognises civil partnerships between same-sex couples.
[277] Civil Unions Act, 2006 - both opposite sex and same-sex couples are allowed to enter into Civil Unions. The legal implications of both marriage and a civil union are the same.
[278] Article 1723, Brazilian Civil Code - recognises both same-sex and opposite sex Stable Unions.
[279] 2022 SCC OnLine SC 1088.

B.

(2) On satisfaction of the truth of the details provided as part of the application submitted under sub-section (1), the Marriage Officer shall issue an Acknowledgement Letter, within a period of 7 days from the date of the application, through electronic or paper mode.
(3) Acknowledgement Letter will be the conclusive proof of the existence of a Stable Union.
(4) A Stable Union shall not be considered invalid merely for non-intimation.

FORM B

The parties submitting the application provided in sub-section (1) of section 25, shall submit the following details as part of the application:

a) names of both the parties;
b) proof of identity and age;
c) statement of intention to be in a stable union;
d) proof of individual residence;
e) an affidavit from each of the applicants stating that:
   i) the applicant is not married at the time of registration of stable union;
   ii) the applicant is not in a subsisting stable union with any other party;
   iii) the applicant gives free and informed consent to the registration;
f) an affidavit for nomination, if any;
g) signatures of both the parties

26. Rights and Obligations arising out of Stable Unions-

(1) Both the parties to a Stable Union shall be entitled to maintenance in accordance with section 16 of this Code.
(2) Both the parties to a Stable Union shall owe each other a duty of respect, mutual support and assistance.
(3) Both the parties to Stable Union shall be conjointly responsible for the care, custody and maintenance of any child that they would be ordinarily responsible for as a parent.

Explanation 1- For the purposes of sub-section (3), "care" shall have the same meaning as provided under sub-clause (d) of section 30 of this Code.

Explanation 2- For the purposes of this Part, "parent" shall have the same meaning as provided under sub-clause (i) of section 30 of this Code.

27. Right to Nominate Stable Union Partner for certain purposes.–

(1) Both the parties to a Stable Union, whose existence is being intimated to the Marriage Officer, shall have the right to make a directive appointing the other partner as a nominated representative for the purposes of:
   (i) claiming social- welfare benefits accessible only to family members or dependants under laws relating to labour and employment;
   (ii) claiming any beneficial right, title or interest in Financial Assets;
   (iii) taking medical or healthcare decisions on behalf of or for the benefit of the nominating party in case of their incapacitation; or
   (iv) any other purposes as may be notified by the Central Government, or the State Government, as the case may be, through notification from time to time.

Explanation - For the purposes of this section, "Financial Assets" shall include but not be limited to Mutual Funds, Life Insurance Policies, Health Insurance Policies, Pension Schemes, Public Provident Funds and Bank Accounts.

(2) The nomination shall be made through an affidavit which shall be submitted along with the intimation application as provided under section 25 of this Act.
(3) A nomination for the purposes specified under sub-section (1), if not made at the time of intimation, can be made at any time during the subsistence of the Stable Union by submitting an affidavit to the Marriage Officer to whom the intimation of the Stable Union has been made under section 25 of this Code.
(4) Any nomination made as per sub-section (2) or sub-section (3), may be modified or revoked by either of the parties to the Stable Union at any time by submitting a fresh affidavit to the Marriage Officer to whom the initial intimation of nomination was made under sub-section (2) or sub-section (3).
(5) The nominated partner shall have the right to act on behalf of the partner making the nomination and to realise the benefits that might accrue due to the nomination.
(6) A nomination made under sub-section (1) or sub-section (3) shall be legally binding and enforceable.

28. Determination of the existence of a Stable Union in the absence of Intimation.-

(1) On a petition filed by any person claiming to be part of a stable union, a court of competent jurisdiction may determine the existence of a stable union, if the existence of the Stable Union has not been intimated to the Marriage Officer, subject to the fulfilment of conditions specified under section 24 of this Code.
(2) While considering a petition in accordance with sub-section (1), the court shall take into consideration any of the following factors-
    (i) duration of the relationship;
    (ii) degree of financial dependence or interdependence;
    (iii) degree of mutual support and personal care; or,
    (iv) any child that the parties are responsible for as parents.

29. Dissolution of Stable Union.-

(1) A Stable Union may be dissolved at any time at the instance of either of the parties by submitting an application to the Marriage Officer, in the format as set out in Form C.
(2) On satisfaction of the truth of the details provided as part of the application submitted under sub-section (1), the Marriage Officer shall issue confirmation of dissolution of Stable Union within a period of 14 days from the date of the application, through electronic or paper mode.
(3) The Marriage Officer shall ensure that both the parties have knowledge of the fact of dissolution of the Stable Union.

FORM C

The parties submitting the application provided in sub-section (1) of section 27, shall submit the following details as part of the application:

a) names of both the parties;

b) statement of intention to dissolve stable union;
c) statement of intimation to the other party;
d) signature of the applicant; and
e) copy of acknowledgment of Intimation of Stable Union

Chapter 2: Parent-Child Relations

This chapter seeks to provide a progressive legal framework that governs parent-child relations in India. It does so by, *first*, proposing a draft law on parenthood, and parental responsibilities and rights. This draft law expands parenthood beyond the heterosexual conjugal family unit to include a diversity of parent-child relations within the folds of law. It also marks a shift from the common law position of 'parental authority' governing parent-child relations towards a regime where parents have rights to carry out the responsibilities they have towards their children. *Second*, it identifies specific amendments to secular laws governing court appointed guardians, adoption, and reproductive technology and parenthood to eliminate discrimination based on sex, sexual orientation, gender identity, and marital status. These amendments are aimed at ensuring that a plurality of family forms are reflected in the law on parent-child relations.

This chapter is divided into 5 Parts. The key features of each Part are as follows:

Sr. No.	Part	Key Features
I.	**Law on Parenthood and Parental Responsibilities and Rights**	Part I lays out the theoretical framework and justification for a law on parenthood and parental responsibilities and rights, and recommends a draft law to this effect. It expands parenthood to include parents outside the heterosexual conjugal family unit and extends legal recognition to social parents i.e. persons who may not be genetically related to the child, or married to the legal parent, thus delinking certain kinds of parenthood from biology and marriage. The draft law codifies parental responsibilities and rights, outlines conditions under which third parties can acquire parental responsibilities and rights to provide legal recognition to a diversity of caretaking arrangements for children, codifies the best interest principle to rationalise the principle, and prescribes additional provisions to protect legal rights of parents and children.
II.	**Court Appointed Guardians**	Part II recommends amendments to the Guardians and Wards Act, 1890 to bring it in sync with our recommended draft law on parenthood and parental responsibilities and rights. This includes amendments to multiple provisions of this Act to ensure that "best interests" of a minor are prioritised when district courts appoint guardians, and due consideration to a child's intelligent preference is given during such appointment.
III.	**Adoption**	Part III recommends amendments to the Juvenile Justice (Care and Protection of Children) Act, 2015 and subordinate legislation to make them inclusive of the plurality of parent-child relations, and to incorporate concepts such as 'direct adoptions', 'second parent adoptions' and 'post-adoption agreements'.
IV.	**Reproductive Technology and Parenthood**	Part IV recommends amendments to the Surrogacy (Regulation) Act, 2014 and subordinate legislation to make them inclusive of the plurality of parent-child relations, and removes eligibility criteria which restrict the rights of various classes of parents from availing surrogacy services. It also recommends amendments to the Assisted Reproductive Technology (Regulation) Act, 2021 and

		subordinate legislation to make them inclusive of the plurality of parent-child relations.
V.	**Maintenance of Parents**	Part V recommends amendments to the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 to make it inclusive of the plurality of parent-child relations, and codify factors that must be taken into account when determining the quantum of maintenance.

Part I – Parenthood and Parental Responsibilities and Rights

One of the recent trends in child law has been a shift from the common law concept of parental authority to that of parental care, as encapsulated by the codification of 'parental responsibilities and rights' in legislation.[280] One of the earliest articulations for a parental responsibilities and rights framework was by the Scottish Law Commission which saw merit in making 'explicit what was already implicit in (common) law'.[281] It added that such a framework would clarify that parental rights were not absolute or unqualified but were conferred to enable parents to carry out their responsibilities.[282] The South African Law Commission also made a recommendation to this effect - the common law concept of 'parental authority' be replaced with that of 'parental responsibility', and a balance be struck between parental responsibilities and the rights along with the power needed to fulfil such responsibilities.[283] A law on parental responsibilities and rights moves away from a parent-centric approach to a child-centric approach by centering the 'best interests of the child' in matters concerning the parent-child relationship. This shift has been witnessed in India with courts prioritising the 'best interests of the child/welfare of the child'[284] when taking decisions with respect to guardianship and custody.[285]

Under the present legal regime, the institution of parenthood and the patriarchal family is informed by parent-child relations being determined by biological relatedness and marriage, fathers being the natural and sole guardians of their children, and parents exercising authority over the child.[286] A modern approach to parent-child relations marks a departure from the limited imagination of such a legal regime, and seeks to establish an inclusive and just legal framework that recognises parenthood for all parents independent of their gender identity, sexual orientation or marital status. Such a framework accounts for the diversity of parent-child relations beyond the conjugal heterosexual unit defined by biology and marriage.

Originally, common law on parent-child relations deemed the father as the guardian who had the right to take legal decisions vis-a-vis the child and their property whereas the mother was the custodian who entailed the duty to care for the child. This common law principle has been abolished in progressive jurisdictions around the world wherein parents are now given equal status in the eyes of the law. In India, natural guardianship is governed largely by personal laws whereas court appointed guardians are governed by secular law (primarily, the Guardians and Wards Act, 1890). All personal laws continue to follow outdated common law principles where the father is deemed the primary authority for children born within wedlock while the mother is the custodian of such a child up to a certain age.[287] Thus while the father has the legal authority to take decisions regarding the child, the mother is relegated to the role of the caretaker. Further, laws on natural guardianship stigmatise children born out of wedlock by categorising them as 'illegitimate children' and denying them rights vis-a-vis the father.[288]

Not only do laws in relation to natural guardianship discriminate on the basis of sex but they also fail to account for parents outside the heterosexual conjugal family unit, such as queer parents and parents

[280] NV Lowe, 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' [1997] International Journal of Law Policy and Family 192.
[281] Scottish Law Commission, Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property (Discussion Paper No. 88, October 1990) 5.
[282] ibid.
[283] South African Law Commission, Review of the Child Care Act (Project 110, December 2002) 58.
[284] Used synonymous with 'best interests of the child'.
[285] The Supreme Court has repeatedly held that welfare of the child is the paramount consideration in deciding guardianship and custody, and not the right of the parents. Case law to this effect has been cited in a later section of this paper.
[286] *See* the Hindu Minority and Guardianship Act, 1956; For Muslim law on natural guardianship, *see Imambandi v Mutsaddi* (1918) 45 IA 73, and *Gulamhussain Kutubuddin Maner v Abdulrashid Abdulrajak Maner*, (2000) 8 SCC 507); For, Christian and Parsi laws on natural guardianship, *see* Law Commission, 'Consultation Paper: Family Law Reforms', 2018, 85-88).
[287] ibid.
[288] *ABC v State NCT of Delhi* (2015) 10 SCC 1; *Dharmesh Vasantrai Shah v Renuka Prakash Tiwari* 2020 SCC OnLine Bom 697. *See* Law Commission, 'Consultation Paper: Family Law Reforms', 2018, 177-182.

who are not in a marital relationship with one another. Further, the idea of family reflected by existing laws on parent-child relations fail to recognise diverse care-taking arrangements for children where persons who are not legal parents undertake parenting activities. Consequently, it is critical to provide a progressive legal framework which provides for an expansive understanding of parenthood and codifies the law in relation to parental responsibilities and rights. While India does not have a law on 'parental responsibilities and rights', this concept has been reflected in laws such as the Juvenile Justice (Care and Protection of Children) Act, 2015[289] and the Assisted Reproductive Technology (Regulation) Act, 2021[290] as well as common law principles.[291] Codification of this concept will be a welcome step in ensuring that laws on parent-child relations are reflective of progressive, gender-just and inclusive trends being witnessed around the world.[292]

I. Parenthood

Parenthood (also referred to as 'parentage' in this paper) is the legal relationship between the parent and the child. Traditionally, parentage law viewed parenthood as organised around marriage.[293] The mother who birthed the child and the father who was related to the mother via marriage were deemed to be the legal parents of the child, with the father exercising parental authority over the child. The child born within marriage had a right to inherit the property of their parents as well as a right to be maintained by their parents. Such a legal regime viewed the family through a myopic lens as comprising a man and a woman related by marriage, and a child born within such a union. Consequently, parenthood was the exclusive domain of heterosexual persons in a conjugal relationship. Over time, with the introduction of adoption, surrogacy and artificial insemination, the contours of parenthood expanded. In the United States of America (USA), same-sex marriage was legalised by the Supreme Court in *Obergefell v Hodges*.[294] In *Obergefell*, while recognising marriage equality, the Court noted that marriage is the basis for 'expanding (the) list of governmental rights, benefits, and responsibilities'[295] which included parenthood rights such as 'adoption.. child custody, support, and visitation rules.'[296] *Obergefell* was followed by *Pavan v Smith*[297] wherein the Court recognised the constitutional right of same-sex partners to parenthood. A right to marriage has thus been accompanied by a host of other rights recognised by family law, including a right to parenthood. Consequently, a progressive modern family law regime must ensure a right to parenthood for all. This must be done by expanding legal parentage to account for the diversity of parent-child relations in society.

While a fundamental right to parenthood per se has not been articulated or recognised in India, constitutional courts have recognised the fundamental right to family life as well as the fundamental right to motherhood. In *Lakshmi Bhavya Tanneru v Union of India*,[298] the Delhi High Court ruled that an unreasonable denial of the petitioner's request for an inter-cadre transfer to be with her spouse infringed her right to family life. The Court noted, "*We have no doubt that the right to meaningful family life, which allows a person to live a fulfilling life and helps in retaining her/his physical, psychological and emotional*

[289] The Juvenile Justice (Care and Protection of Children) Act 2015, s 2(2).
[290] The Assisted Reproductive Technology (Regulation) Act 2021, s 31(2).
[291] *See In the Matter of Lovejoy Patell and Ors.* AIR 1944 Cal 433; *Tushar Vishnu Ubale v Archana Tushar Ubale*, AIR 2016 Bom 88; *Yashita Sahu v State of Rajasthan* (2022) 3 SCC 67; *State of Haryana v Smt. Santra* (2000) 5 SCC 182; *Vinod Gulshandev Chopra v Vimivinod Chopra* 2012 SCC OnLine Bom 656; *Soumitra Kumar Nahar v Parul Nahar* (2020) 7 SCC 599; *Vikas Agarwal v Geeti Mathur* 2017 SCC OnLine Del 7006; *Nirali Mehta v Surendra Kumar Surana and Anr* 2013 SCC OnLine Bom 268; *S. Anand @ Akash v Vanitha Vijaya Kumar* 2011 SCC OnLine Mad 435; *Betty Philip v William Chacko M* 2021 SCC OnLine Ker 15276; *Labh Singh v Superintendent, Nari Niketan, Amritsar* MANU/PH/0216/1961.
[292] *See* United Kingdom Children Act 1989; South Africa Children's Act 2005; Children (Scotland) Act 1995, Australia Family Law Act, 1975.
[293] Dougal Nejaime, 'The Nature of Parenthood', The Yale Law Journal, 2017.
[294] 576 U.S. 644 (2015) ('*Obergefell*').
[295] ibid, 16.
[296] ibid, 17.
[297] 137 S. Ct. 2075 (2017).
[298] *Lakshmi Bhavya Tanneru v Union of India*, W.P.(C) 5533/2021 & CM Nos. 17155-56/2021.

integrity would find a place in the four corners of Article 21 of the Constitution of India."[299] In *Dr. Mrs. Hema Vijay Menon v State Of Maharashtra*,[300] the Bombay High Court held that there is a fundamental right to motherhood. While noting that denying maternity leave to a woman who had become a mother through surrogacy amounted to discrimination, the High Court stated the "*Right to life under Article 21 of the Constitution of India includes the right to motherhood.*"[301]

Post the Supreme Court's decisions in *Navtej* and *NALSA*, and in light of the litigation concerning marriage equality, family law must be reformed to recognise a queer person's right to family which, by extension, includes a right to parenthood. Queer parents face several challenges when it comes to accessing legal parenthood. As marriage is an entry point to parenthood, a denial of the right to marriage leads to a denial of joint legal parenthood. Further, the eligibility criteria prescribed for parenthood via the routes of adoption, surrogacy and artificial reproductive technologies (ART) disqualify persons on the basis of sexual orientation and gender identity. *First*, only married heterosexual couples can jointly avail these routes for parenthood. *Secondly*, while a queer person can adopt as a single parent, only certain classes of women can avail surrogacy or ART services as single parents. Access to legal parenthood remains contingent on gender identity, sexual orientation and marriage.

In addition to queer persons, unmarried partners and single fathers are also left out by the law on parenthood. For instance, only married partners and certain classes of single women can access parenthood via surrogacy and ART. Similarly under secular adoption laws, a single male can only adopt male children. Such restrictions are premised on sex-stereotyping and are liberty restrictions which cannot be deemed to serve a legitimate state interest. While single parenthood is recognised in India, parenthood is not recognised for persons who are not in a marital union. This has significant implications for both parents as well as children. Non-married partners are prohibited from adopting[302] and availing surrogacy and ART services. Further, only mothers are guardians of children born out of wedlock while fathers do not have any legal relation with the child. Also, children born out of wedlock are deemed illegitimate and do not have any rights vis-a-vis their fathers.

In *Deepika Singh v Central Administrative Tribunal*,[303] the Supreme Court has recognised that the family is an ever-changing evolving unit and includes unmarried as well as queer partnerships.[304] The Court noted, "*[A]typical manifestations of the family unit are equally deserving not only of protection under law but also of the benefits available under social welfare legislation. The black letter of the law must not be relied upon to disadvantage families which are different from traditional ones.*"[305] It is thus critical to broaden law's understanding and articulation of the family. One way of achieving this is by delinking parenthood from marriage and ensuring that access to legal parenthood is not restricted on the basis of outdated and regressive social mores.

II. Law on Parenthood in India

In India, parenthood is governed by personal laws[306] and the secular law[307] on guardianship. Under the present regime, motherhood is deemed to be biological and fatherhood social, as motherhood is

[299] ibid, para 12.2.
[300] *Dr. Mrs. Hema Vijay Menon v State Of Maharashtra*, WRIT PETITION NO. 3288 OF 2015.
[301] ibid, para 8.
[302] Central Adoption Resource Authority, Circular dated 16 June 2022 <https://cara.nic.in/PDF/Registration-of-cases-of-single-PAPs-having-a_live-in_partner-in-a-long-time-relationship-and-not-married160622.pdf> accessed 14 May 2023.
[303] *Deepika Singh v Central Administrative Tribunal*, 2022 SCC OnLine SC 1088.
[304] ibid, Para 26.
[305] *Deepika Singh v Central Administrative Tribunal*, 2022 SCC OnLine SC 1088.
[306] *See* the Hindu Minority and Guardianship Act, 1956 ('HMGA'); Muslim law on natural guardianship (*Imambandi v Mutsaddi* (1918) 45 IA 73, and *Gulamhussain Kutubuddin Maner v Abdulrashid Abdulrajak Maner (2000) 8 SCC 507)*; Christian and Parsi law on natural guardianship, *See* Law Commission, 'Consultation Paper: Family Law Reforms', 2018, 85-88).
[307] The Guardians and Wards Act, 1890.

established by the fact of birth and fatherhood through marriage to the birth mother.[308] This is where the concept of legitimacy of the child acquires significance. Section 112[309] of the Indian Evidence Act, 1872, which deals with the presumption of paternity, deems a person to be the father of a child if such child was born during the continuance of a valid marriage or 280 days after the dissolution of the marriage. The concept of legitimacy has significance for the rights of children vis-a-vis their parents. As per the law on natural guardianship, the father is the guardian of the child born within wedlock and such child has inheritance rights vis-a-vis the father as well as a right to be maintained by the father.[310] In case of 'illegitimate' children or children born out of wedlock, the mother is the natural guardian and the father does not have any obligations towards such a child.[311]

The rights of a child within a family are thus ***informed by the nature of the relationship between the parents***, with children born out of wedlock being deemed fatherless and stigmatised as illegitimate. Such a framework discriminates against mothers as well the children born outside of wedlock by denying them rights and protections available to children born within wedlock. Further, laws on guardianship continue to be premised on the existing male-female binary of gender, and do not recognise parenthood for same-sex/same-gender partners or unmarried fathers. Queer persons are consequently left out of the present legal framework on parent-child relations. The recommended draft law on parenthood addresses the issues reflected in the present legal regime. It does so by recognising a right to parenthood for all parents independent of gender identity, sexual orientation and marital status, and does away with the discriminatory policies underlying the law on parent-child relations.

III. Parental Responsibilities and Rights

Parenthood is an ongoing status in relation to the child, and is associated with the parent's right to be recognised as the legal parent of the child and their responsibility for raising the child.[312] Parental responsibilities and rights are the "legal powers and duties associated with parental responsibility and its exercise but not the wider legal status of being a parent."[313] As children are not in a position to look after themselves, a legal system must decide who is responsible for bringing up the child and acting on their behalf,[314] and consequently, grant rights to do the same. This clarifies that parental rights exist for the purpose of carrying out parental responsibilities vis-a-vis the child.

The Scottish Law Commission has identified the advantages of codifying parental responsibilities and rights in legislation. Such codification would:[315]

(a) Make explicit what was already implicit in (common) law.
(b) Clarify that parents have not just rights but also responsibilities.
(c) Make clear that parental rights are not absolute or unqualified, but exist to enable parents to meet their responsibilities towards children.

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[308] Saptarshi Mandal, 'Biology, Intention, Labour: Understanding Legal Recognition of Single Motherhood in India' (2019)15 Socio-Legal Rev 131.
[309] The Indian Evidence Act 1872, s 112 reads 'Birth during marriage, conclusive proof of legitimacy.—*The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.*'
[310] Hindu Minority and Guardianship Act, 1956, s 6.
[311] *ABC v State NCT of Delhi* (2015) 10 SCC 1; *Dharmesh Vasantrai Shah v Renuka Prakash Tiwari* 2020 SCC OnLine Bom 697.
[312] Andrew Bainham, 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in Andrew Bainham, Shelley Day Sclater, and Martin Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing 1999) 29.
[313] ibid, 27.
[314] NV Lowe, 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' [1997] International Journal of Law Policy and Family, 195.
[315] Scottish Law Commission, Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property (Discussion Paper No. 88, October 1990) 5.

While parenthood is restricted to those the law views as the legal parents of the child, parental responsibilities and rights can be held by legal parents as well as third parties who are not the legal parents of the child. This is also reflected in the law on guardianship which allows persons who are not the legal parents of the child to be appointed as guardians of the child and take legal decisions in relation to the child and their property.[316] Parental responsibilities are thus distinct from legal parenthood - while they confer responsibilities and rights on third parties who are not parents, they do not create the legal status of parenthood for such third parties.[317]

IV. Who holds Parental Responsibilities and Rights

Originally under common law, only the father held parental rights with respect to the child. This continues to be the case under Indian law wherein the father is the guardian and has rights over the child, and the mother is the custodian of minor children. The Hindu Minority and Guardianship Act, 1956 ('HMGA'), which is the codified personal law for Hindus, mandates that the natural guardians for the Hindu minor, in the case of a boy or an unmarried girl, is the father, and "after him", the mother.[318] Section 6(a), which makes this stipulation, also provides that the custody of a minor below the age of five years shall be with the mother. It is worth mentioning that section 6(a) of the HMGA was challenged before the Supreme Court in *Githa Hariharan v Reserve Bank of India*,[319] ('*Githa Hariharan*') for being violative of Articles 14 and 15 of the Constitution. This challenge was on the ground that the mother of the minor was relegated to an inferior position on the ground of sex, and her right to natural guardianship could come alive only "after" the father (presumably after his lifetime). The Supreme Court did not strike down section 6(a), and held that the word "after" need not necessarily mean "after the lifetime", but instead "in the absence of".[320] This could cover instances where the father is wholly indifferent to the matters of the minor or is physically incapable of taking care of the minor.[321] While the ruling in *Githa Hariharan* could be considered encouraging, it remains open to criticisms. The most obvious one is that the judgment comes into effect only when the father either abdicates his responsibility towards the child, or agrees to elevate the mother to the status of the natural guardian.[322] In keenly contested custody battles, the judgment has been said to not be very useful.[323] While the mother is not the guardian of children born within wedlock, under the HGMA the mother is the only legal guardian of children born out of wedlock.[324] Further, the HGMA deems children born outside of wedlock to be illegitimate and discriminates against them by denying them certain rights vis-a-vis the father.

Muslim law on guardianship is uncodified and varies among different schools of Muslim personal law. A common principle, however, amongst the different schools is that the mother has custody (*hizanat)* of the minor up to a certain age, and the father has the guardianship of the minor *(wilayat*).[325] Thus, while fathers have the legal authority to make decisions in relation to the child, mothers are considered the caretakers of the minor child. Under Muslim law, the age of majority is calculated based on attainment of puberty, and while this age varies across different schools, the principles on guardianship and custody remain the same.[326]

[316] The Guardian and Wards Act, 1860, ss. 8, 9.
[317] Anna Sophia Lou, 'Acquisition of Parental Responsibilities and Rights', University of Pretoria (2009) 36 <https://repository.up.ac.za/handle/2263/27861> accessed 22 May 2023.
[318] HMGA, s 6(a).
[319] (1999) 2 SCC 228.
[320] (1999) 2 SCC 228, para 10.
[321] (1999) 2 SCC 228, para 10.
[322] Flavia Agnes, *Family Law: Marriage, Divorce, and Matrimonial Litigation* (OUP 2011) 252.
[323] ibid.
[324] HMGA, 1956, s 6(b).
[325] Dinshaw Fardunji Mulla, *Mulla Principles of Mahomedan Law*, (LexisNexis, 2020) 485.
[326] Law Commission, 'Consultation Paper: Family Law Reforms', 2018, 77.

Unlike Hindus and Muslims, Christians and Parsis are not governed by any specific personal laws when it comes to guardianship of a minor. While provisions in relation to custody of children are found in the Indian Divorce Act, 1949 for Christians, and the Parsi Marriage and Divorce Act, 1936 for Parsis, they are invoked only in the event of legal separation of the parents of the child.[327] As far as guardianship is concerned, Christians and Parsis are governed by the secular Guardians and Wards Act, 1890 ('GWA') which, up till 2010, gave preferential treatment to fathers in matters of guardianship over mothers.

Noting the unequal status of mothers and fathers under guardianship laws, the Law Commission in a Consultation Paper on 'Reform of Family Laws' had recommended that guardianship laws must treat both parents on an equal footing.[328] Similarly, in its report on 'Reforms in Guardianship and Custody Laws in India', the Law Commission had recommended that preferential treatment given to fathers on the basis of gender stereotypes must be curbed, and noted that '*(the) superiority of one parent over the other should be removed, and that both the mother and the father should be regarded, simultaneously, as the natural guardians of a minor.*'[329] However, these recommendations have largely remained unimplemented.

As outlined, the GWA, which is also the law on the procedure for appointment of guardians by the court, gave preferential treatment to the father (over the mother). Under this Act, the court could not appoint a guardian of a minor (other than a married female), if the minor's father was living and fit to be the guardian.[330] This position was altered by an amendment in 2010 by which the mother has also been included as the natural guardian of the child, along with the father.[331] Following this amendment, the court is prevented from appointing a guardian for a minor when their mother is alive, thus removing the preferential position of the father. Further, under the GWA, a person other than the parent of the child can be appointed as the guardian of the child subject to a judicial order to this effect.[332]

The recommended draft law shifts away from the present laws on parent-child relations in the following ways –

(a) It recognises parents as equal holders of parental responsibilities and rights;
(b) It abolishes the concept of 'illegitimate child/children';
(c) It recognises that third persons, who are not the legal parents or members of the natal family of the child, may hold parental responsibilities and rights without the necessity of a court order.

This approach makes space for autonomy of individuals and extends legal recognition to a diversity of caretaking arrangements.

Here, it is critical to articulate the distinction between legal parents of a child ('parenthood/parentage') and third parties who have parental responsibilities and rights in relation to a child. While a third party holder of parental responsibilities is authorised by law to exercise parental rights vis-a-vis the child, the legal effects which are peculiar to parenthood (such as legal relationships with the family of the legal parent, right to maintenance and right to inheritance) will not pass onto such third parties.[333] As pointed out by scholars on this subject, there is a need to separate the legal consequences of being a parent from those which derive from having parental responsibility.[334] Thus, where a third party has parental responsibilities, they will have the legal right to look after the child, and to take all day-to-day as well as important decisions about upbringing which a parent could take. However, they will not be conferred

[327] Indian Divorce Act, 1869, s 42, 43 and 44; Parsi Marriage and Divorce Act, 1936, s 49.
[328] Law Commission, 'Consultation Paper: Family Law Reforms', 2018, 70.
[329] Law Commission, 'Reforms in Guardianship and Custody Laws in India', 2015, Para 2.3.8.
[330] The Guardians and Wards Act 1890, s 19(b) [unamended].
[331] Personal Laws (Amendment) Act 2010, ch II.
[332] The Guardians and Wards Act 1890, ss. 8, 9.
[333] Andrew Bainham, 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in Andrew Bainham, Shelley Day Sclater, and Martin Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing 1999) 33.
[334] ibid 32.

the wider legal status of being a parent.[335] Consequently, the child will not have a claim in the share of the property of such a third party or a statutory right to claim maintenance.

Objective:
To prescribe a progressive and inclusive draft law on parenthood and parental responsibilities and rights.

Context:
As outlined above.

Proposed Step:
A draft law on parenthood, and parental responsibilities and rights which codifies substantive law with respect to: a) who is a legal parent, b) what are parental responsibilities and rights, c) who holds parental responsibilities and rights, d) conditions for acquisition and termination of parental responsibilities and rights, and e) allied issues. This draft only prescribes substantive law and does not deal with procedural stipulations. Some recommendations for procedure are included but largely, procedure has either not been codified comprehensively or has been left to delegated legislation at this point.

The draft law on parenthood and parental responsibilities and rights seeks to achieve the following –

a) Expand legal parenthood to include: non-marital parents, queer parents and single parents, and provide for legal recognition of social parents, who may not have a biological connection with the child or a marital relationship with the legal parent, subject to certain conditions.
b) Codify the common law shift from 'parental authority' to 'parental responsibilities and rights'.
c) Provide for a progressive framework on parent-child relations that does not follow the discriminatory principles governing guardianship and custody.
d) Abolish the principle of the father being the natural and sole guardian of the child, and ensure equal status of all parents.
e) Abolish the principle of the husband being the guardian of a minor wife.
f) Abolish the concept of 'illegitimate child' and ensure that children are not discriminated against on the basis of their parents' relationship.
g) Recognise the diversity of caretaking arrangements wherein persons who are not the parents or members of the natal family of the child can also be holders of parental responsibilities and rights.
h) Provide enabling provisions for parental agreements and parenting plans.
i) Codify the duty of the Court when adjudicating matters concerning parent-child relations.

30. Definitions for this Chapter.–
In this Chapter, unless the context requires otherwise -

(a) **'Adjudicated parent'** is a person who has been adjudicated to be a parent of a child by a court of competent jurisdiction;

(b) **'Birth parent'** means a person who, irrespective of gender identity, conceives, carries and gives birth to the child but does not include a person who –
  (i) is a surrogate person under the Surrogacy (Regulation) Act, 2021.
  (ii) has surrendered their child and such child has been declared legally free for adoption under the Juvenile Justice (Care and Protection of Children) Act, 2015;

[335] Andrew Bainham, 'Parentage, Parenthood and Parental Responsibility: Subtle, Elusive Yet Important Distinctions' in Andrew Bainham, Shelley Day Sclater, and Martin Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing 1999) 27.

(c) **"Birth register"** means the register of births under the Registration of Births and Deaths Act, 1969;

(d) **"Care"**[336] of the child includes –

(i) Within the capacity of the parents, providing the child with:

1. a suitable place to live;
2. necessary financial support;

(ii) Safeguarding and promoting the material well-being of the child;

(iii) Safeguarding and promoting the emotional and psychological well-being of the child;

(iv) Ensuring optimal growth and development of the personality of the child;

(v) Securing the child's education and upbringing, including religious and cultural education and upbringing in a manner appropriate to the child's age and level of maturity;

(vi) Maintaining a cordial atmosphere at the child's place of residence;

(vii) Maintaining contact with the child;

(viii) Mitigating the suffering, hardship and psychological trauma to the child caused by separation of their parents or primary caregivers;

(ix) Protecting the child from abuse, neglect, discrimination, violence, exploitation and any other physical or emotional harms;

(x) Preserving and nurturing the overall physical and mental health of the child, and providing for necessary medical treatment in the event of illness;

(xi) Providing for any special needs that the child may have;

(xii) Ensuring that the best interests of the child are always considered in all matters affecting them;

(e) **"Contact"**, in relation to a child, means

(i) maintaining a personal relationship with the child;

(ii) if the child does not reside with the parent, then –

(1) communicating, on a regular basis, with the child in-person by visiting or being visited by the child, or

(2) communicating, on a regular basis, with the child in any other manner, including:

a) through written correspondence; or

b) via phone calls or any other form of electronic communication;[337]

(f) **"Court"** means, in any area for which there is a city civil court, that court, and in any other area, the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government by notification in the Official Gazette as having jurisdiction in respect of the matters dealt with in this Chapter;

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[336] Presently, courts have been exercising wide discretion in determining what constitutes the "care" of a child, and how the welfare and best interests of the child can be ensured. A clear definition eludes the concept of "welfare of the child". This provision on care codifies certain principles which can be culled out from the body of case law concerning the "welfare of the child" principle. In codifying these principles, the provision draws from existing judicial discourse on this subject, and attempts to bring some semblance of determinacy to the welfare and care of a child. This could ensure that courts have a set of indicative factors to rely on while deciding questions concerning a child's welfare when guardianship and/or custody is disputed. Simultaneously, this provision also grants discretion to courts to account for additional factors as well as to modify these factors in a way best suited to the specific facts of a case. This provision will also codify Article 3(1) of the United Nations Convention on the Rights of the Child, 1989 which requires courts of law (besides all other public authorities) to primarily consider the "best interests" of the child in all actions concerning children. It also draws from the definition of "care" under the South African Children's Act, 2005.

[337] In recent times, "contact" has been construed liberally to also include parents establishing contact with the child via video calling services. *See*, *Yashita Sahu v State of Rajasthan* (2020) 3 SCC 67.

(g) **"Guardian"**[338] means a person having the care of the person of a minor or of their property or of both their person and property and includes:
   (i) The parents of the child;
   (ii) A guardian appointed by will by the parent of the child as per section 50 of this Chapter;
   (iii) A guardian appointed by the Court under the Guardians and Wards Act, 1890;
   (iv) A person empowered to act as such by or under any enactment relating to any Court of Wards;

(h) **"Minor"** means a person who has not attained the age of majority as per section 3 of the Majority Act, 1875;

(i) **"Parent"** means a person who has established a parent-child relationship as per section 31 of this Chapter;

(j) **"Parentage"** means the legal relationship between a child and a parent of the child;

(k) **"Parental Responsibilities and Rights Agreement"** means an agreement as per section 37 of this Chapter;

(l) **"Parenting Plan"** means the plan under section 42 of this Chapter;

(m) **"Parenting Responsibilities and Rights"** in relation to a child mean the responsibilities and rights referred to in section 34 of this Chapter;

(n) **"Presumed Parent**" is a person who is presumed to be the parent of the child as per section 46 of this Chapter;

(o) **"Registering Officer"** means the authority as defined in section 3(f) of Chapter I;

(p) **"Stable union'"** means a stable union as defined in section 24 of Chapter I;

(q) **"Single parent"**[339] means a parent who is the only legal parent of the child or is the only parent exercising parental responsibilities and rights in relation to the child for any reason, which includes –
   (i) death of the other parent;
   (ii) desertion by the other parent;
   (iii) demonstration of lack of interest in the affairs of the child by the other parent;
   (iv) termination of parental responsibilities and rights of the other parent under section 41 of this Chapter;

   Explanation: For the purpose of this subsection, 'desertion' means desertion as defined in Explanation 1 of section 12(1) of Chapter I;

(r) **"Third party"** includes a person who is not the legal parent of the child or a member of a natal

[338] Definition of 'guardian'' as contained in the Guardians and Wards Act, 1857. All classes of guardians including guardians under the Court of Wards Act, 1977 are included.
[339] The parental responsibilities and rights framework permits single parents to, via a parental agreement, share parental responsibilities and rights with a third party. A single parent has been defined in a broad and inclusive fashion and includes cases where the other parent is present but does not show interest in the affairs of the child (See *Jijabai Vithalrao Gajre v Pathankhan and Ors.* (1970) 2 SCC 717, at para 12. and *ABC v NCT of Delhi* (2015) 10 SCC 1).

family of the child.

Issue: Who is a parent?

Objective:
To recognise a right to parenthood for all parents independent of gender identity, sexual orientation, marital status and/or a biological/genetic connection with the child.

Context:
As discussed above, laws on parent-child relations continue to deem biological connection and/or the marital bond as key to establishing parentage. They extend parenthood to largely those who operate within the heterosexual marital paradigm. Such an approach leaves out several classes of parents from the ambit of legal recognition and protection.

Proposed Step:
A provision which clarifies the conditions that lead to the establishment of a parent-child relationship, and extends the right to parenthood to a diversity of parents independent of gender identity, sexual orientation, marital status of parents and a biological/genetic connection with the child.

While biological connection and marriage is recognised as one basis of legal parenthood, law must also acknowledge those social dimensions where the intention to parent is a key/decisive factor to recognise parenthood. Laws on adoption, surrogacy and ART recognise social parenthood, but do not provide recognition to nonmarital parents.[340] Comparative case law[341] also demonstrates the challenges queer persons have experienced in case they do not have a genetic or biological connection with the child or are not married to the legal parent of the child. Tethering parenthood to biological connection excludes same-sex/same-gender couples as not all parents in such partnerships have biological or genetic ties with the child. Similarly, centering marriage as the basis of joint parenthood leaves out non-marital parents. Consequently, extending legal protection to such parents, irrespective of whether they have a biological or genetic connection with the child or are married to the legal parent of the child, is critical.

In order to address the challenges arising from absence of biological ties with the child or a marital relationship with the legal parent, courts around the world have applied the doctrine of 'intentional and functional parenthood'.[342] This has been done to *first*, legalise parentage by queer partners who do not have a genetic link with the child, and *secondly*, to determine parentage in cases where persons rely on

[340] Under the Juvenile Justice (Care and Protection of Children) Act, 2015, the Surrogacy Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021, certain single parents can acquire parenthood. However, the law is unclear on how a second party can acquire parenthood in relation to such a child when the adoption or parentage order under the above listed laws are issued only in favour of the single parent and not the second party who wants to claim parentage in relation to such child. Two potential routes exist for the second party to acquire parentage in relation to such a child. First, through second party adoption (see chapter on adoption laws) and second, on the basis of the common law principle of intention to parent and performance of parental responsibilities towards the child as the decisive factor in determining legal guardianship of the child. The recommended provision on establishment of parent-child relations codifies another route through which parentage can be acquired by such potential parents by centering parental autonomy and minimising the role of the State/Courts. It does so by providing for a clause on 'acknowledgement of parentage' and by expanding the presumption of parentage to cover 'holding out'.
[341] Dougal Nejaime, 'The Nature of Parenthood', The Yale Law Journal, 2017.
[342] The doctrine of intentional and functional parenthood has been used by American Courts to determine who the legal parent of the child is by treating intention to parent and performance of parental responsibilities in relation to the child as the decisive factor on the basis of which parentage is determined in cases involving non-traditional parents. This ensures that persons who have played a role in parenting the child are not rendered legal strangers to the children they have helped raise or create. *See* Melanie B. Jacobs, 'Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognise Multiple Parents', 9 Journal of Law and Family Studies 309-339, 309 (2007).

ART to become parents.[343] Social parenthood is reflected in adoption laws, and Indian common law where intent to parent and performance of parental responsibilities towards the child has been the decisive factor in determining the legal guardian of the child.[344] Recognising the social dimensions of parenthood, wherein the intention to parent determines who the legal parent is, will significantly benefit queer parents, parents who do not have a biological or genetic link with the child, or those who are not married to the legal parent of the child.

In addition to articulating existing law on establishment of parent-child relations (*see*, clauses (a) to (d)), the proposed provision expands parenthood by using gender neutral language and by explicitly codifying intention to parent as the basis on which parenthood may be recognised. It does so by

a) providing a provision for voluntary acknowledgement of parentage, and
b) expanding the presumption of parentage to include queer parents, non-marital parents as well as persons who hold themselves out as the parent of the child and perform parental responsibilities in relation to the child.[345]

31. Establishment of Parent-Child Relationship.–

(1) A parent child relationship is established between a person and a child if –

(i) The person is the birth parent of the child;

(ii) The person has legally adopted the child as per the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015 or the Hindu Adoption and Maintenance Act, 1956;

(iii) The person is the parent of the child under section 31(1) of the Assisted Reproductive Technology (Regulation) Act, 2021;

(iv) A parentage order has been passed in favour of such a person under section 4(iii)(a)(II) of the Surrogacy (Regulation) Act, 2021;

(v) There is a presumption of parentage in favour of a person under section 46 of this Chapter unless such presumption has been successfully rebutted;

(vi) The person has successfully executed an acknowledgement of parentage in relation to the child as per section 33 of this Chapter.

(2) A person under sub-section (1) is the legal parent of the child and will have all rights, duties and obligations of a parent.

Issue: What is acknowledgement of parentage?

Objective:

To enable persons to acknowledge their parentage in relation to the child and establish a parent-child relationship with such child.

Context:

As marriage continues to be treated as key to joint legal parenthood, parents who are not in a marital relationship and persons who are in a relationship with a single parent may find it challenging to establish a legal relationship with the child despite their intention to parent. It is thus critical to provide for an enabling provision that allows such parents to acknowledge parentage in relation to the child and acquire legal parenthood.

[343] Melanie B. Jacobs, 'Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognise Multiple Parents', Journal of Law and Family Studies (2007) 309-339, 310.
[344] *Mohd Arman v Union of India*, LPA No. 249 of 2016, decided on January 23, 2017 (P&H); *Mohit v Union of India*, 2016 SCC OnLine P&H 10157.
[345] See section 46 of the Code.

Presently, both Muslim personal law as well as common law demonstrates that an intention to parent plays a critical role in determining the legal parent of the child. Under Muslim law, when the paternity of a child cannot be proved by establishing a marriage between the parents of the child, acknowledgement of the child by the father is the method through which marriage as well as legitimacy of the child can be established.[346] Such an acknowledgement can be explicit or implied, and may be presumed from the fact that the father was habitually residing with the child and was treating the child as his legitimate child.[347] In *Mohd Arman v Union of India*,[348] while holding that the step-father was the legal guardian of the child, the Supreme Court noted that it is the intention to parent the child which determines who the legal guardian of the child is as opposed to a biological relationship with the child or a Court order appointing such person as a guardian.

Drawing from the above, a provision for acknowledging parentage has been provided in this draft law. This provision benefits nonmarital parents as well as persons who may want to take on the role of a legal parent of the child by providing for establishment of a parent-child relationship on the basis of the intention to parent. In the USA, where almost all states have a provision on acknowledgement of parentage, such voluntary acknowledgements have become the most common way to establish parentage in relation to children born outside of marriage.[349]

Proposed Step:
A provision which enables a person to acknowledge parentage in relation to the child to establish a parent-child relationship.

32. Acknowledgement of Parentage –

(1) A person can acknowledge parentage in relation to the child by –
  (a) getting named as the parent of the child in the register of births, jointly with the legal parent of the child at the time of the birth, or subsequently with the consent of the legal parent of the child; or
  (b) executing an acknowledgement deed in relation to the child under section 33 of this Chapter with the consent of the legal parent of the child.

(2) A person can acknowledge parentage in relation to the child only if such child does not have a presumed, acknowledged or adjudicated parent other than the legal parent of the child and the person seeking to establish a relationship with the child through acknowledgement in relation to the child.

33. Registration of Acknowledgement Deed –

(1) A person who acknowledges parentage in relation to the child under section 32(b) of this Chapter must execute an acknowledgement deed with the consent of the legal parent of the child.

(2) An acknowledgement deed must be –
  (a) in accordance with the format prescribed in Schedule xx of this Chapter; and
  (b) registered with the registering officer as per the procedure prescribed.

(3) An acknowledgement of parentage is void if at the time of registering the acknowledgement deed, a person other than the legal parent of the child and the person seeking to establish parentage is a presumed, acknowledged or adjudicated parent.

[346] Dinshah Fardunji Mulla, *Mulla Principles of Mahomedan Law*, (LexisNexis, 2020), 476.
[347] ibid, 477.
[348] LPA No. 249 of 2016, decided on January 23, 2017 (P&H).
[349] Leslie Joan Harris, Voluntary Acknowledgments of Parentage for Same-Sex Couples, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 469-70 (2012).

(4) A successful execution of an acknowledgement of parentage in relation to the child confers on the acknowledged parent all the rights, duties and obligations of a legal parent in relation to such child.

Issue: What are parental responsibilities and rights?

Context:
There can be two distinct approaches to drafting a 'parental responsibilities and rights' clause. In the United Kingdom ('UK') and Scotland, parental responsibilities[350] and parental rights[351] are defined in different provisions. In South Africa, 'parental responsibilities and rights' are articulated in a single provision.[352] We follow the latter formulation to emphasise the fact that parental rights exist for the purpose of performing parental responsibilities and are not independent of it. This aligns with the common law shift from the concept of parental authority to parental responsibilities, and also ensures that the law is 'child-centric', accounting for their best interests.

Proposed Step:
The provision on 'parental responsibilities and rights' combines the approach of laws in the UK, Australia and South Africa. In the UK and Australia, parental responsibilities and rights are defined broadly to include 'any power, right, duty and responsibility' that a parent has by law, in relation to the child. South Africa, on the other hand, articulates the components of parental responsibilities and rights. The UK/Australia approach has been critiqued for its indeterminacy[353] but at the same time provides for a non-exhaustive approach to ascertaining what parental responsibilities and rights are. We combine the open-ended definition in UK/Scotland/Australia with an indicative (and inclusive) list of components of parental responsibilities and rights, as is the case in South Africa. In its current formulation, this provision consciously does not use the term "custody", and adopts the formulation of "contact" and "care". The distinction between guardianship and custody makes sense in the context of a regime with gendered powers and responsibilities, as is the case under present laws which recognise fathers as guardians and mothers as custodians. Since the unequal position of parents has been abolished, 'custody' stands replaced with 'contact' and 'care' under the proposed draft law.

[350] *See* UK Children Act 1989, s 2; Children (Scotland) Act 1995, s 2.
[351] *See* UK Children Act 1989, s 3; Children (Scotland) Act 1995, s 1.
[352] South Africa Children's Act 2005, s 18.
[353] NV Lowe, 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' [1997] International Journal of Law Policy and Family 195.

34. Parental Responsibilities and Rights –

(1) Parental responsibilities and rights mean all the rights, duties, powers, authority and responsibilities which, by law, a parent has in relation to their child and the child's property, and includes –
(i) acting as the guardian of the child;
(ii) ensuring contact with the child;
(iii) caring for the child; or,
(iv) contributing to the maintenance of the child.

(2) More than one person can hold parental responsibilities and rights in relation to a child.

Issue: Who has parental responsibilities and rights?

Context:
Two major trends have been witnessed in laws on allocation of parental responsibilities and rights. In Australia,[354] all parents automatically acquire parental responsibilities and rights. In the UK,[355] Scotland,[356] and South Africa,[357] mothers and married fathers have parental responsibilities and rights, whereas unmarried fathers do not automatically acquire them. Mothers and unmarried fathers are treated differently in the UK and Scotland to account for situations where single mothers may not want the father involved in their life or may want to conceal their identity.[358] Similarly in South Africa, despite submissions to the Law Commission that parental responsibilities and rights must vest in both parents irrespective of the nature of their relationship, automatic vesting of such rights in unmarried fathers was opposed,[359] with this position being eventually reflected in the law.

Consequently, unmarried fathers only have parental responsibilities and rights if they are deemed 'meritorious' in the eyes of the law by demonstrating intention to be a parent to the child.[360] This also aligns with how the law views parenthood in India wherein motherhood is assumed to be biological whereas fatherhood is assumed to be social.[361] Additionally, perhaps the biggest challenge with automatic grant of parental responsibilities and rights to unmarried fathers lies in the issue of identification. It has been argued that while all married fathers appear on the birth certificate of the child, the same may not be the case with unmarried fathers. Consequently, to grant automatic rights to fathers without any form of identification may be impracticable.[362]

We believe that all parents must automatically acquire parental responsibilities and rights irrespective of gender and marital status. Denying unmarried fathers parental responsibilities and rights is informed by sex-stereotyping[363] that assumes that mothers are caretakers while an unmarried father can only

[354] Australia Children's and Young People Act 2008, s 16, Division 1.2.3.
[355] UK Children's Act, 1989, s 4.
[356] Children (Scotland) Act 1995, ss 4 and 4A.
[357] South Africa Children's Act 2005, ss 19, 20 and 21.
[358] NV Lowe, 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' [1997] International Journal of Law Policy and Family 198, 199.
[359] South African Law Commission, Review of the Child Care Act (Project 110, December 2002) 70.
[360] NV Lowe, 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' [1997] International Journal of Law Policy and Family 198.
[361] Saptarshi Mandal, 'Biology, Intention, Labour: Understanding Legal Recognition of Single Motherhood in India' (2019)15 Socio-Legal Rev 131.
[362] Ros Pickford, 'Unmarried Fathers and the Law' in Andrew Bainham, Shelley Day Sclater, and Martin Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing 1999, 154.
[363] *Navtej Johar v Union of India* (2018) 10 SCC 1, para 393 (Chandrachud, J.)

exercise parental responsibilities if he is a 'meritorious father'. In fact, a minor empirical study[364] carried out in the UK demonstrates that most unmarried fathers did not agree with the law denying them automatic parental responsibilities and rights.[365] Further, a consultation paper issued by the UK Lord Chancellor's Department in 1998 went on to show that almost all unmarried fathers were dissatisfied with the law denying them automatic parental responsibilities and rights.[366] It has also been argued that such distinction between married and unmarried fathers is not in the 'best interests of the child', which concept serves as the underlying thrust for a parental responsibilities framework.[367] An approach that does not differentiate between mothers and fathers on the basis of gender and their marital relationship also ensures that the law on parent-child relations is inclusive of queer parents and parents in non-marital relationships as it treats them with parity. Consequently, under this regime, all parents automatically acquire parental responsibilities and rights.

However, it is acknowledged that there may be legitimate concerns with automatic vesting of parental responsibilities and rights in unmarried fathers, especially in cases where the mother is not willing to involve the father in her or the child's life. A study of Indian case law reveals multiple instances wherein unmarried/single mothers went on to successfully challenge practices which required them to identify and name the father in identity documents.[368] Further, the Supreme Court has ruled that children born out of relationships in the nature of marriage are the legitimate children of such parents, thus recognising certain unmarried fathers as legal parents and extending protections to such children.[369] However, despite this concern, a gender neutral approach to parental responsibilities and rights protects the rights of all parents independent of gender identity, sexual orientation and marital status. It ensures parity amongst parents, besides also doing away with sex stereotyping and the centrality of marriage in determining who has parental responsibilities and rights.

Proposed Step:
The draft law provides that all parents have parental responsibilities and rights in relation to the child. Such an approach treats all parents equally irrespective of gender identity, sexual orientation and marital status. Article 18 of the United Nations Convention on the Rights of the Child, 1990, which India has ratified, also imposes an obligation on the State to "*use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child*."[370] The proposed provision also reflects this principle.

In case of parents who are minors, the South African[371] approach has been followed, where guardians of the biological mother have parental responsibilities and rights till she acquires age of majority. The proposed provision has been modified to recognise guardians of both minor parents as holding responsibilities vis-a-vis the child. This is because under our recommended regime both parents, irrespective of gender or marital status, automatically acquire parental responsibilities and rights.

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[364] Ros Pickford, 'Unmarried Fathers and the Law' in Andrew Bainham, Shelley Day Sclater, and Martin Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing 1999. (This study was carried out by Pickford in 1999 and a total of 154 responses were received).
[365] Ros Pickford, 'Unmarried Fathers and the Law' in Andrew Bainham, Shelley Day Sclater, and Martin Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing 1999, 145.
[366] ibid 153.
[367] ibid 158.
[368] *ABC v State NCT of Delhi* (2015) 10 SCC 1, *XXX v State of Kerala*, High Court of Kerala at Ernakulam, WP(C) NO. 13622 OF 2021; *Shalu Nigam v The Regional Passport Officer*, 2016 SCC OnLine Del 3023; *Prerna Katia v Regional Passport Office And Anr.*, [2016 SCC OnLine P&H 14187]; *Smita Maan & Anr. v Regional Passport Officer*, W.P.(C) 1408/2023 & CM APPL. 5246/2023, High Court of Delhi at New Delhi.
[369] *Tulsa & Ors v Durghatiya & Ors.* (2008) 4 SCC 520; *Bharatha Matha & Anr. v R Vijaya Renganathan & Ors.* AIR 2010 SC 2685.
[370] United Nation Convention on the Rights of the Child, art 18 <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> accessed 28 May 2023.
[371] South Africa Children's Act, 2005, s 19(2).

35. Parental Responsibilities and Rights of Parents.–
Each parent of a child has parental responsibilities and rights in relation to the child.

36. Parental Responsibilities and Rights when Parent is Minor.–

(a) If one of the parents of the child is a minor –
  (i) the parent who is of age of majority will have parental responsibilities and rights in relation to such a child;
  (ii) as soon as the minor parent acquires age of majority, both parents will have parental responsibilities and rights in relation to the child.

(b) If both parents of the child are minors –
  (i) the guardians of the minor parents will have parental responsibilities and rights in relation to the child;
  (ii) the guardians of the minor parents will cease to have parental responsibilities and rights in relation to the child as soon as one of the parents of the child acquires age of majority.

Explanation **–** For the purposes of this section, age of majority has the same meaning as under section 3 of the Majority Act, 1875.

Issue: What is a Parental Responsibilities and Rights Agreement ('Parental Agreement')?

Context:
A parental agreement is an agreement through which the legal parent of a child or a person who has parental responsibilities in relation to the child can share parental responsibilities and rights with a third party. There are two distinct approaches towards parental agreements:

(a) In the UK, the legal parent can only enter into a parental agreement with the unmarried father of the child,[372] or with the step-parent subject to the consent of the other parent.[373] Third parties, other than step-parents, cannot acquire parental responsibilities and rights via a parental agreement.
(b) In South Africa, a person with parental responsibilities and rights can enter into a parental agreement with any third party who has an interest in the "*care, well-being and development of the child*".[374] Thus, any person can acquire parental responsibilities and rights via a parental agreement, subject to certain conditions.

Under Indian law, the GWA permits third parties who are not the legal parents or members of the natal family of the child to apply to become the guardian of a child.[375] Indian case law has also noted that when it comes to determining who the legal guardian of a child is, the intention to parent is critical, as opposed to mere biological link with the child or a court order appointing a person as the guardian of the child.[376] Consequently, third parties who do not have a legal or familial relationship with the child can act as guardians of the child. A parental agreement which enables a person who has parental

[372] UK Children Act, 1989, s 4.
[373] UK Children Act, 1989, s 4A.
[374] South Africa Children's Act 2005, s 22.
[375] Guardians and Wards Act, 1890, s 7, 8 (*See*, *Budhulal Shankarlal v An Infant-Child* AIR 1971 MP 235 where custody of the minor was given to foster parents as opposed to the legal parents of the child; *Nil Ratan Kundu v Abhijit Kundu*, (2008) 9 SCC 413 where the Court stated that the best interests of the child must be considered in custody decisions; *Shakuntala T. Sonawane v Narendra A. Khaire*, (2003) 3 Mah LJ 484 where the Court noted, '*It is also well settled that even if a natural guardian is alive and stakes his/her claim, but the Court can still proceed to appoint some other fit person as the guardian under the provisions of the Act. That needs to be done having regard to the welfare of the minor.*'; *Athar Hussain v Syed Siraj Ahmed* (2010) 2 SCC 654 where the Court stated that guardianship decisions must be informed by the best interests of the child).
[376] *Mohd Arman v Union of India* LPA No. 249 of 2016, decided on January 23, 2017 (P&H); *Mohit v Union of India*, 2016 SCC OnLine P&H 10157.

responsibilities and rights in relation to the child to share the same with a third party provides for two benefits. *First*, it centres the autonomy of the person who has parental responsibilities when it comes to deciding who they want to share responsibilities with. *Secondly*, it allows for a flexible mechanism to share parental responsibilities without the necessity of adjudication and an order of a court.

India is home to a diversity of parental caretaking arrangements involving persons who are not the legal parents of a child. For instance, in her work on motherhood, Amrita Nandy (2017)[377] has thrown light on non-traditional parent-child relations in India where queer and lesbian women, single mothers and friends raise children together thus demonstrating the existence of non-traditional parenting arrangements. Further, the model of family which is limited to kinship and marriage has also been critiqued for its myopic view of what a family constitutes and for discriminating against non-marital and non-heterosexual intimacies.[378]

Family law can play a critical role in enhancing individual autonomy by providing for an enabling framework for intimacies beyond the natal and marital. A progressive law on parent-child relations can aid in this by providing for an enabling provision that allows persons who have parental responsibilities and rights to legally share such responsibilities with persons of their choice via an agreement. Granting legal recognition to third parties who are carrying out parental responsibilities does not disturb parenthood, as legal parents continue to be the parents of the child. Such recognition allows for parental responsibilities to be shared amongst multiple parties who engage in caretaking and upbringing of the child.

Proposed Step:
An enabling provision that permits persons who hold parental responsibilities and rights to be able to enter into parental agreements with third parties, independent of the nature of the relationship between them.[379] The objective of such an enabling provision is to ensure that third parties have legal rights vis-a-vis the child so that they can effectively carry out parental responsibilities. There are three cases where parental responsibilities and rights can be shared via an agreement under this proposed law -

(1) In case of single parents or a person who is the sole holder of parental responsibilities and rights, parental agreements can be used to share responsibilities with a third party. A single parent has been defined broadly under section 30(q)[380] to include cases where the second legal parent does not perform their parental responsibilities towards the child.
(2) In case of two legal parents, a parent may enter into a parental responsibilities and rights agreement with a third party with the consent of the other parent.[381]
(3) Finally, when a court directs that parties enter into a parental responsibilities and rights agreement.

While the South African model only permits vesting of legal guardianship through a court order,[382] and not via a parental agreement, Indian case law has recognised the intent to parent as critical in determining who is the legal guardian of the child independent of a Court order to this effect.[383] This

[377] Amrita Nandy, *Motherhood and Choice: Uncommon Mothers, Child Free Women* (Zubaan, 2017).
[378] Arijeet Ghosh and Diksha Sanyal, 'How can families be imagined beyond kinship and marriage?'(2019) 5(45) EPW Engage, Vol. 54 <https://www.epw.in/engage/article/how-can-families-be-imagined-beyond-kinship-and-marriage> accessed 23 May 2023.
[379] Such a model also enables the legal parent to legally share parenting responsibilities with persons of their choice thus centering parental autonomy.
[380] A single parent includes a parent who is the only legal parent of the child or is the only parent exercising parental responsibilities and rights in relation to the child for any reason whatsoever which includes: death of the other parent; desertion by the other parent; lack of interest in the affairs of the child by the other parent, or termination or revocation of parental responsibilities and rights of the other parent.
[381] UK Children Act, 1989, s 4A.
[382] South Africa Children's Act 2005, s 24.
[383] *Mohd Arman v Union of India* LPA No. 249 of 2016, decided on January 23, 2017 (P&H); *Mohit v Union of India* 2016 SCC OnLine P&H 10157.

common law position is reflected in the provision under which a parental agreement can also be the basis on which guardianship vis-a-vis the child is shared with a third party. This approach makes the process of sharing parental responsibilities and rights via a parental agreement less onerous, by eliminating the requirement of a court order if certain conditions are satisfied.

37. Parental Responsibilities and Rights Agreement –

(1) A single parent or a sole person who has parental responsibilities and rights may enter into a parental responsibilities and rights agreement with a third party who has an interest in the care, well-being and development of the child.

(2) A parent who has parental responsibilities and rights may, with the consent of the other parent who has parental responsibilities and rights, enter into a parental responsibilities and rights agreement with a third party who has an interest in the care, well-being and development of the child.

(3) A person can enter into a parental responsibilities and rights agreement with respect to only those components of parental responsibilities and rights that they hold at the time of entering into the agreement.

(4) The court may direct persons to enter into a parental responsibilities and rights agreement in the best interests of the child.

(5) A parental responsibilities and rights agreement must be –
(i) in the format prescribed in Schedule xx of this Chapter; and
(ii) registered with either the registering officer in accordance with the procedure prescribed or
(iii) made under an order of the court if such agreement has been entered into in accordance with sub-section (4) of this section.

(6) A person whose parental responsibilities and rights have been suspended, terminated, modified or restricted by an order of the court cannot acquire such parental responsibilities and rights through an agreement under this section.

Issue: How can a parental agreement be terminated or modified?

Proposed Step:

The provision on termination or modification of a parental agreement provides for the procedure by which such agreements can be modified or terminated. Key aspects of this provision include:

(a) Parental agreements can be terminated unilaterally by either party to such agreement.

(b) Parental agreements can be modified by a joint application by both parties to such an agreement.

(c) When a parental agreement has been made through an order of a court, termination or modification can happen only through a judicial order.

38. Termination or Modification of Parental Responsibilities and Rights Agreement –

(1) A parental responsibilities and rights agreement may be terminated by the registering officer –
  (a) upon an application by the third party who has acquired such parental responsibilities and rights as per section 37(1) or section 37(2);
  (b) upon an application by a parent or a person who holds parental responsibilities and rights and who has entered into a parental responsibilities and rights agreement with a third party as per section 37(1) or section 37(2));
  (c) upon an application made by any other person acting in the best interests of the child, with the leave of the court.

(2) A parental responsibilities and rights agreement may be modified by the registering officer upon a joint application by the parties to such an agreement.

(3) A parental responsibilities and rights agreement which has been made upon the order of a court can only be modified or terminated by the court upon an application by –
   (a) either of the parties to such a parental responsibilities and rights agreement; or
   (b) any person who has an interest in the care, well-being and development of the child.

Issue: How can Parental Responsibilities and Rights be acquired?

Context:
Parental responsibilities and rights frameworks allow for the acquisition of such parental rights via one of two routes - either through a parental agreement between the parties or by an order of a competent court.

Proposed Step:
A draft provision which recognises three routes for acquisition of parental responsibilities and rights:
(a) First, via a parental responsibilities and rights agreement;
(b) Second, through an order of the court.
(c) Third, default acquisition if certain conditions are satisfied.

A default acquisition of parental responsibilities and rights accounts for the low incidence of parental agreements and orders in other jurisdictions. For instance, data from the UK shows that parental agreements and parental orders have not been widely used.[384] A default acquisition provision is also reflective of Indian common law principles wherein the intent to parent has been decisive in deciding who has legal guardianship of the child.[385]

Default acquisition has been restricted to cases where, *first*, the child has a single parent or there is a sole holder of parental responsibilities in relation to the child. Such a condition mitigates the possibility of conflicts and disputes such a default regime may give rise to with multiple parties, including both parents, acquiring responsibilities upon satisfying the prescribed conditions. *Second*, default acquisition is restricted to third parties who engage in caregiving and who the single parent or sole holder of parental responsibilities intends to co-parent the child with. Such conditions have been prescribed to centre the intention to parent as the defining condition for default acquisition. This also ensures that family members in a joint family arrangement who care for the child but do not have an intent to parent do not automatically acquire parental responsibilities and rights.

39. Acquisition of Parental Responsibilities and Rights.–
(1) A person will acquire parental responsibilities and rights in the following circumstances –
   (i) If such person has entered into parental agreement with such a person as per per section 37(1), section 37(2) or section 37(4) this Chapter; or
   (ii) If upon application by such person, a court issues an order vesting parental responsibilities and rights in them under section 41 of this Chapter; or
   (iii) If such person, being a third party, has contributed to the upbringing and maintenance of the child for a period of at least two years.

[384] Ros Pickford, 'Unmarried Fathers and the Law' in Andrew Bainham, Shelley Day Sclater, and Martin Richards (eds), *What is a Parent? A Socio-Legal Analysis* (Hart Publishing 1999) 152.
[385] *Mohd Arman v Union of India* LPA No. 249 of 2016, decided on January 23, 2017 (P&H), *Mohit v Union of India* AIR 2017 P&H 1.

(2) A person will acquire parental responsibilities and rights in relation to a child under clause (iii) of sub-section (1) only if –

(i) The child has a single parent or only a sole person holds parental responsibilities and rights in relation to the child, and

(ii) The single parent or person holding parental responsibilities and rights intends to co-parent the child with such a third party and vice-versa.

Issue: **How are Parental Responsibilities and Rights to be exercised?**

Objective:
To clarify the position of law with respect to exercise of parental responsibilities and rights in relation to a child.

Context:
Almost all regimes on parental responsibilities and rights provide for the independent exercise of such rights by those who hold them. The UK Law Commission has noted that irrespective of whether parents live together or not, to impose a legal duty of consultation prior to exercise of parental rights is neither workable or desirable - a position which is reflected in the UK's Children's Act, 1989.[386] In South Africa, consent is required for certain decisions in relation to the child such as giving the child up for adoption, removing the child from the Republic, consenting to the child's marriage, and applying for a passport for the child.[387]

Proposed Step:
A provision which allows for co-exercise of parental responsibilities and rights, and does not impose an obligation to consult each other minimises adjudication in cases where there is no consensus between co-holders of such rights. However, safeguards in relation to alienation of property of the child by the guardian of such child have been provided for in section 49 of this Chapter.

40. Exercise of Parental Responsibilities and Rights.–
When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or co-holders when exercising those responsibilities and rights, except when this Chapter, any other law in force, or an order of the Court, provides otherwise.

Issue: **How are Parental Responsibilities and Rights modified or terminated?**

Context:
Presently, under Indian marriage laws,[388] courts are empowered to pass orders for the custody of the child. Similarly, under Indian guardianship laws,[389] the district court is empowered to appoint a guardian for a minor and their property as well as revoke the guardianship rights of a person in relation to a minor and their property. Case law demonstrates that the 'best interests of the child' and/or 'welfare of the child' is central to the courts' decisions.[390] As guardianship and contact are components of parental

[386] Sally Sheldon, 'Unmarried Fathers and Parental Responsibility: A Case for Reform' [2001] Feminist Legal Studies 95.
[387] South African Law Commission, Review of the Child Care Act (Project 110, December 2002) 74.
[388] The Divorce Act, 1869, ss 41, 42, and 43; The Parsi Marriage and Divorce Act, 1936, s 49; Hindu Marriage Act, s 26.
[389] The Guardians and Wards Act, 1890, s 39 and the Hindu Minority and Guardianship Act, 1956, s 13.
[390] This principle has been endorsed by the Supreme Court as well as High Courts. See, *Thrity Hoshie Dolikuka v Hoshiam Shavaksha Dolikuka* (1982) 2 SCC 544; *Surinder Kaur Sandhu v Harbax Singh* (1984) 3 SCC 698; *Nil Ratan Kundu v Abhijit Kundu* (2008) 9 SCC

responsibilities and rights, a provision which allows for grant, modification and termination of parental responsibilities and rights must find place in the proposed law.

Proposed Step:
A provision which specifies who can apply for grant, modification or termination of parental responsibilities and rights, and outlines the factors a court must consider while issuing an order to such effect. It must be noted that the termination of a parent's responsibilities does not affect their legal parenthood including their statutory obligation to maintain the child or the child's inheritance rights vis-a-vis such a parent. Further, just like custody and guardianship orders, such orders are not final and are of an interim nature.[391]

41. Grant, Termination, Suspension, Extension or Restriction of Parental Responsibilities and Rights.–

(1) Any person under sub-section (2) can apply to a court for an order which –
(i) suspends for a period, or terminates, any or all of the parental responsibilities and rights which a specific person has in respect of a child;
(ii) extends or restricts the exercise by that person of any or all of the parental responsibilities and rights which a specific person has in respect of a child.

(2) An application for an order under sub-section (1) can be made by one of the following persons –
(i) a parent holding parental responsibilities and rights;
(ii) a person other than a parent who has holds parental responsibilities and rights in relation to the child;
(iii) any other person having a sufficient interest in the care, protection, well-being or development of the child.

(3) When considering an application under sub-section (1), the court must take into account -
(i) the best interests of the child;
(ii) the preference of the child if the child is of such age, maturity and at that stage of development where they can form an intelligent preference;
(iii) any other factor that should, in the opinion of the Court, be taken into account.

(4) The termination, suspension or restriction of a parent's parental responsibilities and rights will not affect –
(i) the parents' duty to maintain the child under any law in force; or
(ii) the inheritance rights of the child in relation to such a parent under any law in force.

(5) An order issued by the court under this section will be an interim order.

Issue: **What is a Parenting Plan and what is the process of registration of such a plan?**

Context:

413; *Anjali Kapoor v Rajiv Baijal* (2009) 7 SCC 322; *Shyamrao Maroti Korwate v Deepak Kisanrao Tekram* (2010) 10 SCC 31; *ABC v State NCT of Delhi* (2015) 10 SCC 1. See also, *Mumtaz Begum v Mubarak Hussain* AIR 1986 MP 221; *Shakuntala T Sonawane v Narendra A Khaire* AIR 2003 Bom 323; *Smt Radha alias Parimala v N Rangappa* AIR 2004 Kar 299; *Nirali Mehta v Surendra Kumar Surana*, AIR 2013 Bom 123.

[391] *Rosy Jacob v Jacob A Chakramakkal* (1973) 1 SCC 841.

A parenting plan could be employed in the event of separation of one's parents. An indicative draft parenting plan has been made available on the Ecourts Services website,[392] and it has either been approved by certain High Courts[393] or is being used as a guidance document by them.[394] Pursuant to their adoption by the High Courts, these guidelines are to be shared by judges in Family Courts and marriage counsellors for implementation/enforcement in their respective divisions. By incorporating a provision on parenting plans within this framework, the essence of these guidelines can be codified.[395]

Broadly, a parenting plan must ensure the best interests of the child, minimise the child's exposure to harmful parental conflict, and encourage parents to mutually agree on the division of responsibilities of the child's upbringing.[396] This plan should facilitate decision-making in regard to both the everyday life of the child, as well as the more crucial aspects of their being. Issues such as their residential schedule (during and outside of vacations), and travel arrangements should be considered in such a plan. Major decisions concerning education, healthcare, religious upbringing, financial support, and insurance should also prominently feature in the parenting plan. Judges in family courts and marriage counsellors must endeavour that separating parties arrive at a mutually workable parenting plan.[397]

Proposed Step:
As mentioned above, parenting plans must be resorted to in the event of a dispute regarding the guardianship and/or custody of a child. In such cases, the onus is on the court to nudge parties to arrive at a parenting plan, while also ensuring that they have complete autonomy in arriving at the terms of such a plan. The aim must be to ensure that the plan is consensually agreed upon by the parents Once finalised, the parenting plan must be approved by the court, and enforced like any other order of the court.

42. Parenting Plan.–
(1) During the continuance of proceedings related to custody of a child, the court shall invite the parents of a child who have parental responsibilities and rights in relation to such child to mutually arrive at a parenting plan.
(2) A parenting plan may determine any matter in connection with parental responsibilities and rights in relation to such a child, including –
(i) residence of the child;
(ii) contact between the child and
a. the parent; and
b. any other person;
(iii) physical and mental well-being of the child;
(iv) financial decisions in relation to the child;
(v) decisions in relation to the education of the child;

[392] Standard Parenting Plan, Website of Ecourt Services <https://districts.ecourts.gov.in/sites/default/files/Parenting%20Plan%28final%29.pdf> accessed 25 May 2023.
[393] Child Access and Custody Guidelines is approved by the Himachal Pradesh High Court <https://hphighcourt.nic.in/pdf/ParentingPlan032014.pdf> accessed 25 May 2023.
[394] Family Court Mumbai, Circular dated 04 March 2022 <://districts.ecourts.gov.in/sites/default/files/Circular%20Parenting%20Plan%2004032022_0.pdf> accessed 22 May 2023. Parenting Plan, Madhya Pradesh High Court (2014) <https://districts.ecourts.gov.in/sites/default/files/Circular%20Parenting%20Plan%2004032022_0.pdf> accessed 22 May 2023.
[395] In fact, the Law Commission has also contemplated the prospect of a parenting plan (by recommending its insertion via the GWA), the essence of which can be incorporated into the PRR framework. Law Commission of India, Reforms in Guardianship and Custody Laws in India (257th Report, May 2015).
[396] Law Commission of India, Reforms in Guardianship and Custody Laws in India (257th Report, May 2015) 78.
[397] Vishwas Kothari, 'Family Court Sets Parenting Plan in Motion' *Times of India* (Pune, 08 November 2015) <https://timesofindia.indiatimes.com/city/pune/family-court-sets-parenting-plan-in-motion/articleshow/49706478.cms> accessed 22 April 2023; *Tushar Vishnu Ubale v Archana Tushar Ubale* (2016) SCC OnLine Bom 33.

(vi) overall upbringing of the child;
(vii) any other matter deemed relevant in relation to the child.

(3) Upon agreement on the terms of the parenting plan, the parents of a child shall submit the plan to the concerned court for such court to pass an order for enforcement of the parenting plan.

(4) A parenting plan must be in accordance with the format prescribed in Schedule xx of this Chapter and signed by the parents of the child.

Issue: **Who has the duty to maintain children and what factors must be accounted for by the court while awarding maintenance?**

Context:

At present, secular laws governing the maintenance of children by parents are Section 125 of the Code of Criminal Procedure 1973 ('Cr.P.C.') and Section 38 of the Special Marriage Act, 1954.[398] The language of Section 125, Cr.P.C. employs obsolete terminology like 'legitimate' and 'illegitimate' children and puts an obligation on men to maintain the wife, legitimate children and parents. However, judicial pronouncements by the Supreme Court and various High Courts have clarified that the obligation to maintain the children is on both parents.[399]

The Hindu Adoptions and Maintenance Act, 1956 ('HAMA') is the only codified personal law that governs the laws for adoption and maintenance of Hindus, Buddhists, Jains, or Sikhs. Other personal laws like the Muslim Women (Protection of Rights on Divorce) Act, 1986, the Divorce Act, 1869, and the Parsi Marriage and Divorce Act, 1936 have largely remained uncodified with respect to a general obligation for maintenance of children. At present, the language of the provisions on maintenance under some of these laws links maintenance of the children to the marital status of their parents[400] and leaves out children born out of non-marital relationships. In light of the fact that parenthood has moved away from its original conception of only heterosexual persons in a conjugal relationship, the provisions of maintenance law must recognise the diversity of parent-child relations and abolish the concept of 'illegitimacy'. The law should ensure maintenance of children irrespective of the marital status, sexual orientation, and gender identity of the parents.

Proposed step:
A provision recognising the obligation of the parents (irrespective of the nature of the relationship between them) to maintain their children and providing factors to guide the discretion of the court to determine the amount of maintenance for children is proposed. The obligation upon the parents to maintain the child arises from the very existence of the relationship between the parent and the child. The duty of maintenance is not linked with the marital status of parents. Hence, all children are to be maintained by the parents irrespective of the parent's marital status, sexual orientation, or gender identity. The guidelines laid down by the Supreme Court in *Rajnesh v Neha*[401] have been relied on to list factors that the court shall consider to determine the amount of maintenance.

43. Maintenance of Children.–

[398] Section 38- Custody of children.— the court may pass orders for custody, maintenance and education of minor children.
[399] Judicial precedents have broadened the scope of Section 125 CrPC, for instance the Supreme Court in *Rajnesh v Neha* (2021) 2 SCC 324 and *Padmaja Sharma v Ratan Lal Sharma* (2000) 4 SCC 266 has held that a mother is liable to maintain her children u/s 125 CrPC. See *Sarita Jain v Master Rishab Jain and Anr* (2016) Crl Rev P 419/2014; *Manjulaben Prakashbhai Sarvaiya v State of Gujarat and Ors.* (2016) CriLJ2 59; *Madhuri Bai v Minor Surendra Kumar and Anr* 2000 (1) MPJR332.
[400] The Muslim Women (Protection of Rights on Divorce) Act, 1986, s 3; The Divorce Act, 1869, ch XI, ss 41, 42, and 43; The Parsi Marriage and Divorce Act, 1936, s 49.
[401] (2021) 2 SCC 324.

(1) Parents have a duty to maintain their children.
(2) Parents shall be responsible for maintaining –
(i) Minor children till they attain majority, or
(ii) Major children, who are unable to sustain themselves on account of any physical or mental disability or illness or injury.

Provided that a step-parent shall be responsible for maintaining a step-child if and only if the step-child has no other living parent.

***Explanation*:** A physical or intellectual disability has the same meaning as given to it in accordance with the Schedule to the Rights of Persons with Disabilities Act, 2016.

(3) While adjudicating a petition for the maintenance of a child, the court will determine the amount of maintenance to be granted.

(4) In determining the amount of maintenance under sub-section (3), the court shall take into consideration the following –

(i) the income of the parents;
(ii) the economic capacity and status of the parents;
(iii) the lifestyle enjoyed by the child;
(iv) the reasonable needs of the child;
(v) the provisions for food, clothing, shelter, education, etc. of the child;
(vi) need for any medical attendance, treatment or care of the child;
(vii) the best interests of the child; and
(viii) any other factors which the court may deem necessary based on the relevant facts and circumstances of each case.

(5) Anything contained under this section is without prejudice to the rights of a child to claim maintenance under section 125 of the Code of Criminal Procedure, 1973 or any other law for the time being in force.

Miscellaneous Provisions -

A. Prohibition of discrimination against parents and against children born out of wedlock.

Context:
Following are some of the key features of existing laws on parent-child relations:
(a) Parenthood is recognised largely for heterosexual persons in a conjugal relationship;
(b) The mother is the sole guardian of a child born out of wedlock; and
(c) A child born out of wedlock does not have inheritance rights vis-a-vis the father and, in some cases, a right to be maintained by the father.

Proposed Step:
A provision which prohibits discrimination against parents on the basis of gender identity, sexual orientation or marital status, abolishes the concept of 'illegitimate child', and prohibits differential legal treatment of children born within and outside of wedlock.

44. Prohibition of discrimination -

(1) A parent-child relationship extends equally to every child and parent, regardless of the gender identity, sexual orientation or marital status of the parent.

(2) Every child will have all rights in relation to their parents, including the right to be maintained and the right to inherit movable or immovable property of such parents, under any law in force.

(3) The rights of a child under sub-section (2) will not be prejudiced by the fact of whether or not the parents of such a child are in a marital relationship or a stable union.

B. Single parent's right to be named as sole parent of the child in identity documents.

Context:

Judicial decisions have articulated the right of a single/unwed mother to be named as the sole parent of the child in the birth register and the passport of the child.[402] Taking note of a decision of the Supreme Court,[403] the Ministry of Home Affairs issued a direction to all Chief Registrars of Births and Deaths to do away with the requirement of naming the father of the child in case of single/unwed mothers.[404] This right must be extended to all single parents, irrespective of gender identity.

Proposed Step:

Codify the common law position regarding the right of an unwed/single parent to be named as the sole parent in the birth register and other legal documents of the child, and extend such right to all single parents.

45. Right to be Named as Single Parent in Birth Register and identity documents –

The single parent of a child has the right to be named as the only parent in the register of births and other identity documents and forms in respect of such child.

***Explanation 1*- For the purpose of this section, identity documents and forms include a Passport issued under section 2(b) of the Passport Act, 1967, the Aadhaar enrolment form under the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 and school certificates issued under the relevant law in force.

***Explanation* 2 –** For the purpose of this section, 'single parent' means a parent who is the only legal parent of the child or is the only parent exercising parental responsibilities and rights in relation to the child on account of –

(a) the death of the other parent;

(b) desertion by the other parent;

(c) lack of interest in the affairs of the child shown by the other parent.

C. Presumption of Parentage.

[402] *ABC v State NCT of Delhi* (2015) 10 SCC 1, *XXX v State of Kerala*, High Court of Kerala at Ernakulam, WP(C) NO. 13622 OF 2021; *Shalu Nigam v The Regional Passport Officer*, 2016 SCC OnLine Del 3023; *Prerna Katia v Regional Passport Office And Anr.*, [2016 SCC OnLine P&H 14187]; *Smita Maan & Anr. v Regional Passport Officer*, W.P.(C) 1408/2023 & CM APPL. 5246/2023, High Court of Delhi at New Delhi.

[403] *ABC v State NCT of Delhi* (2015) 10 SCC 1.

[404] Ministry of Home Affairs, Government of India circular dated 21 July 2015 <https://upload.indiacode.nic.in/showfile?actid=AC_CEN_5_40_00006_196918_1517807324141&type=circular&filename=Supreme%20Court%20judgment%20regarding%20registration%20of%20birth%20of%20a%20child%20in%20case%20of%20single%20parent,%20unwed%20mother.pdf> accessed 12 May 2023.

Context:
Section 112 of the Indian Evidence Act, 1872 provides for presumption of paternity of the father during the continuance of a valid marriage.

Proposed Step:
Section 112 of the Evidence Act provides for presumption of paternity of the father during the continuance of a valid marriage. In light of expansion of parenthood, the presumption has to be conceptualised again so as to accommodate the newly recognised forms of parent-child relations. The amended presumption makes the following modifications:

(a) It uses the gender-neutral term 'parentage' to include persons of all gender identities and sexual orientations.
(b) The second section extends the presumption of paternity to persons who hold themselves out to be the parent of the child. Holding oneself out as the parent of the child, as opposed to only carrying out parental responsibilities towards the child,[405] is the key factor for the presumption to kick in. This also reflects the common law position where the intent to parent has been held to be the decisive factor in determining who is the legal guardian of the child. In order to extend legal recognition to non-traditional parents,[406] it is critical for law to accommodate for the social dimensions of parenthood by recognising the parentage of persons who may not be related to the child through biology or marriage.[407] Borrowing from comparative law[408] a heightened standard of scrutiny has been provided for persons who hold themselves out to be the parent of a child by articulating the additional criteria that must be satisfied for such a person to be presumed to be the legal parent of the child.
(c) It excludes gamete donors under the ART Act.
(d) It provides for the process to be followed by persons who claim to be the parent of the child but who are not recognised as the legal parent to claim parentage The draft clause follows the South African model in this regard.[409]
(e) Section 47 prescribes the procedure for denial of parentage for a presumed and an alleged genetic parent.

46. Presumption of Parentage —

[405] It is critical to draw a distinction between default acquisition of parental responsibilities by third parties and presumption of parentage on the basis of holding out. The former only leads to acquisition of parental responsibilities and rights and not legal parenthood, while the latter leads to a presumption of parentage. Consequently, a heightened standard of scrutiny centering holding oneself out as the parent of the child and the child as one's own has been provided for the presumption.
[406] A provision on 'holding out' will benefit several classes of parents including fathers in non-marital relationships as well as persons who may not have a biological connection with the child or a marital relationship with the legal parent of the child (such as the second lesbian mother in a same-sex non marital partnership) who intent to serve as the parent of the child and engage in parenting. Further, literature demonstrates that queer, specifically transgender communities in India already subvert traditional family structures by living in shared households defined by co-dependant relationships despite the absence of biological or marital ties. A provision on 'holding out' will benefit such family structures through recognition of social parenthood defined on the basis of intention to parent and relationships of care and dependence as opposed to biological connection or marriage. Tarini Mehta, 'Where are India's queer parents? Having a family is not even an option for many Indians, The Print, https://theprint.in/opinion/where-are-indias-queer-parents/608267/#google_vignette (Dec Feb, 21, 2001).
[407] Courts in the US have time and again conferred legal parenthood on persons in the absence of adoption, marriage or genetic relation with the child. This has happened in cases involving same-sex couples, unmarried fathers and persons relying on surrogacy and ART. Holding out the child as one's child and voluntarily performing parental responsibilities in relation to the child have been decisive in such cases. Such an approach has expanded the contours of parenthood and consequently family by prioritising intention, care and dependence. (David D Meyer, 'Parenthood in a Time of Transition: Tensions between Legal, Biological, and Social Conceptions of Parenthood', American Journal of Comparative Law, 2006, 135; David D. Meyer, 'The Constitutionality of Best Interests', William and Mary Bill of Rights Journal, 14, 861; Courtney G. Jocelin, 'De Facto Parentage and the Modern Family', American Bar Association of Family Law, 40, 2018).
[408] Uniform Parentage Act, 2017, s 204, s 609; *In re Custody of H.S.H.-K*, 533 N.W.2d 419, 421 (Wis. 1995) (Supreme Court of Wisconsin).
[409] South Africa Children's Act, 2005, s 26.

(1) A person will be presumed to be the parent of the child if the child was born during the continuance of a marriage between the birth parent and such person, or within two hundred and eighty days after the dissolution of such marriage, the birth parent remaining unmarried.
(2) A person will be presumed to be the parent of the child only if they openly hold out the child to be their child and -
(i) The legal parent of the child has consented to the person establishing a parental relationship with the child;
(ii) They reside in the same household with the child;
(iii) They regularly contribute to the upbringing and maintenance of the child, and
(iv) They have established a parental relationship of dependence, bond and care with the child.

(3) A person who claims to be the parent of the child may –
(i) apply for an amendment to be effected to the register of births identifying such person as the parent of the child, if the legal parent consents to such amendment, or upon an order of the court; or
(ii) apply to a court for an order confirming their parentage of the child.

(4) This section does not apply to –
(i) the parent of a child conceived through the rape of the child's birth parent; or
(ii) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation under the Assisted Reproductive Technology (Regulation) Act, 2021.

(5) A presumption of parentage under this section may be rebutted and competing claims to parentage resolved by a court of competent jurisdiction.

Explanation **-** For the purposes of sub-section (1), marriage includes relationships in the nature of marriage as defined in section 9 of Chapter I.

47. Denial of Parentage –
(1) A presumed parent or alleged genetic parent who wants to deny parentage in relation to a child can apply for a court order affirming their denial of parentage in relation to such child.
(2) A successful execution of a denial of parentage discharges the presumed parent or alleged genetic parent from all rights, duties and obligations of a parent in relation to such child.
(3) An adjudicated parent cannot deny parentage in relation to the child.

Explanation **–** An alleged genetic parent does not include any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation under the Assisted Reproductive Technology (Regulation) Act, 2021.

D. Child's right to Privacy in Paternity Suits.

Context:
The Supreme Court has recently ruled in *Aparna Ajinkya Firodia v Ajinkya Arun Firodia ('Aparna Ajinkya),*[410] that children have a right to privacy in cases where such child's paternity is disputed and provides for exceptional circumstances under which such a child can be subject to a DNA test to determine paternity.

[410] 2023 LiveLaw (SCC) 122.

Proposed Step:
This provision codifies the guidelines in *Aparna Ajinkya* to provide statutory recognition of a child's right to privacy in parentage suits/disputes.

48. Child's Right to Privacy in Parentage Suits –

(1) A child has a right to privacy in cases where their parentage is under dispute.

(2) A child will not be subject to a DNA test to establish their parentage unless the court, after accounting for the best interests of the child and the child's right to privacy, arrives at the conclusion that there is no other mode of establishing parentage other than a DNA test.

(3) For the purpose of sub-section (b), a court will direct a DNA test only if –
(i) it is impossible to draw an inference regarding the paternity of the child based on all other evidence; and
(ii) a DNA test is indispensable to establishing the paternity of the child.

(4) An order for a DNA test by the court for establishing the parentage of a child will be accompanied by reasons recorded in writing.

E. Restrictions on the power of a guardian to alienate the child's property.

Context:
Section 8 of the HMGA, imposes restrictions on the powers of guardians to alienate the child's property in order to protect the interests of the child.

Proposed Step:
A provision which gives certain powers to the guardian of the child while also imposing certain restrictions on such powers. This provision substantively borrows from section 8 of the HMGA.

49. Restrictions on Guardian's Power to Alienate Property –

(1) The guardian of the child has power to do all acts which are necessary or reasonable and proper for the benefit of the child or for the realisation, protection or benefit of the child's estate but the guardian can in no case bind the minor by a personal covenant.

(2) The guardian of the child shall not, without the previous permission of the court, -
(i) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the child; or
(ii) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the child will attain majority.

(3) Any disposal of immovable property by a guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the child or any person claiming under them.

(4) No court shall grant permission to the guardian to do any of the acts mentioned in subsection (2) except in case of necessity or for an evident advantage to the child.

(5) The Guardians and Wards Act, 1890 (8 of 1890) shall apply to and in respect of, an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29[411] of that Act, and in particular—
(i) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof;
(ii) the court shall observe the procedure and have the powers specified in sub-sections (2),

[411] Section 29 of the GWA provides for limitations of powers of guardian of property appointed or declared by the Court.

(3) and (4) of section 31 of that Act; and

(iii) an appeal shall lie from an order of the court refusing permission to the guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.

F. Parent's right to appoint testamentary guardians.

Context:
Laws on guardianship suffer from sex discrimination as fathers are the guardians of children and consequently have the sole right to appoint a guardian for such a child via a will.[412] The mother has such a right, only after the father.

Proposed Step:
A provision authorising a parent who is also the guardian of the child to appoint a testamentary guardian in relation to their children's person, property or both. Such a provision treats both parents of the child as equals as opposed to privileging the father.

50. Power to appoint Testamentary Guardian.–

(a) A parent who is the guardian of the minor has the right to, by will, appoint a fit and proper person as the guardian for the minor.

(b) A parent under sub-section (1) can appoint a guardian in respect of the minor's person or the minor's property or both.

(c) A person appointed as guardian under sub-section (1) acquires guardianship -

  (a) after the death of the parents of the child; and

  (b) upon the person's express or implied acceptance of the appointment.

(d) If two or more persons are appointed as guardians any one or more or all of them may accept the appointment except if provided otherwise.

G. Best interests of the child.

Objective:
To codify the 'best interests of the child'.

Context:
It has been argued that the 'best interest of a child' principle grants judges substantial discretion in interpreting it to reflect their social and cultural ideas of family and marriage[413] and can lead to arbitrariness.[414] While the indeterminate nature of this principle allows Courts to account for the evolving nature of the family, it is critical to codify what accounts for best interests such that it cannot be deployed in a manner that is reflective of a judge's subjective views of a family. This will ensure that a judge is guided by clear and objective criteria which can be applied to the facts of a case to arrive at a well-reasoned decision.

[412] Guardians appointed via a will are known as 'testamentary guardians'.
[413] Archana Parashar, 'Welfare of Child in Family Laws - India and Australia', NALSAR Law Review, Vol. 1.
[414] David D. Meyer, 'The Constitutionality of Best Interests Parentage', Will and Mary Bill of Rights Journal, 14, 879.

It must be mentioned that in crucial determinations with respect to a child/minor, Indian courts have repeatedly accounted for the 'welfare of the child/minor' and the 'best interests of the child', terms which may have been used interchangeably.[415] In the interests of clarity, the 'best interests of the child' should be accepted and used as the guiding principle for courts, and previous enunciations of the 'welfare' principle should be subsumed within it.

Proposed Step:
This provision codifies the 'best interests of the child' principle to provide for a set of factors on the basis of which Courts must decide cases where the best interests of a child must be accounted for.[416] A prescription of a list of factors guides judicial interpretation when determining 'best interest' while providing sufficient flexibility to decide the matter on a case-by-case basis. The provision on 'best interests of the child' borrows from existing Indian case law on the subject, besides also emulating certain aspects from the South African law.[417]

51. Factors relevant to determine best interests of the child.–
(1) In determining the best interests of the child, the following factors must be taken into consideration, namely-
(a) the nature of the relationship between-
(i) the child and the parents, or any specific parent;
(ii) the child and the immediate relations of the parents, or any specific parent;
(iii) the child and any other caregiver relevant in those circumstances;
(b) the conduct of the parents, or any specific parent, towards-
(i) the child; and
(ii) the exercise of parental responsibilities and rights in respect of the child;
(c) the capacity of the parents, or any specific parent, or of any other care-giver, to provide for the day-to-day needs of the child;
(d) the capacity of the parents, or any specific parent, or of any other care-giver, to provide for the overall development of the child, including emotional and intellectual development;
(e) the likely effect on the child of any change in the child's circumstances in the event of separation from-
(i) one or more parents, or
(ii) any sibling or other child with whom the child has been living, or
(iii) any other care-giver or relative, with whom the child has been living;
(f) the need for the child to maintain contact with –
(i) one or more parents, or
(ii) the extended family of one or more of the parents;
(g) the age, maturity and stage of development of the child;
(h) any disability and special needs that a child may have;

[415] See, for instance, *Mausami Moitra Ganguli v Jayant Ganguli*, (2008) 7 SCC 673 - "*..It is trite that while determining the question as to which parent the care and control of a child should be committed, the first and the paramount consideration is the* ***welfare and interest of the child*** *and not the rights of the parents under a statute*.." See also, the Law Commission of India, Reforms in Guardianship and Custody Laws in India (257th Report, May 2015) 19, para 2.3.1 - "*Judicial Interpretations: The Supreme Court of India and almost all of the High Courts have held that, in custody disputes, the concern for the* ***best interest/welfare of the child*** *supersedes even the statutory provisions on the subject.*" Principles concerning the best interests of the child can be drawn from the framework on parental rights and responsibilities.

[416] This principle has been endorsed by the Supreme Court as well as High Courts. See, *Thrity Hoshie Dolikuka v Hoshiam Shavaksha Dolikuka* (1982) 2 SCC 544; *Surinder Kaur Sandhu v Harbax Singh* (1984) 3 SCC 698; *Nil Ratan Kundu v Abhijit Kundu* (2008) 9 SCC 413; *Anjali Kapoor v Rajiv Baijal* (2009) 7 SCC 322; *Shyamrao Maroti Korwate v Deepak Kisanrao Tekram* (2010) 10 SCC 31; *ABC v State NCT of Delhi* (2015) 10 SCC 1. See also, *Mumtaz Begum v Mubarak Hussain* AIR 1986 MP 221; *Shakuntala T Sonawane v Narendra A Khaire* AIR 2003 Bom 323; *Smt Radha alias Parimala v N Rangappa* AIR 2004 Kar 299; *Nirali Mehta v Surendra Kumar Surana*, AIR 2013 Bom 123.

[417] South Africa Best Interests of child standard; South Africa Children's Act 2005, s 7 <https://www.gov.za/sites/default/files/gcis_document/201409/a38-053.pdf> accessed 22 April 2023.

(i) any chronic illness that a child may be suffering from;
(j) the need to protect the child from any physical or psychological harm, and maltreatment, abuse, neglect, violence or harmful behaviour;
(k) any other factor that a court may deem relevant.

H. Duty of the Court

Context:
Disputes involving children often have an adverse impact on the parties involved. Prolonged litigation and the economic costs of custody battles disproportionately affect women who often give up custody to avoid the emotional turmoil of such proceedings.[418] As outlined above, when deploying the 'best interests of the child' principle, courts often disregard the autonomy or rights of the parties by imposing their social values regarding family and marriage on them.[419] This has been addressed to a certain extent by codifying the factors that guide the application of the 'best interests of the child' principle. However, it is also critical to ensure the best interest principle is not deployed to force resolution or cooperative parenting when it can render vulnerable parties, including women and children, at risk of violence or harm.[420] Finally, it is critical to ensure that the agency of children in matters directly impacting them is recognised by accounting for their wishes and needs.[421] A clause that encourages courts to consult competent professionals such as child psychologists may also assist courts in taking informed decisions.[422]

Proposed Step:
A provision which prescribes the duty of the court when adjudicating matters under this Chapter.

52. Duty of the Court.–
(1) While adjudicating matters under this Chapter, the Court will -
  (a) Ensure that the proceedings are conducted without undue delay and concluded within a reasonable period of time;
  (b) Facilitate the parties to arrive at mutually agreeable outcomes that promote cooperative parenting unless this risks exposing the child or the parties to violence or harm;
  (c) Account for the wishes of the child if the child is of such age, maturity and is at the stage of development where they can form an intelligent preference;
  (d) Account the best interests of the child.
(2) A Court may designate a family consultant for the purpose of assisting it with proceedings under this Chapter.

I. Amendments to other laws.

[418] Flavia Agnes, Family Law: Marriage, Divorce, and Matrimonial Litigation (OUP 2011) 256-257.
[419] Archana Parashar, 'Welfare of Child in Family Laws - India and Australia', NALSAR Law Review, Vol. 1. (Parashar argues that while the 'welfare principle' has been central custody decisions, it has often been applied by judges as per their common sense knowledge about the family. Critically analysing Supreme Court cases on custody from 1959 till 2000, Parashar demonstrates how the application of this principle has led to decisions being informed by sex-stereotypes concerning women and motherhood as opposed to systematic social science knowledge).
[420] Australia Family Law Act, 1975, Part VII, Division 12A, 69ZN.
[421] *Kirtikumar Maheshankar Joshi v Pradipkumar Karunashanker Joshi*, (1992) 3 SCC 573 (The Court noted that the intelligence preference of the child must be regarded in custody proceedings); *Purvi Mukesh Gada v Mukesh Popatlal Gada & Ors.* AIR 2017 SC 5407 (The Supreme Court took into account the wishes of the children when deciding custody and awarded custody to the mother accordingly).
[422] Australia Family Law Act, 1975, Part III, Division 1, 11A. .

The following amendments to other laws are proposed:

(a) Amend the Indian Evidence Act, 1872 to modify the presumption of paternity as per the new position of law under this Code.

(b) Amend the ART Act to recognise the right of a child to know certain information about the 'genetic parent' other than their identity. Such a provision balances the child's right to know their genetic parent[423] vis-a-vis the gamete donor's right to privacy.[424] It also follows the South African approach[425] wherein the child has the right to information about their genetic parent while keeping the identity of the gamete donor confidential.

(c) Amend the the Registration of Births and Deaths Act, 1969 to allow a person to be named as the legal parent of the child with the consent of the other parent subsequent to the birth of the child, thus prioritising parental autonomy.

53. Amendments to other Acts.-

The Acts mentioned in the First Schedule shall be amended in the manner mentioned therein.[426]

AMENDMENTS TO THE INDIAN EVIDENCE ACT, 1872
(1 OF 1872)

1. For section 112 of the Indian Evidence Act, the following section shall be substituted, namely.–

112. Presumption of Parentage -

(a) A person will be presumed to be the parent of the child if the child was born during the continuance of a marriage between the birth parent and such person, or within two hundred and eighty days after the dissolution of such marriage, the birth parent remaining unmarried.

(b) A person will be presumed to be the parent of the child if they openly hold out the child to be their child and -

(i) The legal parent of the child has consented to the person establishing a parent-like relationship with the child,

(ii) They reside in the same household with the child,

(iii) They contribute to the upbringing and maintenance of the child, and

(iv) They have established a parent-like relationship of dependence and care with the child.

(c) person who claims to be the parent of the child may –

(i) apply for an amendment to be affected to the birth register of the child identifying such person as the parent of the child, if the legal parent consents to such amendment, or upon an order of the court; or

(ii) apply to a court for an order confirming their parentage of the child.

(d) This section does not apply to –

[423] *ABC v State NCT of Delhi* (2015) 10 SCC 1; Article 7 and 8 of the United Nations Convention on the Rights of Child.
[424] *XXX v State of Kerala*, WP(C) NO. 13622 OF 2021, High Court of Kerala at Ernakulam, at para 19.
[425] South Africa Children's Act 2005, s 41.
[426] Certain amendments to the Indian Evidence Act, 1872, the Assisted Reproductive Technology (Regulation) Act, 2021, and the Registration of Births and Deaths Act, 1969 are enlisted in the box below. Other amendments to these legislations as well as to other primary and subordinate legislations have been enlisted in Parts II-V of this Chapter. All amendments sought to be made in Chapter II to existing laws can be found in a consolidated form in the Second Schedule to the Code.

(i) the parent of a child conceived through the rape with the child's birth parent; or
(ii) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation under the Assisted Reproductive Technology (Regulation) Act, 2021.

(e) A presumption of parentage under this section may be rebutted and competing claims to parentage resolved by a court of competent jurisdiction.

Explanation - For the purpose of sub-section (a), marriage includes relationships in the nature of marriage as defined in section 9 of Chapter I of the Family Law Code, 2023.

AMENDMENTS TO THE ASSISTED REPRODUCTIVE TECHNOLOGY (REGULATION) ACT, 2021 (42 OF 2021)

1. After section 31 of the principal act the following section will be inserted, namely –

31A. Child's Right to Information about Genetic Parent –

(1) A child born as a result of assisted reproductive technology has a right to –
   (a) any medical information concerning their genetic parents; and
   (b) any other information concerning the genetic parents once such child reaches the age of majority under the Majority Act, 1872.

(2) Subject to the provisions of this Act, information disclosed in terms of sub-section (1) will not reveal the identity of the gamete donor.

AMENDMENTS TO THE REGISTRATION OF BIRTHS AND DEATHS ACT, 1969 (18 OF 1969)

1. After section 2(1)(e) of the Registration of Births and Deaths Act, 1969, the following section will be inserted, namely –

2(1)(ea). "Single parent" means a parent who is the only legal parent of the child or is the only parent exercising parental responsibilities and rights in relation to the child on account of –
(a) the death of the other parent;
(b) desertion by the other parent; or
(c) lack of interest shown in the affairs of the child by the other parent.

2. After section 15 of the Registration of Births and Deaths Act, 1969, the following section will be inserted, namely –

15A. Modification of entry in the register of births and deaths –

(1) The Registrar may cause an entry in the register of births and deaths to be amended to allow a person to be named as the legal parent in respect of a child if -
   (a) A single parent has been named in the register as the only legal parent of the child and such parent consents to the person being named as the other parent of the child, or
   (b) A competent court has ordered that such person be named in the register as a legal parent of the child.

(2) For the purposes of subsection (1), an entry will be modified in the register of births and deaths within such time and in such manner as may be prescribed.

Part II - Court Appointed Guardians for Minors

As is evident from the above, much of the law concerning natural guardianship of a minor is derived from personal laws (across religions).[427] The Guardians and Wards Act, 1890 ('GWA') comes into play when a minor does not have either a natural or a testamentary guardian. The GWA was premised largely on the principles underlying English family law, and subscribed to the doctrine which made father the legal guardian of the child.[428]

The GWA prescribes the procedure for the District Court to appoint a guardian for both the person as well as property of the minor.[429] Essentially, the GWA provides for "court-appointed" guardians. Once such an appointment has been made, the powers of the natural or testamentary guardian stand suspended.[430] An application for appointment of a guardian can be made by one of the following persons - (a) the person desirous of, or claiming to be the guardian of the minor, (b) any relative or friend of the minor, (c) the Collector of the district or other local area within which the minor ordinarily resides or in which they have property, or (d) the Collector having authority with respect to the class to which the minor belongs.[431]

While the GWA does not define either "custody" or "custodian", section 25 is invoked in matters where the custody of a minor is in dispute. Section 25 concerns the title of the guardian to the custody of a ward, and authorises the District Court to make an order for the return of a ward, if they leave or are removed from the custody of the guardian of their person.[432] The Court can make such an order for return if it is of the opinion that this would be for the welfare of the ward.[433]

In order to make the GWA more child-centric, and align it with the principles proposed under Chapter II of the draft Code, certain amendments are being proposed, as follows.

Issue: How can the law on court appointed guardians be made more child-centric?

Objective:
To ensure that appointment of guardians by the court is premised on the "best interests of the child" principle, and all other considerations are made subordinate to it.

Context:
Under the GWA, 'welfare of the minor' as well as 'best interests of the child'[434] are the cardinal principles which determine where guardianship and custody lie.[435] Having said that, under section 17(1) of the GWA, courts are to be guided by the personal law of the minor in determining their welfare. Further, section 17(2) of the GWA mandates that certain other factors, such as the minor's age, sex and religion, and the character and capacity of the proposed guardian, are also to be considered in the appointment

[427] Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) Family Law Quarterly 441.
[428] Flavia Agnes, *Family Law: Marriage, Divorce, and Matrimonial Litigation* (OUP 2011) 246.
[429] An application in this regard can be made to the District Court under the Guardians and Wards Act 1890, s 9.
[430] Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) Family Law Quarterly 441.
[431] The Guardians and Wards Act, 1890, s 8.
[432] The Guardians and Wards Act, 1890, s 25(1).
[433] The Guardians and Wards Act, 1890, s 25(1).
[434] Referred to as 'best interests of the child' in this paper.
[435] See, the Guardians and Wards Act, 1890, ss 7 and 17.

of guardians.[436] The text of the law, by itself, does not mandate that the best interests of the child is paramount, and must take precedence over all other considerations. As mentioned above, while courts across India[437] have held the welfare principle to be of highest priority, it is worth clarifying the same within the GWA itself.

Further, certain provisions of the GWA must be aligned with the proposals made under Chapter II of the draft Code as well as principles laid down in existing case law, while the language in some others need to be modernised.

Proposed Step(s):
As mentioned above, personal laws continue to privilege the father as the natural guardian of a child. In cases of appointment of guardians by a court, however, the paramount consideration must be the best interests of the child which has been codified in Chapter II of the draft Code. To give full effect to the best interest principle, and to align court-appointed guardianship with the principles informing Chapter II of the draft Code, amendments are being proposed to certain provisions of the GWA.

Further, amendment is also being proposed to the provision concerning issuance of notice to the parents of a minor before appointment of a guardian, when the application for guardianship is made by a 'single parent'. This is in furtherance of a decision of the Supreme Court to that effect.

[436] The Guardians and Wards Act, 1890, s 17.
[437] An indicative set of cases which use the best interests of the child and welfare principles are cited at n 86.

Proposed Amendments:

Provision (Act, Regulation, Rule)	Current Provision	Amended Provision	Principle
Section 1(a)	**No provision**	***'Best Interest' means best interests of the minor as defined in section 51 of Chapter II of the Code on Indian Family Law, 2023.***	As Chapter II of the Draft Code lays down factors to be considered in determining the 'best interests of the child' and this principle is the guiding policy for appointment of guardians under the GWA, a clause defining it has been inserted.
Section 11	**Procedure on admission of application.**—(1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing— (a) to be served in the manner directed in the Code of Civil Procedure (14 of 1882) on—	**Procedure on admission of application.**—(1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing— (a) to be served in the manner directed in the Code of Civil Procedure (5 of 1908) on— (i) the parents of the minor if they are residing in any State to which this Act extends, ***Provided that the requirement of serving notice may be dispensed with where an application has been made by a 'single parent' as defined under section***	Section 11 requires a notice to be served to the parents of a minor before appointment of a guardian. An amendment is being proposed to one of the sub-clauses of section 11(1)(a) to give effect to the judgment in *ABC v. State (NCT of Delhi)*.[438] In this case, the Supreme Court held that section 11 would not be applicable in cases where one of the parents petitions the court for appointment as guardian of their child. The judgment clarifies that section 11 applies to situations where the guardianship of the child is sought by a third party, so that parents can ensure the welfare of their child. In this case, the Supreme Court was speaking in the specific context of an uninvolved father/a father who does not partake in upbringing of the child, and whose views/opinions are not essential to protect the interests of the child.[439] To give effect to this interpretation of section 11, a proviso is being inserted to section 11(1)(a)(i) dispensing with the requirement of service of notice in cases where a single parent is making an application for guardianship. For the

[438] (2015) 10 SCC 1.
[439] *ABC v State NCT of Delhi* (2015) 10 SCC 1, paras 24, 25.

	(i) the parents of the minor if they are residing in any State to which this Act extends,	***30(q) of the Chapter II of the Code on Indian Law, 2023.***	purpose of this proviso, the definition of single parent is to be drawn from the Draft Code.
Section 17	**Matters to be considered by the Court in appointing guardian.**—(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. (2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any	**Matters to be considered by the Court in appointing guardian.**—(1) In appointing or declaring the guardian of a minor, ***the best interests of the minor[440] should be of paramount consideration.*** (2) The Court shall have regard to the ***best interests of the minor*** and the character and capacity of the proposed guardian and their nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or their property. ***(3) If the minor is of the age, maturity and is at the stage of development where they can form an intelligent preference, the Court shall consider that preference.***	Currently, sub-section (1) of section 17 provides the welfare of the minor to be consistent "**with the law to which a minor is subject**." However, the best interests of the child continues to be the primary consideration in appointment of a guardian (and has been so recognised by courts as well). To ensure the best interest principle is prioritised, the Law Commission's recommendations for amendment of section 17(1) and insertion of a sub-section (1A) are reiterated.[441] This would, as the Law Commission noted in its 257th Report, "*remove the possibility of the appointment of a guardian without first assessing welfare*".[442] Essentially, all other considerations must be made subordinate to the best interests of the minor.[443] As personal law on guardianship stands to be repealed by this draft Code, the primary consideration in appointing a guardian for a minor will be the 'best interests of the child'. Personal law across religions prioritises the father as the natural guardian. For all practical purposes, courts across have been using the best interests principle in appointing guardians for minors (even in cases where their natural guardians are alive). With the repeal of the personal law on guardianship as well as the proposed amendment to section 17(1), the best interests principle will be prioritised over all other considerations. Further, to modernise

[440] The factors which aid determination of best interests are mentioned in section 59 of this Code, and can also guide courts for the purpose of section 17(1) of the GWA.
[441] Law Commission of India, Reforms in Guardianship and Custody Laws in India (257th Report, May 2015) 68, Annexure II.
[442] ibid 56.
[443] Law Commission of India, The Guardians and the Wards Act, 1890 and Certain Provisions of the Hindu Minority and Guardianship Act, 1956 (83rd Report, April 1980) 35, para 6.59.

	existing or previous relations of the proposed guardian with the minor or his property. (3) If the minor is old enough to form an intelligent preference, the Court may consider that preference. . . (5) The Court shall not appoint or declare any person to be a guardian against his will.		its language, an amendment to sub-section (3) is being proposed. The amendment would clarify what indicative factors could be considered while taking into account the preference of a minor.
Section 19	**Guardian not to be appointed by the Court in certain cases.**—Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person—	**Guardian not to be appointed by the Court in certain cases.**—Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person— (a) **Delete.** (b) of a minor, whose parent is living and is not, in	This provision concerns the preferential right of certain persons to be regarded as natural guardians.[444] Given that section 19 fetters the jurisdiction of the Court to appoint a guardian (both of the person as well as property of a minor) in some respects, the Law Commission has recommended wholesale repeal of section 19.[445] The Law Commission's recommendation was premised on the fact that the sole consideration in determining guardianship is the "welfare" of the minor, which must override any provision giving preferential treatment to any relative of the minor. This position has also received judicial endorsement, with the Supreme Court saying that the father's fitness (in the context of a particular case) cannot override considerations of

[444] Law Commission of India, Reforms in Guardianship and Custody Laws in India (257th Report, May 2015) 56.
[445] Law Commission of India, The Guardians and the Wards Act, 1890 and Certain Provisions of the Hindu Minority and Guardianship Act, 1956 (83rd Report, April 1980) 35, para 6.59.

	(a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or (b) of a minor, other than a married female, whose father or mother is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor, or. (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.	the opinion of the court, unfit to be guardian of the person of the minor, or, (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor. ***Provided that in determining whether a person is unfit to be a guardian under clause (b), the best interests of the minor as required under sub-section (1) of section 17 shall be the paramount consideration.***	the welfare of the minor children.[446] In its current form, section 19 could also conflict with section 17, under which welfare is supposed to be the paramount consideration in appointment of a guardian by the Court. It will also run contrary to the framework on parental rights and responsibilities, which abolishes the principle of the husband being the guardian of a minor wife. In light of these considerations, it is recommended that: ● clause (a) of section 19 be repealed, and ● a proviso be made applicable to clause (b) which gives precedence to the best interests of the minor over the principle of fitness of either parent.
Section 21	**Capacity of minors to act as guardians** — A minor is incompetent to act as guardian of any minor except his own wife or child or where he is the managing member of an undivided Hindu family, the wife or	**Capacity of minors to act as guardians** — ***A minor is incompetent to act as a guardian.***	This section has been amended to reflect the abolition of the principle of vesting the guardianship of a minor wife with the husband.

[446] *Rosy Jacob v Jacob A Chakramakkal* (1973) 1 SCC 841, para 15.

	child of another minor Member of that family.		
Section 25	**Title of guardian to custody of ward.**—(1) If a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return, and for the purpose of enforcing the order may cause the ward to be arrested and to be delivered into the custody of the guardian. (2) For the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code	**Proceedings for custody of ward.**— ***(1) Notwithstanding anything contained in section 19, if a ward leaves or is removed from the custody of a guardian of their person, or is not in the custody of the guardian entitled to such custody, the Court, if it is of the opinion that it will be for the best interest of the ward to return to the custody of their guardian or to be placed in his custody, may make an order for their return, or for such minor being placed in the custody of the guardian, as the case may be.*** ***(2) For the purpose of enforcing the order, the court may exercise the power conferred on a Magistrate of the first class by section 97 of the Code of Criminal Procedure, 1973.*** ***(3) The residence of a ward against the will of their guardian with a person who is not their guardian does not of itself terminate the guardianship.*** ***(4) For the purpose of an order under sub-section (1), the best interest of the minor shall be of paramount consideration.***	Currently, sub-section (1) states that if a ward leaves or is removed from the custody of the guardian, the court can issue an order for the ward's return, if it is of the opinion that such return is in the welfare of the minor. Further, for the enforcement of this order, the court may cause the ward to be **arrested** and delivered into the custody of the guardian.[447] The Law Commission has repeatedly alluded to the need to do away with the provision on "arrest" of the ward, if they leave or are removed from the custody of their guardian.[448] The concept of arrest is considered to be archaic, and not reflective of modern social considerations. To give effect to this change and make section 25 more contemporary, the Law Commission's recommendations for its amendment are reiterated below: ● *First*, in sub-section (1), replace "arrest" with the requirement to return the ward to the custody of their guardian; ● *Second*, clarify whether a guardian who has never had custody of a minor is entitled to the relief under this section. The language of the provision must specifically state that it applies in cases where the child is not in the custody of the guardian, though the latter is entitled to such custody.[449] Two further changes are also being recommended: ● *First*, reference be made to section 97 of the Code of Criminal Procedure, 1973 (in place of section 100 of the Code of Criminal Procedure, 1882);

[447] Under section 25(2) of the GWA, for the purpose of arresting the ward, the Court may exercise the power conferred on a Magistrate of the first class by section 100 of the Code of Criminal Procedure, 1898.
[448] Law Commission of India, The Guardians and the Wards Act, 1890 and Certain Provisions of the Hindu Minority and Guardianship Act, 1956 (83rd Report, April 1980) 48, para 7.18; Law Commission of India, Reforms in Guardianship and Custody Laws in India (257th Report, May 2015) 57-58.
[449] Law Commission of India, Reforms in Guardianship and Custody Laws in India (257th Report, May 2015) 68-69.

	of Criminal Procedure, 1882 (10 of 1882). (3) The residence of a ward against the will of his guardian with a person who is not his guardian does not of itself terminate the guardianship.	***(5) The court shall not make an order under this section in respect of a child who is of the age, maturity and is at the stage of development where they can form an intelligent preference, without taking into consideration the preference of the child.***	• *Second*, mandatorily require the Court to take into consideration the wishes of the child who is capable of making an intelligent preference while making an order under sub-section (1).

Caveat

The GWA is a largely procedural law concerning appointment of guardians by the District Court. The recommendations have, deliberately, not touched upon the procedural aspects of how guardians are appointed in practice, and are limited only to the substantive stipulations under the GWA.

Part III - Adoption Laws

Law on Adoption

In India, secular adoption is governed by Chapter VII of the Juvenile Justice (Care and Protection of Children) Act, 2015 ('JJ Act'), the Juvenile Justice (Care and Protection of Children) Model Rules, 2016,[450] and the Adoption Regulations, 2022 ('2022 Regulations')[451] issued by the Central Adoption Resource Authority ('CARA'). Among all of the personal laws in India, it is only the Hindu Adoptions and Maintenance Act, 1956 ('HAMA') that permits adoption. No other personal law permits adoption. The JJ Act provides a secular framework for adoption under which aspiring parents who intend to adopt children can proceed, without being inhibited by their respective personal laws.[452]

The JJ Act has a wide scope and covers both children in conflict with the law as well as children in need of care and protection. Children who are eligible to be adopted fall in the latter category. The JJ Act defines adoption to mean the process through which the adopted child is permanently separated from their biological parents, and becomes the lawful child of the adoptive parents with all the rights, privileges and responsibilities that are attached to a biological child.[453] It lays down elaborate procedures for both intra-country as well as inter-country adoptions.

The JJ Act provides for the constitution of one or more Child Welfare Committees ('CWC') for every district at the behest of the concerned State Government.[454] Under section 30 of the JJ Act, one of the functions of the CWC is to declare an orphan, abandoned and surrendered child as 'legally free for adoption', after due inquiry.[455] Prospective adoptive parents ('PAPs') can apply to a Specialised Adoption Agency ('SAA')[456] in the manner provided under the 2022 Regulations.[457] The SAA then prepares a home study report of the PAPs and upon finding them eligible, refers a child declared legally free for adoption to them (along with the child study report and medical report of the child).[458] Upon acceptance of the child from the PAPs, the SAA must give the child in pre-adoption foster care and file an application before the District Magistrate for obtaining the adoption order.[459] The District Magistrate has the authority to issue an adoption order, after satisfying themselves that the adoption is for the welfare of the child, due consideration is given to the wishes of the child, and no payment or reward forms the basis of the adoption in question.[460]

For the purpose of this paper, amendments are being proposed only to certain substantive provisions of the JJ Act and subordinate legislation to: expand the class of persons who can adopt beyond the heterosexual conjugal unit, remove liberty restrictions that do not serve any legitimate state interest and facilitate direct adoptions and second parent adoptions to keep up with progressive comparative practices.

Issue: Who can adopt?

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[450] The Juvenile Justice (Care and Protection of Children) Model Rules, 2016 <https://cara.nic.in/PDF/english%20model%20rule.pdf> accessed 27 April 2023.
[451] The Adoption Regulations 2022 <https://cara.nic.in/PDF/adoption%20regulations%202022%20english_27.pdf> accessed 27 April 2023.
[452] See *Shabnam Hashmi v Union of India* (2014) 4 SCC 1.
[453] JJ Act, s 2(2).
[454] JJ Act, s 27.
[455] JJ Act, s 30(xi).
[456] JJ Act, s 2(57), Specialised Adoption Agency means an institution established by the State Government or by a voluntary or non-governmental organisation and recognised under section 65, for housing orphans, abandoned and surrendered children, placed there by order of the Committee, for the purpose of adoption.
[457] JJ Act, s 58(1).
[458] JJ Act, s 58(2).
[459] JJ Act, s 58(3).
[460] JJ Act, s 61.

Objective:
To expand the statutory right to adoption to all classes of prospective adoptive parents irrespective of marital status, gender identity and sexual orientation, subject to other eligibility conditions.

Context:
At present, section 57 of the JJ Act along with Regulation 5 of the Adoption Regulations, 2022 prescribe the eligibility criteria for PAPs. On 16 June 2022, the CARA issued a circular which prohibits single PAPs, who are in a live-in relationship with a partner, from adopting under the JJ Act.[461] This, according to the circular, is in line with Regulation 5(3) of the Adoption Regulations, 2017. Under this regulation, one of the eligibility criteria for PAPs is that they should be a couple who have been in at least two years of a stable marital relationship.[462] Consequently, non-marital partners are deemed ineligible to adopt under the JJ Act. Besides this, the 2022 Regulations also impose certain liberty restrictions which do not serve a legitimate state interest - section 57(4) and Regulation 5(2)(c) prohibit single males from adopting a girl child, and Regulation 5(7) prohibits couples with two or more children to adopt, subject to certain exceptions.

Proposed steps:
It is proposed that section 57 of the JJ Act and Regulation 5 of the Adoption Regulations, 2022 be amended to include non-marital partners, remove-gender based restrictions on adoption, and restrictions on the basis of number of children who can be adopted. Further, the CARA circular referred to above must be withdrawn.

Proposed amendments:

[461] Central Adoption Resource Authority, Circular dated 16 June 2022 <https://cara.nic.in/PDF/Registration-of-cases-of-single-PAPs-having-a_live-in_partner-in-a-long-time-relationship-and-not-married160622.pdf> accessed 14 May 2023.
[462] JJ Regulations, Regulation 5.

Provision (Act, Regulation, Rule)	Current Provision	Amended Provision	Principle
Section 1(a)	**No existing provision.**	***'Acknowledged Stable Union' means a stable union under section 25(2) of Chapter I of the Code on Indian Family Law, 2023.***	Since persons in a stable union are eligible to adopt jointly, an acknowledged stable union has been defined.
Section 57, JJ Act	**Eligibility of prospective adoptive parents.—** (1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing a good upbringing to him. (2) In case of a couple, the consent of both the spouses for the adoption shall be required. (3) A single or divorced person can also adopt, subject to fulfilment of the criteria and in accordance with the provisions of adoption regulations framed by the Authority. (4) A single male is not eligible to adopt a girl child. (5) Any other criteria that may be specified in the adoption regulations framed by the Authority.	**Eligibility of prospective adoptive parents.—** (1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing such child a good upbringing. (2) In the case of ***a married couple***, ***or persons in an intimated stable union*** consent of both parties for adoption is required. (3) A single or divorced person is eligible to adopt. (4) **Delete.** (5) Any other criteria that may be specified in the adoption regulations framed by the Authority.	The following modifications have been made to this provision: (a) Eligibility criteria for couples has been expanded to include married couples and persons in an acknowledged stable union irrespective of gender identity or sexual orientation. (b) The prohibition on single male persons from adopting female children has been deleted as the same is a liberty restriction that does not serve any legitimate state interest. The potential rationale, that a male adoptive parent may sexually abuse a female child, stands rebutted by the position of law in relation to child abuse wherein the perpetrator and survivor are gender neutral.[463] Further the provision of post-adoption supervision under the JJ Act acts as a safeguard to mitigate the possibility of

[463] Protection of Children from Sexual Offences Act, 2012, ss 2(1)(d) and 3.

			adopted children being abused by the adoptive parent(s).
Regulation 5, Adoption Regulations, 2022	**Eligibility criteria for prospective adoptive parents.-** (1) The prospective adoptive parents shall be physically, mentally, emotionally and financially capable, they shall not have any life threatening medical condition and they should not have been convicted in criminal act of any nature or accused in any case of child rights violation. (2) Any prospective adoptive parents, irrespective of his marital status and whether or not he has biological son or daughter, can adopt a child subject to following, namely:- (a) the consent of both the spouses for the adoption shall be required, in case of a married couple; (b) a single female can adopt a child of any gender; (c) a single male shall not be eligible to adopt a girl child. (3) No child shall be given in adoption to a couple unless they have at least two years of stable marital relationship except in the cases of relative or step-parent adoption.	**Eligibility criteria for prospective adoptive parents.-** (1) The prospective adoptive parents shall be physically, mentally, emotionally and financially capable, they shall not have any life threatening medical condition and they should not have been convicted in criminal act of any nature or accused in any case of child rights violation. (2) Any prospective adoptive parent, irrespective of their marital status and whether or not they have biological children, can adopt a child subject to following, namely:- (a) the consent of both the partners for the adoption shall be required, in case of ***a married couple or an intimated stable union;*** (b) **Delete.** (c) **Delete.** (3) No child shall be given in adoption to a couple unless the prospective adoptive parents have a ***stable relationship for a period of at least two years*** except in case of relative or step-parent adoption. (4) The age of prospective	The following modifications have been made to this provision: a) Eligibility criteria for couples has been expanded to include married couples and persons in stable unions. b) The above principle has also been reflected in the provision regarding the minimum period of stability. c) Gender based restrictions on adoption have been deleted. d) Prohibiting couples with two or more children from adopting more children (subject to the condition that they otherwise satisfy the criteria for being deemed fit parents) is a liberty restriction that does not serve any legitimate state interest or the interests of children who are legally free to be adopted. Subsequently, Regulation 5(7) has been deleted.

	(4) The age of prospective adoptive parents, as on the date of registration, shall be counted for deciding the eligibility and the eligibility of prospective adoptive parents to apply for children of different age groups shall be as under:- ... (5) In case of a couple, the composite age of the prospective adoptive parents shall be counted. (6) The age criteria for prospective adoptive parents shall not be applicable in case of relative adoptions and adoption by step-parent. (7) Couples with two or more children shall only be considered for special needs children as specified in clause (25) of regulation 2, and hard to place children as stated in clause (13) of regulation 2 unless they are relatives or step-children. (8) The prospective adoptive parents have to revalidate their Home study report after a period of three years. (9) The seniority of the prospective adoptive parents who have not received a single referral within three years shall be counted from their date of	adoptive parents, as on the date of registration, shall be counted for deciding the eligibility and the eligibility of prospective adoptive parents to apply for children of different age groups shall be as under:- ... (5) In case of married couples and ***parties in an intimated stable union***, the composite age of the prospective adoptive parents shall be counted. (6) The age criteria for prospective adoptive parents shall not be applicable in case of relative adoptions and adoption by step-parent. (7) **Delete.** The minimum age difference between the child and either of the prospective adoptive parents shall not be less than twenty-five years. (8) The prospective adoptive parents have to revalidate their Home study report after a period of three years. (9) The seniority of the prospective adoptive parents who have not received a single referral within three years shall be counted from their date of registration except those	

	registration except those who have crossed composite years of one hundred ten years.	who have crossed composite years of one hundred ten years.	
CARA Circular Dated 16 June, 2022.	The CARA Circular prohibits a single person from adopting a child if such person is in a live-in relationship as such a relationship does not qualify as a stable family.	**Withdraw**	Withdrawal of this circular will remove the restriction on individuals in live-in relationships from adopting.

Issue: How can direct adoptions be facilitated through the JJ Act?

Objective:
To explicitly recognise direct adoptions for the surrendering parent(s) and provide for post-adoption agreements, subject to the consent of the surrendering parent/guardian and the prospective adoptive parent.

Context:
At present, the JJ Act does not provide for direct adoption in case of any class of children. In the case of orphaned or abandoned children, quite naturally, acquiring knowledge about or establishing contact with the parents of the child is not possible. In the case of surrendered children, however, contact with the parents can be established. A "surrendered child" means a child who is relinquished by the parent or guardian to the CWC, on account of physical, emotional and social factors beyond their control, and declared as such by the CWC.[464]

Section 35 of the JJ Act is applicable with respect to surrendered children. A parent or guardian can produce a child before the CWC on account of physical, emotional and social factors beyond their control. Such parents or guardians shall be given two months' time to reconsider. In the intervening period, the CWC could follow one of three options - (i) allow the child to be with their parents or guardian under supervision, (ii) place the child in a SAA if they are below 6 years of age, or (iii) place the child in a children's home if they are above 6 years of age.[465] Finally, the decision to declare an orphan, abandoned or surrendered child as legally free for adoption shall be taken by at least three members of the CWC.[466]

Direct adoption contemplates a situation where the surrendering parent(s) of the adoptive child are crucial to the process of choosing the adoptive parent, and there is possibility of maintaining contact with them even after the adoption has taken place.[467] Currently, direct adoption is not recognised under the JJ Act.

Proposed step:
To facilitate direct adoption of surrendered children, the preference of the parents of such children must be actively considered by the CWC. To that end, an amendment is being proposed under section 35 of the JJ Act. Further, a new provision, numbered section 35-A is being proposed for 'post-adoption agreements'. Such an agreement will be entered into between the parents of the surrendered child and the PAPs so as to facilitate communication between the child and the surrendering parents. This agreement will also determine the mutually agreed upon terms based on which the surrendering parents will be kept abreast of the major decisions taken with respect to the child. It is also proposed that a schedule be appended to the 2022 Regulations which has a standard format for a post-adoption agreement. Such a format will facilitate parties as well as the CWC in finalising the post-adoption agreement.

Proposed amendments:

[464] The Juvenile Justice (Care and Protection of Children) Act, 2015, s 2(60).
[465] The Juvenile Justice (Care and Protection of Children) Act, 2015, s 35(3).
[466] The Juvenile Justice (Care and Protection of Children) Act, 2015, s 38(4).
[467] Elsbeth Neil, 'The benefits and challenges of direct post-adoption contact: perspectives from adoptive parents and birth relatives' (2010) 27 Aloma 89 - 115 <https://contact.rip.org.uk/wp-content/uploads/Supporting_direct_contact_after_adoption_neil_aloma_2010.pdf> accessed 04 May 2023.

Provision	Current Provision	Amended Provision	Principle
Section 30	**Functions and responsibilities of Committee.—** The functions and responsibilities of the Committee shall include— . (xi) declaration of orphan, abandoned and surrendered child as legally free for adoption after due inquiry;	**Functions and responsibilities of Committee.—** The functions and responsibilities of the Committee shall include— . ***(xia) in the case of adoption of a surrendered child, facilitating and assisting in the preparation of a post adoption agreement between the prospective adoptive parents and the parent or guardian of the surrendered child;***	Insertion of a new sub-clause is recommended in section 30, one which gives the CWC the responsibility of aiding the preparation of post-adoption agreements, in the context of adoption of surrendered children.
Section 35	**Surrender of children.—** (1) A parent or guardian, who for physical, emotional and social factors beyond their control, wishes to surrender a child, shall produce the child before the Committee. (2) If, after prescribed process of inquiry and counselling, the Committee is satisfied, a surrender deed shall be executed by the parent or guardian, as the case may be, before the Committee. (3) The parents or guardian who surrendered the child, shall be given two	**Surrender of children.—** (1) A parent or guardian, who for physical, emotional and social factors beyond their control, wishes to surrender a child, shall produce the child before the Committee. (2) If, after prescribed process of inquiry and counselling, the Committee is satisfied, a surrender deed shall be executed by the parent or guardian, as the case may be, before the Committee. (3) The parents or guardian who surrendered the child, shall be given two months' time to	The following modifications have been made to the provision: (a) Addition of sub-section (4) allows for direct adoption of the child without the necessity of institutionalisation thereby accounting for cases where the parent or guardian may not want to give up custody of (or institutionalise) the child till such child is legally adopted. (b) In case of direct adoptions, the parent/guardian who surrendered the child may have a preference for who should be the prospective adoptive parents of such a child. Sub-section (5) provides that the CWC must take into consideration such preference. This proposal

	months time to reconsider their decision and in the intervening period the Committee shall either allow, after due inquiry, the child to be with the parents or guardian under supervision, or place the child in a Specialised Adoption Agency, if he or she is below six years of age, or a children's home if he is above six years.	reconsider their decision and in the intervening period the Committee shall either allow, after due inquiry, the child to be with the parents or guardian under supervision, or place the child in a Specialised Adoption Agency, if he or she is below six years of age, or a children's home if he is above six years. ***(4) The Committee may allow the parents or guardian who have surrendered the child to retain custody of the child, under the supervision of the Committee, till the child is legally adopted as per section 63;*** ***(5) If the parents or guardian of the surrendered child have any preference with respect to the prospective adoptive parents, the Committee shall take the same into consideration.***	draws from a similar provision in the South African Children's Act, 2005.[468]
Section 35-A	**No existing provision.**	***Post-adoption Agreement —*** ***(1) Subject to consent of all parties involved, the prospective adoptive parents may enter into a post-adoption agreement with the parents or guardian of a surrendered child before the issuance of an adoption order by the District Magistrate under section 61;*** ***Provided that the post-adoption agreement will have effect only after it is approved by the District Magistrate.***	A provision for post-adoption agreements provides for direct adoptions under the JJ Act and recognises that the surrendering parent may want to remain in contact with the child who has been adopted. Such an agreement must be: (a) entered consensually; (b) cognisant of the wishes and the best interests of the child; (c) approved by the District Magistrate before the issuance of an adoption order.

[468] *See* South Africa Children's Act, 2005, s 233(3).

		(2) The post-adoption agreement may include the following – ***(a) communication, including in-person visits between the surrendered child and the parent or guardian of such child;*** ***(b) sharing of information, including educational and medical information concerning the child;*** ***(c) sharing of any other information as provided in the adoption regulations framed by the authority.*** ***(3) A post-adoption agreement will not be entered into without the consent of the surrendered child if the child is of the age, maturity and stage of development to understand the implications of such an agreement.*** ***(4) The Committee shall assist the prospective adoptive parents and the parent or guardian of a surrendered child in preparing a post-adoption agreement and counsel them on the implications of such an agreement.*** ***(5) In finalising the terms of the post-adoption agreement, the best interests of the surrendered child shall be of paramount consideration.***	This agreement can be modified/amended in accordance with prescribed procedure. This proposal (for a post-adoption agreement) also draws from a similar provision in the South African Children's Act, 2005.[469]

[469] *See* South Africa Children's Act, 2005, s 234.

		(6) An application for amendment, revocation or termination of a post-adoption agreement may be made to the District Magistrate by - ***(a) one of the parties to the agreement; or*** ***(b) the adopted child.***	
Section 61	**Procedure for disposal of adoption proceedings.—** (1) Before issuing an adoption order, the District Magistrate shall satisfy itself that— (a) the adoption is for the welfare of the child; (b) due consideration is given to the wishes of the child having regard to the age and understanding of the child; and (c) that neither the prospective adoptive parents has given or agreed to give nor the specialised adoption agency or the parent or guardian of the child in case of relative adoption has received or agreed to receive any payment or reward in consideration of the adoption, except as permitted under the adoption regulations framed by the Authority towards the adoption fees or service charge or child care corpus.	**Procedure for disposal of adoption proceedings.—** (1) Before issuing an adoption order, the District Magistrate shall satisfy itself that— (a) the adoption is for the welfare of the child; (b) due consideration is given to the wishes of the child having regard to the age and understanding of the child; and (c) that neither the prospective adoptive parents has given or agreed to give nor the specialised adoption agency or the parent or guardian of the child in case of relative adoption has received or agreed to receive any payment or reward in consideration of the adoption, except as permitted under the adoption regulations framed by the Authority towards the adoption fees or service charge or child care corpus. ***(1A) Before issuing an adoption order with respect to a surrendered child under section 61, the District Magistrate may approve a post-adoption agreement between the prospective adoptive parents and the parent or guardian of a surrendered child as per section 35A.***	A corresponding amendment is being proposed in section 61 of the Act, which empowers the District Magistrate to approve the post-adoption agreement before issuing an adoption order with respect to a surrendered child.

Issue: How can second parent adoptions be facilitated through the JJ Act?

Objective:
To provide for second parent adoption which enables a person to directly adopt the child of a person they are in an acknowledged stable union with.

Context:
Under the JJ Act and the JJ Regulations, only step-parents can directly adopt the children of their spouses. In case the former spouse of the parent is alive, then the consent of such a former parent is required prior to adoption by the step-parent.[470] The adoption procedure prescribed for step-parents prioritises parental autonomy as the consent of the parents and, in some cases, the consent of the child as well is the basis on which the adoption is effected. However, neither the JJ Act nor the JJ Regulations permit direct adoption by persons who are not legally married to the legal parent of the child they intend to adopt. A progressive law on adoption must permit direct adoption by the second parent irrespective of whether they are married to the legal parent or not while prescribing conditions for such an adoption to safeguard the interests of the child.

Proposed Provision:
An enabling provision which allows a second parent to adopt the child of a legal parent when they are not related to the legal parent by marriage but are instead in a stable union with such a parent, subject to conditions prescribed. Such a provision centres parental autonomy and, in certain cases, the consent of the child when it comes to second parent adoptions.

[470] JJ Regulations, Entry 5, Sch VI.

Provision	Current Provision	Amended/Proposed Provision	Principle
Regulation 2(4)	"Biological parent" means a man or woman who is genetically father or mother of a child;	"Parent" means a parent as defined under section 30(i) of Chapter II of the Code on Indian Family Law, 2023.	The definition of parent has been modified to make it gender neutral and reflective of the updated definition in Chapter II of the Family Law Code.
Regulation 2(26)	"step parent" means a parent who is married to the father or mother of a child, but who is not that child's biological father or mother;	"step parent" means a person who is married to the parent of a child, but who is not the legal parent of such a child.	The definition of step-parent has been modified to make it gender neutral.
Regulation 2(27)	"step parent adoption" means any situation in which someone becomes a legal parent for his or her spouse's child;	"step parent adoption" means the process by which a person becomes the legal parent of the child or children of their spouse.	The definition of step-parent adoption has been modified to make it gender neutral.
Regulation <>	**No existing provision.**	***"Second parent adoption" means adoption as per Entry 6 of Schedule VI of these regulations.***	The conditions for second parent adoption have been prescribed in the newly added Entry 6 to Schedule VI of the JJ Regulations.
Regulation <>	**No existing provision.**	***"Single parent" means a person who is the only legal parent of the child.***	Single parent has been defined.
Entry 6, Schedule VI of 2022 Regulations	**No existing provision.**	***In case of adoption of a child or children by a second parent the legal parents and second parent will have to register on the Designated Portal and provide relevant documents by uploading the same online through the Designated Portal.***	The conditions for adoption by a second parent are similar to the conditions prescribed for adoption by a step parent under Entry 5, Schedule VI. The requirement for proof of marriage has been removed and replaced with a proof of the parents being in an acknowledged stable union.

		<u>Documents to be uploaded at the time of registration</u> ***(6) Adoption of child or children by a second parent*** ***At the time of registration, all requisite documents to be uploaded on the Designated Portal as stated above in cases of in-country Adoption [(1)-(9)] alongwith*** ***(1) A recent photograph of the child or children to be adopted.*** ***(2) In case the child has a single parent, consent of the single parent to adoption by the second parent as per the format prescribed in Schedule xx.*** ***(3) In case the child has two legal parents, consent of both legal parents, the second parent adopting the child or children as provided in the Schedule xx of the Adoption Regulations along with relevant documents mentioned thereof.*** ***(4) Consent of the child to be adopted by the second parent if the child is of five years of age or above as per the format prescribed in Schedule xx.*** ***(5) Proof that both parents (legal parent and second parent) are in an intimated stable union.*** ***(6) Any other document as may be prescribed by CARA.***	This ensures that the child is being adopted into a stable family unit and extends the right to adopt to persons in diverse forms of intimacies, beyond marriage. Certain other modifications have been made, such as consent of child being mandatory if the child is above five years of age and an enabling clause which allows CARA to prescribe further documentary proof for second parent adoptions.

Part IV - Reproductive Technology and Parenthood

Two laws regulate the use of reproductive technology and parenthood in India:

1) The Surrogacy (Regulation) Act, 2021 ('Surrogacy Act') which regulates the use of surrogate services, and
2) The Assisted Reproductive Technology (Regulation) Act, 2021 ('ART Act') which regulates the use of assisted reproductive technologies[471] (including donation and use of gametes), and establishments providing reproductive technology services.

Both these laws operate on the presumption that the heterosexual conjugal unit is the only family structure that has legitimacy to acquire parenthood through use of surrogacy and ART. Certain amendments are being proposed to both these laws with the aim of bringing a diversity of family forms within its purview.

Issue: Who is eligible to use the services of a surrogate under the Surrogacy Act to become a parent/parents?

Objective:
To ensure surrogacy laws are inclusive of a diversity of families irrespective of marital status, sexual orientation, and gender identity.

Context:
Under the Surrogacy Act, only two classes of people can become parents by relying on the services of a surrogate - *first*, married heterosexual couples who have a medical condition that necessitates gestational surrogacy, and *second*, a woman who is a widow or divorcee between the age of 35 to 45 years. The medical conditions are specified in Rule 14 of the Surrogacy (Regulation) Rules, 2022 ('Surrogacy Rules'). The Surrogacy Act and Surrogacy Rules thus reinforce the idea of a heteronormative family as being the only legitimate family form that can access surrogacy services.

Proposed Step:
It is proposed that the Surrogacy Act be amended to include a diversity of family forms including single persons, same gender/sex partners, and partners who are in a stable union as qualifying for using surrogacy services to form families. This can be done by focusing on the following:

(a) Eligibility: The class of persons who are eligible to use surrogacy services can be widened by removing the prerequisite of medical conditions/widowhood/divorce (so as to expand the universe of persons who can become parents using surrogacy services);

(b) Use of gender neutral terms: Gender neutral terms can be used to include trans-men, trans-women, non-binary transgender persons and same sex/same gender partners within the purview of the law.

Proposed Amendments:

I. Definitions:

[471] Hereinafter referred to as ART(s).

Provision	Current Provision	Amended Provision	Principle
Section 2(h)	"couple" means the legally married Indian man and woman above the age of 21 years and 18 years respectively;	"couple" includes: ***(a) legally married persons,*** ***(b) persons in an acknowledged stable union under section 25(2) of Chapter I of the Code on Indian Family Law, 2023.***	The definition of couple has been expanded to include acknowledged stable union, and has been made inclusive of persons of all gender identities and sexual orientations.
Section 2(r)	"intending couple" means a couple who have a medical indication necessitating gestational surrogacy and who intend to become parents through surrogacy;	"intending couple" means a couple who ***intend to become parents through surrogacy*:** ***Explanation I: Surrogacy refers to only 'gestational surrogacy'.*** ***Explanation II: 'gestational surrogacy' means a practice by which a surrogate person carries a child for the intending couple or intending person through implantation of embryo in their womb and the child is not genetically related to the surrogate person.***	The definition of intending couple has been modified to delete the requirement of a medical necessity as a pre-condition for being able to use surrogacy services. This follows the position taken by the UK[472] to expand the class of people who can rely on the services of a surrogate. Further, 'gestational surrogacy' has been defined.[473]
Section 2(s)	"Intending woman" means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy;	"Intending person" means an ***Indian person who intends to become a parent through surrogacy***;	The definition of intending woman has been changed to intending person to ensure that all single persons, irrespective of gender identity, can rely on surrogacy services to become a parent.

[472] UK Surrogacy Arrangements Act 1985.
[473] The definition of 'gestational surrogacy' has been moved from the Surrogacy (Regulation) Act, 2021, s 4(ii) to the Definitions section.

Section 2(zd)	"surrogacy" means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth;	"Surrogacy" means a practice whereby a ***person*** bears and gives birth to a child for an intending couple or ***intending person*** with the intention of handing over such child to the intending couple or ***intending person*** after the birth of the child;	The definition of surrogacy has been modified to use gender neutral language so that persons other than women can also act as surrogates.
Section 2(zg)	"surrogate mother" means a woman who agrees to bear a child (who is genetically related to the intending couple or intending woman) through surrogacy from the implantation of embryo in her womb and fulfils the conditions as provided in sub-clause (*b*) of clause (*iii*) of Section 4;	"surrogate parent' means a person agrees to bear a child (who is genetically related to the intending couple or ***intending person***) through surrogacy from the implantation of embryo in their womb and fulfils the conditions as provided in sub-clause (*b*) of clause (*iii*) of Section 4;	The definition of surrogate mother has been modified to the extent that 'surrogate mother' has been replaced with 'surrogate parent' and 'intending woman' is replaced with 'intending person'. Consequently, surrogacy is understood to be independent of the gender identity of the person such that transgender persons can also become surrogates.

II. Other provisions:

Provision	Current provision	Amended Provision	Principle
Section 4(ii)	**Regulation of surrogacy and surrogacy procedures:** (i)..... (*ii*) no surrogacy or surrogacy procedures shall be conducted, undertaken, performed or availed of, except for the	**Regulation of surrogacy and surrogacy procedures:** (i)..... ***(ii) A surrogacy or surrogacy procedure will be performed only if the following conditions are satisfied –*** ***(a) the intending couple or intending person of***	The following modifications have been made to this provision: (a) Intending woman has been replaced with 'intending person' to include single persons irrespective of gender identity. (b) The term 'diseases' has been deleted to do away

	following purposes, namely: (a) when an intending couple has a medical indication necessitating gestational surrogacy: Provided that a couple of Indian origin or an intending woman who intends to avail surrogacy, shall obtain a certificate of recommendation from the Board on an application made by the said persons in such form and manner as may be prescribed. *Explanation*.—For the purposes of this sub-clause and item (*I*) of sub-clause (*a*) of clause (*iii*) the expression "gestational surrogacy" means a practice whereby a surrogate mother carries a child for the intending couple through implantation of embryo in her womb and the child is not genetically related to the surrogate mother; (b) when it is only for altruistic surrogacy purposes; (c) when it is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures; (d) when it is not for producing children	***Indian origin has obtained a certificate of recommendation from the Board on an application made in such form and manner as prescribed;*** ***(b) the surrogacy is only for altruistic surrogacy purposes;*** ***(c) the surrogacy is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures***; ***(d) the surrogacy is not for producing children for sale, prostitution or any other form of exploitation; and*** ***(e) Any other conditions as may be specified by regulations made by the Board are satisfied.***	with the requirement of a medical condition as a prerequisite for relying on the services of a surrogate. This expands the class of persons who can use the services of a surrogate and allows for inclusion of single persons of all gender identities as well as same-sex/gender couples.

	for sale, prostitution or any other form of exploitation; and (e) any other condition or disease as may be specified by regulations made by the Board;		
Section 4(iii)(a) (I)	(a) the intending couple is in possession of a certificate of essentiality issued by the appropriate authority, after satisfying itself, for the reasons to be recorded in writing, about the fulfilment of the following conditions, namely: — (I) a certificate of a medical indication in favour of either or both members of the intending couple or intending woman necessitating gestational surrogacy from a District Medical Board. Explanation.—For the purposes of this item, the expression "District Medical Board" means a medical board under the Chairpersonship of Chief Medical Officer or Chief Civil Surgeon or Joint Director of Health Services of the district and comprising of at least two other specialists, namely, the chief gynaecologist or obstetrician and chief paediatrician of the district;	**Delete**	This provision has been deleted as a medical condition is no longer a prerequisite for using the services of a surrogate.

Section 4(iii)(b)	(b) the surrogate mother is in possession of an eligibility certificate issued by the appropriate authority on fulfilment of the following conditions, namely: — (I) no woman, other than an ever married woman having a child of her own and between the age of 25 to 35 years on the day of implantation, shall be a surrogate mother or help in surrogacy by donating her egg or oocyte or otherwise; (II) a willing woman shall act as a surrogate mother and be permitted to undergo surrogacy procedures as per the provisions of this Act: Provided that the intending couple or the intending woman shall approach the appropriate authority with a willing woman who agrees to act as a surrogate mother; (III) no woman shall act as a surrogate mother by providing her own gametes; (IV) no woman shall act as a surrogate mother more than once in her lifetime:	b) the surrogate ***parent*** is in possession of an eligibility certificate issued by the appropriate authority on fulfilment of the following conditions, namely: — (I) no ***person***, other than a ***married person*** having a child of her own and between the age of 25 to 35 years on the day of implantation, shall be a surrogate ***parent*** or help in surrogacy by donating her egg or oocyte or otherwise; (II) a ***willing person*** shall act as a surrogate ***parent*** and be permitted to undergo surrogacy procedures as per the provisions of this Act: Provided that the ***intending couple or the intending person*** shall approach the appropriate authority with a ***willing person*** who agrees to act as a surrogate ***parent;*** (III) ***no person*** shall act as a surrogate ***parent*** by providing her own gametes; (IV) ***no person*** shall act as a surrogate ***parent*** more than once in her lifetime:	The following modifications have been made to this provision: (a) Married woman has been replaced with "married person" and 'surrogate mother' with 'surrogate person' such that persons of any gender identity can act as a surrogate; (b) Willing woman has been replaced with "willing person" to ensure that persons of all gender identities can act as surrogates.
Section	(*c*) an eligibility certificate for intending	*(c)* an eligibility certificate for intending couple or	The provision has been modified to introduce a uniform

4(c)(I)	couple is issued separately by the appropriate authority on fulfilment of the following conditions, namely:-- (I) the intending couple are married and between the age of 23 to 50 years in case of female and between 26 to 55 years in case of male on the day of certification;	intending person is issued separately by the appropriate authority on fulfilment of the following conditions, namely:-- (I) ***the parties to the intending couple or the intending person must be between 23 to 55 years old.***	age for all genders to ensure the provision is not restricted to the binary of male and female. Additionally, there is no clear rationale as to why the eligibility age is different for men and women. A policy call regarding age must be evidence based.
Section 8	Rights of surrogate child.— A child born out of surrogacy procedure, shall be deemed to be a biological child of the intending couple or intending woman and the said child shall be entitled to all the rights and privileges available to a natural child under any law for time being in force.	Rights of surrogate child.— A child born out of surrogacy procedure, shall be deemed to be the ***legal child*** of the intending couple or intending person and the said child shall be entitled to all the rights and privileges available to a ***legal child*** under any law for time being in force.	The change in language from 'biological child' to 'legal clarifies' that only biological relatedness is not the only basis of parentage and a child's rights vis-a-vis one's parents.
Rule 14, Surrogacy Rules	**Medical indications necessitating gestational surrogacy –** A woman may opt for surrogacy if; – (a) she has no uterus or missing uterus or abnormal uterus (like hypoplastic uterus or intrauterine adhesions or thin endometrium or small unicornuate uterus, T-shaped uterus) or if the uterus is surgically removed due to any medical conditions such as gynaecological cancer; (b) intended parent or woman who has	**Delete**	This Rule has been deleted as a medical condition is no longer a prerequisite for using the services of a surrogate.

	repeatedly failed to conceive after multiple In vitro fertilisation or Intracytoplasmic sperm injection attempts. (Recurrent implantation failure); (c) multiple pregnancy losses resulting from an unexplained medical reason. unexplained graft rejection due to exaggerated immune response; (d) any illness that makes it impossible for woman to carry a pregnancy to viability or pregnancy that is life threatening.		
	General Amendment.	Replace 'intending woman' with '***intending person***' in the following provisions – (a) Section 4(iii)(a)(II). (b) Section 7. (c) Section 8.	Intending woman has been replaced with intending person to include single persons of all genders.

Caveat

The constitutionality of the Surrogacy Act has been challenged before the Supreme Court on the ground that it violates the right to equality and liberty. Specifically, provisions restricting single women from accessing surrogate services and prescribing restrictive eligibility criteria have been challenged for infringing the reproductive rights of persons who are desirous of using the services of

a surrogate.[474] Simultaneously, the prohibition of commercial surrogacy has also come under criticism.[475] While acknowledging these concerns, this study does not comment on the merits of the Surrogacy Act. It only seeks to address issues in relation to eligibility to expand parenthood to include diversity of family forms.

[474] *X v Union of India and Anr.* WP(C) No. 42/2023.
[475] Prabha Kotiswaran and Sneha Banerjee, 'Tracing the journey, and the flaws, of the Surrogacy Bill', *Hindustan Times* (16 February 2020) <https://www.hindustantimes.com/analysis/tracing-the-journey-and-flaws-of-the-surrogacy-bill/story-zuWjB3MXl3KHZ3lQ3dcpAJ.html> accessed 16 May 2023.

Issue: Who is eligible to use assisted reproductive technology services under the ART Act, 2021 to become a parent(s)?

Objective:
To ensure assisted reproductive technology laws are inclusive of a diversity of families irrespective of marital status, sexual orientation, and gender identity.

Context:
The ART Act provides for regulation of ART clinics and banks, and prescribes eligibility criteria for persons who can serve as gamete donors and can rely on ART services for the purpose of becoming a parent/ parents. At present, two classes of people can rely on ART services - *first*, an infertile heterosexual married couple, and *second*, a woman above the age of 21 years. Consequently, queer persons and other family forms are left out of the purview of the law.

Proposed Steps:
It is proposed that the ART Act be amended to include a diversity of family forms including single persons, queer partners, and persons in acknowledged stable unions qualifying for using ART services to form families. This can be done by focusing on the following:

(a) **Eligibility:** The class of persons who are eligible to use ART services to become parents can be expanded. The qualifying ground of infertility may be removed to ensure queer persons (who may not be infertile) can rely on ART services.
(b) **Gender neutral terms:** Gender neutral terms can be used to include trans-men, trans-women, and non-binary transgender persons within the purview of the law.

Proposed Amendments:

I. Definitions

Provision	Current Provision	Amended Provision	Principle
Section 2(1)(a)	"assisted reproductive technology" with its grammatical variations and cognate expressions, means all techniques that attempt to obtain a pregnancy by handling the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive system of a woman;	"assisted reproductive technology" means all techniques that attempt to obtain a pregnancy by handling the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive system of ***a person who can conceive and carry a child*;**	'Woman' has been replaced by 'person who can conceive and carry a child' to ensure persons of all genders can access assisted reproductive technology services.
Section 2(1)(e)	"commissioning couple" means an infertile married couple who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the services authorised of the said clinic or bank;	***"Commissioning couple" includes:*** ***(a) legally married persons; and*** ***(b) persons in an acknowledged stable union under section 25(2) of Chapter I of the Code on Indian Family Law, 2023.*** ***who are unable to conceive a child and who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the services authorised of the said clinic or bank;***	The definition of 'commissioning couple' has been modified to provide for: (a) Inclusion of persons in an acknowledged stable union. (b) Modifying 'inability to conceive because of infertility' to 'inability to conceive' to include queer parents.
Section 2(1)(h)	"gamete donor" means a person who provides sperm or oocyte with the objective of enabling an infertile couple or woman to have a child;	"gamete donor" means a person who provides sperm or oocyte with the objective of enabling the commissioning couple or ***commissioning person*** to have a child;	'Woman' has been replaced with 'commissioning person' to include persons of all gender identities.

Section 2(1)(j)	"infertility" means the inability to conceive after one year of unprotected coitus or other proven medical condition preventing a couple from conception;	**Delete.**	As infertility is no longer the only ground for qualifying to use ART services, the term has been deleted.
Section 2(1)(u)	"woman" means any woman above the age of twenty-one years who approaches an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the authorised services of the clinic or bank.	"***commissioning person***" means any person above the age of twenty-one years who approaches an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the authorised services of the clinic or bank.	'Woman' has been replaced with 'commissioning person' to ensure that single persons of all genders can rely on assisted reproductive technology services to become a parent.

II. Other provisions

Provision	Current Provision	Amended Provision	Principle
Section 21(g)	(g) the clinics shall apply the assisted reproductive technology services, — (i) to a woman above the age of twenty-one years and below the age of fifty years; (ii) to a man above the age of twenty-one years and below the age of fifty-five years;	***(g) the clinics shall apply the assisted reproductive technology services to persons above the age of twenty one years and below the age of fifty five years.***	The provision has been modified to introduce a uniform age for all genders to ensure the provision is not restricted to the binary of male and female. Additionally, there is no clear rationale as to why the eligibility age is different for men and women. A policy call regarding age must be evidence based.
Section 27	**Sourcing of gametes by assisted reproductive technology banks. —** (1) ..... (2) The banks shall—	**Sourcing of gametes by assisted reproductive technology banks. —** (1) .... (2) The banks shall—	Replacing 'males' with 'semen donors' and 'females' with 'oocyte donors' will ensure that persons of all gender identities can be semen and oocyte donors.

	(a) obtain semen from males between twenty-one years of age and fifty-five years of age, both inclusive; (b) obtain oocytes from females between twenty-three years of age and thirty-five years of age; and (c) ….	(a) obtain semen from ***semen donors*** between twenty-one years of age and fifty-five years of age, both inclusive; (b) obtain oocytes from ***oocyte donors*** between twenty-three years of age and thirty-five years of age; and (c) ….	
Section 27(6), Explanation	Explanation. —For the purposes of this section, the expressions— (i) "retrieval" means a procedure of removing oocytes from the ovaries of a woman;	Explanation. —For the purposes of this section, the expressions— (i) "retrieval" means a procedure of removing oocytes from the ovaries of an ***ovary donor***;	Replacing 'woman' with 'ovary donor' will ensure that persons of all gender identities can be ovary donors.
Section 31	**31. Rights of child born through assisted reproductive technology. —** (1) The child born through assisted reproductive technology shall be deemed to be a biological child of the commissioning couple and the said child shall be entitled to all the rights and privileges available to a natural child only from the commissioning couple under any law for the time being in force.	**31. Rights of a child born through assisted reproductive technology. —** (1) The child born through assisted reproductive technology shall be deemed to be the legal child of the commissioning couple or ***commissioning person*** and the said child shall be entitled to all the rights and privileges available to a natural child only from the commissioning couple under any law for the time being in force.	Adding 'commissioning person' clarifies that single persons can also rely on assisted reproductive technology services to become parents.
Section 31A	**No existing provision.**	***31.A. Child's Right to Information about Genetic Parent –*** ***(1) A child born as a result of assisted reproductive technology has a right to –*** ***(a) any medical information concerning***	S. 31A has been inserted to recognise the right of a child to know certain information about the 'genetic parent' other than their identity. Such a provision balances the child's right to know their

		their genetic parents; and ***(b) any other information concerning the genetic parents once such child reaches the age of majority under the Majority Act, 1872.*** (3) ***Subject to the provisions of this Act, information disclosed in terms of sub-section (1) will not reveal the identity of the gamete donor.***	genetic parent [476] vis-a-vis the gamete donor's right to privacy.[477] Such a provision also follows the South Africa approach[478] wherein the child has the right to information about their genetic parent while keeping the identity of the gamete donor confidential.
	General Amendment.	Replaced 'woman' with '***commissioning person***' in the following provisions: (a) Section 21(a), Sections 21(c)(i), 21(c)(ii) and 21(c)(iii). (b) Section 21(d) (c) Section 21(e) (d) Section 21(h) (e) Section 21(j) (f) Section 22(4) (g) Section 22(4), Explanation (iii) (h) Section 24(c) (i) Section 25(2)(a) (j) Section 33(d)	Replace 'woman' with 'commissioning person' to include single persons of all genders from being able to use assisted reproductive technology services.

[476] *ABC v State NCT of Delhi* (2015) 10 SCC 1; Article 7 and 8 of the United Nations Convention on the Rights of Child.
[477] *XXX v State of Kerala*, WP(C) NO. 13622 OF 2021, High Court of Kerala at Ernakulam, at para 19.
[478] South Africa Children's Act 2005, s 41.

Caveat

The constitutionality of the ART Act has been challenged before the Supreme Court. Some of the issues flagged in these petitions include the exclusion of single persons, live-in partners, and same sex/gender partners from the purview of the Act.[479] Further, the absence of monetary compensation for gamete donors and unscientific restrictions on donation have also been flagged and marked as a violation of reproductive autonomy guaranteed by Article 21 of the Constitution.[480] While acknowledging these concerns, this study does not comment on the merits of the ART Act. It only seeks to address issues in relation to eligibility to expand parenthood to include diversity of family forms.

[479] 'Another petition in Supreme Court challenging provisions of Surrogacy and ART Act' (*The Print*, 10 January 2023) <https://theprint.in/india/another-petition-in-supreme-court-challenging-provisions-of-surrogacy-and-art-act/1307757/> accessed 22 May 2023.

[480] Awstika Das, 'Restrictions On Egg Donations Unreasonable' : Another Plea By IVF Specialists Challenging ART Act; Supreme Court Issues Notice' (Live Law, 09 January 2023) <https://www.livelaw.in/top-stories/restrictions-on-egg-donations-unreasonable-another-plea-in-supreme-court-by-ivf-specialists-challenging-art-act-218502> accessed 25 May 2023.

Part V - Maintenance of Parents by Children

Issue: What should be the law governing the maintenance of parents by their major children?

Objective:

To amend the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 ('2007 Act') to make it inclusive of the plurality of parent-child relations.

Context:

The secular law governing the maintenance of parents by their major children is Section 125 of the Cr.P.C. Originally, the obligation to maintain parents has found legal expression in personal law which sees maintenance as a right of the parents and a duty of the major children.[481] HAMA is the only codified personal law that governs the law for the maintenance of parents for Hindus, Buddhists, Jains, or Sikhs.[482] HAMA places an equal duty on the son and daughter to maintain aged and infirm parents unable to maintain themselves.[483] The other personal laws, however, are neither codified nor impose an obligation on all children to maintain parents.[484] The 2007 Act was enacted to provide for secular and effective provisions for the maintenance and welfare of parents and senior citizens.[485]

While secular laws such as Section 125, Cr.P.C. and the 2007 Act provide a robust scheme for the maintenance of parents, need has been felt to further fine-tune the 2007 Act to broaden the scope of the person who shall be maintained, the persons who shall provide for the maintenance, and the amount of maintenance to be paid.[486] An amendment to that effect has been proposed to the 2007 Act, and it is currently pending before the Lok Sabha.[487]

Proposed step:

Amendments are being proposed to the 2007 Act to:

(a) broaden its application by including a plurality of parent-child relations outside the heterosexual conjugal family unit, and

(b) provide guiding factors to the 'Maintenance Tribunals'[488] for determining the quantum of maintenance under the 2007 Act.

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[481] Mulla, *Principles of Mahomedan Law* (LexisNexis, 20th Edn) ch XIX; Mayne, *A Treatise on Hindu Law and Usage* (Higginbotham and Co, 1892) ch XIV.

[482] The Hindu Adoption and Maintenance Act 1956, s 20.

[483] Ibid.

[484] The uncodified Muslim personal law entitles indigent parents to claim maintenance from their son. *See* Mulla, *Principles of Mahomedan Law* (LexisNexis, 20th Edn) ch XIX. The uncodified personal laws of Christians and Parsis do not impose a duty on the children to maintain the parents.

[485] The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Preamble.

[486] The Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill, 2019. *See* The Report of the Standing Committee on the Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill, 2019 (Ministry of Social Justice and Empowerment 2021). *See*, Sarasu Esther Thomas, 'Law and its discontents: Ageing and Family Law in India' [2023] 19 Journal of Social and Economic Development 1- 16.

[487] The Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill, 2019 (*PRS Legislative Research*) <https://prsindia.org/billtrack/the-maintenance-and-welfare-of-parents-and-senior-citizens-amendment-bill-2019> accessed 15 May 2023.

[488] The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, s 7. Constitution of Maintenance Tribunal.— (1) The State Government shall within a period of six months from the date of the commencement of this Act, by notification in Official Gazette, constitute for each Sub-division one or more Tribunals as may be specified in the notification for the purpose of adjudicating and deciding upon the order for maintenance under section 5.
(2) The Tribunal shall be presided over by an officer not below the rank of Sub- Divisional Officer of a State.
(3) Where two or more Tribunals are constituted for any area, the State Government may, by general or special order, regulate the distribution of business among them

Proposed Amendments:

Provision	Current Provision	Amended Provision	Principle
Section 2(a)	2(a) "children" includes son, daughter, grandson, and grand-daughter but does not include a minor;	"Children" ***in relation to a parent means children and grandchildren who have attained the age of majority as per the Majority Act, 1875.***	Gender neutral terms have been used.
Section 2(b)	"maintenance" includes provisions for food, clothing, residence and medical attendance and treatment;	"maintenance" ***includes provisions for food, clothing, housing, safety and security, medical attendance, healthcare, treatment and all other necessary support to ensure the holistic wellbeing, dignity, and quality of life of an individual.***[489]	The definition of maintenance has been expanded to incorporate the recommendations in the Amendment Bill of 2019.
Section 2(d)	"parent" means father or mother whether biological, adoptive or step father or step mother, as the case may be, whether or not the father or the mother is a senior citizen;	"parent" ***means a parent as defined in section 30(i) of Chapter II of the Code on Indian Family Law, 2023 and includes step-parents.***	The definition of parent has been cross referenced to allow for an expansion of the concept of parent.
Sections 4(1), (2) and (3)	**Maintenance of parents and senior citizens.—** (1) A senior citizen including parent who is unable to maintain himself from his own	**Maintenance of parents and senior citizens.—** ***(1) Subject to this provision, a parent or a senior citizen who cannot maintain themselves shall be entitled to make an application under section 5[490] of this Act.***	Step parent has been included within the scope of this provision subject to certain conditions.

[489] See, The Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill 2019, cl 2(b).
[490] Section 5 Application for maintenance.— An application for maintenance under section 4, may be made
a. by a senior citizen or a parent, as the case may be; or
b. if he is incapable, by any other person or organisation authorised by him; or
c. the Tribunal may take cognizance *suo moto*…

	earning or out of the property owned by him, shall be entitled to make an application under section 5 in case of— (i) parent or grand-parent, against one or more of his children not being a minor; (ii) a childless senior citizen, against such of his relative referred to in clause (g) of section 2. (2) The obligation of the children or relative, as the case may be, to maintain a senior citizen extends to the needs of such citizen so that senior citizen may lead a normal life. (3) The obligation of the children to maintain his or her parent extends to the needs of such parent either father or mother or both, as the case may be, so that such parent may lead a normal life.	***(2) A parent or grand-parent under sub-section (1) can make a claim for maintenance against their children;*** ***Provided that a step-parent can make a claim of maintenance from their step-child only if such step-parent is childless.*** ***(3) A childless senior citizen under sub-section (1) can make a claim of maintenance against their relative[491] subject to section 4(A) of this Act.***	

[491] Relative is defined in section 2(g) of the 2007 Act as "any legal heir of the childless senior citizen who is not a minor and is in possession of or would inherit his property after his death;"

Section 4(4) and proviso	(4) Any person being a relative of a senior citizen and having sufficient means shall maintain such senior citizen provided he is in possession of the property of such citizen or he would inherit the property of such senior citizen: Provided that where more than one relatives are entitled to inherit the property of a senior citizen, the maintenance shall be payable by such relative in the proportion in which they would inherit his property.	**(4) Duty of relative to maintain –** ***(1) A person who is a relative of a senior citizen and who has sufficient means has an obligation to maintain them if such relative –*** ***(a) is in possession of the property of the senior citizen, or*** ***(b) will inherit the property of the senior citizen.*** ***(2) When more than one relative is entitled to inherit the property of a senior citizen, the maintenance shall be payable by such relative in the proportion to the share of property they inherit.***	The duty of a relative to maintain has been split into a separate provision.
Section 9	**Order for maintenance.—** (1) If children or relatives, as the case may be, neglect or refuse to maintain a senior citizen being unable to maintain himself, the Tribunal may, on being satisfied of such neglect or refusal, order such children or relatives to make a monthly allowance at such monthly rate for the maintenance of such senior citizen, as the Tribunal may deem fit and to pay the same to such senior	**Order for maintenance —** (1) If the children or relatives, as the case may be, neglect or refuse to maintain a senior citizen who is unable to maintain themselves, the Tribunal may, on being satisfied of such neglect or refusal, order such children or relatives to make a monthly allowance at such monthly rate for the maintenance of such senior citizen, as the Tribunal deems fit and to pay the same to such senior citizen as the Tribunal may, from time to time, direct. (2) While deciding an application for the	Factors that the Tribunal under the 2007 Act may take into consideration for determining the amount of maintenance have been articulated.

	citizen as the Tribunal may, from time to time, direct. (2) The maximum maintenance allowance which may be ordered by such Tribunal shall be such as may be prescribed by the State Government which shall not exceed ten thousand rupees per month.	maintenance of a parent or senior citizen, the Tribunal shall take into consideration ***(i) the income of the children or relative;*** ***(ii) the economic capacity and status of the parent or senior citizen;*** ***(iii) the standard of living of the parent or senior citizen;*** ***(iv) the reasonable needs of the parent or senior citizen to achieve holistic wellbeing, dignity and overall quality of life;*** ***(v) the provisions for food, clothing, shelter, etc. of the parent or senior citizen;*** ***(vi) the need for any medical attendance, treatment or care of the parent or senior citizen; or*** ***(vii) any other factors which the Tribunal may deem necessary based on the relevant facts and circumstances of each case.***	

Caveat

The 2007 Act touches upon several aspects of welfare and maintenance of parents and senior citizens in addition to recognising the duty of major children to maintain their parents. Recommendations in this study are limited only to the latter.

Chapter 3: Succession

Introduction

This Chapter of the draft Code proposes a model framework on succession law. Based on a review of practices embedded in the personal laws of succession of various communities as well as prevalent global practices, this Chapter first delinks the law of succession from religion, enabling it to lay down a uniform scheme of intestacy that is based on ties of natural love and affection, duty of care to heirs, and other fundamental requirements of public policy. Second, by employing gender-inclusive drafting and accounting for a plurality of family structures, this Chapter extends the benefit of intestate succession to a broader mass while also safeguarding the interests of existing heirs. Third, the Chapter extends the benefit of privileged wills to all civilians and to all religious communities and also gives effect to digital wills in India. Lastly, based on a considered view of the legislative competence of the Parliament as well as modern socio-legal realities and gender justice, the Chapter abolishes artificial distinctions between agricultural and non-agricultural property as well as individual and joint family property.

The Chapter is divided into four Parts. The key features of each Part are as follows:

Sr. No.	Part	Key Features
I.	**Preliminary Provisions**	• Extends the Chapter to cover agricultural land. • Abolishes the coparcenary system and the distinction between joint family property and individual property.
II.	**Intestate Succession**	• Divides all heirs of the intestate into three groups (immediate family, extended family, and distant family), and sets out the inter-se rules of succession among these groups and within them. • Extends the benefit of intestate succession to a plurality of family structures - for example, stable unions and relationships in the nature of marriage, as well as children born outside of marriage. • Provides for the inheritance rights of multiple validly married spouses under the existing marriage laws and the inheritance rights of persons who may be in polygamous relationships not recognised by the law. • Balances the rights of different heirs by providing an alternate succession scheme for spouses in cases where they have opted for the partial community of assets regime. • Accounts for the rights of heirs in certain special cases - for example, a child born through assisted reproductive technology after the intestate's death.
III.	**Testamentary Succession**	• Applies the Indian Succession Act, 1925 to all communities in India. • Recognises digital wills in India. • Extends the benefit of privileged wills to civilians and persons of all religious communities.
IV.	**Maintenance of Immediate Family and Dependants**	• Empowers members of the immediate family and any dependants who were being maintained by the deceased during their lifetime, and who have not been provided for through a will

		or through intestate succession, to move the court for an order of maintenance. ● Enables the court to grant a wide range of final or interim orders of maintenance based on a set of illustrative factors. ● Gives the spouse a preferential right of habitation and use over the residential house.

Part I - Preliminary Provisions

Issue: What should the status of agricultural property be under a modern, gender-just succession regime?

Objective:
To ensure that the reform of succession law is able to achieve its intended impact.

Context:
The scope and manner of coverage of agricultural land under succession laws has been a contentious issue. In question have been the legislative competence of the Centre and the States to legislate on matters relating to agricultural land and the impact of succession laws on agricultural land such as fragmentation of land and diversion of tenancy rights which could impact agricultural productivity.

Coverage of agricultural land under Central succession laws and the issue of legislative competence

Owing to the distribution of legislative powers between the Parliament and the State legislatures, agricultural land in India is governed by State-level laws.[492] These are generally laws which were passed in the interests of redistributive justice and sought to abolish the zamindari system of land ownership, strengthen land rights on the basis of self-cultivation, and impose a ceiling on the maximum area of land that can be held by a single family - for example, the Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950 ('UP Zamindari Act').

These laws, in certain instances,[493] contain elaborate provisions on the devolution of and succession to agricultural land and generally discriminate against female heirs in this respect. Predictably, the scheme of devolution set out in these laws is in direct conflict with the provisions of various personal laws on succession inasmuch as these personal laws cover agricultural land.

As a result, when originally enacted in 1956, the Hindu Succession Act ('HSA') contained section 4(2), which stated:

> "For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provision of any law for the time being in force providing for the **fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights** in respect of such holdings." (emphasis supplied)

Similarly, section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 ('Shariat Act') exempts the application of Muslim personal law from "questions relating to agricultural land".

However, the scope of coverage of agricultural land under the two Acts varies. Section 4(2) of the HSA entailed that except for cases where laws dealt with the fragmentation of agricultural holdings or fixation of ceilings or devolution of tenancy rights, in respect of agricultural holdings, the HSA applied to agricultural lands as well.[494] The Shariat Act, on the other hand, completely excludes agricultural land from its purview.[495]

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[492] Constitution of India, 1950 Seventh Schedule, List II, Entry 18.
[493] See below, 'State laws on agricultural land'.
[494] *Tukaram Genba Jadhav & Ors. v Laxman Genba Jadhav & Anr*. AIR 1994 Bom 247.
[495] The difference in approach could be explained by the fact that at the time the Shariat Act was passed, the Government of India Act, 1935, was in force. The earlier Hindu Women's Right to Property Act, 1937, similarly excluded agricultural land completely from its ambit. As explained later in this section, agricultural land was specifically excluded from the ambit of the Centre's legislative

Notably, in 2005, when critical amendments were introduced to the HSA to give daughters and sons equal rights in coparcenary property, section 4(2) was omitted. The question which naturally arose was whether the HSA in its amended form now covered *all* agricultural land.

Some High Courts held that despite the omission of section 4(2), owing to the distribution of legislative powers, the HSA cannot extend to agricultural land.[496] If this interpretation is correct, reforms undertaken to the personal law of succession at the Central level (for example, to the HSA) can have little effect on the devolution of agricultural land.

In its 2018 consultation paper on reforming family law, the Law Commission of India opined that by virtue of the omission of section 4(2), the HSA now unequivocally applies to agricultural land as well.[497] In its recent landmark judgment in *Babu Ram v Santokh Singh*,[498] the Supreme Court has finally put quietus to this issue. The Court studied the predecessor of the relevant entries in the Seventh Schedule - i.e., the distribution of legislative powers between the Federal and provincial governments under the Government of India Act, 1935 ('1935 Act'). The entries in the Concurrent List of the 1935 Act relating to personal law were:

> "6. Marriage and divorce; infants and minors; adoption.
> 7. Wills, intestacy; and succession, **save as regards agricultural land**." (emphasis supplied)

On the other hand, the entry in the Concurrent List of the Constitution is:

> "5. Marriage and divorce; infants and minors; adoption; wills, **intestacy and succession**; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law." (emphasis supplied)

The Supreme Court observed that by dropping the words which had explicitly excluded agricultural land from the scope of succession in the 1935 Act, the Constituent Assembly intended to carve out devolution to agricultural land and place it under the Concurrent List.[499] The Supreme Court thus held that Parliament is in fact competent to legislate on the devolution of agricultural land as devolution of all kinds of property falls within the scope of the Concurrent List. As a result of this judgement, any legislation enacted by the Parliament can now include provisions on the devolution of agricultural land without any concerns relating to legislative competence.

It was also clarified that post the deletion of section 4(2) of the HSA, it applies for succession to all agricultural land. This has now led to an anomalous situation where succession to agricultural land is governed by personal law for Hindus but by State-level laws for other communities in some instances, as explained below.

State laws on agricultural land

competence over succession. Thus, only provincial governments had the competence to legislate on matters relating to agricultural land, including succession.

[496] *Balkaur Singh v Gurmail Singh* 2006 SCC OnLine P&H 1257; *Subramaniya Gounder v Easwara Gounder* 2010 SCC On Line Mad 4546.

[497] Law Commission of India, *Consultation Paper on Reform of Family Law* (August 2018) 134.

[498] *Babu Ram v Santokh Singh* (2019) 14 SCC 162.

[499] ibid [10].

States can be grouped into three categories based on their treatment of succession to agricultural land:

1. Succession governed by personal law - in Rajasthan,[500] Madhya Pradesh,[501] and Telangana[502]

2. Succession governed by specific State laws - Unmarried daughters and unmarried sisters are low in the order of succession in Delhi.[503] Married daughters and sisters are not included as heirs. In Himachal Pradesh,[504] Haryana,[505] and Punjab,[506] daughters and sisters, regardless of their marital status, are not included as heirs at all.

   Male descendants in the male line of the landholder are the first order heirs in all these States. The widow inherits in the absence of these male heirs in Delhi,[507] Himachal Pradesh,[508] Haryana,[509] and Punjab,[510] and along with the male descendants in Uttar Pradesh[511] and Uttarakhand.[512]

   In Uttar Pradesh[513] and Uttarakhand,[514] unmarried daughters have been made heirs along with the widow and male lineal descendants. Married daughters still rank low in the order of preference for succession.

   Further, female heirs can have only a limited interest in these lands so that after their death, the landholding does not devolve on their heirs but passes to the heirs of the last male landowner.[515] The female heirs also lose the land if they remarry or if they abandon it (i.e., fail to cultivate it for a specified period of time, usually a year or two).[516]

3. Lack of clarity on law governing succession- in West Bengal, Kerala, Tamil Nadu, Karnataka, Orissa, Maharashtra, Bihar, and Gujarat. In such states, agricultural land is subject to the rules of enactments governing tenancies, but they do not provide for its devolution on the death of the holder. There is a presumption that personal law applies.

   The Shariat Act specifically exempts agricultural land from the purview of Muslim personal law. This implies that the law as it stood before the passing of the Shariat Act must continue to be applied to agricultural land. Thus, in states where customary law (at variance with Muslim personal law) was applied before the passage of the Shariat Act, it would continue to be applied.[517] Some states such as Kerala,[518] Tamil Nadu,[519] and Andhra Pradesh[520] passed amendments removing this exemption. In such states, Muslim personal law applies for agricultural land in the absence of state-specific succession rules. In other states, if there was no strong presumption in favour of custom at variance with Muslim personal law before the Shariat Act was passed, and there are no state-level succession rules, agricultural land is

[500] Rajasthan Tenancy Act 1955, s 40.
[501] The Madhya Pradesh Land Revenue Code, 1959 s 164.
[502] Andhra Pradesh (Telangana Area) Tenancy Act 1956 s 40 (read with the commentary to section 40).
[503] The Delhi Land Reforms Act 1954, s 50.
[504] The Himachal Pradesh Tenancy and Land Reforms Act 1972 s 45.
[505] The Punjab Tenancy Act 1887, s 59.
[506] ibid.
[507] The Delhi Land Reforms Act 1954, s 50.
[508] The Himachal Pradesh Tenancy and Land Reforms Act 1972, s 45.
[509] The Punjab Tenancy Act 1887 s 59.
[510] ibid.
[511] The Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950, s 171.
[512] ibid.
[513] ibid.
[514] ibid.
[515] See, for example, The Delhi Land Reforms Act, 1954 s 51; The Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950, s 172.
[516] ibid.
[517] Mulla, *Principles of Mahomedan Law* (20th ed., LexisNexis 2020) 4-7.
[518] Muslim Personal Law (Shariat) Application (Kerala Amendment) Act 1963.
[519] Muslim Personal Law (Shariat) Application (Madras Amendment) Act 1949.
[520] Muslim Personal Law (Sharial) Application (Andhra Pradesh) (Andhra Area) Amendment Act 1949.

assumed to be governed by Muslim personal law.

Ceilings on agricultural landholdings:

As part of the land reforms undertaken after independence, the maximum agricultural land that a family unit of up to five members can hold has been fixed by respective state governments. Families of more than five members are allowed to hold additional land subject to a specified maximum. These legislations fixing land ceilings are uniform in application, i.e., they apply irrespective of the religion of the parties and thus the personal law applicable to them.

Gender anomalies occur on three counts in these laws:

a. Definition of family: In some states like Haryana,[521] Delhi,[522] Punjab,[523] Rajasthan,[524] Uttar Pradesh,[525] and Andhra Pradesh,[526] the family unit consists of the cultivator, his/her spouse, minor sons and unmarried minor daughters. In Bihar,[527] Himachal Pradesh,[528] and Madhya Pradesh,[529] it comprises the cultivator, his/her spouse and minor children. Tamil Nadu has defined family units to include the cultivator, his/her spouse, minor sons, unmarried daughters and orphaned minor grandsons and orphaned unmarried granddaughters in the male line of descent,[530] while in Kerala family units include the cultivator, his/her spouse and unmarried minor children[531]. Adult married daughters are not considered part of the family unit in any of these states. In Haryana, Delhi, etc., even minor married daughters are not considered a part of the family unit. Surprisingly, even in the states where daughters have been introduced as coparceners, the definition of a family unit in the agricultural laws remains unaffected.[532]
b. Additional land for sons: In Delhi,[533] Haryana,[534] Punjab,[535] and Uttar Pradesh,[536] the parental households can hold additional land on account of each adult son. Families with adult daughters, married or unmarried, do not enjoy the same benefit. In Himachal Pradesh,[537] Rajasthan,[538] Gujarat,[539] Madhya Pradesh,[540] Maharashtra,[541] Andhra Pradesh,[542] and Tamil Nadu,[543] each adult son constitutes a separate family unit and is entitled to hold a specified extent of land in his own right. It is only in Kerala that both adult unmarried sons and adult unmarried daughters count as separate family units.[544]

[521] The Haryana Ceiling on Land Holdings Act 1972, Explanation 1 to section 3(f).
[522] The Delhi Land Holdings (Ceiling) Act 1960 s 2(d).
[523] The Punjab Land Reforms Act,1972, s 3(4).
[524] The Rajasthan Imposition of Ceiling on Agricultural Holding Act 1973, s 2(f).
[525] The Uttar Pradesh Imposition of Ceiling on Land Holdings Act 1960, s 3(7).
[526] The Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1973, s 3(f).
[527] Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 1961, s 2(ee).
[528] The Himachal Pradesh Ceiling on Land Holdings Act 1972, s 3(e).
[529] The Madhya Pradesh Ceiling on Agricultural Holdings Act 1960, s 2(gg).
[530] Tamil Nadu land Reforms (Fixation of Ceiling on Land) Act 1961, s 3(14).
[531] The Kerala Land Reforms Act 1963, s 2(14).
[532] In *B. Chandra Sekhar Reddy v. State of Andhra Pradesh* AIR 2003 SC 2322, the Supreme Court held that a major daughter is not to be treated as a member of the family unit and would not be entitled to hold a land unit independently even though she is a coparcener, and her land will be declared surplus land. The Court specifically said that the amendment to the Andhra Pradesh Hindu Succession Act 1956 does not affect the Andhra Pradesh Land Reform (Ceiling on Agricultural Holding) Act 1973.
[533] The Delhi Land Holdings (Ceiling) Act 1960, s 3(7).
[534] The Haryana Ceiling on Land Holdings Act 1972, s 3(q).
[535] The Punjab Land Reforms Act 1972, s 5(1).
[536] The Uttar Pradesh Imposition of Ceiling on Land Holdings Act 1960, s 5(3)(a).
[537] The Himachal Pradesh Ceiling on land Holdings Act 1972, s 4(4).
[538] The Rajasthan Imposition of Ceiling on Agricultural Holding Act 1973, s 2(m).
[539] The Gujarat Agricultural Lands Ceiling Act 1960, s 6(3-C).
[540] The Madhya Pradesh Ceiling on Agricultural Holdings Act 1960, s 7(2).
[541] The Maharashtra Agricultural Lands (Ceiling on Holdings) Act 1961.
[542] The Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1973, s 4-A.
[543] Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 1961.
[544] The Kerala Land Reforms Act 1963, s 82.

c. Husband as an independent unit: In many cases, while the husband is counted as an independent family unit, the wife is not even if she is a landowner in her own right.

The underlying assumption behind these ceiling specifications is that those who are recognised as part of the family unit or as a separate family unit (in the case of adult sons), will be maintained by the land such families are allowed to hold.[545] It is thus clear that the needs of adult unmarried daughters or minor married daughters have not been focussed on adequately while due consideration has been accorded to sons, irrespective of their age or marital status.[546] Due to the patrilocal patterns of habitation post marriage, adult married daughters lie entirely beyond the contemplation of the legislature in such scenarios as they are no longer viewed as being part of the natal family. It is the marital home that they are deemed to depend on and be a part of for all purposes, including sustenance.

Moreover, while in states such as Delhi[547] it is the tenure holder who is allowed to hold additional land due to the presence of adult son(s), when correlated with the inheritance laws in such states, the land will ultimately pass to the male lineal descendants as female heirs rank low in the scheme of succession. In such states, the land ceiling rules and succession rules in tandem fail to provide for even adult unmarried daughters, minor married daughters and widows. Equally pernicious is the role that such laws could play in promoting sex selection among foetuses in such states, and exacerbating the discriminatory treatment faced by women.

Since these laws relate to agrarian reform, article 31A of the Constitution can be pressed into action,[548] and a large number of these laws have also been placed in the Ninth Schedule of the Constitution.[549] As such, constitutional challenges cannot be levelled against them on the ground that they discriminate on the basis of gender and violate the fundamental right to equality. When faced with such challenges, the Supreme Court has rejected them.[550]

Examining the rationale behind exempting agricultural land from Central inheritance laws

The question that arises is: should Parliament exercise its legislative competence in relation to agricultural land or should agricultural land be excluded from the ambit of Central succession laws and continue to be governed by the existing state-level laws?

Apart from the conflict with state-level laws mentioned above, a key reason behind keeping agricultural land outside the purview of Central succession laws was to prevent the fragmentation of landholdings.[551] It was argued that individual inheritance rights and the division of a man's estate between female relatives could create the potential to aggravate the fragmentation of landholdings, something that was seen as one of the biggest threats to Indian agricultural productivity.[552] It was further argued that women's needs were anyway provided for through dowry.[553] Patrilocal residence arrangements were also relied upon to say that vesting rights in women would lead to high levels of land sales and absentee landholders, problems which would run fundamentally against agricultural productivity.[554] Some warned

[545] Bina Agarwal, 'Gender and Legal Rights in Agricultural Land' (1995) 30(12) Economic and Political Weekly 39, 46.
[546] ibid.
[547] Other states include Haryana, Himachal Pradesh and Punjab.
[548] This provision prevents courts from testing the constitutionality of certain categories of laws from being tested on the touchstone of fundamental rights.
[549] Constitution of India 1950, A. 31B.
[550] *Ambika Prasad Mishra v State of UP* (1980) 3 SCC 179.
[551] Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India* (Cambridge University Press 2013), 206-207.
[552] ibid 206.
[553] Bina Agarwal, 'Gender and Legal Rights in Agricultural Land' (1995) 30(12) Economic and Political Weekly 39, 48.
[554] Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India* (Cambridge University Press 2013) 210, 211; 24 March 1943, Legislative Assembly Debates, 1419-1420

that it would thus be impossible to give a daughter a share in her father's land without affecting agricultural yield.[555]

The Hindu Law Committee opined that a uniform law for all kinds of property may not be feasible, and in the interests of agriculture, special laws may in due course be enacted for securing consolidation and preventing the fragmentation of landholdings.[556] This sentiment was echoed by Dr. Ambedkar who was of the view that it may prove to be in the interests of agriculture to have different sets of inheritance laws for agricultural land and non-agricultural land.[557]

The reasoning presented above can be called into question on multiple grounds.

First, the effect of fragmentation on agricultural productivity is contested as different studies have yielded contradictory findings.[558] Some experts have stated that there is no noteworthy evidence of an adverse size effect on output.[559] In fact, since the 1960s, small farms have been found to have a higher value of output per cultivated unit compared to large farms in many studies conducted in India and other parts of South Asia.[560]

Secondly, if the rationale is efficiency-based, it can be argued that comprehensive agricultural rights for women will increase productivity.[561] Scholars have stressed on the importance of contesting a priori negative efficiency arguments, such as the fragmentation argument, which are often put forward in relation to women's inheritance rights but not those of men. Instead, the positive productivity effects of more gender equal land access and of greater tenure security and access to inputs for women farmers, found in some existing studies, need to be emphasised.[562]

Thirdly, even if one proceeds on the premise that fragmentation leads to a loss of agricultural productivity, the scope and focus of laws preventing women from inheriting agricultural land must be investigated. Fragmentation of landholdings occurs even in cases where male lineal descendants inherit the land.[563] None of the state-level laws listed above contain measures for the prevention of fragmentation of land upon inheritance. Instead, they appear to be informed by the patriarchal reasoning of women moving away from the natal household and being absentee landholders. With rising male out-migration rates, absenteeism of landholders is not an issue that is specific to women.[564] On the contrary, it is often the women who tend to and cultivate the land that is held by the men in the family once they migrate in search of employment.[565] Thus, if fragmentation of agricultural land and absentee landholders

[555] ibid.
[556] *Report of the Hindu Law Committee, 1944–45* (1947), p. 10, available at <https://archive.org/details/in.ernet.dli.2015.51597/page/n3/mode/2up?view=theater> last visited 4 July 2023.
[557] Constituent Assembly of India (Legislative) Debates (9 April 1948) 3651.
[558] See, for example, Blarel et al., 'The Economics of Farm Fragmentation: Evidence from Ghana and Rwanda' (1992), 6(2) World Bank Economic Review; Tim Nguyen and others., 'Land Fragmentation and Farm Productivity in China in the 1990s' (1996) 7(2) China Economic Review 169.
[559] Bina Agarwal, 'Are We Not Peasants Too? Land Rights and Women's Claims in India' (2002) 21 SEEDS 6.
[560] See, for example, Abhijit Banerjee, *Land Reforms: Prospects and Strategies* (MIT 1999) 5-7, available at <http://dspace.mit.edu/bitstream/handle/1721.1/63873/landreformsprosp00bane.pdf;sequence=1> last visited 4 July, 2023; Amartya Sen, 'Size of Holdings and Productivity' (1964) 16(5) Economic and Political Weekly 6. For an overview of studies exploring the relationship between farm size and productivity, see Jigmat Norobo & Tsewang Dolma, 'Relationship Between Farm Size and Productivity' (March 2023) 28(3)(7)IOSR Journal of Humanities and Social Sciences 25.
[561] Bina Agarwal, 'Are We Not Peasants Too? Land Rights and Women's Claims in India' (2002) 21 SEEDS 6.
[562] ibid 5, 6.
[563] For example, in a paper, Dr. Ambedkar cites Adam Smith, who posited that the law of primogeniture was related to the prevalence of large landholdings while the adoption of the law of equal division of landholding among all children led to increased incidence of small landholdings. B.R. Ambedkar, 'Small Holdings in India and Their Remedies' (1918) I Journal of the Indian Economic Society, available at <https://shrigururavidasji.com/site/articles_books/files/ambedkar/36_small-holdings-in-india-and-their-remedies.pdf> last visited 4 July 2023. None of the State laws listed above, however, follow the rule of primogeniture and allow multiple male lineal descendants to inherit landholdings.
[564] Bina Agarwal, 'Are We Not Peasants Too? Land Rights and Women's Claims in India' (2002) 21 SEEDS 6.
[565] ibid.

are undesirable, inheritance-related policy measures should be focussed on countering these issues, such as through measures for consolidation of landholdings,[566] instead of preventing women from inheriting agricultural land based on gendered assumptions.

Approximately 60% of the total land area in India is agricultural land.[567] The potential impact of reforms which seek to achieve gender justice in succession law would thus be minimal if they are unable to affect an overwhelming majority of the land held by families in the country. Importantly, in recent decades it has been recognised by academics, policymakers as well as civil society practitioners that women's ownership of immovable property, especially agricultural land, is a significant determinant of their economic and social status, physical security, bargaining power and well-being.[568] Land can provide women with both direct and indirect benefits. Direct advantages can stem from growing not just crops but trees, a vegetable garden, or grass for cattle.[569] Indirect advantages arise in various ways: owned land can serve as collateral for credit or as a mortgageable or saleable asset during a crisis.[570] Correspondingly, the prevalent gender gap in the ownership and control of property (especially agricultural land) is a critical factor responsible for the gender gap in economic well-being, social status, and empowerment.[571] Although women can acquire land by various means such as inheritance, gift, purchase, or government transfers, inheritance is usually the most important means, especially in South Asia where land (and especially agricultural land) is largely owned privately, and women are more financially constrained than men in their ability to purchase it.[572] Achieving gender equality in landed property thus depends especially on inheritance laws and their effective implementation which turns on whether a law of this nature can be extended to agricultural land.

Proposed step:
Considering the discriminatory impact of the laws currently in force, the disadvantages they present for women, and the disparate position created post the deletion of section 4(2) of the HSA by the 2005 Amendment, agricultural land should be covered within the scope of this draft Code to allow equitable inheritance rights for all persons in agricultural land, irrespective of gender.

Notes for Consideration:

What are some policy measures that can be undertaken to ensure that agricultural productivity is not adversely affected by inheritance schemes while protecting the rights of women? For instance, should inheritance laws have a first option clause? If an heir plans on selling agricultural land inherited from A, should the other heirs of A who have inherited other part(s) of the agricultural land(s) from A, and

[566] For instance, in his 1918 paper, Dr. Ambedkar too had proposed measures for consolidation of land holdings to counter the effects of fragmentation of landholdings. B.R. Ambedkar, Small Holdings in India and Their Remedies (1918) I Journal of the Indian Economic Society, available at <https://shrigururavidasji.com/site/articles_books/files/ambedkar/36_small-holdings-in-india-and-their-remedies.pdf> last visited 4 July, 2023. Others have argued that farmers have dealt with fragmentation in various ways where necessary, such as through consolidation through purchase and sale, land leasing arrangements to bring together cultivation units even where ownership units are scattered and joint investment and cultivation by small groups. Bina Agarwal, 'Are We Not Peasants Too? Land Rights and Women's Claims in India' (2002) 21 SEEDS
[567] World Bank, 'Agricultural land (% of land area) - India' <https://data.worldbank.org/indicator/AG.LND.AGRI.ZS?locations=IN> Accessed 29 May 2023.
[568] See Bina Agarwal et al., 'Which Women Own Land in India? Between Divergent Data Sets, Measures and Laws' (2020) GDI Working Paper 2020-043; A.R. Quisumbing & J.A. Maluccio. 'Intrahousehold Allocation and Gender Relations: New Empirical Evidence From Four Developing Countries in A. Quisumbing (ed.), *Household Decisions, Gender and Development, a Synthesis of Recent Research* (IFPRI 2003); Esha Sraboni and others; 'Women's Empowerment in Agriculture: What Role for Food Security in Bangladesh?' (2014) 61 World Development 11.
[569] Bina Agarwal, 'Are We Not Peasants Too? Land Rights and Women's Claims in India' (2002) 21 SEEDS 5.
[570] ibid.
[571] Bina Agarwal, 'Gender and Command Over Property: A Critical Gap in Economic Analysis and Policy in South Asia' (1994) 22(10) World Development 1455.
[572] See Bina Agarwal and others, 'Which Women Own Land in India? Between Divergent Data Sets, Measures and Laws' (2020) GDI Working Paper 2020-043.

are already cultivating it or plan on cultivating it, have a preferential right to acquire that land? A fair consideration mechanism would also have to be put in place in such cases.

Issue: What should the relationship between immovable property and the domicile of the intestate be?

Objective:
To introduce clarity in the law on domicile and immovable property by introducing a bright line rule.

Context:
In *Thilliammal v Thandavamurthy*,[573] it fell upon the Karnataka High Court to determine the law of succession applicable to a particular piece of immovable property owned by an intestate who had changed his domicile prior to his death. The result was different depending on whether the law of his old domicile would apply or that of his new one.

The court held that succession to immovable property is to be decided by the domicile of the person at the time of his death. If the law in the *situs* of the property is the same as the law of the domicile, there is no issue. If they are different, then the *intention* of the deceased person has to be determined - whether they wanted to give up the law which was applicable to their old place of residence and wanted to embrace the new law.

Proposed step:
In order to move from a subjective, intention-based test to an objective, situs-based test, a bright line rule is to be introduced based on where the immovable property is situated and not the domicile of the intestate. For movable property, the domicile-based test may be retained.

Proposed provision:

54. Application of this Chapter.–

(1) Succession to the immovable property of the deceased person shall be governed by this Chapter if the property is situated in India, irrespective of the domicile of the deceased person at the time of death.

(2) Succession to any movable property shall be governed by this Chapter if and only if the deceased person was domiciled in India at the time of death.

(3) Notwithstanding anything contained in any other law for the time being in force, this Chapter also applies to agricultural land.

Issue: Should the coparcenary system be continued?

Objective:
Align the law on succession with modern socio-legal realities.

[573] *Thilliammal v Thandavamurthy* 2007 SCC OnLine Kar 17.

Context:
Hindu law recognises a presumption of jointness in every family. In other words, every Hindu family is presumed to be a joint family in the eyes of the law unless the contrary is proved. Two distinct systems of joint family property exist under Hindu law. In territories governed by the *Dayabhaga* school,[574] shares of property are held by members of the joint family in their individual capacity as their own personal property, capable of transfer, alienation, etc. On the other hand, in territories governed by the Mitakshara school,[575] the property collectively owned and held by the family, i.e., the joint family property, is owned in the name of the coparcenary - a smaller sub-unit of the larger joint family.

Under classical Hindu law, the coparcenary consisted only of the male members of the family. The senior-most male member of the family and his lineal descendants up to three generations (his son, his grandson, and his great-grandson) constituted the coparcenary within the larger joint family. The underlying principle was that a son has a birthright in the joint family property - a prominent maxim of classical Hindu law. Although the joint family property was legally owned by the coparceners, all members of the joint family had a catena of rights over the property - for example, the right to be maintained out of the property, the right to claim expenses for marriage, etc. The underlying principle was the moral obligation of the coparceners to maintain and provide for members of their family. According to the Supreme Court,[576] six legal rules govern the use, devolution, and alienation of property in coparcenaries. Known as the 'incidents' of coparcenership, these rules are:

1. Male lineal descendants up to the third generation constitute a single coparcenary and acquire a right by birth in the joint family property;
2. The coparceners can seek partition of the property by claiming their share;
3. Until such a partition is effected, each coparcener owns all of the property jointly with the other coparceners;
4. Each coparcener enjoys common possession and common enjoyment of the property,
5. No alienation of the property is possible unless it is for necessity or with the concurrence of the other coparceners; and
6. Upon the death of a coparcener, his interest lapses and is divided equally between the remaining coparceners (this is known as the doctrine of survivorship).

In 1937, through the enactment of the Hindu Women's Right to Property Act, this scheme was partially modified to give widows a limited right to the interest held by their deceased husband as a coparcener in the joint family property. The right was available only during the lifetime of the widow and would terminate upon her death or remarriage. Further, her right was restricted only to the enjoyment of the property and its usufruct with a severely curtailed right of alienation. In 1956, through the formal codification of classical Hindu succession law in the form of the HSA, widows and daughters[577] were both made statutory heirs, and along with the other heirs in Class I, would inherit equal shares in the property of the deceased including his share in the joint family property. Upon the death of a coparcener, a 'notional partition' would be affected to determine his interest in the coparcenary property. This interest would devolve to the statutory heirs in accordance with the scheme of succession laid down in the HSA and not to the coparceners according to the doctrine of survivorship. The HSA also clarified when female heirs received a share, their right over it would no longer be a limited one.

[574] Primarily the eastern region of India - including West Bengal, Odisha, Assam etc.
[575] The remainder of India.
[576] *State Bank of India v Ghamandi Ram* AIR 1969 SC 1330.
[577] In addition to a large number of other female heirs.

Notably, the original draft of the Hindu Code Bill ('Bill'), which was presented to the Constituent Assembly in 1948 and formed the precursor to, among other things, the HSA, adopted a different approach to empowering female heirs. The Bill sought to wholly do away with the concept of joint family property. Instead, it clarified that property obtained by heirs would be their separate property, capable of being enjoyed/alienated as they pleased. While introducing the Bill and explaining its provisions in the Assembly, Dr. Ambedkar, a key advocate for the Bill, clarified that this scheme did not represent a radical change to Hindu law.[578] By abolishing the concept of the coparcenary's collective ownership over property, by abolishing the distinction between joint family property and individual property, the Bill merely sought to extinguish the Mitakshara school and uniformly apply the existing Dayabhaga school across the country in alignment with the prevalent socio-legal realities.[579] Ultimately, however, this proposal was dropped, and the concept of coparcenary property was retained in the HSA.[580] Female heirs were given shares following the death of a coparcener as statutory heirs without being made coparceners themselves. This perpetuated the fundamental inequality between male and female heirs.[581]

Over the course of the next half-century, several state legislatures stepped in to enact reforms. While Kerala adopted the model of the 1948 Hindu Code Bill and abolished the system of joint family property altogether,[582] a host of other states reformed the coparcenary system to make unmarried daughters coparceners.[583] In 2005, Parliament amended the HSA to adopt the latter model. Daughters were given the same rights in a coparcenary as sons. The 2005 Amendment clarified that following the death of a coparcener in any Hindu joint family governed by Mitakshara law, the share of such a person in the coparcenary would devolve under the provisions of the HSA through a notional partition and not by the doctrine of survivorship.[584] The shares which devolve on the heirs of the person vest in them as their separate property and not as shares in a coparcenary. In other words, the amendment does away with the doctrine of survivorship. It may be noted, however, that the concept of coparcenary property itself has not been explicitly done away with. In existing coparcenaries where no coparcener has died, the usual incidents of coparcenary property - for example, the right to partition - are available to all coparceners.[585]

Further, the legal fiction of a joint family has also been retained. This has resulted in several anomalies. For example, a daughter who was born and married prior to the 2005 Amendment would cease to be a member of her joint family of birth upon her marriage but upon the commencement of the 2005 Amendment would become a member of the smaller sub-unit within that family, i.e., the coparcenary - giving her an interest over and a right to administer property of a joint family of which she is not a part. Next, a daughter born to such an individual would become a coparcener in two joint families - her father's family as well as her mother's birth family - as well as a member of a third joint family upon her marriage. Such unintended anomalies arise from the retention of the legal fiction of the joint family - the only

[578] *Dr. Babasaheb Ambedkar: Writings and Speeches* (Vol. 14, Part I, Sections I to III) 4, 276.
[579] ibid.
[580] One of the reasons was the perceived lack of public consultation on the decision to abolish the coparcenary system. Several members expressed concern over the adverse impact of the move on the rights of sons, who form the centre of the economy in upper India - Lok Sabha Debates (Part II, 1955) cited in Poonam Pradhan Saxena, 'Succession Laws and Gender Justice' in Amita Dhanda and Archana Parashar (eds.) *Redefining Family Law in India* (Routledge India 2008).
[581] In a family consisting of a father, his son, and his daughter, only the father and the son are coparceners. During the father's lifetime, the son has an interest in half of the coparcenary property. Upon the father's death, his half interest in the coparcenary property is divided equally between his son and his daughter as his Class I heirs. The son ultimately holds 3/4 of the property, while the daughter only holds ¼. See Poonam Pradhan Saxena, 'Succession Laws and Gender Justice' in Amita Dhanda and Archana Parashar (eds.) *Redefining Family Law in India* (Routledge India 2008).
[582] Kerala Joint Family (Abolition) Act 1976.
[583] Andhra Pradesh Hindu Succession (Amendment) Act 1975; Tamil Nadu Hindu Succession (Amendment) Act 1989; Maharashtra Hindu Succession (Amendment) Act 1994; Karnataka Hindu Succession (Amendment) Act 1994.
[584] Hindu Succession Act, 1956 s 6(3).
[585] Sir Dinshaw Fardunji Mulla, *Hindu Law* (24th edition, 2022) 1161.

arguable advantage of which is to enable the senior-most coparcener (the *karta*) to claim income tax benefits.[586]

The situation is further compounded by the decision of the Supreme Court in *Uttam v Saubhag Singh*,[587] which effectively held that upon the death of an existing coparcener, the property that devolves would cease to be joint family property - a ruling which logically follows from the 2005 Amendment. This effectively sets in motion a time-frame within which all Hindu undivided families ('HUF') will cease to exist.[588]

The issue goes beyond legal uncertainties and ambiguities. Seen in terms of its social practice, the prevalence and significance of the joint family has reduced.[589] Market pressures, increasing labour mobility, and a host of other factors have contributed to this. Most families now are either nuclear families or 'stem families'.[590] The ideals which a joint family traditionally espoused no longer bear a close nexus to the system's actual operation. The sole purpose that the HUF system still faithfully serves is to provide tax benefits to the *karta* of the HUF.[591] Even the Law Commission of India in its 2018 Consultation Paper has observed that the HUF system is "neither congruent with corporate governance, nor is it conducive to the tax regime".[592] The Commission goes further and outrightly places the country's revenue requirements above "deep-rooted sentiments".[593]

When faced with such inconsistencies and drawbacks, and considering the actual purpose served (tax benefits), it is worth asking whether the system of HUF (created for tax purposes by the British government for ease in calculating the tax base)[594] is worth retaining. Any inquiry of this sort runs into the problem of justifying radical change which requires not just the non-fulfilment of purported ideals (a criterion that the HUF system meets) but the additional demonstration of *actual harm* (however measured). This is because, in the absence of actual harm, it may be argued that it is not necessary to do away with the HUF system as it might serve other (unmeasured) benefits such as cultural recognition.

It is clear that actual harms also exist. If the only major goal that is achieved by the HUF system is to enable certain members of a single community to avail of tax benefits, then this system discriminates against other communities who do not have the benefit of such a system only due to historical reasons. Discrimination, in this context, occurs because two similarly-placed communities (for all relevant purposes for this discussion) are treated dissimilarly due to factors which have no relevance to any *legitimate* goal sought to be achieved.[595] To this extent, it is blatantly unconstitutional. This point is noted by scholars who have studied the effective tax rates of HUFs and other corporate entities as well. After noticing that HUFs have the lowest effective tax rates, they conclude that "[t]his unique legal family/firm

[586] Poonam Pradhan Saxena, 'Succession Laws and Gender Justice' in Amita Dhanda & Archana Parashar (eds.) *Redefining Family Law in India* (Routledge India 2008).
[587] (2016) 4 SCC 68.
[588] PP Saxena, 'Judicial Re-Scripting of Legislation Governing the Devolution of Coparcenary Property and Succession under Hindu Law' (2016) 58(3) Journal of the Indian Law Institute 337.
[589] JP Singh, 'Nuclearisation of Household of Family in Urban India' (2003) 52(1) Sociological Bulletin 53.
[590] ibid.
[591] PP Saxena, 'Succession Laws and Gender Justice' in (Amita Dhanda and Archana Parashar eds) *Redefining Family Law in India* (Routledge India 2008) 288. "The only purpose served by a statutory recognition of the HJF is to enable the Karta, to claim tax benefits." Singh reaches a similar conclusion. See JP Singh, 'Nuclearisation of Household of Family in Urban India' (2003) 52(1) Sociological Bulletin 53, 61. "These days, owing to the rising spirit of individualism, most often two brothers tend to form two independent households even within the same city, even when the ancestral property is not formally partitioned in their native place. Thus, the conventional joint family is now more a fiction than a reality in urban India."
[592] Law Commission of India, 'Consultation Paper on Reform of Family Law' (2018) 132.
[593] ibid 133.
[594] Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community* (Cambridge 2013) 93-128.
[595] This is the classic test to adjudicate claims of equality violation under Article 14. See Tarunabh Khaitan, 'Equality: Legislative Review under Article 14' in Sujit Choudhary and others (eds) *The Oxford Handbook of the Indian Constitution* (OUP 2016) 699-720.

interlock is not available to Muslims, Christians, Parsis or Jews and hence is a perverse legal privilege for the Hindu business family".[596]

Ultimately, retaining a beneficial fiscal structure for a single community must be weighed against the harms of discrimination against other communities and the revenue loss caused to the exchequer. While this is a complex question requiring a careful balancing of interests, for the reasons indicated above, the balance tilts in favour of abolition of the coparcenary and joint family system. The joint family is a social phenomenon - the law does not need to provide fiscal benefits to a single community to encourage it.

55. Abolition of the coparcenary system.–

(1) On and after the commencement of this Code, no right to claim any interest in any property of an ancestor during or after their lifetime shall be recognised if it is founded on the mere fact that the claimant was born in the family of the ancestor.

(2) All members of an undivided Hindu family governed by *Mitakshara* law holding any coparcenary property on the day this Code comes into force shall, with effect from that day, be deemed to hold it as tenants-in-common as if a partition had taken place among all the members of that undivided Hindu family with respect to such property and as if each one of them is holding their share separately as full owner thereof.

Issue: How should the terms 'parent' and 'child' be defined for the purposes of this Chapter of the draft Code and what should the inheritance rights of such parents and children be?

Objective:
To account for the diverse forms of parent-child relations adequately in the scheme of inheritance and maintenance through alignment with the law on parenthood under Chapter II of this draft Code.

Context:
The current inheritance laws in India do not specifically define *who* the parents or children are for the purposes of succession. The establishment of parent-child relationships for this purpose has proceeded on the general basis of establishment of biological maternity and social paternity. The woman who gives birth to the child is taken to be the mother of the child and the basis of the relationship between the two is thus biological. Paternity, on the other hand, has usually been premised on the factum of marriage. Thus, as per section 112 of the Indian Evidence Act, 1872 ('Evidence Act') the husband of the mother is presumed to be the father of the child for all legal purposes, including inheritance, if such a child is born during the subsistence of a valid marriage or 280 days after the dissolution of the marriage, subject to the mother remaining unmarried. Such children are also deemed to be the 'legitimate' children of the parents and get full inheritance rights in their property and also in the property of the relatives of the parents whose heirs they may be under the scheme of succession.

The presumption under section 112 is rebuttable. Hence, if it can be proven that the parties had no access to each other during the marriage, the husband is no longer deemed to be the father of the child and the child no longer has rights such as inheritance due to the lack of legitimacy.[597] Section 112 has

[596] Chirashree Das Gupta and Mohit Gupta, 'The *Hindu Undivided Family* in Independent India's Corporate Governance and Tax Regime' (2017) 15 South Asia Multidisciplinary Academic Journal 1, 20.
[597] *KS Lakshmikantharaju v Sowbhagya N* AIR 2019 Karn 99.

been amended under Chapter II of this draft Code to be queer-inclusive and account for a plurality of family structures. The presumption of parentage now extends to: i) relationships in the nature of marriage ('RNM') and ii) to not just the husband of the biological mother but to anybody who may be in a marriage or relationship in the nature of marriage with the birth parent of the child. Moreover, the provision explicitly allows third parties who are not in a marriage or RNM with the birth parent to claim parentage. Moving beyond just marriage and blood relations for the establishment of parenthood, the provision extends the presumption of parentage to situations where a person openly holds out a child to be their own child, subject to certain conditions. The relevance of this amendment for the purposes of succession has been explained below.

A legal parent-child relationship is also created in certain cases such as adoption and void/voidable marriages as explained below. However, no comprehensive understanding or definition of parents and children informs the law of succession that is in keeping with modern family structures.

Adopted children: Currently, Hindu personal law recognises the rights of adopted children to inherit property from their adoptive parents. This is not because of a provision to that effect in the HSA but because of section 12 of the Hindu Adoptions and Maintenance Act, 1956 ('HAMA') (effects of adoption), which states that an adopted child shall be deemed to be the child of the adoptive parents for all purposes. In *Basavarajappa v Gurubasamma*,[598] the Supreme Court clarified that by virtue of section 12, an adopted child also becomes a coparcener in a Hindu joint family.

Muslim personal law places an explicit bar on adoption of children, so the question of giving inheritance rights to adopted children does not arise. There is no statutory personal law equivalent of the HAMA for other communities. Under the Indian Succession Act, 1925 ('ISA'), an adopted child has the same rights as a biological child only by virtue of judicial interpretation[599] and not by virtue of the text of the ISA.

It is now an accepted position in most jurisdictions that through adoption, the legal relationship between the child and their biological parent(s) is severed and an analogous relationship is established between the child and their adoptive parent(s).[600] This legal relationship extends not just to the adoptive parent(s) but also to the other relatives of the adoptive parent(s). In its 1985 Report on reforming the ISA, the Law Commission of India noted that the implicit exclusion of adopted and illegitimate children from the scope of 'child' under the ISA "does not reflect modern socio-legal thinking in the matter of rights of adopted and illegitimate children".[601] As such, it proposed the addition of a clause in section 2 - 'child' includes adopted child - in case the personal law applicable to the person permits adoption- and illegitimate children. In keeping with this position, the term 'parent' under Chapter 1 of this draft Code includes adoptive parents and correspondingly, the term child includes adopted children. Adoptive parents and adopted children have rights of inheritance in relation to each other, and the adopted child's inheritance rights in the natal family are severed as per section 63 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and section 12 of the HAMA, which will be the legal regime applicable for adoptions under this draft Code. However, this does not affect any property that may have been inherited before such adoption was effected. The adopted child thus has the same rights to inheritance as a 'natural born child'.

Children born out of void/voidable marriages: The current laws in India maintain the concept of legitimacy of children. Only children born during the subsistence of a valid marriage are considered legitimate. Limited statutory legitimacy has been granted to children born out of void and voidable marriages under

[598] *Basavarajappa v Gurubasamma* (2005) 12 SCC 290.
[599] *Joyce v Shameela Nina* (RFA 849 of 2010).
[600] See, e.g., Succession Act, 1964 (Scotland) section 23(1); French Civil Code 1966, Article 358C.
[601] Law Commission of India, *Report No. 110: Indian Succession Act, 1925* (1985).

different laws. As per section 16 of the Hindu Marriage Act, 1955 ('HMA'), such children are treated as legitimate children and have inheritance rights in the property of only their parents. The issue of whether such property includes ancestral property is pending for a larger bench's consideration.[602] However, this right does not extend to the property of the persons to whom the child is related through such marriage and to whom the child would not have been related to by reason of being an illegitimate child (the relations of the parents). Thus, the right to inheritance is limited to the property of only the parents as statutory legitimacy is conferred on such a child. Under Muslim Law, a child born out of a void marriage is considered illegitimate. Illegitimate children under Muslim law can inherit property only from the mother. However, the child can be granted legitimacy through an acknowledgement of paternity by the father.[603] Under the Christian Marriage and Divorce Act, 1955 only children born out of a marriage that has been annulled on grounds of either the former husband/wife of the person being living without the knowledge of the person who enters into another marriage or insanity are granted legitimacy and thus inheritance rights in the estate of their parents.[604] The rights of children born out of void and voidable marriages vary under different regimes and remain restricted. As per the regime proposed under Chapter II of this draft Code, the presumption of parentage under section 112 of the Evidence Act has been extended to children born out of void/voidable marriages. Such children will thus have full inheritance rights in their parents' property and in the property of the relations of their parents under this Chapter.

Children born outside of marriage: Under the HMA, section 16 has been given a wide interpretation to include children born out of relationships in the nature of marriage.[605] The courts have reasoned that while such children are illegitimate, they are granted limited legitimacy with respect to their parents and thus have inheritance rights in the property of both their parents.[606] Under the ISA too, in the case of *Jane Anthony v Siyath*,[607] the Kerala High Court extended the right of inheritance to children born outside of marriage to persons whose relationship was in the nature of marriage.

As proposed above in Chapter II of this draft Code, the concept of 'legitimacy' has no place in contemporary law as it is based on an arbitrary yardstick of the marital status of the parents. The concept has now been abandoned in most jurisdictions. Following constitutional litigation, all distinctions between the rights of children born during marriage and outside of marriage have now been removed.[608]

Under Chapter II of this draft Code, the presumption of parentage has now been extended to relationships in the nature of marriage. Thus, inheritance rights should automatically accrue to children born out of such unions. In keeping with this position and the recommendation of the Law Commission of India,[609] full inheritance rights under this Chapter of the draft Code will accrue to children irrespective of the marital status of the parents and vice versa.

In case of stable unions generally, while the presumption of parentage does not apply by virtue of the two persons being in a stable union alone, the presumption will still operate if the person holds themselves out as a parent in relation to the child, as per the proposed amended version of section 112(2) of the Evidence Act. Provisions for adjudication of parenthood and voluntary acknowledgment of parenthood are also available for the benefit of such persons. Once established as parents, full inheritance rights will ensue.

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[602] *Revanasidappa & Ors. v. Mallikarjuna & Ors.* (2011) 11 SCC 1.
[603] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford 2009).
[604] Christian Marriage and Divorce Act 1955, s 87.
[605] *Bharat Matha & Anr. v Vijay Renganathan & Ors.* AIR 2010 SC 2685; *Tulsa & Ors. v Durghatiya* AIR 2008 SC 1193; *D. Velusamy v D. Patchaiammal* (2010) 10 SCC 469.
[606] *Bharat Matha & Anr. v Vijay Renganathan & Ors.* AIR 2010 SC 2685; *Tulsa & Ors. v Durghatiya* AIR 2008 SC 1193.
[607] 2008 SCC OnLine Ker 503.
[608] See, for example, *Trimble v Gordon* 430 US 762 (1977).
[609] Law Commission of India, *Report No. 110: Indian Succession Act, 1925* (1985).

Additionally, as per the amended section 112, a person who is not married to or in a RNM with the birth parent of a child can now apply to be named as the parent of the child on their birth certificate with the consent of the mother or apply to a court for an order confirming their parentage. Once such parentage has been established, the child will have full inheritance rights in the property of such a parent and vice versa. There may be cases where the birth parent is in a marriage or in an RNM with somebody other than the other biological parent so established of the child. In such cases, once the presumption under section 112 has been rebutted, the biological parent as established through court order/with the birth parent's consent will be the parent for the purposes of inheritance. This will extend to inheritance rights in the property of relations of the parents as well.

Children born to queer persons in a relationship: The current provisions for succession are gendered in nature. By employing ungendered terminology, the rights of parents and children in relation to each other, irrespective of the gender and sexual orientation of both parties, will be recognised (as explained later[610]).

Moreover, since the frameworks on adoption, assisted reproductive technology ('ART') and surrogacy have been amended to include queer persons and to be gender-inclusive, the inheritance rights in case of children born to queer persons will accrue in accordance with these frameworks.

Further, Chapter I of this draft Code extends the legal regime for marriage, relationships in the nature of marriage, and stable unions to queer persons. The presumption of parentage under section 112 of the Evidence Act has been modified to be gender-inclusive. It is now not restricted to just biological mothers and their husbands but extends to any person who may be in a marriage or a RNM with the birth parent of a child, irrespective of gender and sexual orientation. Where relevant, the presumption of parentage under section 112 will apply and inheritance rights will accrue accordingly.

Children born through reproductive technology: The Assisted Reproductive Technology (Regulation) Act, 2021 ('ART Act') and the Surrogacy (Regulation) Act, 2021 ('Surrogacy Act') provide a framework where the intending/commissioning couple/person will be deemed to be the legal parent(s) for all purposes, including inheritance.[611] The Surrogacy Act provides that the intending couple/person can apply for an order concerning the parentage and custody of the child to be born through surrogacy to a Court of the Magistrate which will be the birth affidavit after the child is born.[612] The ART Act too lays down that the child born through ART will be deemed to be a biological child of the commissioning couple/person and will be entitled to all the rights and privileges available to a natural child *only* from the commissioning couple/person and not any person whose reproductive material may have been utilised apart from the commissioning couple/person.[613] The inheritance rights of children who may be conceived through the use of reproductive technology post the death of a person using their reproductive material have been laid down in this Chapter of the draft Code, in section 66.

Social parenthood: Under the current laws, marital unions and biology are seen as the basis of parenthood. In certain cases, such as adoption and ART/surrogacy, parenthood is legally extended to the concerned parties. Due to basing succession on only these formal status-based criteria, in most jurisdictions, step-parents and step-children enjoy no or negligible succession rights in each other's property, for instance.[614] Chapter II of this draft Code moves beyond this approach to recognise diverse

[610] See commentary to section 58 on the overall scheme of devolution.
[611] Assisted Reproductive Technology Act 2021, s 31; Surrogacy (Regulation) Act 2021, section 4(iii)(II).
[612] Surrogacy (Regulation) Act 2021, Section 4(iii)(a)(II),
[613] Assisted Reproductive Technology Act 2021, s 31.
[614] Kenneth Reid et al., 'Intestate Succession in Historical and Comparative Perspective' in Kenneth Reid and others (eds.) *Comparative Succession Law, Volume II: Intestate Succession* (Oxford University Press 2015) 488. Step-parents and step-children are

forms of parent-child relations that are premised on the intent to parent and the performance of parental responsibilities in relation to the child. This may be especially relevant in the context of queer parents, in cases of step-parenting, and in cases of stable unions generally, elaborated upon in Chapter II.

As explained below,[615] intestate succession schemes are designed on the basis of the presumed intention of the deceased which is based on factors such as ties of natural love and affection and duty of care existing between the deceased and their purported heirs. In most such cases, these ties of affection and duty of care have been assumed to exist in the cases of marriage and blood relations. However, we aim to expand the scope of succession laws to grant recognition to the ties of love and affection and duty of care that may exist in other relationships which have not enjoyed legibility under the law so far. Thus, in cases where a person has been presumed to be the parent of a child under section 112 or has been adjudicated as the parent of a child or has acknowledged their parenthood in relation to the child, the same ties of love and affection and duty of care can be presumed to exist. Succession rights will thus accrue as in other cases.

Proposed step:
Uniform succession rights shall accrue in all cases where a parent-child relationship exists, irrespective of factors such as the marital status and gender of the parents and the manner of establishment of the parent-child relationship (through adoption, assisted reproductive technology, etc.).

Proposed provision:

56. Definitions for this Chapter.–
In this Chapter, unless the context otherwise requires,–
(a) 'Code' means this Act;
(b) 'intestate' means the person who has died without having made a valid will with respect to their property or any portion thereof and whose property is to be inherited by heirs in accordance with this Code;
(c) 'parent' has the same meaning as in sub-section (i) of section 30 of Chapter II;
(d) 'not alive' means not alive at the time of the intestate's death; and
(e) 'spouse' means, in relation to the intestate, a person who was married to the intestate at the time of their death, and in relation to an heir of the intestate, a person is married to the heir at the time of the intestate's death.

Issue: How can this Chapter of the draft Code be applied in a fair and just manner to a plurality of family structures in the future? How should courts seek to answer questions arising under this Chapter which could not be contemplated by its drafters?

Objective:
To provide some form of basic guidance to those tasked with implementing this Chapter of the draft Code (the executive) as well those tasked with interpreting it (the judiciary).

Context:
While drafting this Code, it is not possible to account for all kinds of family structures. The conventional

excluded from inheritance to also avoid the issue of double parentage and the child enjoying simultaneous intestate succession rights in two different families. The provisions in Chapter II of the Draft Code safeguard against this possibility.
[615] See the section on 'Rationale Behind Succession Schemes" below.

structure of a family changes with time, and applying the model of devolution laid down in this Chapter may not necessarily produce fair/efficient results. In the future, ambiguities may arise while applying this Chapter to newer and unconventional family structures.

Proposed step:
In such a situation, this provision will act as a tool of interpretation for courts as well as the executive. While resolving ambiguities or implementing the provisions of this Chapter, it will guide the court/executive to adopt the interpretation which is in alignment with these principles.

For instance, current legislations such as The Special Marriage Act, 1954 were not drafted in a future-proof manner, which has meant that in order to grant the reliefs such as the one sought in the marriage equality case,[616] the court may be required to read down or read into the legislation.

57. Principles for devolution of property.–
Succession of property under this Code shall be guided by the following principles:–
(a) gender inclusivity,
(b) uniform application to all kinds of property, irrespective of its nature, and
(c) bringing within the fold of intestacy and testamentary succession a plurality of family structures.

[616] *Supriyo @ Supriya Chakraborty & Anr. v Union of India*, W.P.(C) No. 1011/2022.

Part II - Intestate Succession

Issue: What should the overall scheme of intestate succession be?

Objective:
To introduce a clear and logical scheme of devolution where the hierarchy of inheritance corresponds to actual family ties based on natural love and affection as well as modern socio-legal realities.

Context:
Laws on succession across the world (including the HSA, the ISA, as well as Muslim personal law in India) give the right of intestate succession to various categories of relatives such as 'lineal descendants' (for example, children and grandchildren), spouses, 'lineal ascendants' (for example, parents and grandparents) and 'collaterals' (for example, siblings). These heirs are further grouped into multiple categories based on a range of factors studied below. Heirs in certain preferred categories generally inherit the estate to the total exclusion of other heirs. Finally, if there are no heirs at all, then the property goes to the state (this is referred to as escheat).

Rationale behind succession schemes:

In his treatise 'On Jurisprudence', Sir John Salmond explained with great clarity the general principle which underlies the law of intestate succession. Adapted to be gender-neutral, the statement reads:

> "Inheritance is in some sort a legal and fictitious continuation of the personality of the dead person…The rights which the dead person can no longer own or exercise in propria persona, and the obligations which they can no longer in propria persona fulfil, the person owns, exercises, and fulfils in the person of a living substitute. To this extent, and in this fashion, it may be said that the legal personality of a person survives their natural personality, until, all obligations being duly performed, and the property duly disposed of, the representation of such a person among the living is no longer called for."

As such, the ideal scheme of intestate succession should conform as far as possible to the scheme of succession that the deceased person would have set out had they been alive. In cases where the deceased has not been able to express their intention through testamentary instruments, the law steps in to supply an adequate scheme premised on the 'presumed intention' of the deceased.[617] Other factors are the person's moral or social duty to provide for their family after their death, resulting from either dependency or need, and considerations of public policy, such as achieving gender inclusivity.[618] Thus, the law looks at not only what the deceased wanted but also what the deceased ought to have wanted.[619] All the factors have to be weighed and balanced while designing a succession regime.

This requires the law to make several presumptions about the deceased person. This cannot be based on the actual intentions of all the deceased persons but is instead informed by the typical intention of the average deceased person. As the law is required to make this presumption simultaneously for all persons whom it governs, it must be based on certain common factors which are uniformly applicable to all prospective intestates, such as natural love and affection and a duty of care for family members.[620]

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[617] This has long been considered as the foundation of intestate succession by jurists such as Grotius, Pufendorf and Stair. See Kenneth Reid and others., 'Intestate Succession in Historical and Comparative Perspective' in Kenneth Reid and others (eds.) *Comparative Succession Law, Volume II: Intestate Succession* (Oxford University Press 2015) 446. Reiterated by Law Commission of India in *Report No. 110: Indian Succession Act, 1925* (1985).
[618] Kenneth Reid and others, 'Intestate Succession in Historical and Comparative Perspective' in n Kenneth Reid and others (eds.) *Comparative Succession Law, Volume II: Intestate Succession* (Oxford University Press 2015) 447-448.
[619] ibid.
[620] ibid.

As scholars have noted,[621] the current conception of family under the law is informed by factors such as marriage (relations by affinity) and consanguinity (relations by blood) for the purposes of succession. Ties of natural love and affection and duty of care are consequently assumed to exist in the case of blood relations and marriage. Thus, persons gain inheritance rights in the property of the deceased through achieving a legal status. This legal status is granted by relatedness through either marriage (such as in the case of spouses) or through blood (such as in the case of parents and children). In certain cases such as adoption, inheritance rights are granted through the creation of a specific legal status.[622]

With this draft Code, we propose moving beyond a purely status-based approach to the law of succession. While relatedness through marriage or blood are still employed in many cases due to established practices and presumptions, newer forms of family and relationships should be accommodated (for instance, it is proposed that succession rights will accrue in cases of social parenthood and may accrue in cases of stable unions[623]).

Issues with current succession schemes in India:

a) Non-alignment of categories of heirs with modern family structures:

In addition to the primary factors discussed above, to decide the preferential order and specific rules for succession, personal laws are informed by a variety of other rationales.

Muslim law:
In the case of Muslim personal law, as several scholars have noted,[624] the scheme of succession is informed by the customs of ancient Arabia (pre-Islamic system of succession) and the rules laid down by the Quran. The pre-Islamic system of succession centred on male agnatic relations, i.e., the males related to the deceased through only male relatives. This included relatives such as sons, sons' sons, brothers, brothers' sons, father, father's father, etc. Cognatic heirs (who were related to the intestate through an intervening female relative) had no succession rights. The nearest male agnatic heirs would take the entire estate of the deceased. Women possessed no inheritance rights. This was rooted in the patrilineal nature of tribal society which was formed of adult males tracing their descent from a common ancestor through exclusive male links. The rules of succession helped in consolidating the tribes' military strength and preserving their patrilineal character by limiting inheritance rights to male agnatic relatives.[625]

The Quran modified the system of succession. The Quranic revelations entitled ten relatives to rank as relatives of the deceased, six of them women- the mother, true grandmother, the husband, the wives, son's daughter how low so ever (i.e., without any generational limit), sisters (full, consanguine and uterine), uterine brother, father and true grandfather.[626] Thus, female heirs were now included specifically in the scheme of succession and shares were laid down for the specified Quranic heirs.

However, there is a split between the way heirs are categorised in the Sunni and Shia systems of succession. Under Sunni law, the Quranic law acts as a superstructure upon the ancient tribal law. Thus,

[621] Poonam Pradhan Saxena, *Family Law II* (LexisNexis 2022); Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009); Tahir Mahmood, *Family Law in India* (EBC 2023).
[622] Hindu Adoption and Maintenance Act 1956, s 12.
[623] See the section below on succession in case of stable unions.
[624] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009); Sir Dinshaw Fardunji Mulla, *Hindu Law* (24th edition, 2022); J.N.D. Anderson, 'Recent Reforms in the Islamic Law of Inheritance' (1965) 14(2) The International and Comparative Law Quarterly); Lucy Carroll, 'The Hanafi Law of Intestate Succession: A Simplified Approach' (1983) 17(4) Modern Asian Studies 629.
[625] Noel J. Coulson, *A History of Islamic Law* (Edinburgh 1964); Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009).
[626] ibid.

in the categorisation of heirs rules have been so devised that the male agnatic heirs are preferred in the scheme of succession and end up getting larger shares.[627] The first essential is to give any entitled quota-sharer his or her prescribed share, which varies, and to then allot the remainder to the nearest agnate. If there is no agnate, however remote, then any quota-sharers will first take their prescribed shares and then divide the residue between them proportionately, by the doctrine of *radd* or return. Under this system, the bulk of the estate is often preserved for the closest surviving male agnate.[628]

Further, similarly placed female heirs get half of the share of similarly placed male relatives. Agnates are still preferred over cognates (such as a daughter's children or a son's daughter's children). As commentators have pointed out, this may lead to a counterintuitive result where a cognatic relative such as a daughter's child may be excluded from inheritance by an agnatic relative such as an uncle of the deceased. Some countries have tried to put in place specific rules to avoid such situations.[629] For instance, in Iraq, a daughter or son's daughter excludes from succession the deceased's brothers, sisters and other remote legal heirs.[630] In Tunisia, the daughter takes all property by way of *radd* even in the presence of male agnates such as a brother or uncle.[631] However, she enjoys the share allowed by Islamic law in the presence of father or paternal grandfather.

The Shia system, on the other hand, gives priority to the immediate family of the deceased, setting aside the concept of agnatic heirs. No relative is also solely excluded on the basis of gender alone, i.e., males and females inherit together even if males generally receive twice the share of females. The Shias divide the relatives into three classes: first, a class composed of descendants (irrespective of whether they were agnates or not) together with the father and the mother; second, a class made up of brothers and sisters and their descendants, together with grandparents and great grandparents; finally, a class which comprises uncles and aunts and great uncles and aunts and their descendants on both the paternal and the maternal side. Any claimant from the first class will exclude all other heirs and so on. However, husband and wife will in all cases be entitled to their respective share.[632]

Muslim personal law[633] retains the distinction between full-blood and half-blood relations, giving preference in succession rights to full-blood relations, who share a common mother *and* father. Consanguine heirs (who share a common father) are further preferred over uterine heirs (who share a common mother).

Hindu law:

Prior to the enactment of the HSA, succession to the property of Hindus was governed by a variety of systems which were in place in different parts of the country - namely, Mitakshara, Dayabhaga, Mayukha, Marumakkattayam, Ayilasantana, and Nambudri.[634] Generally, ancestral property passed by survivorship and self-acquired property by inheritance across all these systems. Women only had a life-interest in their property (except their *stridhana* which was their absolute property). This was known as her limited estate. Following her death, this property passed to the next heir of the previous owner of the property (i.e., the person from whom the woman had inherited her property).[635] A catena of legislations governing specific aspects of Hindu succession law were also in force across the country -

[627] Lucy Carroll, 'The Hanafi Law of Intestate Succession: A Simplified Approach' (1983) 17(4) Modern Asian Studies 629.
[628] Lucy Carroll, 'The Hanafi Law of Intestate Succession: A Simplified Approach' (1983) 17(4) Modern Asian Studies 629.
[629] See for example, Muslim Family Laws Ordinance 1961 (Pakistan); Code of Personal Status 1953 (Syria).
[630] The Civil Code of Iraq 1951, Articles 1188 and 1189.
[631] Personal Status Code, 1956.
[632] Noel J. Coulson, *A History of Islamic Law* (Edinburgh 1964); Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009).
[633] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009).
[634] Sarasu Esther Thomas, *BM Gandhi's Family Law* (Eastern Book Company 2nd edn., 2023) 63.
[635] Sarasu Esther Thomas, *BM Gandhi's Family Law* (Eastern Book Company 2nd edn., 2023) 63.

Caste Disabilities Removal Act, 1850, Hindu Widows' Remarriage Act, 1856, Hindu Inheritance (Removal of Disabilities) Act, 1928 etc. In 1937, with the enactment of the Hindu Women's Right to Property Act, minor improvements were made to the succession rights of Hindu women. In 1956, the HSA was enacted, largely uniformising succession law for all Hindus (with slight modifications in place for certain communities[636]). Undertaken as a comprehensive codification exercise, the HSA was able to make significant reforms to the prevailing gender imbalance in Hindu succession law. It made women equal heirs in the scheme of intestate succession and abolished the concept of limited estates. By classifying heirs into four broad groups - Class I, Class II, agnates, and cognates, the HSA also abolished the prevalent system of classifying heirs based on ancient Hindu law.[637]

However, the HSA still retains strong elements of classical Hindu law. Specifically in the case of the *Mitakshara* school, which is still recognised and given effect to by the HSA, succession is centred around the joint family and the coparcenary. These systems are based on the outdated concept of the jointness of food and worship in Hindu undivided families and the moral obligation of certain members (traditionally males) to maintain and look after the whole family.[638] Further, under the HSA, succession to the property of a male intestate and a female intestate is governed by wholly distinct rules.[639] In case of the latter, succession is governed by the general principle that property reverts to the source from which she received it.[640] Hindu personal law[641] also retains the distinction between full-blood and half-blood relations and gives preference in succession rights to full-blood relations, who share a common mother *and* father. Under the HSA, while consanguine heirs are allowed to inherit, uterine heirs are not.[642]

These schemes of intestacy, as several commentators have noted, may not align with modern family structures.[643] Succession schemes are based on the presumed intention of the deceased and thus on proximity to the deceased. In modern times, when nuclear families are becoming the norm, the privileging of extended familial relations, such as male agnatic heirs, over those who may be considered nearer in relation to the deceased (such as the spouse or the lineal descendants) is anachronistic. Thus, inheritance schemes informed by pre-Islamic tribal society realities or the presumption of jointness of food and worship under Hindu law may not be able to adequately and effectively provide for the rights of the heirs of the deceased.

b) Gender discriminatory categorisation:

HSA:

i) The father and mother are in different classes of heirs. The mother is a Class I heir who inherits to the total exclusion of the father, who is a Class II heir.[644]

ii) As discussed previously, separate schemes of succession have been laid down for male and female intestates who are married.[645] Female intestates' property devolves on the husband's heirs first and only

[636] See Hindu Succession Act, 1956, s.17.
[637] Mitakshara school - Gotraja Sapinda, Samanodakas, and Bandhusunder; Dayabhaga school - Sapindas, Sakulyas, and Bandhus.
[638] See commentary to section 1 of this Code.
[639] See Hindu Succession Act 1956, ss 8-16.
[640] Sir Dinshaw Fardunji Mulla, *Hindu Law* (24th edition, 2022) 1451.
[641] Hindu Succession Act 1956, s 18.
[642] See Hindu Succession Act 1956, Schedule.
[643] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009); Sir Dinshaw Fardunji Mulla, *Hindu Law* (24th edition, 2022); J.N.D. Anderson, 'Recent Reforms in the Islamic Law of Inheritance' (1965) 14(2) The International and Comparative Law Quarterly (1965); Lucy Carroll, 'The Hanafi Law of Intestate Succession: A Simplified Approach' (1983) 17(4) Modern Asian Studies.
[644] See the Schedule to the Hindu Succession Act, 1956.
[645] See Hindu Succession Act 1956, ss 8-16.

in their absence does it pass to her parents. There are exceptions in cases when the property is inherited from the natal family but not in all cases of separately property acquired by the woman, such as property received by way of will, gift, settlement, etc. For male intestates, the natal family of the wife has no claim in inheritance. The scheme is grounded in patriarchal logic that views the wife as a member of the husband's family and as having severed ties with the natal family despite daughters being made coparceners. The unjustness of this scheme has been acknowledged by the courts in cases such as *Omprakash v. Radhacharan*[646] and *Ganny Kaur v. State of NCT of Delhi*[647].

Muslim personal law:

i) Sons and daughters are placed in different classes of heirs. Daughters are Class I heirs while sons are Class II heirs, under Sunni law.

ii) Under Sunni law, sons' descendants are Class I and Class II heirs, while the daughter's descendants are Class III heirs. Thus, daughters' heirs inherit in the absence of Class I and Class II heirs, except in cases where the sole other heir is the surviving spouse(s), where they inherit alongside the spouse(s).[648]

iii) Under both Shia and Sunni law, similarly placed male and female heirs mostly inherit shares in the ratio of 2:1. The disparate shares were informed by females being excused from the performance of many duties imposed by law upon a male, such as service in the holy wars, maintenance or support of relations and payment of expiatory fines.[649] However, this division of responsibilities does not ring true in contemporary times and inheritance rights that are informed by this assumption are thus anachronistic.

iv) A relatively low share has been reserved in inheritance for the spouse(s) (who also do not participate in *radd* ordinarily) which may be worse in cases where there are multiple widows who collectively inherit the share due.[650] Further, under Shia Law, a childless widow is not entitled to immovable property as inheritance.[651]

ISA:

For Christians, there is disparity between the mother's and the father's right of inheritance. The father excludes the mother from inheritance altogether. The father also excludes the siblings from inheritance, but the mother inherits alongside the siblings. [652]

<u>c) Lack of queer inclusivity:</u>

Since succession laws in India are gendered in nature (recognising the binary of male and female), they also employ gendered terminology (terms such as husband and wife, mother and father, brother and sister, and pronouns such as he and she). Even in cases where the inheritance rights of similarly related male and female members are the same, gendered terminology is still employed.[653] As the Supreme Court observed in *NALSA*, gendered laws that conform to the male and female binary and the necessity of gender identification for the enjoyment of various civil rights create hurdles for such persons in the

[646] 2009 (7) SCALE 51.
[647] AIR 2007 Del 273.
[648] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009).
[649] Noel J. Coulson, *A History of Islamic Law* (Edinburgh 1964).
[650] Lucy Carroll, The Hanafi Law of Intestate Succession: A Simplified Approach (1983) 17(4) Modern Asian Studies 629.
[651] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009).
[652] See The Indian Succession Act, 1925 ss. 42 and 43.
[653] See, for example, The Schedule to the Hindu Succession Act, 1956.

exercise of their rights.[654] This binary understanding of gender has led to ambiguity regarding the inheritance rights of transgender persons under the law. Three possible scenarios present themselves:

i) Inheritance rights accrue as per the gender assigned to the respective persons at birth. This would involve individuals choosing between conforming to their assigned gender or not availing of their rights;
ii) Inheritance rights accrue as per the gender they identify as (this would be supported by the interpretation in the case of *Arun Kumar v Inspector General of Registration*,[655] though that case pertained to marriage rights);
iii) Inheritance rights do not accrue due to issues with gender identification and issues with identification of successors, the latter caused by lack of documentation and inability to prove adoption.[656]

This scheme also leaves certain persons completely out of its fold. What about persons with intersex variations? In what capacity would they exercise inheritance rights? And persons who do not identify with either gender? The only option open for them would be to conform with the gender assigned at birth. Judicial decisions provide no answer since courts have not dealt with transgender persons' inheritance rights generally apart from cases pertaining to the particular customs among the *hijra* community.[657]

There are two ways to address this issue: specific inclusion of a third gender in inheritance laws as per the directions in *NALSA*, later codified through the Transgender Persons (Protection of Rights) Act, 2019 ('2019 Act') or ungendered terminology that is inclusive of all gender identities.

Uttar Pradesh has adopted the former approach and amended their Revenue Code, 2006 to include references to third gender persons for various purposes such as the allotment of *abad*i sites and the order of succession.[658] Several problems persist with this approach. As several commentators have noted, it still does not extend to persons the option to be recognised as per the gender they identify as.[659] Vastly cumbersome is the fact that individuals must apply for a transgender certificate without which they cannot avail any benefits or protection under the framework of the 2019 Act.[660] The law vests discretion in external authorities for determining a person's gender and goes against the right of self-determination recognised in *NALSA*. Lastly, since the law recognises different inheritance rights for men and women, how will transgender persons who are included in the law as a third gender inherit property?

The previous subsection explored how gender discriminatory inheritance provisions are rooted in patriarchal logic and are not backed by rationales that fit modern social contexts and would fall afoul of the right to equality since the Constitution bars any discrimination based on religion, race, caste, sex, or birthplace. This implies that the state cannot make laws that treat people differently based on the aforementioned distinctions (except in particular circumstances).[661] Since gender has been read within

[654] *National Legal Services Authority v Union of India* (2014) 5 SCC 438.
[655] (2019) 4 Mad LJ 503.
[656] Mini Muringatheri, 'Transgenders raise the adoption question' (*The Hindu*, 2020) <https://www.thehindu.com/news/national/kerala/transgenders-raise-the-adoption-question/article30481170.ece> accessed 25 June 2023.
[657] See, Karan Gulati and TusharAnand, 'Inheritance Rights of Transgender Persons in India' (2021) NIPFP Working Paper Series.
[658] The Uttar Pradesh Revenue Code (Amendment) Act, 2020, clauses 2, 9(1) and 9(2).
[659] See, for example, Vikramaditya Sahai, 'The Sexual is Political: Consent and the Transgender Persons (Protection of Rights) Act, 2019' (*Centre for Law and Policy Research*, 3 February 2020) <https://clpr.org.in/blog/the-sexual-is-political-consent-and-the-transgender-persons-protection-of-rights-act-2019/> accessed 26 June 2023; Gautam Bhatia, The Constitutional Challenge to the Transgender Act (*Indian Constitutional Law and Philosophy*, 31 January 2020) <https://indconlawphil.wordpress.com/2020/01/31/the-constitutional-challenge-to-the-transgender-act/ > accessed 26 June 2023.
[660] Transgender Persons (Protection of Rights) Rules 2019, Rule 3.
[661] Clauses (3), (4) and (5) of Article 15 provide exceptions to clause (1). The State may make laws designed to provide special benefits for women, children, and socially and economically backward classes of citizens.

sex in Article 15,[662] laws should not discriminate against transgender persons only because of their identities. Ungendering inheritance provisions would thus ensure equitable inheritance rights for transgender persons while safeguarding the right to self-determination.

The gendered language adopted under the various succession laws also affects the rights of other queer groups. Chapter I of this draft Code extends the regime for marriage and stable unions to queer couples. The current gendered terminology employed under succession laws operates on the assumption that such relationships can only exist between a cis-gender, heterosexual man and woman. Succession rights are thus laid down for 'widows' and 'widowers' under the various laws.[663] Even though queer couples could technically be accommodated under the law through applying terms such as 'husband' and 'wife', this would lead to anomalous results. For a lesbian couple, the succession rights for 'widows' would accrue to both the parties under the current regime, while for a gay couple, the succession rights for 'widowers' would accrue to both parties. This becomes relevant as laws like the HSA lay down differential rules for males and females, such as different schemes of succession for married male and female intestates.[664] Under Shia law, childless widows cannot inherit immovable property but widowers can. These rules are grounded in a patriarchal understanding of heteronormative, heterosexual marriages, as explored above, and extrapolating the same archaic rules to queer couples would lead to absurd results and further perpetuation of inequity.

This gendered terminology also ends up being of relevance in the context of parents and children. Under Hindu, Muslim and Christian law, different succession rules have been laid down for fathers and mothers. Under the HSA, the mother is a Class I heir while the father is a Class II heir.[665] The extension of this rule to queer couples would result in the following situation- two women who are the legal parents of a child would both inherit as Class I heirs, while two men who are the legal parents of a child would both inherit as Class II heirs. Under the ISA, the father excludes the mother from inheritance.[666] He excludes the siblings of the deceased, while the mother would inherit along with such siblings.[667] Now for the extension of this scheme to same-sex couples: two fathers would supposedly inherit together while excluding siblings. Two mothers would also supposedly inherit together but alongside the same siblings whom the fathers would exclude. While these discriminatory provisions seem unreasonable in the context of non-queer relationships, their application to queer persons appears even more bizarre as they were not designed to account for such relationships in the first place.

Succession laws thus have to be designed to adequately and comprehensively account for the interests of queer persons which can be done through ungendering inheritance provisions.

Potential solutions based on modern succession schemes:

As noted above, in succession law, ties of natural love and affection are said to inform succession schemes which have been assumed to exist in the case of blood relations and marriage. These grant people the legal status to inherit from the estate of the deceased.

In keeping with this, most modern inheritance laws follow a categorisation scheme where the spouse, parents (lineal ascendants) and children of the deceased (lineal descendants) are preferred heirs. The exact order of succession among these heirs and the shares that each of these three categories get varies across jurisdictions. However, the heirs in this category generally inherit the estate to the total exclusion

[662] *National Legal Services Authority v Union of India* (2014) 5 SCC 438 [75].
[663] See The Hindu Succession Act, 1956, The Schedule; The Indian Succession Act 1925, ss. 33-35
[664] The Hindu Succession Act 1956, ss 8-16.
[665] See The Hindu Succession Act, 1956, The Schedule; The Indian Succession Act 1925, ss 33-35.
[666] The Indian Succession Act 1925, ss. 42 and 43.
[667] ibid.

of other heirs. In some jurisdictions, such as England, the surviving spouse inherits the property to the total exclusion of all other heirs including lineal descendants, up till a certain valuation of the estate.[668] In other jurisdictions, such as Goa,[669] the lineal descendants inherit to the exclusion of other heirs. In yet other jurisdictions, spouses, children and parents inherit together,[670] while a few others allow the parents to inherit in the absence of spouses and/or children[671].

Other lineal descendants and lineal ascendants (such as grandchildren, grandparents and so on) may either be allowed to inherit in their own right or through the principle of representation. Under the ISA, for instance, lineal descendants both inherit in their own right as well through representation.[672] As per the principle of representation, if during the lifetime of an ancestor, any of their legal heirs die but their heirs still survive, the surviving heirs become entitled to a share in the property as representatives of the predeceased heir. For instance, A is the intestate. He had a son B, who was his legal heir. B has a son C who is his legal heir. B dies during A's lifetime, but C survives. C will now represent his predeceased father and will be entitled to inherit A's property in the same manner as B.

The categorisation of heirs is thus based on the proximity to the deceased and the nearness in relation to the deceased as informed by factors such as presumed intention and the duty of care towards such heirs, and the rise in nuclear families over extended families. In this view, the spouses and the children are treated as a family unit. Thus the spouse and children are, almost invariably, the foremost heirs of the deceased.[673]

The general rule is that descendants are given priority over ascendants and ascendants are given priority over collateral heirs such as siblings.[674] For instance, between a grandchild and a grandparent, a grandchild is usually given priority over the grandparent in the order of succession. The privileged position of lineal descendants is also informed by the interest in preserving family property and ensuring its intergenerational transfer.[675]

The second category consists of blood relations who are considered to be more remotely related to the deceased (collateral relatives such as siblings and some of their dependants through the ascendants, certain lineal ascendants, uncles, aunts, etc.). They usually step in to inherit in the absence of lineal descendants, lineal ascendants and spouses as discussed above. In the absence of these heirs, the property is taken by the other distant relatives. Finally, if there are no heirs at all, then the property goes to the state (this is referred to as escheat). This system can be explained through a combination of the factors such as presumed intention of the deceased, duty of care owed to the heirs and public policy.

Further, modern laws on succession make no distinction whatsoever between agnatic and cognatic heirs as well as between full-blood and half-blood relations.

Proposed step:
Three categories of heirs - (immediate, extended, and distant) - may be created, where each category

[668] Inheritance and Trustees' Powers Act 2014, s 1.
[669] The Goa Succession, Special Notaries and Inventory Proceeding Act 2012, s 52.
[670] See, for example, Family Code 1999 (Azerbaijan).
[671] See, e.g., the scheme of succession in Intestate Succession Act 1987, section 1 (South Africa).
[672] See Indian Succession Act 1925, ss 36-40.
[673] Some exceptions exist, such as Goa, where the spouse's right of inheritance arises after the parents and the siblings of the deceased. See The Goa Succession, Special Notaries and Inventory Proceeding Act 2012, section 52. This may be explained by the preferential right of habitation over the residential house provided for the spouse (section 82) and the community property regime prevalent in the state (see Article 1130 and 1131 of the Goa Civil Code,), which together serve to protect the interests of the spouse.
[674] See Kenneth Reid and others., 'Intestate Succession in Historical and Comparative Perspective' in Kenneth Reid and others (eds.) *Comparative Succession Law, Volume II: Intestate Succession* (Oxford University Press 2015).
[675] ibid.

inherits to the total exclusion of the subsequent ones.

Composition of the categories:

1. *Immediate family* - Preliminarily, the members of the nuclear family of the intestate (i.e., the spouse and children) will form a part of the intestate's family. This category should also include the parents of the deceased considering the continued prevalence of the joint family system[676] in India[677] and the cases of neglect and abandonment of senior citizens that regularly come to light.[678] The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 was passed with the aim of allowing senior citizens to file claims for maintenance if they were unable to do so through their own property or earning.[679] Providing a default share in inheritance in case of intestate succession is a way of further bolstering this protection.

The above categorisation is thus broadly based on both the presumed natural ties of love and affection as well as the duty of care the deceased person owes to their heirs.

If the children of the intestate are not alive, then *their* spouse (child in-law of the intestate) and *their* children (grandchildren of the intestate) should step into their shoes and inherit from the intestate following the principle of representation.

2. *Extended family* – Next, the other blood-relatives of the intestate who have not been included in the immediate family may be placed in this category. The extended family of the intestate should contain three kinds of heirs – *first*, the dependants of the intestate's grandchild, i.e., the intestate's great-grandchild and grandchild-in law; *second*, the intestate's collaterals and *their* dependants, and *third*, the intestate's grandparents.

3. *Distant relatives* – Currently, both under the ISA and HSA as well under Muslim personal law, the Government is excluded from inheriting the estate of the intestate even if there is a single heir alive, irrespective of how distant a relative of the intestate they are - as long as they are related by blood (or by adoption) to the intestate. In other words, there is no limitation on the capacity of blood relatives to inherit the estate of the intestate vis-a-vis the number of degrees of separation between the blood relative and the intestate. The relatives of the intestate who are not part of the previous categories of heirs can be included in this umbrella category without making any distinction between agnates and cognates.

Proposed provisions:

58. Order of succession.

Upon the death of an intestate, the property of the intestate shall be inherited by:

[676] Joint family here does not refer to the Hindu joint family, which has a specific significance and is recognised as a legal entity for purposes such as taxation.
[677] Soutik Biswas 'Why Indians Continue to Live in Joint Families' (*BBC News*, 14 September 2020) <https://www.bbc.com/news/world-asia-india-54053091> accessed 26 June 2023; John Samuel 'The Nuclear Family is on The Decline in India (*Scroll.in*, July 7 2014)<https://scroll.in/article/669053/the-nuclear-family-is-on-the-decline-in-india> accessed 26 June 2023.
[678] Sukriti Vats, '35% senior citizens in India suffer abuse by sons, 21% by daughters-in-law, finds survey' (*ThePrint*, 15 June 2022) <https://theprint.in/india/35-senior-citizens-in-india-suffer-abuse-by-sons-21-by-daughters-in-law-finds-survey/997283/> accessed 26 June 2023; Mala Kapur Shankardass and S. Irudaya Rajan (eds.) *Abuse and Neglect of the Elderly in India* (Springer 2018).
[679] The Maintenance and Welfare of Parents and Senior Citizens Act 2007, section 4.

(a) the immediate family,
(b) If there is no immediate family, the extended family,
(c) If there is no immediate or extended family, the distant family,
(d) If there is no immediate family, extended family or distant family, the Government.

59. Composition of immediate family.

The immediate family of an intestate consists of:
(a) spouse, or spouses in case the intestate has more than one legally married spouse,
(b) children, or a spouse of a child only when such child is not alive,
(c) grandchildren, only when their parent who is the child of the intestate is not alive, and
(d) parents.

60. Composition of extended family.

The extended family of the intestate consists of:
(a) great-grandchildren,
(b) spouses of grandchildren,
(c) siblings,
(d) spouses as well as children of siblings who are not alive, and grandchildren of siblings, only when the sibling and their child who is the parent of the grandchild is not alive, and
(e) grandparents.

61. Composition of distant family.

The intestate's distant family consists of any person related to the intestate in any degree of separation who is not a part of their immediate family or extended family.

Issue: How should the principle of representation be operationalised while distributing shares among members of the immediate family?

Objective:
To introduce a scheme of devolution that is in alignment with modern socio-legal realities as well as ties of natural love and affection and duty of care.

Context:
The immediate family of the intestate consists of two kinds of heirs: the direct heirs (spouse, parents, and children) and the indirect heirs (children-in-law and grandchildren). The indirect heirs are connected through the intestate *through* another direct heir. Thus, they become members of the intestate's immediate family *if and only if* the individual who connects them to the intestate (i.e., the predeceased child) has died before the intestate's death. As a result, they should only receive shares out of that share that the connecting individual would have received had they been alive by stepping into their shoes. This is the principle of representation.

Proposed step:

The estate may be divided between the branches of the intestate's family (where each branch is represented by a child - alive or not). The indirect heirs belonging to a single branch may then be given equal shares in the share of that branch.

Issue: What should the scheme of devolution be in cases where the partial community of assets regime applies?

Objective:
To provide an equitable distribution of the estate for the spouse and other surviving heirs of the deceased under different kinds of property regimes, depending on the property rights that accrue to the spouse on the death of the intestate.

Context:
The financial affairs of spouses/partners in an RNM may often be intertwined. An important preliminary question is to determine which assets are attributable to the deceased and which to the spouse/partner who has survived. In other words, what property can the surviving spouse take (or claim) as their own, and what is the extent of the deceased's own estate in respect of which the surviving spouse must compete along with other relatives?

In India, the current default regime is separation of property, where assets acquired by the parties to a marriage during the subsistence of the marriage are held separately by them. Each of the spouses maintains the ownership of all that belongs to him or her and may freely dispose of the respective assets. Legal and economic scholarship over the years has established how this system often disadvantages the economically weaker spouse in the marriage, mostly women.[680] Since marriages are not recognised as economic partnerships, the ownership of property among women is disproportionately low, attributable to factors such as: i) domestic work not being recognised as productive work, ii) women being forced to sacrifice careers for the nature and nurture burden, and iii) women being confined to relatively low-paid jobs.[681] As a result of this regime, for many women, the initial corpus of wealth that they have at the time of marriage (including *stridhana*), together with accretions to their property that are made by their own effort or through gifts or inheritance, alone constitute the property over which they exercise ownership at the time of the dissolution of marriage.[682]

In such a scenario, it becomes important to secure adequate rights for the economically weaker surviving spouse on the death of the deceased to ensure an adequate standard of independent living. Another way of approaching spousal entitlement is to look not at future needs but at past contributions. Marriages have increasingly come to be seen as a partnership. If both partners contribute significantly to the marriage – whether in the form of wealth, income, or emotional or practical support – then, when the marriage comes to an end, its fruits should be divided between them. And if one partner, still typically the woman, has sacrificed her career to manage the household and raise the children, then considerations of equity require that she should be properly rewarded. In the case of a community of property regime, recognition and reward can largely be taken care of through the matrimonial property regime. But in case of separate property regimes, the economically weaker spouse's rights would have to be adequately secured through provisions for inheritance.

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[680] See, for example, Bina Agarwal, 'Gender and Command Over Property: A Critical Gap in Economic Analysis and Policy in South Asia' (1994) 22 World Development 1455.
[681] B. Sivaramayya, *Matrimonial Property Law in India* (Oxford University Press 1999).
[682] Kamala Sankaran, 'Family, Work and Matrimonial Property' in Amita Dhanda & Archana Parashar (eds.) *Redefining Family Law in India in India* (Routledge India 2008).

Under the partial community of assets regime prescribed above under Chapter I of this draft Code, upon the dissolution of marriage through divorce, death or otherwise, the surviving spouse will take their share of the joint assets on the death of the deceased. This regime is based on the conception of marriage as a partnership in which the spouses' respective contributions should be recognised and rewarded. In such cases, upon death, the surviving spouse will receive half of the community property upon the death of the deceased. The other half of the community property and the personal property of the deceased will form the estate for inheritance.

In the case of the partial community of assets regime, the accrued property may be an important means for the surviving spouse to secure an element of independent living. On the other hand, in separation of property regimes historically, much of the property has been held by the economically independent spouse to the detriment of the economically weaker spouse. In such cases, therefore, more safeguards may be required on the death of the spouse to adequately secure the rights of the surviving spouse, especially the economically weaker surviving spouse.

Proposed Step:
In case the partial community of assets regime is applicable, the spouse should not receive any part of the deceased person's half in the community of assets. The rights of the spouse are not adversely affected as they receive not only their half in the partial community of property but also preferential rights in the residential house.[683] The spouse should receive an equal share as the other members of the immediate family in the intestate's separate property. This is in line with the approach adopted in jurisdictions such as Argentina[684] and the United States.[685]

Issue: What should the scheme of devolution be in the case of stable unions generally and in the case of relationships is in the nature of marriage?

Objective:
To introduce a scheme of devolution that is in alignment with modern socio-legal realities as well as ties of natural love and affection.

Context:
In recent years, in India, there has been a move towards recognising conjugal relationships that are in the nature of marriage and extending limited rights to partners and children in those cases. The courts have accorded recognition to such partners for certain purposes such as maintenance and have defined factors that are relevant for determining whether a relationship is in the nature of marriage.[686] This includes factors such as common residence, duration of relationship, public aspects of the relationship, birth of children, sexual relations, etc. Thus, essentially, there is a presumption of marriage that is created in these cases and rights flow due to this presumption of marriage.

This logic should extend to inheritance rights for relations in the nature of marriage as well, but the position remains unclear. It is only in certain specific cases that limited succession rights have been provided to persons in relationships in the nature of marriage,[687] but the general position remains

[683] See section 22 of this Chapter of the draft Code.
[684] Civil and Commercial Code of Argentine Republic 2014, Article 3576.
[685] The Uniform Probate Code 1969, section 102-A.
[686] *Chanmuniya v Chanmuniya Virendra Kumar Singh Kushwaha* (2011) 1 SCC 141; *Indra Sarma v V.K.V. Sarma* AIR 2014 SC 309.
[687] *Dhannulal & Ors v Ganeshram & Anr.* AIR 2015 SC 2382.

undefined. Thus even though the inheritance rights of children born out of such relationships have in some cases been recognised,[688] the rights of partners vis-a-vis each other remain vague.

Proposed Step:

Relationships in the Nature of Marriage

Considering that Chapter I this draft Code grants legal recognition to relationships in the nature of marriage and specifically empowers courts to determine whether such a relationship exists, inheritance rights should also be extended to partners in such cases.

As discussed above, succession laws are usually understood to be premised on the presumed intention of the deceased and their duty of care towards their heirs.[689] Stability and certainty are also values that underpin succession schemes. In cases where a judicial determination has been made that two persons are in a relationship in the nature of marriage, we propose extending the regime applicable to spouses to partners in such cases. Since the relationships in such cases resemble marriage closely and thus the interdependencies and duty of love and care that define marriages, the presumed intention of the deceased and the duty of care towards heirs can be extended to the partners in such cases too to award them a significant portion in the estate of the deceased. A similar position has been adopted in other jurisdictions that have granted legal recognition to such relationships.[690] Moreover, such a regime is crucial to secure the rights of vulnerable parties in such relationships.

While relational equality, i.e., equalisation of legal status between different kinds of relationships, should be aimed for while designing a legal regime, equality within relationships must also be ensured. This would be premised on overcoming unequal distributions of wealth and power, for instance those based on historical inequality between men and women.

As per section 9 of Chapter I of this draft Code, a judicial determination is necessary for the purpose of ascertaining the existence of such a relationship, based on the factors laid out. Once the court has made such a determination, property would devolve as per the provisions set out below.

Stable Unions Generally

Due to the fluid nature of such relationships, and the diverse forms they can take,[691] a default regime may be impractical to prescribe. Instead, the inheritance rights of such parties vis-a-vis each other may be established through judicial determination. On establishing the existence of such a relationship, as per section 28 of Chapter I of this draft Code, the court may grant inheritance rights to such persons in their deceased partner's property, as deemed fit, taking into account the factors set out below.

While some jurisdictions automatically extend the inheritance regime applicable to spouses to relationships that resemble such stable unions,[692] a status-based approach in such cases may not be possible due to the lack of judicial precedent and the relative lack of legibility of such relationships under the law. However, through the prescribed intimation process under section 25 of Chapter I of this draft

[688] *Bharat Matha & Anr. v Vijay Renganathan & Ors.* AIR 2010 SC 2685; *Tulsa & Ors. v Durghatiya* AIR 2008 SC 1193; *D. Velusamy v D. Patchaiammal* (2010) 10 SCC 469.
[689] Kenneth Reid and others, 'Intestate Succession in Historical and Comparative Perspective' in Kenneth Reid and others (eds.) *Comparative Succession Law, Volume II: Intestate Succession* (OUP 2015) 446.
[690] See, for example,the decision of the Brazil Federal Supreme Court in Recurso Extraordinario (RE) 646721.
[691] See Chapter 1 above for details of the stable union framework.
[692] See, for example, Relationships Act, 2003 (Tasmania) and Reciprocal Beneficiaries Act, 1997 (Hawaii).

Code, the parties may opt for the scheme of inheritance applicable to surviving spouses under this Chapter of the draft Code.

Issue: How should the inheritance rights be decided in case of multiple spouses and/or stable union partners coexisting?

Objective:
To ensure adequate rights for all involved parties in the specified cases, especially those in a position of vulnerability.

Context:
Under the scheme proposed, there may be multiple scenarios where two or more spouses or stable union partners or partners in a relationship in the nature of marriage coexist, including situations:

- Where multiple marriages have been validly solemnised under Hindu personal law before the enactment of the Hindu Marriage Act, 1956.
- Where multiple marriages have been validly solemnised under Muslim personal law before the coming into force of a Code of this nature.
- Where a person has entered into other marriage(s) during the subsistence of a validly solemnised marriage.
- Where a person has entered into one or more stable unions during the subsistence of a validly solemnised marriage.
- Where a person enters into one or more marriages during the subsistence of a stable union.
- Where a person enters into one or more stable unions during the subsistence of another stable union.

While as per section 4 and section 24 of Chapter I of this draft Code, only a validly solemnised marriage or a legitimate stable union would be recognised in the latter four cases, it becomes important to secure the rights of parties in such polygamous relationships nonetheless, especially those in a position of vulnerability or economic dependency.[693] There have also been reports of dominant partners exploiting systems such as *maitri karar* to be in polygamous relationships while depriving partners of rights despite a private agreement being in place.[694] Section 18 of the HAMA, for instance, recognises the need for this protection by recognising the right to maintenance of other living wives[695] and of concubines[696] (however anachronistic the term may be).

Proposed Step:
Under the HSA, where there are more widows than one (in case of polygamous marriages that were solemnised before the enactment of the Hindu Marriage Act, 1956), they together take one share in the property of the deceased.[697] Similarly, under Muslim personal law, all widows together take one share in the property of the deceased. Under the proposed scheme, such marriages entered into before the coming into force of such a Code will continue to be valid. To ensure adequate protection to all the surviving widows, each widow shall individually get a share in the property of the deceased along with the other members of the immediate family.

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[693] Partners for Law in Development, 'Rights in Intimate Relationships' (2010), <https://www.academia.edu/15497286/Rights_in_Intimate_Relationships> accessed 29 May 2023.
[694] Partners for Law in Development, 'Rights in Intimate Relationships' (2010), <https://www.academia.edu/15497286/Rights_in_Intimate_Relationships> Accessed 29 May 2023.
[695] The Hindu Adoptions And Maintenance Act 1956, s 18(d).
[696] The Hindu Adoptions And Maintenance Act 1956, s 18(e).
[697] The Hindu Succession Act 1956, section 10.

In other cases, such as void and voidable marriages and/or multiple stable unions coexisting, strict portions may be difficult to lay down due to the configurations of relationships that may arise and to provide for each scenario due to the abundance of factors that may affect the rights of both parties, such as the duration of both relationships, financial position of the parties, the nature of both relationships, and the qualifying contributions made by both parties giving rise to a retained benefit or economic disadvantage. A judicial determination may thus become necessary in such cases to ensure proper apportionment of the estate of the deceased between the various partners. While in usual cases, one's status as a spouse alone is enough to establish full inheritance rights, in such special cases, it may be necessary to evaluate the quality of the respective relationships and the needs of the surviving spouse/partner(s).

Proposed provision:

62. Rules for devolution among immediate family.–

(1) The intestate's separate property shall devolve according to the following rules:

(a) Every member of the immediate family alive at the time of the intestate's death shall inherit an equal share of the intestate's property.

Illustration

Facts - X, the intestate, is survived by her wife A, her daughter B, her son C, her daughter-in-law D (who is the widow of his second son E), her son-in-law F (who is the husband of his daughter B), and two grandchildren G and H, whose parents I and J (sons of X) are not alive.
Calculation - A, B, C, D, G, and H will inherit X's property equally. F does not receive a share as his wife is alive at the time of X's death.
Final Shares - A, B, C, D, G, and H receive 1/6 share each.

(b) The intestate's grandchildren and the spouse of the intestate's children, in the branch of each deceased child of the intestate, shall inherit between them one share, which shall be divided equally.

Illustration

Facts - X, the intestate, has two children - A and B. A is married to C and has 2 children - D and E. B is married to F and has 3 children - G, H, and I. A and B both died before X's death.
Calculation - The property is first split 2-ways between A and B's branch. In A's branch, the share is divided equally between C, D, and E. In B's branch, the share is divided equally between F, G, H, and I.
Final Shares
C, D, and E will receive 1/6 share each.
F, G, H, and I will receive 1/8 share each.

(c) If the intestate was in a stable union at the time of death, as per sections 24 and 28 of this Code, then the share of the partner shall be determined according to the following rules:

(i) In cases where the stable union has been intimated as per section 25 of this Code, the partner shall be entitled to the same rights in the intestate's property as a spouse

under this Code, if and only if the partners opt in to the scheme of intestate succession under this Code.

(ii) If the partners have not opted in to the scheme of intestate succession under this Code, or, the stable union not having been been intimated, the court has made a determination under section 28 of this Code, then the partner's share (including preferential right of habitation and use over the residential house under section 76 of this Code) shall be determined by a court based on the following factors:

(a) financial position of the partner;
(b) the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners;
(c) any contributions made or actions taken by the spouse(s) and/or the partner(s) during the subsistence of the relationship, which has given rise to a sustained economic benefit or disadvantage;
(d) other such factors which may be prescribed.

(d) In cases where a court has determined the existence of a relationship in the nature of marriage as per section 9 of this Code, the partner shall be entitled to the same rights in the intestate's property as a spouse under this Code.

(e) If at the time of death, the intestate is part of more than one validly solemnised marriage, then each spouse shall receive one share each.

(f) If at the time of death, the intestate is part of more than one marriage, or more than one stable union, or a marriage and a stable union (whether void or voidable) then the share of the spouse(s) and/or the partner(s), as the case may be, shall be determined by a court based on the following factors:

(i) the nature of relationship between the parties;
(ii) the period of de facto separation between the parties;
(iii) the financial position of the spouse(s) and/or the partner(s) in a stable union or relationship in the nature of marriage, including any independent source of income;
(iv) the degree of financial dependence or interdependence, or any arrangements for financial support, between the parties;
(v) any contributions made or action taken by the spouse(s) and/or the partner(s) during the subsistence of the relationship, which has given rise to a sustained benefit or economic disadvantage;
(vi) the number of heirs of the intestate who are entitled to a share; and
(vii) other such factors as may be prescribed,

and while determining the collective share of the spouse(s) and/or partner(s), the court may proportionately reduce the shares of the other heirs of the intestate.

Explanation.– For the purposes of this sub-section:

(i) "contributions made" shall include any action which seeks to contribute to the welfare of the intestate and/or their family, such as acquiring, conserving, or improving the property of the intestate and/or their family, looking after the home or caring for the family; and

(ii) "economic disadvantage" shall include foregoing an independent income or making a substantial financial contribution.

(2) The intestate's share in the partial community of property regime shall devolve according to the following rules:

(a) the spouse shall not receive a share,
(b) the share shall be divided equally between the other members of the intestate's immediate family, and
(c) clause (b) of sub-section (1) shall apply to the devolution of property under this sub-section.

Notes for Consideration:

Should the inheritance rights of the surviving spouse vary in cases where the partial community of assets regime applies? What would the apt way of grading rights in such a situation be?

Should the default inheritance regime in case of surviving spouses be extended to all stable unions?

Issue: **How should property be distributed among members of the extended and distant family?**

Objective:
To introduce a scheme of devolution that is in alignment with modern socio-legal realities as well as ties of natural love and affection and duty of care.

Context & Proposed Step:

Extended family

The heirs who have been placed in this category can be broadly grouped into four sub-categories - intestate's grandchildren's dependants, intestate's siblings, and intestate's siblings' dependants, and intestate's grandparents. For the purposes of inheritance, these sub-categories may be kept insular and separate from one another. A provision may be introduced which gives effect to two basic rules:

1. The estate is divided equally among the four sub-categories of heirs.
2. The share of an heir is affected only by other heirs who inherit in the same capacity (for example, the share of a sibling is only reduced by another sibling).

Distant family

As of now, under the ISA, when the intestate has left no lineal descendant, parent, or sibling, then the property goes to the other relatives based on two simple rules: heirs nearest in degree to the intestate wholly exclude all remoter heirs, and the heirs in the same degree inherit equally amongst themselves.

Under the HSA, if no Class I and Class II heirs are present, then the property goes to agnates. If there are no agnates, then it goes to cognates. Within agnates and cognates, property devolves based on three

simple rules: heirs with fewer degrees of ascent are preferred; if two heirs have the same degrees of ascent, then the one with fewer degrees of descent is preferred, and if both the degrees of ascent and descent are the same, then the heirs take simultaneously.

Both legislations are based on counting the degrees of separation between the intestate and the heirs. While both broadly follow the same model, the HSA contains two additional rules - agnates are preferred to cognates, and lineal descendants are preferred to lineal ascendants (as those with fewer degrees of ascent are preferred).

An ideal scheme for devolution among members of the distant family may be adopted consisting of two rules - one which provides for the *inter se* hierarchy of devolution among members of the distant family, and the other which explains the method of counting degrees. The distinction between agnates and cognates may be wholly done away with as it is rooted in gender-based discrimination.

Proposed provisions:

63. Rules for devolution among extended family.–

The following rules shall apply to the devolution of property among members of the extended family–

(1) The intestate's great-grandchildren and the spouse of the intestate's grandchildren, in the branch of each deceased grandchild of the intestate, shall together take one share, which shall be divided equally.

Illustration

Facts - X, the intestate, has 2 children - A and B. A has 2 children - C (who is married to C1 and has 3 children C2, C3, and C4) and D (who is married to D1 and has 2 children D2 and D3). B has 1 child - E (who is married to E1 and has no children). A, B, C, D, and E all died before X's death.
Calculation - X's property is first split 3 ways between the branches of the 3 grandchildren - C, D, and E. In C and D's branches, the share is divided equally between the spouse and the children. In E's branch, the spouse takes the whole share.
Final Shares
C1, C2, C3, and C4 will receive 1/12 share each of X's property.
D1, D2, and D3 will receive 1/9 share each of X's property.
E1 will receive 1/3 share of X's property.

(2) All the siblings shall together take one share, which shall be divided equally.

(3) The spouses, children, and grandchildren in the branch of each sibling or child of the sibling, as the case may be, shall together take one share, which shall be divided equally.

Illustration

Facts - X has two siblings - A and B - who both died before X's death.
A has left behind a spouse C and one child - D.
B has left behind a spouse E, daughter F, two grandchildren - G and H (who are the children of I - B's son who died before X's death).
Calculation - X's share is first split two ways between the branches of A and B.
In A's branch, the share is divided equally between C and D.

In B's branch, the share is split in three ways between E, F, and I's branch.
In I's branch, the share is split equally between G and H.
Final Shares
C and D will receive 1/4 share in X's property.
E and F will receive 1/6 share in X's property.
G and H will receive 1/12 share in X's property.

(4) All grandparents shall together take one share, which shall be divided equally.

Illustration

Facts - X is survived by his siblings A, B, and C, his paternal grandfather D and his maternal grandmother E.
Calculation - A, B, and C together take one share. D and E together take one share.
Final Shares
A, B, and C will receive 1/6 share each of X's property.
D and E will receive 1/4 share each of X's property.

64. Rules for devolution among distant family.–

(1) Amongst members of the distant family related to the intestate in different degrees of separation, a member with fewer degrees shall exclude any other member with more degrees.

Illustration

Facts - X has left behind his parent's sibling's child Y and his sibling's great-grandchild Z.
Calculation - Y is separated from X by four degrees and Z by five degrees. The former wholly excludes the latter.
Final Shares - Y will inherit all of X's property.

(2) Multiple members of the distant family with the same degree of separation shall inherit equally.

Illustration

Facts - X has left behind his parent's sibling's child Y and his sibling's grandchild Z.
Calculation - Both Y and Z are separated from X by four degrees and thus share equally.
Final Shares - Y and Z = 1/2.

(3) For the purpose of this section, the counting of degrees of separation shall be based on the following rules:–

(a) counting of degrees of separation shall start with the intestate,

(b) degrees of separation refer only to degrees of ascent and degrees of descent, and

Illustration

Facts - X leaves behind his parent's sibling's grandchild A, his sibling's child's spouse B, and his sibling's grandchild C.

Calculation - X is separated from A by five degrees, and from C by four degrees. B is not a member of X's distant family as they are not related to X through a degree of ascent or descent.
Final Shares - C inherits all of X's property.

(c) there shall be no distinction between degrees of ascent vis-a-vis degrees of descent.

Illustration

Facts - X has left behind his parent's sibling's child Y and his sibling's grandchild Z.
Calculation - Both Y and Z are separated from X by four degrees. While Y is separated by two degrees of ascent and two degrees of descent, Z is separated by one degree of ascent and three degrees of descent. Both inherit equally.
Final Shares - Y and Z will receive 1/2 share in X's property.

Issue: Should an heir who is still in the womb at the time of the intestate's death be given a share?

Objective:
To provide for the reasonable rights of an heir who is conceived but not born at the time of death of the deceased.

Context:
This provision applies the *nasciturus* doctrine, which is generally utilised in the law of succession. While a beneficiary, to inherit, must usually be alive at the date of the deceased's death, the *nasciturus* doctrine constitutes an exception in favour of a person who was conceived by that date, but had not yet been born.[698] The ISA,[699] the HSA,[700] and Muslim personal law[701] all provide for the rights of the unborn child who has been conceived but has not been born at the time of the death of the intestate. The principle *nasciturus pro iam nato habetur, quotiens de commodo eius agitur* evolved in Roman law.[702] In terms of this principle, foetuses could be treated as already born if this was to their benefit.[703] The principle was also applied for the purposes of inheritance. The *nasciturus* doctrine thus deems legal subjectivity to begin at conception if there is a benefit which would accrue to the foetus once it is born. This means that a foetus may receive rights prior to its birth. The doctrine also requires that a foetus must be born alive and that the conception of the foetus must have occurred before such a benefit accrued.[704] Since the succession opens upon the death of the intestate, the *nasciturus* doctrine presumes the existence of the child in womb and secures their right.

Proposed Step:
Incorporate the position under the current laws in force.

[698] Karl Heinz Neumayer, 'Intestate Succession' in *International Encyclopedia of Comparative Law* (IECL 2002) vol 5, ch 3
[699] Indian Succession Act 1925, s 27(c), s 50(a).
[700] Hindu Succession Act 1956, s 20.
[701] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009).
[702] *The Digest of Justinian* (University of Pennsylvania Press A Watson tr. 1986).
[703] Johnston D., 'The Renewal of the Old' (1997) Cambridge Law Journal 80-95.
[704] Boezaart T. 'Child Law, the Child in South African Private Law' in Boezaart T (ed.) *Child Law in South Africa* (Juta Claremont 2009) 3-37.

Proposed provision:

65. When an heir is conceived but not born at the time of death.–

(1) A child who was conceived by the time of the intestate's death and is subsequently born alive, shall be deemed to be a 'child' for the purposes of this Code.

(2) Such a child shall inherit their share of the intestate's property as if they had been born before the death of the intestate.

(3) The inheritance shall be deemed to have taken effect from the date of the intestate's death.

Issue: Should the intestate's child, who is conceived through ART after the death of the intestate, be given a share in inheritance?

Objective:
To adequately provide inheritance rights for the intestate's child conceived through ART after the death of the intestate while balancing the rights of other heirs.

Context:
ART has expanded the scope of succession beyond the *nasciturus* doctrine. It is now possible for children to be conceived utilising the intestate's reproductive material even post their death as such reproductive material can be preserved. Thus, a spouse's or a stable union partner's sperm may be cryo-preserved and utilised by their spouse/partner for conceiving after their death, through the use of ART. Similarly, a couple's embryos may be frozen and may be implanted in the surviving spouse/partner only after the man's death. In the recent past, reports of increasing incidence of such cases have emerged in India.[705] Succession law will, in such circumstances, have to account for the inheritance rights of the children so born.

Proposed Step:
The same inheritance rights as children born/conceived during the lifetime of the deceased may be provided for the children conceived after the death of the deceased due to the relatedness of the child with the deceased. However, certain factors would have to be accounted for while doing this:

i) *Time limit for conception and birth:* Considering that cryopreserved reproductive material may be viable for an indefinite period of time, such conception may be possible long after the death of the person. In the context of inheritance, such a conception and birth may take place long after succession has been opened and settled. For instance, the two spouses may have frozen an embryo. This embryo may be implanted in the woman years after the spouse's death. An intestate heir would thus come into being and upend the distribution of the estate, with retrospective effect. Theoretically it could take decades for succession to be conclusively settled. Jurisdictions such as New Zealand[706] and New South Wales[707] have thus excluded posthumous conception cases from inheritance to avoid indefinite delays.

[705] Nilkita Doval, 'Life Uninterrupted' (*Open the Magazine*, 2021) <https://openthemagazine.com/feature/life-uninterrupted/> accessed 29 May 2023.
[706] Nicola Peart and Prue Vines, 'Intestate Succession in Australia and New Zealand' in Kenneth Reid and others (eds.) *Comparative Succession Law, Volume II: Intestate Succession* (Oxford University Press 2015) 364.
[707] Succession Act 2006, section 3(2); Estate of K (1996) 5 Tas R 365

Three possible solutions can be adopted here to avoid such uncertainty and complications: i) A time limit could be laid down within which such a conception and birth must take place; ii) the succession could remain open indefinitely till such a conception takes place, and iii) the succession scheme is reopened upon the conception and birth of such a child, whenever that happens. The latter alternatives would adversely affect the rights of the other heirs and lead to prolonged uncertainty. Public policy considerations and the interests of the other heirs may require a balancing exercise to be undertaken where a time limit is laid down for such a conception and birth but the inheritance rights of the child so born are still secured. Succession in such cases may be reopened with retrospective effect on the birth of such a child. The other heirs should also be alerted to the possibility of such a birth taking place at the time of the death of the intestate. Countries such as Spain[708] and Austria[709] have adopted this approach as a way of adequately balancing different interests.

ii) *Cases in which such posthumous conception may be valid:*

Consent of the donor: Section 22(2) of the ART Act, provides that ART clinics and banks must not cryo-preserve any human embryos or gametes, without specific instructions and written consent from all the parties seeking ART, in case of death or incapacity of any of the parties. The accrual of inheritance rights in the case of posthumous conception are thus contingent on the intestate providing their written consent for both the preservation of their reproductive material and for such use, after their death, during their lifetime. Since succession regimes are based on presumed intention of the deceased, such consent can establish intention on the part of the deceased for the passing of their estate to the child so born.

66. When the intestate's child is conceived and born after the intestate's death.–

(1) The intestate's child who is conceived after the intestate's death under this section and is subsequently born alive, shall inherit their share of the intestate's property as if they had been born before the death of the intestate, subject to the following conditions:

(a) The intestate's spouse must have given written notice of their intention to use preserved reproductive material or an embryo for the conception of a child, through assisted reproductive technology (with or without a surrogate), to other members of the immediate family, within such period as may be prescribed.
(b) The reproductive material must be preserved in accordance with section 22(2) and section 24(1)(f) of the Assisted Reproductive Technology (Regulation) Act, 2021.
(c) The reproductive material must be utilised in accordance with the written consent of the intestate under section 22(1)(a) of the Assisted Reproductive Technology (Regulation) Act, 2021.
(d) The child must be born no later than such anniversary of the intestate's death as may be prescribed.
(e) The spouse must not have remarried after the intestate's death and before the birth of the child.

(2) The inheritance shall be deemed to have taken effect from the date of the intestate's death.

Explanation.– For the purposes of this section, the term 'spouse' shall include a partner in a stable union or a relationship in the nature of marriage, and the term 'remarries' shall include entering into a stable union or a relationship in the nature of marriage.

[708] Law 14/2006, 26 May.
[709] Civil Code of Austria 1811, sections 545 and 546.

Notes for Consideration:

Should the marital status of the partner affect the right to inheritance of children born as per this section?

How should the written notice provisions under the ART and Surrogacy frameworks be modified to accommodate the requirements of this section? In what form should the notice provide for the terms of consent of the person whose reproductive material is utilised? Should inheritance rights automatically arise by virtue of consent being given for the utilisation of reproductive material for posthumous conception or should there be a requirement for an express stipulation to this effect? Should the notice provide the details of the persons who may utilise such reproductive material material?

What factors should play a role in laying down a time limit for conception and birth as per this section for inheritance rights to accrue?

Issue: **How can the order of deaths be determined in case of simultaneous deaths?**

Objective:
To introduce objectivity and certainty in the scheme of intestate succession.

Context:
In case of simultaneous deaths, where it is difficult to ascertain who died before the other, it is generally presumed that the elder passed away before the younger, unless evidence contrary to this presumption is produced. This is a principle of common law that has been borrowed as it is by the HSA[710] in order to avoid difficulty in ascertaining property rights.[711]

Proposed Step:
Same position can be retained to avoid difficulty.

67. When individuals die simultaneously.–

When multiple persons have died in circumstances which make it difficult to determine the order of their deaths, then for the purposes of devolution of property under this Code, the elder shall be deemed to have died before the younger, until the contrary is proved.

Issue: How should a person who has murdered an intestate family member in anticipation of inheritance be disqualified from inheriting from the intestate?

Objective:

[710] Hindu Succession Act 1956, s 21.
[711] *Jayantilal Mansukhlal And Anr. v Mehta Chhanalal Ambalal* AIR 1968 Guj 212.

To make the application of a rule of this nature clear and unambiguous.

Context:
To disincentivise persons from killing for property, section 25 of the HSA disqualifies killer-heirs from inheriting a share in the estate of their victim. The Supreme Court has clarified that this principle also extends to the heirs of the offender, who are also equally disqualified.[712] It may be noted that the text of the provision does not reflect this position.

Further, owing to the language used in section 25, courts have held that 'murder' is not to be understood in the technical sense as defined in section 300 of the Indian Penal Code, 1860 ('IPC'). As such, even in a case where the criminal court had eventually held that the deceased person had died by suicide and acquitted the killer-heir for lack of conclusive evidence, the civil court saw it fit to disqualify the person on the basis of equity, justice, and good conscience.[713]

Proposed step:
A provision may be introduced disqualifying the killer-heir as well as their heirs. To ensure clarity and avoid ambiguity, the standard for disqualification may be conviction under the IPC. The Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 (a uniform code on succession for the state of Goa) has adopted conviction as the standard.

68. When an heir is a murderer.–

(1) A person who is convicted for the murder or abetment of murder of the intestate shall be disqualified from inheriting any share in the intestate's property.

(2) A person who is convicted for the murder or abetment of murder of any other person shall be disqualified from inheriting any property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

(3) If any person is disqualified from inheriting any property under sub-sections (1) or (2), it shall devolve as if such person had died before the intestate.

Issue: How should property devolve if the intestate has left behind no heir?

Context:
The doctrine of escheat applies when the intestate has not left any heir. 'Escheat' recognises the paramountcy of the State as the ultimate sovereign in whom the property would vest upon a clear and established case of failure of heirs. The Supreme Court opined in the case of *Kuchilal Rameshwar Ashram Trust v Collector*[714] held that this principle is based:

> "*on the norm that in a society governed by the rule of law, the court will not presume that private titles are overridden in favour of the state, in the absence of a clear case being made out on the basis of a governing statutory provision. The doctrine of escheat postulates that where an individual dies intestate and does not leave behind an heir who is qualified to succeed to the property, the property devolves on government. Though the property devolves on government in such an eventuality, yet the*

[712] *Vellikannu v. R. Singaperumal* (2005) 6 SCC 622.
[713] *GS Sadashiva v MC Srinivasan* AIR 2001 Kant 453.
[714] (2008) 12 SCC 541.

government takes it subject to all its obligations and liabilities. The state in other words does not take the property "as a rival or preferential heir of the deceased but as the lord paramount of the whole soil of the country."

Proposed Step:
The position remains the same. The doctrine of escheat is to apply in case there is no heir of the intestate. Since no degree of limitation has been laid down for the distant family of the intestate, the state will only inherit the estate when the intestate has *no* heirs at all. Even if there is a single heir, however distant they may be, they will inherit the property as a member of the distant family before escheat applies.

69. When no heir is present.–

(1) If the intestate has left no heir in their immediate, extended, or distant family, then the intestate's property shall devolve on the Government.

(2) The Government shall take the property subject to the same obligations and liabilities as any other heir.

Notes for Consideration:

In some jurisdictions, unlimited succession is not allowed and a limitation is placed on the degrees of heirs who can inherit.[715] The limitation is motivated by a concern that the estate should not devolve upon persons who are so remotely related to the deceased that ties of love and affection or duty of care are unlikely to exist, i.e., persons for whom the inheritance constitutes a windfall[716].[717] Should the proposed succession regime proceed on the assumption that any relative, however remote, is better than no relative at all or should a limit be fixed? If yes, what factors should inform such a limit?

Importantly, is there a legitimate state interest in laying down such a limit or would such a provision amount to excessive state intervention?

[715] France and Italy limit succession at 12th degree of kindred; see French Civil Code, 2006, Article 745; Italian Civil Code, 1942, Article 572(2). Spain limits it at 4th degree; see Spanish Civil Code, Article 954. England, New Zealand and some states of Australia stop succession at aunts and uncles; see Administration of Estates Act, 1925, s 46(1)(v) (England); Administration Act, 1969, s 77 (New Zealand); Succession Act, 2006, s 130 (New South Wales).
[716] In the United States, for instance, remote relatives are known as laughing heirs because they have little to no affinity with the deceased and presumably laugh all the way to the bank on the death of the deceased and their new windfall inheritance. Ronald Scalise, 'Intestate Succession in the United States of America', in Kenneth Reid and others (eds.), *Comparative Succession Law: Volume II: Intestate Succession* (OUP 2015) 404.
[717] Kenneth Reid and others, 'Intestate Succession in Historical and Comparative Perspective' in Kenneth Reid and others (eds.) *Comparative Succession Law, Volume II: Intestate Succession* (OUP 2015) 467.

Part III - Testamentary Succession

Issue: What should the law governing testamentary succession be?

Objective:
To adopt a single uniform legislation applicable to every person, without any exceptions based on religion.

Context:
Currently, there does not exist a uniform law on testamentary succession in India. Testamentary succession for Hindus (including Buddhist, Sikh or Jain), Christians and Parsis is governed by the ISA. However, there are several provisions of the ISA which are not applicable to Hindus (see sections 57 and 58, for example). For Muslims, testamentary succession is governed by Muslim personal law. The two laws significantly differ in their approach to testamentary succession.

First, under Muslim personal law, wills can be either written or oral. For written wills, there is no requirement of signature, attestation or registration.[718] Under the ISA, oral wills are granted limited recognition under the category of privileged wills for armed forces personnel. Further, attestation of some form is a mandatory requirement for wills. Secondly, under Muslim personal law only 1/3 of the estate/property can be bequeathed through a will and the rest of the share devolves through intestate succession on the specified heirs. The exception to this rule is if the testator has no heirs or obtains their consent to bequeath more than 1/3 property.[719] On the other hand, under the ISA, a testator has complete freedom over the property that they can bequeath and there are no limits on testamentary freedom. Thirdly, under Muslim personal law there are religious qualifications for a legatee, i.e., the legatee must be competent to hold property, should not be against Islam and should not have renounced Islam for another faith. If the property is being bequeathed to an institution, the said institution should not promote anti-Islamic activities or promote any other religion.

Scholars have called for relooking at these aspects of Muslim personal law. First, the rule of limited testamentary freedom prevents a testator from bequeathing in favour of heirs who may be vulnerable or who may require financial support. The existing intestate law is preferentially tilted towards male heirs and in many instances gives lesser shares to female heirs. Removing the 1/3 limit on testamentary freedom will allow the testator to bequeath property to female heirs and other heirs who otherwise might receive lesser or no shares. Secondly, traditionally oral wills were preferred in Islamic law because of the high rate of illiteracy in the Arabian Peninsula in the 7th and 8th century and the trend of oral transmission.[720] However, the position has changed today. The global best practice amongst nations following Islamic law is to move towards written wills as against oral wills. For instance, under Moroccan Law a written will is valid if it is in the handwriting of the testator and has been signed by him. However, an oral to be valid requires certification by a notary or needs to be made in the presence of two witnesses who must present themselves before the Court to provide testimony regarding the will.[721] Therefore, the law is slowly moving towards encouraging written wills over oral wills. Similarly, in Egypt oral wills have become obsolete procedurally, since they require documentary proof if a claim based on oral wills is raised.[722] As per the Iraqi Code of Personal Status, only wills that are supported by documentary

[718] *Mazar Husen v Bodha Bibi* (1898) 21 All 91.
[719] Poonam Saxena, *Family Law Lectures: Family Law II* (LexisNexis 2019) 502.
[720] Nadjma Yassari, 'Testamentary Formalities in Islamic Law and their Reception in the Modern Laws of Islamic Countries', in Kenneth Reid and others (eds.) *Comparative Succession Law: Volume I: Testamentary Formalities* (Oxford 2011) 292.
[721] Code of Family Law, Law No 70.03 of 3 February 2004, Article 295 and 296.
[722] The Egyptian Law No 71/1946, Article 2 s 1. See, Nadjma Yassari, 'Testamentary Formalities in Islamic Law and their Reception in the Modern Laws of Islamic Countries' in KennethReid and others (eds), *Comparative Succession Law: Volume I: Testamentary Formalities* (Oxford 2011) 299.

evidence, signed, sealed or thumb marked by the testator are recognised. Hence, in effect, only written wills are valid. Similar is the position in Tunisia.[723] In addition to nations following Islamic laws, the requirement of a written will along with attestation is the norm in most common law countries as well.[724]

Proposed Steps:
Ideally, a new framework dealing with testamentary succession should be adopted. This framework should be drafted after a study of the existing law on testamentary succession, followed by consultations with all stakeholders. This exercise will require considerable time and effort and hence will be undertaken in future.

Currently, it is recommended that the ISA should be uniformly applied to all religions sans any exceptions. This choice is based on the existing application of the ISA to the majority of religions in India. However, several modifications have been made to the provisions of the ISA, keeping in mind the principles of this draft Code. For instance, religious exemptions have been removed from the ISA so as to have parity in law without any religious discrimination.

Issue: Should digital wills be recognised?

Objective:
To recognise digital wills and virtual execution.

Context:
With the rise of technology, several countries are considering recognising digital or electronic wills. The Uniform Law Commission in the United States has drafted a Unified Electronic Wills Act which recognises electronic wills. In Australia,[725] Canada[726] and in South Africa,[727] the courts have interpreted statutory law to recognise and give effect to digital wills.

However, Indian law is silent on the validity of electronic wills. The Information Technology Act, 2000 which governs electronic transactions specifically excludes wills from its operation.[728] The Steering Committee on Fintech Related Issues in the year 2009 recommended amendments in various laws to allow digital alternatives for all processes that have a bearing on financial services, including wills. However, this recommendation has not been implemented.[729]

A measure connected to digital wills is the recognition of electronic or virtual execution. The existing law requires that a will should be executed in the physical presence of two persons. However, virtual execution allows an individual to witness the will virtually using video-conferencing or other facilities. The Unified Electronic Wills Act in the United States recognises both physical and virtual execution of a will. States like Alaska, Alabama, Arkansas, Illinois, Maine, Massachusetts, Michigan, and New York permit virtual witnessing of a will as well.[730] Virtual execution is extremely helpful when the intended witnesses are in different locations, immobile or elderly, and it is not possible to physically witness the

[723] The Tunisian Law of Personal Status of 1956, Article 176.
[724] John H. Langbein, 'Substantial Compliance with the Wills Act' (1975) 88 Harvard Law Review 489, 490.
[725] *Yazbek v. Yazbek* [2012] NSWSC.
[726] *Hubschi Estate*, 2019 BCSC 2040.
[727] *MacDonald v. The Master* 2002 (3) SA 64 (N) 11.
[728] The Information Technology Act, 2000 s 1(4)(d).
[729] Lira Goswami, 'Time to Ease Execution of Wills in India' (Times of India, 27 October 2022) <https://timesofindia.indiatimes.com/blogs/voices/time-to-ease-execution-of-wills-in-india/> accessed 10 July 2023.
[730] Richard Storrow, 'Legacies of a Pandemic: Remote Attestation and Electronic Wills' (2022) 48 Mitchell Hamline Law Review 826, 843.

will. This was particularly helpful during the COVID-19 pandemic where due to restrictions, people could not be in the same physical space.[731] Keeping this in mind, countries like England issued executive orders temporarily amending the law to allow for virtual execution of wills.[732] In Canada, the provinces of Ontario and Quebec passed similar laws during the pandemic.[733]

Traditionally, physical execution has been preferred to guard against mistakes and attempts of fraud or coercion over the testator.[734] It aims to ensure the authenticity of the will. It is argued that virtual execution might not be able to adequately safeguard the process of making a will as it might be difficult to assess the testator's ability and legal capacity to make a will or whether the testator is acting voluntarily or under someone's influence.[735] These concerns are legitimate and should be kept in mind while recognising virtual execution. However, often the requirements of physical execution itself are inadequate to protect the testator or ensure fair execution.[736] Therefore, they should not be used to discredit virtual execution. On the other hand, adequate safeguards should be built into the process of virtual execution to ensure that it is not misused and can safely assess the free agency of the testator.

Proposed Steps:
The law on wills is behind the times and needs to catch up with technology.[737] It is recommended that keeping up with the technological innovations and the permeation of technology in our daily lives, digital wills and virtual execution are recognised. The ISA may be amended to incorporate the following provision:

70. Amendment of the Indian Succession Act.–

(1) After section 63 of the Indian Succession Act, the following sections shall be inserted, namely:—

"63A. Recognition of digital wills.–

(1) Notwithstanding anything contained in any other law for the time being in force, digital wills shall be recognised as valid wills under this Act.

(2) A digital will must comply with the following requirements:
(a) It must be written and readable only through an electronic device,
(b) It must be digitally signed by the testator, or by another individual in the testator's name in the presence and by the direction of the testator.
(c) The signature of the testator, or the signature of the person signing for them, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.
(d) It must be attested by two or more witnesses, each of whom has seen the testator sign or affix their mark to the will or has seen some other person sign the will, in the presence and direction of the testator, or has received from the testator a personal acknowledgement of

[731] ibid.
[732] ibid 828.
[733] Michael Rosen and others, 'Virtual testimony in wills and powers of attorney' (*BLG* May 29 2023) <https://www.blg.com/fr/insights/2020/04/virtual-witnessing-of-wills-and-powers-of-attorney>.
[734] Richard Storrow, 'Legacies of a Pandemic: Remote Attestation and Electronic Wills' (2022) 48 Mitchell Hamline Law Review 826, 835.
[735] BJ Crawford and others, 'Wills Formalities in a Post-Pandemic World: A Research Agenda' (2021) 96 University of Chicago Legal Forum 93, 94 and 117.
[736] John Langbein, 'Substantial Compliance with the Wills Act' (1975) 88 Harvard Law Review 489, 496.
[737] Kyle Gee, 'The Electronic Will Revolution: An Overview of Nevada's New Statute, The Uniform Law Commission's Work, and Other Recent Developments' (2018) 28 Probate Law Journal of Ohio 126, 127.

their signature or mark, or of the signature of such other person; and each of the witnesses must digitally sign the will in the presence of the testator. However, it will not be necessary that more than one witness be present at the same time, and no particular form of attestation will be necessary except the digital signature.

Illustration:

(a) 'A' dictated a will to her brother 'B', who typed the will on a computer. 'A' then digitally signed the will on the computer in the presence of and along with two witnesses. The will is a digital will.

(b) 'A' wrote her will with a stylus on a tablet device. Thereafter, she signed it digitally in the presence of and along with two witnesses. The will is a digital will.

(c) 'A' dictated a will to her brother 'B', who typed the will on a computer. Thereafter, the will was printed, and 'A' signed the printout of the will in the presence of and along with two witnesses. The Will is not a digital will under this Section.

(d) 'A' recorded an audio on an electronic device dictating her testamentary wishes. This is not a digital will since it is not written or readable.

(e) 'A' used a voice recognition software on her mobile phone to dictate her will. The software converted her spoken words to text, which was later digitally signed by 'A' in the presence of and along with two witnesses. This is a digital will.

(3) For the purposes of this section and the Act, digitally signing a will means affixing a digital signature issued by a Certifying Authority licensed by the Controller of Certifying Authorities under the Information Technology Act, 2000.

(4) The following Acts shall apply to digital wills in such amended form as may be prescribed:
(a) Indian Evidence Act, 1872, and
(b) Information Technology Act, 2000.

63B. Presence includes 'virtual presence'.–

(1) For the purposes of sections 63, 63A and 70 of the Act, 'presence' includes 'virtual presence' as well.

(2) For the purpose of sub-section (1) of this section, 'virtual presence' means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.[738]

Illustrations:

(a) 'A' made a digital will and signed it in the presence of 'B' and 'C'. A, B and C were connected on video call. The requirements of section 60 are complete as B and C were present virtually.

(b) 'A' made a digital will and signed it in the presence of 'B' and 'C'. A, B and C were physically in the same room during the signing of the will. The requirements of section 63 are complete as B and C were in the presence of the testator.

(c) 'A' made a will in the month of April 2023. However, in June, on a video call with 'B' and 'C' he wrote a declaration to revoke the will, which was digitally signed by 'A' along with and in the presence of B and C. The will is validly revoked under section 70.

[738] Borrowed from Section 2(2), Uniform Electronic Wills Act, 2019.

(*continued in the next box)*

Issue: Should privileged wills be restricted to armed forces personnel engaged in warfare only?

Objective:
To extend privileged wills to individuals who are in situations wherein they reasonably believe that their death is imminent.

Context:
As per sections 65 and 66 of the ISA, a soldier, airman or mariner engaged in combat may make a privileged will either in writing or word of mouth. The requirements of executing these wills are not as stringent as unprivileged wills. As per the Law Commission in its 110th Report, this special provision was made to account for the necessities of combat during which it is not possible to undergo elaborate testamentary formalities.[739] It is based on the concept of necessity. However, the same principle can be extended to civilians in certain situations as well.

There may be situations wherein it might be impossible or extremely difficult for a civilian to comply with the requirements of an unprivileged will. These situations may include when a person is affected by any accident, earthquake, fire, flood or other similar calamity wherein the person concerned reasonably believes that death is imminent. In such situations, they may wish to declare their testamentary intention and the law should enable them to do so. This was recommended by the Law Commission in its 110th Report as well.

Proposed Step:
The ISA may be amended to include a provision that allows persons in situations of a calamity, earthquake, accident, fire or a similar situation, to make a privileged will, in addition to a soldier, airman or mariner engaged in expedition.

Proposed provision:

[739] Law Commission of India, *110th Report on Indian Succession Act* (1985) 89.

(continued from previous box)

(2) After section 65 of the Indian Succession Act, the following section shall be inserted, namely:—

"65A. Extension of privileged wills to civilians.–

(1) Notwithstanding anything contained in Section 65, any person stuck in situations of a calamity, earthquake, accident, fire or a similar situation wherein the person reasonably believes that death is imminent may make a privileged will under Section 65.

Illustrations:

(a) 'A' along with others is stuck in a house in the middle of an earthquake. He is qualified to make a privileged will under this section.

(b) 'A' was driving to work when his car met with a severe accident. He was taken to the hospital. He is qualified to make a privileged will under this section."

(3) In section 63 and section 66, after the words "soldier, airman, or mariner", the words "civilians stuck in certain situations" shall be inserted.

Part IV - Maintenance of Immediate Family and Dependants

Issue: How should those heirs of the deceased person or dependants who have not been provided for either through a will or through intestate succession be maintained out of the deceased person's property?

Objective:
To lay down a scheme of maintenance that is in alignment with the duty of care owed by the deceased person to his closest family members and any dependants.

Context:
Under the personal laws regime in India, the HAMA provides for the maintenance of heirs following the death of a person. Broadly based on classical Hindu law, the HAMA lists certain dependants of the deceased person and then places an obligation on those persons who have received a share in the deceased person's estate (whether through intestate succession or through a will) to maintain them. The amount and form of maintenance has been left to the absolute discretion of the court. The general principle underlying the obligation of maintenance under HAMA is that a dependant of a male or female Hindu who has not obtained any share in the estate of the deceased is entitled to claim maintenance from those who take the estate.[740] Notably, this obligation of maintenance overrides the scheme of both intestate as well as testamentary disposition.

Under Muslim law, the rights of heirs are addressed differently by placing a direct limitation on testamentary disposition. The concerned person cannot dispose of more than 1/3 of their property through a will, subject to the consent of all their heirs. Thus, 2/3 of the property passes through intestate succession. The limitation, it is said, was specifically put in place to adequately secure the rights of the heirs of the deceased.[741]

Unlike Hindu and Muslim personal law, no corresponding provisions exist for securing the rights of heirs in other communities' laws post the death of a person.

While the principle of freedom of testation is recognised in most jurisdictions, several countries have laid down limits on testamentary powers. In effect, certain categories of heirs can override the provisions of a deceased person's will to be able to claim certain assets from the deceased person's estate. These limits may operate in both a direct and indirect manner and take two basic forms, which have been termed in scholarship as: i) compulsory portions and ii) family provisions.[742] In the former, a pre-ordained fixed share is conferred on certain specified heirs of the deceased and such devolution is automatic and compulsory.[743] Such a share will necessarily devolve on the heirs irrespective of any bequest to the contrary by the deceased through a will. In the latter system, the devolution is based on the discretion of the court and is often wider in scope, with the court assessing the heirs' needs and subsequently issuing orders for devolution.

Behind both threshold criteria lies the idea that family members have a special claim on the estate of the deceased, and that the deceased person is under a corresponding duty, often described as a 'social' or 'moral' duty, to make sufficient provision on their behalf. There is also, in the case of the surviving spouse,

[740] Sir Dinshaw Fardunji Mulla, *Hindu Law* (24th edition, 2022) 1451.
[741] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009); Tahir Mahmood, *Family Law in India* (EBC 2023).
[742] See Kenneth Reid and others (eds.) *Comparative Succession Law, Volume III: Mandatory Protection* (Oxford University Press 2020), vii-viii; Jürgen Basedow and others (eds.) *The Max Planck Encyclopedia of European Private Law* (2012) pp. 327–341.
[743] See, for example, the French Civil Code 2006, Articles 913 and 914; the German Civil Code 2002, section 2303; The Italian Civil Code, Article 536.

the idea of marriage as a partnership, the assets of which should be fairly distributed when the partnership comes to an end on death.

England is an example of the discretionary approach. As per the Inheritance (Provisions for Family and Dependants) Act, 1975 ('English Act') the following heirs can apply for a share of estate: (a) surviving spouse or civil partner; (b) a former spouse who has not remarried; (c) child of the deceased; (d) any person treated by the deceased as a child of the family in relation to a marriage; (e) any person who was maintained wholly or partly by the deceased prior to her/his death; (f) any person living in the same household as the deceased as a husband or wife or as civil partner during a period of two years preceding the date on which the deceased died. Prior to 1995, the claim was to be substantiated based on financial dependence on the deceased. However, this requirement was removed and now the nature of the relationship entitles a person to a share. A similar approach has been followed in other jurisdictions such as New South Wales,[744] New Zealand,[745] and Australia.[746]

Over time, there has been a shift away from fixed shares towards a discretionary system as fixed shares are said to impinge on the testamentary freedom of the deceased and not take varying familial circumstances into account, both for the purpose of determining who the most deserving beneficiaries of such fixed shares are going to be and the quantum of the fixed share.[747] The restrictions on testamentary power under Muslim law too have been criticised for their rigidity and for not allowing special dispositions in favour of persons who may require the same, such as children with disabilities, or for female heirs, whose share is usually lower than their equally placed male counterparts.[748] Moreover, it has been said that in practice, the rigidity of the system has led to an increase in asset distribution *inter vivos* to arrange for the intergenerational transfer of property. Using complex schemes of usufructs accompanied by a limitation on ownership rights, Muslims have been able to circumvent the rigid system of succession rules over the last centuries by using the strict line drawn between post mortem and *inter vivos* transfers.[749]

The advantage of a discretionary system over one which is fixed is that, when someone dies, the circumstances surrounding the deceased's family and those dependant upon the deceased will never be exactly the same as in any other case. Discretion permits the court to modify the distribution of the estate in such a way as to arrive at a result which is closer to being tailor-made to the specific needs and circumstances of the persons concerned than could ever be the case where specified persons are entitled to fixed shares solely on the basis of a particular relationship with the deceased.

In India, since the HAMA is only applicable to Hindus, Sikhs, Buddhists, and Jains, the regime on maintenance is not consistent. Further, the provisions of the HAMA are themselves gendered - for example, only the widow of a male Hindu and *not* the widower of a female Hindu is a dependant entitled to receive maintenance.[750] Stringent conditions have also been laid down for claiming maintenance, such

[744] See Family Provision Act, 1982.
[745] See Family Protection Act, 1955.
[746] See Family Provision Act, 1969.
[747] Kenneth Reid and others, 'Comparative Perspectives' in Kenneth Reid and others (eds.) *Comparative Succession Law, Volume III: Mandatory Protection* (Oxford University Press 2020).
[748] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009); Sir Dinshaw Fardunji Mulla, *Hindu Law* (24th edition, 2022); J.N.D. Anderson, 'Recent Reforms in the Islamic Law of Inheritance' (1965) 14(2) The International and Comparative Law Quarterly 349; Lucy Carroll, 'The Hanafi Law of Intestate Succession: A Simplified Approach' (1983) 17(4) Modern Asian Studies.
[749] Nadjma Yassari, 'Compulsory Heirship and Freedom of Testation in Islamic Law' in Kenneth Reid and others (eds.) *Comparative Succession Law, Volume III: Mandatory Protection* (Oxford University Press 2020); In India too, some figures decried the fragmentation of estates that the rigid application of Quranic succession law resulted in. Sir Syed Ahmed Khan, for instance, urged landed Muslim elites to transform their estates into *waqf* endowments to remove their property from the purview of succession law. Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India* (Cambridge University Press 2013) 46.
[750] The Hindu Adoptions and Maintenance Act 1956, section 21.

as not having attained the age of majority in the case of a son and being unmarried in the case of a daughter.[751] Not only is this provision based on archaic patriarchal logic of the daughter requiring financial support only until she is married, it also fails to account for factors such as mental or physical incapacity which may hamper a person's ability to maintain themselves.

The Law Commission of India in its Consultation Paper on Family Law Reforms too noted the inadequacy of certain provisions under the HAMA, specifically with respect to women. While a widow may claim maintenance from a dependant who has inherited by way of a will from the testator under section 22 of the HAMA, no default charge is created on the estate of the deceased husband unless it has been created in the manner provided under section 27. In the absence of any decree or instrument providing for a charge, the widow would have no recourse against a transferee for consideration and without notice of the right,[752] who has no obligation to maintain her under the HAMA or under section 125 of the Code of Criminal Procedure, 1973. To combat such a situation, the Law Commission recommended that a fixed share be laid down for widows/unmarried daughters/dependants to prevent such a scenario. It is submitted that considering the partial community of assets regime proposed under Chapter I of this draft Code and the preferential right of habitation provided for spouses under this section 22 of this Chapter, such a fixed share may not be necessary.

For other categories of heirs, the maintenance provisions may themselves be fortified to grant adequate security. For a regime of fixed shares to be effective and meaningful, similar restrictions need to be placed on lifetime bequests, as a person may alienate property during their lifetime if they wish to not bequeath it to an heir. In many jurisdictions that adopt this approach, criticism has been levelled against the complex maze of provisions this creates that are often difficult to enforce.[753] Instead, the judiciary should be specifically empowered to determine the quantum of maintenance based on factors which enable it to determine the reasonable needs and financial position of the applicant, any contributions and/or sacrifices made by the applicant in the course of their relationship with the deceased person, etc. While issuing orders of maintenance under HAMA, the Supreme Court has emphasised that the maintenance granted should be real and substantive and not a bare or starving one.[754] The court should thus be empowered to suitably mould the relief by determining the form of maintenance - such as the creation of a charge, making of lump-sum or periodical payments, providing for the food, residence, clothing, education, medical treatment etc. of the applicant.

For instance, in situations where a claimant's right may be adversely affected because the property has been alienated before the claim for maintenance and the transferee has no notice of the right to maintenance, the court may order that any person who has received a share in the deceased person's estate through alienating their share has to make payment to the applicant out of the consideration that they have received by alienating the share.

Additionally, following the coming into force of a law of succession akin to the one in this Chapter which gives equal rights to all persons, irrespective of their gender or sex, there may be attempts to disinherit or otherwise deprive certain heirs of shares. One of the factors in deciding maintenance may be the intention of the deceased to deprive persons of inheritance rights through a will based solely on factors such as gender and sexual orientation. Further, in instances where an heir has alienated the property with the intention of defeating maintenance provisions under this Chapter of the Draft Code, the court may order them to pay maintenance from the proceeds of the alienation to the applicant.

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[751] The Hindu Adoptions and Maintenance Act 1956, section 21(iv) & section 21(v).
[752] Transfer of Property Act 1882, s 39.
[753] See Kenneth Reid and others, 'Comparative Perspectives' in Kenneth G C Reid and others (eds) *Comparative Succession Law, Volume III: Mandatory Protection* (Oxford University Press 2020).
[754] *Ruma Chakraborty v Sudha Ram Banerjee* (2005) 8 SCC 140; see Sarasu Esther Thomas, *BM Gandhi's Family Law* (Eastern Book Company 2nd edn., 2023) 320.

Proposed step:

A study of global practices as well as the operationalisation of the HAMA indicates that when it comes to the maintenance of heirs from the estate of the deceased person, an ideal scheme is one which provides a large degree of discretion to the court to mould the quantum, nature, etc. of maintenance. Such schemes:

> "[do] not purport to lay down any rigid rule or indicate any yardstick upon all cases covered by it, nor does it point to any fixed criterion and leaves the matter of assessment to the discretion of the court, and only emphasised that the considerations mentioned in it are essential factors to be considered. The elements and factors to be considered must include everything having a legitimate bearing upon present or prospective matters affecting the family relations and living of the claimant and the respondent, which are obviously nor susceptible of proper enumeration. In the exercise of its discretion, the court has to select or emphasise such factors as are appropriate to the facts of the particular case."[755]

As such, a scheme on maintenance may be created with the following features based broadly on the provisions of HAMA and global best practices:[756]

- Enable members of the immediate family for whom reasonable financial provision has not been made by the testator's will or by way of intestate succession to apply to a court for an order of maintenance. Expand the category of claimants to include other persons who were being partially or fully maintained by the deceased during their lifetime through substantial contributions towards the reasonable needs of that person. The purpose of maintenance under this Part is thus not the mere prevention of destitution but to provide for the reasonable needs of applicants.
- Empower the court to pass a variety of orders providing for maintenance, including an order to a person who has received a share in the estate to make a payment out of their share or out of consideration that they have received by alienating the share, and creation of a charge on the estate of a person.
- Provide a list of illustrative factors which the court may consider while passing an order of maintenance. Include factors that may be appropriate for deciding the quantum of maintenance in specific scenarios - for example, in the case of children, in keeping with the framework laid down in Chapter II of this draft Code, the best interests of the child may be taken into consideration while deciding maintenance. The interests of economically weaker partners in a relationship may be taken care of through consideration of factors such as contributions made for the benefit of the relationship, both financial and otherwise and any economic disadvantage sustained due to the relationship, such as the loss of independent income.
- Enable the court to pass interim orders of maintenance to ensure that the rights of the parties are not sacrificed at the expense of protracted litigation.
- Enable the court to discharge or modify orders of maintenance upon a material change in circumstances.

71. Order of maintenance.–

The following persons for whom reasonable financial provision has not been made by the intestate's will or by way of intestate succession may apply to a court for an order of maintenance under this Part:

[755] Sir Dinshaw Fardunji Mulla, *Hindu Law* (24th edition, 2022) 1456.
[756] Inheritance (Provisions for Family Dependants) Act 1975 (United Kingdom); Family Provisions Act 1972 (Western Australia); Succession Act 1981 (Queensland); Family Provision Act 1982 (New South Wales); Relationships Act, 2003 (Tasmania).

(a) Members of the immediate family of the deceased person;
(b) A partner who was in a stable union with the deceased person;
(c) A partner who was in a relationship in the nature of marriage with the deceased person;
(d) Step-parents if and only if the step-parent is childless and their spouse who was the parent of the intestate is not alive;
(e) Step-children if and only if the step-child has no parent other than the step-parent;
(f) Any person in relation to whom the deceased person holds parental rights and responsibilities under Chapter II of this Code; and
(g) Any other person who immediately before the death of the deceased person was being maintained either wholly or partly by the deceased.

Explanation.– For the purposes of this section,

(i) 'reasonable financial provision' means such financial provision as would be sufficient for the reasonable maintenance of the applicant; and

(ii) an applicant shall be treated as 'being maintained' by the deceased person, either wholly or partly, if the deceased person was making a substantial contribution (financial or otherwise) towards the reasonable needs of that person, but shall not include arrangements where the deceased person was paying full and valuable consideration to the applicant in an arrangement of a commercial nature.

72. Forms of maintenance.–

Upon receiving an application under this Part, the court may make one or more of the following orders for the maintenance of the applicant:

(a) an order for periodical payments or a lump-sum payment from the deceased person's estate based on such terms and conditions as may be specified in the order,
(b) an order for the creation of a charge on such portion of the deceased person's estate based on such terms and conditions as may be specified in the order,
(c) an order to provide for the reasonable needs of the applicant including food, clothing, residence, education, and medical treatment,
(d) an order to any person who has received a share in the deceased person's estate to make payment to the applicant out of the estate or out of consideration that they have received by alienating the share,
(e) an order to any person who has acquired for consideration a portion of the deceased person's estate to make payment to the applicant out of that portion, provided such person had received notice of the application under this Part, and
(f) other such orders of a similar nature.

73. Factors to be considered for maintenance.–

While passing an order under this Part, the court shall consider the following factors:

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future, including the standard of living of the applicant during the deceased person's lifetime, and the independent income, if any, of the applicant,
(b) any physical or mental incapacity of the applicant;

(c) the financial resources and financial needs which any other person entitled to apply for an order of maintenance under this Part has or is likely to have in the foreseeable future;
(d) the financial resources and financial needs which any person who has received a share in the deceased person's estate has or is likely to have in the foreseeable future;
(e) any obligations which the deceased person had towards the applicant in their lifetime;
(f) best interests of the applicant child, as provided under section 51 of this Code;
(g) any contributions made by a spouse or a partner during the subsistence of the relationship, which may have given rise to a sustained benefit for the relationship and/or an economic disadvantage for the spouse/partner;
(h) the size and nature of the deceased persons' estate;
(i) the intention of the deceased person to defeat a potential order of maintenance under this Part by making a Will;
(j) the intention of the deceased person to disinherit heirs based solely on grounds such as gender and sexual orientation; and
(k) any other similar factor, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

Explanation.– For the purposes of this section:

(i) 'contributions made' shall include any action which seeks to contribute to the welfare of the deceased person and/or their family, such as acquiring, conserving, or improving the property of the deceased person and/or their family, looking after the home or caring for the family; and

(ii) 'economic disadvantage' shall include making a substantial financial contribution and/or foregoing an independent income, independent ability to accumulate wealth, growth in career and profession, or such other disadvantages that the court may determine arising out of the relationship.

74. Interim order of maintenance.–

(1) Upon receiving an application under this Part, the court may pass an interim order of maintenance subject to such conditions and restrictions as may be specified in the order.

(2) A court may pass an interim order under this section only if it is satisfied that a prima facie case is made out that the applicant is entitled to an order of maintenance based on the factors enlisted in section 73 of this Code.

(3) An interim order of maintenance may provide for all or any of the reliefs enlisted in section 72 of this Code.

(4) An interim order of maintenance shall remain valid till the final disposal of the application or until such period as the court may direct.

75. Discharge or variation of order of maintenance.–

(1) An order of maintenance made by a court under this Part may be varied, discharged, partially and/or temporarily suspended by the court upon an application made under this section.

(2) An application under this section may be made by any person who is entitled to apply for an order of maintenance under section 71 of this Code or by a person upon whom an obligation has been placed under the order of maintenance.

(3) While considering an application made under this section, the court shall take into account all relevant circumstances which it was required to take into account while passing the order of maintenance as well any material change of circumstances in any of the factors enlisted in section 73 of this Code, including but not limited to the remarriage of a spouse who is receiving maintenance.

Notes for Consideration:

Instead of a maintenance framework of the kind presented above, should heirs be protected by allotting them fixed shares in the estate of the deceased person which cannot be affected by a contradictory will? This is especially relevant in the context of operationalising women's inheritance of property. Enacting a law may not be sufficient for changing household or individual behaviour and attitudes, especially in the short term. Parental resistance in India's patrilineal communities to giving women immovable property as an inheritance share is well-documented.[757] Hence a change in law, while an important step forward, cannot be assumed, in itself, to change the situation on the ground.[758] In such a scenario, should an embargo be placed on the alienation of property with the intention of strategically depriving women of their share under the law? How would this have to be correlated with lifetime bequests to achieve optimal effect?

While issuing an order of maintenance under this Part, should courts be allowed to give applicants direct ownership/usage rights in the property of the deceased person? Some jurisdictions such as England have provisions to this effect.[759] It has been noted that women without independent resources are highly economically vulnerable. In the context of agricultural land, for instance, widowed women who are deprived of their property shares on the death of their spouse, are found working as agricultural labourers on the farms of their male relatives.[760] Thus, ownership of property or right of usage may operationalise maintenance more effectively and enable independent living as opposed to a remedy such as payment of a monetary amount by those who have inherited a share from the deceased. A balance would have to be struck between the heirs' interests and adequate provision for claimants taking into account factors such as the claimants' residential arrangements in such cases.

Issue: Should a spouse/partner in a relationship in the nature of marriage/stable union partner have a preferential right of habitation and use over the residential house?

Objective:
To assess whether the surviving spouse and/or a partner in a stable union/relationship in the nature of marriage may need preferential rights over the shared family home to live the remainder of life in dignity

[757] Bina Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia* (Cambridge University Press 1994); (Prem Chowdhry ed) *Women's Land Rights: Gender Discrimination in Ownership* (Sage Publications 2017).
[758] ibid.
[759] Inheritance (Provision for Family and Dependants) Act 1975 section 2(1)(c).
[760] Bina Agarwal, 'Are We Not Peasants Too? Land Rights and Women's Claims in India' (2002) 21 SEEDS.

and comfort, and align the spouse's/partner's rights with the presumed will of the deceased and realise their duty to support the surviving spouse/partner.

Context:

The rights of the surviving spouse, and by extension of partners whose relationship displays similar levels of interdependence or care, are premised on the need for ensuring independent living and being able to continue the same standard and arrangement of living as far as practicable, while providing for the rights of other heirs.[761] Various jurisdictions have thus seen an improvement in the position of the surviving spouse as an heir with the passage of time, with their rights evolving from a mere usufruct to a sizable share in the estate.[762]

The need for providing right of habitation and use to spouses sharing a family home has been recognised in multiple jurisdictions,[763] including Goa.[764] In keeping with the general rights of the surviving spouse, the underlying rationale has been that the spouse should have the means of independent living and by preference, should be able to continue in the same house and with the same degree of comfort as before. All of this is readily explicable by reference to a duty to provide for one's family after death, the presumed intention of the deceased and the view that marriage is a partnership where both spouses contribute to building a life and home together. The view of marriage as a partnership has also been relied upon to explain why and how the spouse's rights are balanced against the claims of those who may be related otherwise (through blood, in the scheme of succession) and why certain preferential rights may thus be accorded. One was an increase in life expectancy.[765] Earlier, a child might have relied on inheritance for support in childhood or early adulthood; now, children will usually have achieved majority and means of independent income before the death of their parent(s). In this view, the surviving spouse is thus seen to have a stronger claim on the estate.[766]

In the Indian context, providing such a right becomes important as under the separation of property regime especially, the surviving spouse (in heterosexual, heteronormative marriages, usually the woman) may have no ownership over the shared home and would receive only a part of the estate through intestate succession. Another relevant factor is that some family homes may be held jointly with other family members (siblings, parents, etc.)[767] where the deceased would own only a certain part of the family home.[768]

Presently, there are limited maintenance provisions under the HAMA for the widow of the deceased, where she can claim maintenance from her husband's or father-in-law's estate.[769] Not only is the provision gendered in nature, the process of claiming maintenance may be onerous and resource-consuming as it requires judicial intervention. Maintenance is further based on subjective considerations and the quantum may vary from case to case. A preferential right of habitation in the residential house would help secure the interests of the surviving spouse and offer protection against partitioning of the

[761] Kenneth Reid et al., 'Intestate Succession in Historical and Comparative Perspective' in Kenneth Reid and others (eds) *Comparative Succession Law*, *Volume II: Intestate Succession* (Oxford University Press 2015) 495-496.
[762] bid 497-498.
[763] See, for example, Austrian Civil Code, section 758 (the spouse has an additional entitlement to live in the residential house); French Civil Code 2006, sections 664-766 (value of the preferential right in the residential house has to be deducted from the value of the estate devolving upon the spouse)
[764] The Goa Succession, Special Notaries and Inventory Proceeding Act 2012, section 82 ("2012 Goa Act").
[765] Kenneth Reid and others., 'Intestate Succession in Historical and Comparative Perspective' in Kenneth Reid and others (eds.) *Comparative Succession Law*, *Volume II: Intestate Succession* (Oxford University Press 2015) 492.
[766] ibid.
[767] The term joint family does not carry the same meaning as the Hindu undivided family
[768] Kamala Sankaran, 'Family, Work and Matrimonial Property' in Amita Dhanda & Archana Parashar (eds) *Redefining Family Law in India* (Routledge India 2008).
[769] ibid.

residential house in the event of estate distribution. Moreover, with the rise of fragmented landholdings, divided property may not be viable as a residential house.[770]

Muslim personal law and the ISA make no special provisions regarding residential houses shared by the deceased and the surviving spouse. Section 23 of the HSA, recognised the limited right of residence of female Class I heirs, such as unmarried daughters, in the family dwelling house while also disentitling them from asking for the partition of the dwelling house wholly occupied by a joint family until the male heirs agreed to divide their shares. However, this provision has now been omitted by the 2005 Amendment. Thus, there are currently no special provisions dealing with the rights over residential houses under succession law.

Proposed Step:
Usually, the spouse/partner should be left undisturbed in the shared family house in which much of family life may have played out and be given a preferential right of habitation and of use. Thus, the surviving spouse/partner should have a lifetime occupational right in the shared home. This should be the situation if the deceased owned the house, whether alone or jointly with the surviving spouse/partner. In case of joint family homes, the surviving spouse/partner may be given the right of exclusive habitation and use over the portion that the deceased was entitled to and a reasonable right of habitation and use over the other areas of the house.

These rights should also be available in the case of relationships in the nature of marriage (as provided under section 62(1)(d) of this Code, once a court determines that a relationship in the nature of marriage exists, the same rights as a surviving spouse will accrue to partners in such cases). In the case of stable unions generally, the accrual of such rights would depend on whether the partners have opted for the inheritance regime applicable for surviving spouses under this Chapter. In other cases, the accrual of such a right may be decided by the court in accordance with section 62(1)(c)(i) of this Chapter.

In cases where any combination of spouses and/or stable union partners coexists as explained earlier, these rights may be determined through an order of the Court, as per section 62(1)(f) of this Chapter. If the deceased person was in multiple validly solemnised marriages, each such spouse shall have a preferential right of habitation and use over the residential house they shared with the deceased as per the existing living arrangement at the time of the death of the deceased. Thus, if multiple spouses shared the same residential house as their principal place of residence, each such spouse shall have the right to habitation and use of such a house, in keeping with the terms of ownership specified in the provision below.

Termination of right of habitation and use: Earlier, a spouse's right was often restricted to a life interest or usufruct in the property as there was a reluctance to allow it to pass to the spouse and hence, thereafter, potentially out of the family. This was seen as a way of providing for the spouse while addressing the risk of the property leaving the family. This was especially true of ancestral property.[771] With time, this position has changed and women now have full ownership rights over the property they inherit.

The preferential right of habitation over the residential house is rooted in a view of marriage as a partnership which allows the rights of other heirs to be delayed. Hence, if the spouse or partner were to enter into another marriage or stable union, the basis of the existence of this right gets terminated. Another partnership comes into play here which may bring with it certain concomitant rights as well as concerns about the use of property of the deceased itself.

[770] ibid.
[771] The Women's Right to Property Act, 1937, was enacted to reverse this position under classical Hindu law.

Offsetting of right of habitation and use: In providing the right of habitation to the spouse/partner, the rights of other heirs may get affected if they have a share in such a house. In cases where the spouse's/partner's share in the estate matches or exceeds the value of their right to habitation and use, this may not give rise to a conflict. However, in other cases, the rights of the other heirs vis-a-vis the spouse/partner may have to be balanced. As proposed in the 2012 Goa Act, one way of doing this is to allow the owner or part-owners of the house to claim monetary compensation in lieu of the spouse's partner's occupation of the house. Certain countries have adopted other approaches such as the value of the habitation and use right being deducted automatically from the estate inherited by the spouse[772] or a limited right of habitation being created for the spouse to provide them with an opportunity to find a suitable alternative.[773]

Proposed provision:

76. Preferential rights of a spouse in the residential house.–

(1) If at the time of the intestate's death,

(i) either the intestate alone or the intestate and the spouse collectively owned the residential house; and

(ii) the residential house was, at the time of the death of the intestate, occupied by the intestate and their spouse as their principal place of residence,

the surviving spouse shall have the right to exclusive habitation of the residential house and the right to use the movable and other objects intended for the comfort and service of the house.

Explanation: If the intestate, at the time of their death, was in more than one validly solemnised marriage, then each such spouse shall have the right to habitation and use (but not to exclusive habitation in case multiple such spouses lived in the same residential house as their principal place of residence with the deceased) under this section.

(2) If at the time of the intestate's death, the residential house in which the intestate owns a share is jointly occupied or owned by the intestate's family, the surviving spouse shall have the right to exclusive habitation of the portion of the residential house owned by the intestate and the right to use the movable and other objects intended for the comfort and service of such portion.

(3) If the spouse remarries, rights under this section shall stand terminated upon the solemnisation of such marriage.

(4) If upon an application by the owner or part-owner of the residential house, the court determines that the value of the rights of the spouse in the residential house exceeds the share of the spouse in the intestate's property, the spouse shall pay such sum, as may be determined by the court, to the owner or part-owner.

(5) This section shall also apply to a property over which the intestate alone or the intestate and the spouse collectively have a heritable leasehold right, subject to the terms and conditions contained in the concerned lease agreement.

[772] French Civil Code 2006, Articles 764-766.
[773] See German Civil Code BGB, 2002, section 1969.

Explanation.– For the purposes of this section, the term ‘spouse’ includes a partner in a relationship which is in the nature of marriage as per section 9 of this Code, and the term ‘remarries’ includes entering into a stable union.

Miscellaneous Provisions[774]

77. Power of Government to make rules.–

The Government may make rules to carry out all or any of the provisions of this Code.

78. Repeal and Savings.–

(1) The Acts enlisted in the Second Schedule are repealed to the extent mentioned therein.

(2) Without prejudice to the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), the repeals in sub-section (1) shall not–

(a) affect any other law in which the repealed enactment has been applied, incorporated or referred to;

(b) affect the validity, invalidity, effect or consequences of anything already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing under the repealed enactment;

(c) affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed or recognised or derived by, in or from any enactment hereby repealed;

(d) revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force.

SECOND SCHEDULE[775]

Repeals

1. Divorce Act, 1869 - the whole

2. Indian Christian Marriage Act, 1872 - the whole

3. Indian Succession Act, 1925 - Parts II, III, IV, and V

4. Parsi Marriage and Divorce Act, 1936 - the whole

5. Muslim Personal Law (Shariat) Application Act, 1937 - the whole

6. Dissolution of Muslim Marriages Act, 1939 - the whole

[774] These miscellaneous provisions form part of Chapter IV of the Code, and apply to all the three preceding chapters.
[775] The First Schedule to the Code is a comprehensive list of all amendments sought to be made in existing laws by this Chapter II of this Code. Please see Chapter II and the Code.

7. Hindu Marriage Act, 1954 - the whole

8. Special Marriage Act, 1954 - the whole

9. Hindu Succession Act, 1956 - the whole

10. Hindu Adoptions and Maintenance Act, 1956 - Chapter III

11. Hindu Minority and Guardianship Act, 1956 - the whole

Code

MODEL CODE ON INDIAN FAMILY LAW, 2023	
A BILL	
to lay down a uniform, comprehensive, gender-just, and inclusive family law code for India and for matters connected therewith and incidental thereto.	
BE it enacted by Parliament in the Seventy-Fourth Year of the Republic of India as follows: —	
PRELIMINARY PROVISIONS	
1. Short title, extent, and commencement.–	(1) This Act may be called the Model Code on Indian Family Law, 2023. (2) It extends to the whole of India. (3) It shall come into force on such date as the Central Government may by notification in the Official Gazette appoint.

2. Definitions for the Code.-	In this Code, unless the context otherwise requires:– (a) "Code" means this Act; (b) "Government" means the Central Government.

CHAPTER I **ADULT UNIONS**	
Part I **Preliminary Provisions**	
3. Definitions in this Chapter.	(1) In this Chapter, unless the context otherwise requires,– (a) "Acknowledgement Letter" means a document issued by the Marriage Officer under sub-section (2) of section 25 of this Code; (b) "Certification of Registration" means a certificate issued by the Marriage Officer under section 6 or section 8 of this Code; (c) "court of competent jurisdiction" means - (i) in areas where a family court has been established in accordance with section 3 of Family Courts Act, 1984, the family court; or, (ii) in areas where a family court has not been established in accordance with section 3 of Family Courts Act, 1984, the district court within the local limits of whose original civil jurisdiction-- I. the marriage was solemnised; II. the respondent, at the time of the presentation of the petition resides; III. the parties to the marriage last resided together; or, IV. the petitioner at the time of the presentation of the petition resides; (d) "intimation" means notification of the existence or the intention to be in a stable union to the Marriage Officer, in accordance with the procedure specified under section 25 of this Code;

	(e) "marriage" means a marriage solemnised or registered under this Code; (f) "Marriage Officer" means a person appointed and designated as a Marriage Officer by the State Government for the whole or any part of the State, by notification in the Official Gazette; (g) "Memorandum of Marriage" means a document containing the details specified in Form A, submitted to the Marriage Officer for the purpose of registration of Marriage in accordance with section 5 of this Code; (h) "parties to the marriage" means any two persons who have solemnised their marriage in accordance with the conditions specified under section 4 of this Code; (i) "Register of Marriage" means an electronic, digital or paper document or book kept by the Marriage Officer for the purpose of maintaining records of marriages registered before them; (j) "Spouse" in relation to a party to a marriage or relationship in the nature of marriage, means the other party to the marriage. (2) Notwithstanding anything contained in clause (h) of sub-section (1) of this section, the Central Government or the State Government, may, from time to time, through notification, amend the definition of "spouse" to include stable union partners, for the purposes specified in section 27 of this Code.
Part II **Framework for Marriage**	
4. Conditions for a valid Marriage.-	A marriage between any two persons, irrespective of their sex, gender or sexual orientation, may be registered under this Code if, at the time of the marriage, the following conditions are fulfilled, namely-

	(i) neither party has a spouse living; (ii) neither party- (a) is incapable of giving valid consent due to a mental illness, whether incurable or of a persistent or intermittent nature, that significantly impairs their ability to provide valid consent; (b) though capable of giving valid consent, has been experiencing such health conditions that significantly impair their ability to give informed consent, understand the nature of marriage, or fulfil the responsibilities of marriage; (iii) both parties have completed the age of 18 years. *Explanation*- For the purposes of sub-clause (a) of clause (ii) of this section, "mental illness" shall have the same meaning as provided under sub-section (s) of section 2 of the Mental Healthcare Act, 2017.
5. Process for Registration of Marriages under this Act.	(1) Every marriage shall be registered with the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than 7 days; (2) The parties to the marriage shall submit a Memorandum of Marriage in person in the format as set out under Form A. (3) The Memorandum shall be accompanied by proof of age of both parties. (4) The Memorandum shall be signed by both the parties and two witnesses before the Marriage Officer. **FORM A** The Memorandum under section 5 shall contain the following details: The Memorandum of Marriage shall contain the following details: III. Particulars of the Parties (h) Names of the Parties; (i) Date of Birth of the Parties; (j) Present and Permanent Address of the Parties/ Contact Information/Address of Marital Home of the Parties (Applicable only in case of Marriages Solemnised Otherwise)

	(k) Date of Solemnisation of Marriage (Applicable only in case of Marriages Solemnised Otherwise) (l) Proof of Solemnisation of Marriage (Applicable only in case of Marriages Solemnised Otherwise) (m) Signatures of both the Parties; and, (n) Declaration affirming the consent and truthfulness of information submitted. IV. Particulars of the witnesses (a) Names of the witnesses; (b) Address of the witnesses; (c) Relationship with the Parties; and, (d) Signatures of the witnesses.
6. Procedure to be followed upon receipt of Memorandum.-	(1) On satisfaction of the truth of the information submitted in the Memorandum of Marriage and the completion of the procedure specified in section 5 of this Code, the Marriage Officer shall record the particulars in the Register of Marriage maintained by the Marriage Officer within 3 days from the date of submission of Memorandum. (2) The Marriage Officer must issue a Certificate of Registration, in such form and manner as may be prescribed by the State Government, within 15 days from the date of registration of Marriage. (3) Certificate of Registration shall be conclusive proof of the validity and existence of Marriage.
7. Refusal to register.-	(1) The Marriage Officer shall not refuse to register the Marriage except on the following grounds- (i) The Memorandum of Marriage does not contain all the information as prescribed in the form; or (ii) The parties do not fulfil one or more of the conditions as specified under section 4 of this Code. (2) The Marriage Officer shall intimate the parties about the refusal within 7 days from the date of submission of Memorandum of Marriage. (3) Where the refusal is on the ground specified under clause (i) of sub-section (1), the Marriage Officer shall give the parties an opportunity to rectify the insufficiency within 7 days from the date of intimation given under sub-section (2). (4) If the parties successfully rectify the Memorandum of Marriage, the Marriage Officer shall register the Marriage in accordance with section 6 of this Code.

8. Registration of Marriages Solemnised Otherwise-	(1) Any marriage celebrated in any other form, whether before or after the commencement of this Code, may be registered under this Code, subject to the fulfilment of conditions as specified under section 4 of this Code. (2) The marriage shall be registered as per the same processes as set out under sections 5, 6 and 7 of this Code. (3) Performance or non-performance of any form of ceremonies of marriage will have no bearing upon the eligibility for registration of marriage solemnised otherwise.
9. Relationship in the nature of Marriage.-	(1) A court of competent jurisdiction may recognise two persons to be in a relationship in the nature of marriage on the basis of one or more of the following factors: (i) cohabitation and shared household for a reasonable period of time (ii) domestic arrangements including sharing of household responsibilities; (iii) financial dependence or interdependence; (iv) portrayal to the society; (v) mutual support and personal care; or (vi) responsibility for the care, custody and maintenance of any child. *Explanation* - For the purposes of clause (vi) of sub-section (1) of this section, 'care' shall have the same meaning as provided under sub-clause (d) of section 1 of Chapter II. (2) In cases where a union has been recognised to be a relationship in the nature of marriage in accordance with sub-section (1), the parties shall be - (i) entitled to maintenance in accordance with section 16 and section 17 of this Code; (ii) entitled to inherit from each other in accordance with the rules provided under Chapter III of this Code; (iii) subject to the matrimonial property regime as specified under section 20 of this Code.
10. Void marriage.	Any marriage registered under this Code shall be null and void and may be declared so, by a decree of nullity on a petition presented by either of the parties to the marriage before a court of competent jurisdiction, if any of the conditions specified in clauses (i) and (ii) of section 4 of this Code have not been fulfilled.

11. Voidable marriage.	(1) Any marriage under this Code shall be voidable and may be annulled by a decree of nullity at the instance of either of the parties if,— (i) such party was under the age of 18 at the time of marriage; or (ii) either of the parties refuses to cohabit with the other party; or (iii) if their spouse was pregnant at the time of marriage through another person and the fact of the pregnancy was not known at the time of marriage; or (iii) the consent of such party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872. (2) A petition under clause (i) of sub-section (1) may be filed at any time, but before the expiration of a period of 5 years from the date of attaining majority by the petitioner. (3) The court shall not grant a decree of nullity under clause(iii) of sub-section (1) if,— (i) proceedings have not been instituted within 1 year after the fact of pregnancy was known; or, (ii) the petitioner has with their free consent lived with the other party to the marriage after the fact of the pregnancy was known. (4) The court shall not grant a decree of nullity under clause (iv) of sub-section (1) if,— (i) proceedings have not been instituted within 1 year after the coercion had ceased or, as the case may be, the fraud had been discovered; or (ii) the petitioner has with his or her free consent lived with the other party to the marriage after the coercion had ceased or, as the case may be, the fraud had been discovered.
12. Grounds for dissolution of marriage.	(1) Any party to a marriage may file a petition for dissolution of marriage by a decree of divorce before a court of competent jurisdiction on the ground that the other party:

	(i) has, after the commencement of marriage, had voluntary sexual intercourse with any person other than the spouse; (ii) has deserted the applicant for a continuous period of 2 or more years, immediately preceding the petition for divorce; (iii) has treated the applicant with cruelty; (iv) has been absent and not been heard of as being alive for a period of 7 years or more by those persons who would naturally have heard of it, had that party been alive; (v) has been suffering from a venereal disease in a communicable form, for a period of 1 or more years immediately preceding the petition for divorce; (vi) has been sentenced to imprisonment for an offence for a term exceeding 7 years or more; or (vii) has been suffering from a mental illness, whether incurable or of a persistent or intermittent nature, that significantly impairs their ability to maintain a harmonious marital relationship. *Explanation 1:* For the purpose of this sub-section, "desertion" means desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly. *Explanation 2*: For the purposes of clause (vii) of this sub-section, "mental illness" shall have the same meaning as provided under sub-section (s) of section 2 of the Mental Healthcare Act, 2017. (2) Either of the parties to a marriage may file a petition for dissolution of marriage by a decree of divorce before a court of competent jurisdiction on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of 1 year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties, under section 15 of this Code.
13. Divorce by mutual consent.	(1) A petition for dissolution of marriage by a decree of divorce may be presented to the court of competent jurisdiction by both the parties to the marriage together, on the following grounds:

	(i) that they have been living separately for a period of 1 year or more, (ii) that they have not been able to live together, and (iii)that they have mutually agreed that the marriage should be dissolved. (2) The court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.
14. Irretrievable Breakdown of marriage.	(1) A petition for dissolution of marriage by a decree of divorce may be presented to the court of competent jurisdiction by one or both the parties to the marriage, at any point after a period of 1 year from the date of marriage, on the ground that the marriage has broken down irretrievably with no hope of reconciliation. (2) While adjudicating a petition filed under sub-clause (1), the court must take into consideration the following factors: (i) the period of time for which the parties cohabited after marriage and last date of cohabitation; (ii) any past or ongoing legal proceedings between the parties and the cumulative impact of such proceedings on the personal relationship; (iii) past or ongoing attempts to settle the disputes through intervention of the court, through mediation or out-of-court settlements; (iv) maintenance of children; and (v) any other factual considerations that the court may deem relevant during the course of the proceedings.
15. Grounds for judicial separation.	(1) A petition for judicial separation may be presented to the court of competent jurisdiction by either of the parties to the marriage on any of the grounds specified in section 12 of this Code, and the court, may decree judicial separation, on being satisfied with respect to the following things: (i) the truth of the statements made in such petition, and (ii) there is no legal ground why the application should not be granted. (2) Where the court grants a decree for judicial separation, the petitioner shall not be obligated to cohabit with the respondent. (3) The court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.
16. Permanent alimony	(1) At the time of passing any decree of judicial separation or divorce or at any time subsequent to such decree,

and maintenance.	or on the dissolution of a Stable Union, any court exercising jurisdiction under this Code may, on an application made by either of the parties to the marriage, order that the respondent shall pay to the applicant for their maintenance and support, such gross, monthly or periodical sum, as the court may deem to be just. (2) An order for payment of sum for maintenance and support under sub-section (1), may be made for any term not exceeding the life of the applicant. (3) Payment in pursuance of any order made under sub-section (1) may be secured by a charge on the immovable property of the respondent, if necessary. (4) While determining the amount of maintenance to be granted under sub-section (1), the court must take into consideration the following factors: (i) duration of the relationship; (ii) the respondent's own income and other property, if any; (iii) the income and other property of the applicant; (iv) the needs of the applicant; (v) applicant's liabilities, financial responsibilities or responsibility to maintain dependants; (vi) the age and employment status of the parties; (vii) the residential arrangements of the parties; (viii) any illness or disability; (ix) any contributions made by the applicant during the subsistence of the relationship, which may have given rise to a sustained benefit for the relationship and/or an economic disadvantage for the applicant; (x) protection of vulnerable parties; (xi) preservation of the status of living as it existed during the subsistence of marriage; and (xii) any other circumstances of the case, that the court may deem relevant. *Explanation*: For the purpose of this sub-section: (i) "contributions made" shall include any action which seeks to contribute to the welfare of the deceased person and/or their family, such as acquiring, conserving, or improving the property of the deceased person and/or their family, looking after the home or caring for the family; and

	(ii) "economic disadvantage" shall include making a substantial financial contribution and/or foregoing an independent income, independent ability to accumulate wealth, growth in career and profession, or such other disadvantages that the court may determine arising out of the relationship. (iii) "dependants" mean and include the following: (e) parents; (f) minor children; (g) adult children unable to maintain themselves; and, (h) widowed daughter-in-law, so long as not re-married; (5) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, modify or rescind any such order in such manner as the court may deem just. (6) If the court is satisfied that the party in whose favour an order has been made under this section has re-married, it may at the instance of the other party, modify or rescind any order made under sub-section (1) in such manner as the court may deem just. (7) At the time of registration of marriage under section 5 or section 8, the parties to the marriage may make a provision for payment of *Mehr* on separation or dissolution of marriage, in the Memorandum of Marriage. *Explanation*: For the purposes of this sub-section, "*Mehr*" means a fixed reasonable sum of money agreed to between the parties to the marriage to be paid by a husband to the wife, as a gross sum or on a periodical basis. (8) An application filed under this section is without prejudice to the rights of women to claim maintenance under section 125 of the Code of Criminal Procedure, 1973, the Protection of Women from Domestic Violence Act, 2005 or any other law for the time being in force.
17. Maintenance during	(1) In any proceeding under this Code, where it appears to the court that either of the parties to the marriage has

the course of proceedings.	no independent income sufficient for their support and the necessary expenses of the proceeding, it may, on the application of such party, order the respondent to pay to the petitioner, a reasonable sum as support and expenses of the proceedings, on a weekly or monthly basis. (2) The application for payment of maintenance during the course of the proceedings, in accordance with sub-section (1), shall, as far as possible, be disposed of within 60 days from the date of service of notice on the respondent. (3) While adjudicating an application under sub-section (1) of this section, the court must take into consideration the following factors: (i) the status of the parties, (ii) the capacity of the respondent to pay maintenance, (iii) whether the applicant has any independent income sufficient for his or her support, and (iv) any other factors that the court may deem relevant.
18. Maintenance during the subsistence of marriage.	A wife in a marriage, may file a petition before a court of competent jurisdiction, at any time during the subsistence of marriage for payment of such gross, monthly or periodical sum by the husband to the wife, for her maintenance and support during the subsistence of the Marriage, if the wife is being excluded from a shared mutual enjoyment of the marital home and associated resources.
19. Custody of children.	(1) A court of competent jurisdiction under this Code may, from time to time, make orders, for deciding the joint or separate custody of children. (2) In adjudicating matters under sub-section (1), the court must take into consideration the best interests of the child under section 51 of this Code, the intelligent preferences of the child, and comply with the duties of the court as mentioned under section 52 of this Code. *Explanation*: For the purposes of this sub-clause (1), the determination of the "best interests of the child" would be based on the factors as specified in section 51 of this Code. (3) Despite anything contained in sub-section (1), a court of competent jurisdiction may make, revoke, suspend or vary, all such orders and provisions with respect to custody made by an order under sub-section (1), on an application filed by either of the parties.

	(4) A court of competent jurisdiction under this Code may, from time to time, make orders for maintenance and education of minor children, taking into consideration the factors as specified under sub-section (4) of section 43 of this Code.
20. Partial community of assets.	(1) Parties to the marriage under this Code will be subject to the partial community of assets regime of matrimonial property. (2) Under the regime of partial community of assets, the assets of the parties acquired at the time of or during the subsistence of marriage are communicated and treated as joint matrimonial property. (3) The following types of assets will be communicated into the joint matrimonial property: (i) immovable property acquired during the subsistence of the marriage, even if the title is in the name of one of the spouses; (ii) movable property acquired for the purposes of joint use of the parties; or, (iii) movable or immovable property acquired by the parties as a gift at the time of or during the subsistence of marriage for the joint enjoyment of the parties; (iv) financial assets acquired during the subsistence of the marriage. (4) The following types of assets will be excluded from communication into the joint matrimonial property: (i) any assets acquired by either of the parties before the date of marriage, (ii) any assets inherited by either of the parties before or at the time of marriage or during the subsistence of Marriage, by donation or succession, (iii) any assets acquired by a party as gift for the separate exclusive use of such party, (iv) goods acquired for the personal and exclusive use of either of the parties to marriage, and (v) *stridhana* acquired by a woman for her exclusive ownership and use. (5) Ownership, possession and administration of the joint matrimonial property shall lie jointly with both the parties to marriage. (6) Neither of the parties to marriage shall have the right to alienate joint matrimonial property without the consent of the spouse to marriage under the partial community of assets regime. (7) Any of the parties to marriage may file a petition before the court of competent jurisdiction for the determination of whether an asset is communicated to be part of the joint matrimonial property.

21. Communication of debts under the partial community of assets regime.	(1) Obligations incurred prior to marriage will not be communicated under the partial community of assets regime; (2) Obligations arising out of acts that may be unlawful under any law for the time being in force, will not be communicated under the partial community of assets regime; (3) Any obligations incurred during the subsistence of the marriage or prior to marriage, by act or contract of both the parties, or by either of the parties with the written consent of the other party, will be communicated into the joint matrimonial property. (4) The assets exclusively owned by the party incurring the obligation, will be chargeable for the payment of debts incurred by the party prior to the marriage. *Explanation*: "exclusively owned" means any assets excluded from communion, as specified in sub-section (4) of section 20 of this Code. (5) The assets exclusively owned by the party incurring obligation, will be chargeable for the payment of debts contracted without the written consent of the other party, before or during the subsistence of marriage. (6) In the absence of exclusive assets of the party for payment of debts specified in sub-sections (4) and (5), the moiety in the joint matrimonial property of the party incurring the obligation, may be charged for payment of debts incurred by the party prior to the marriage.
22. Division of property upon dissolution of Marriage.	(1) Assets communicated into the joint matrimonial property during the subsistence of marriage will be presumed to be equally divided amongst the parties to marriage at the time of dissolution of marriage. (2) Where parties to marriage have filed a petition to obtain a decree of divorce under sections 12, 13 or 14 of this Code, the parties must also file an application to the court exercising jurisdiction, for the final determination of titles and division of matrimonial property in accordance with sub-section (1). (3) Any extraordinary circumstances requiring deviation from the scheme of division of matrimonial property provided in sub-section (1) may be considered by the court, at its discretion, in deciding an application under

	sub-section (2). *Explanation*: For the purposes of this sub-section "extraordinary circumstances" may mean and include the following: (i) difference in the growth of the exclusive property of both the parties; (ii) compensation for disadvantages faced for being part of the relationship; (iii) needs of the parties; (iv) residential arrangements of the parties; (v) protection of vulnerable parties; (vi) maintenance and residence of children; or, (vii) any other factors that the court may deem relevant to ensure equitable distribution of property.
23. Division of property upon death.	(1) On death of either of the parties to the marriage, the assets communicated into the joint matrimonial property will be divided equally and the surviving spouse will be entitled to their share in the same manner as on dissolution of marriage. (2) The share of the deceased spouse will be inherited in the manner specified in Chapter III of this Act.
Part III **Stable Unions**	
24. Stable Unions.	Any two persons shall be recognised to be in a Stable Union, through intimation to the Marriage Officer in the manner prescribed under section 25 of this Code, subject to the fulfilment of the following conditions: (i) both persons have completed the age of 18 years; (ii) both the persons have been providing each other or intend to provide each other with mutual support and personal care for a reasonable period of time; and, (iii) both persons do not have a subsisting stable union with any other person.
25. Intimation process for Stable Unions.	(1) Any two persons intending to be recognised as being in a stable union, may intimate the Marriage Officer of the district in which at least one of the parties to the union has resided for a period of not less than 7 days, through an application in the format as prescribed in Form B.

	(2) On satisfaction of the truth of the details provided as part of the application submitted under sub-section (1), the Marriage Officer shall issue an Acknowledgement Letter, within a period of 7 days from the date of the application, through electronic or paper mode. (3) Acknowledgement Letter will be the conclusive proof of the existence of a Stable Union. (4) A Stable Union shall not be considered invalid merely for non-intimation. **FORM B** The parties submitting the application provided in sub-section (1) of section 25, shall submit the following details as part of the application: (a) names of both the parties; (b) proof of identity and age; (c) statement of intention to be in a stable union; (d) proof of individual residence; (e) an affidavit from each of the applicants stating that: (i) the applicant is not married at the time of registration of stable union; (ii) the applicant is not in a subsisting stable union with any other party; (iii) the applicant gives free and informed consent to the registration; (f) an affidavit for nomination, if any; and (g) signatures of both the parties.
26. Rights and obligations arising out of Stable Unions.	(1) Both the parties to a Stable Union shall be entitled to maintenance in accordance with section 16 of this Code. (2) Both the parties to a Stable Union shall owe each other a duty of respect, mutual support and assistance. (3) Both the parties to Stable Union shall be conjointly responsible for the care, custody and maintenance of any child that they would be ordinarily responsible for as a parent. *Explanation 1*- For the purposes of sub-section (3), 'care' shall have the same meaning as provided under sub-clause (d) of section 30 of this Code.

	Explanation 2- For the purposes of this Part, 'parent' shall have the same meaning as provided under sub-clause (i) of section 30 of this Code.
27. Right to nominate Stable Union partner for certain purposes.	(1) Both the parties to a Stable Union, whose existence is being intimated to the Marriage Officer, shall have the right to make a directive appointing the other partner as a nominated representative for the purposes of: (i) claiming social- welfare benefits accessible only to family members or dependents under laws relating to labour and employment; (ii) claiming any beneficial right, title or interest in Financial Assets; (iii) taking medical or healthcare decisions on behalf of or for the benefit of the nominating party in case of their incapacitation; or (iv) any other purposes as may be notified by the Central Government or the State Government, as the case may be, through notification from time to time. *Explanation* - For the purposes of this section, "Financial Assets" shall include but not be limited to Mutual Funds, Life Insurance Policies, Health Insurance Policies, Pension Schemes, Public Provident Funds and Bank Accounts. (2) The nomination shall be made through an affidavit which shall be submitted along with the intimation application as provided under section 25 of this Code. (3) A nomination for the purposes specified under sub-section (1), if not made at the time of intimation, can be made at any time during the subsistence of the Stable Union by submitting an affidavit to the Marriage Officer to whom the intimation of the Stable Union has been made under section 25 of this Code. (4) Any nomination made as per sub-section (2) or sub-section (3), may be modified or revoked by either of the parties to the Stable Union at any time by submitting a fresh affidavit to the Marriage Officer to whom the initial intimation of nomination was made under sub-section (2) or sub-section (3). (5) The nominated partner shall have the right to act on behalf of the partner making the nomination and to realise the benefits that might accrue due to the nomination.

	(6) A nomination made under sub-section (1) or sub-section (3) shall be legally binding and enforceable.
28. Determination of the existence of a Stable Union in the absence of intimation.	(1) On a petition filed by any person claiming to be part of a stable union, a court of competent jurisdiction may determine the existence of a stable union, if the existence of the Stable Union has not been intimated to the Marriage Officer, subject to the fulfilment of conditions specified under section 24 of this Code. (2) While considering a petition in accordance with sub-section (1), the court shall take into consideration any of the following factors- (i) duration of the relationship; (ii) degree of financial dependence or interdependence; (iii) degree of mutual support and personal care; or, (iv) any child that the parties are responsible for as parents.
29. Dissolution of Stable Unions.	(1) A Stable Union may be dissolved at any time at the instance of either of the parties by submitting an application to the Marriage Officer, in the format as set out in Form C. (2) On satisfaction of the truth of the details provided as part of the application submitted under sub-section (1), the Marriage Officer shall issue confirmation of dissolution of Stable Union within a period of 14 days from the date of the application, through electronic or paper mode. (3) The Marriage Officer shall ensure that both the parties have knowledge of the fact of dissolution of the Stable Union.

CHAPTER II **PARENT-CHILD RELATIONS**	
Part I **Preliminary Provisions**	
30. Definitions for this Chapter.	In this Chapter, unless the context requires otherwise - (a) "Adjudicated parent" is a person who has been adjudicated to be a parent of a child by a court of competent jurisdiction; (b) "Birth parent" means a person who, irrespective of gender identity, conceives, carries and gives birth to the child but does not include a person who – (i) is a surrogate person under the Surrogacy (Regulation) Act, 2021. (ii) has surrendered their child and such child has been declared legally free for adoption under the Juvenile Justice (Care and Protection of Children) Act, 2015; (c) "Birth register" means the register of births under the Registration of Births and Deaths Act, 1969; (d) "Care"of the child includes – (i) Within the capacity of the parents, providing the child with: 1. a suitable place to live; 2. necessary financial support; (ii) Safeguarding and promoting the material well-being of the child; (iii) Safeguarding and promoting the emotional and psychological well-being of the child; (iv) Ensuring optimal growth and development of the personality of the child; (v) Securing the child's education and upbringing, including religious and cultural education and upbringing in a manner appropriate to the child's age and level of maturity;

	(vi) Maintaining a cordial atmosphere at the child's place of residence; (vii) Maintaining contact with the child; (viii) Mitigating the suffering, hardship and psychological trauma to the child caused by separation of their parents or primary caregivers; (ix) Protecting the child from abuse, neglect, discrimination, violence, exploitation and any other physical or emotional harms; (x) Preserving and nurturing the overall physical and mental health of the child, and providing for necessary medical treatment in the event of illness; (xi) Providing for any special needs that the child may have; (xii) Ensuring that the best interests of the child are always considered in all matters affecting them. (e) "Contact", in relation to a child, means (i) maintaining a personal relationship with the child; (ii) if the child does not reside with the parent, then – (1) communicating, on a regular basis, with the child in-person by visiting or being visited by the child, or (2) communicating, on a regular basis, with the child in any other manner, including: a) through written correspondence; or b) via phone calls or any other form of electronic communication; (f) "Court" means, in any area for which there is a city civil court, that court, and in any other area, the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government by notification in the Official Gazette as having jurisdiction in respect of the matters dealt with in this Chapter; (g) "Guardian" means a person having the care of the person of a minor or of their property or of both their person and property and includes: (i) The parents of the child;

	(ii) A guardian appointed by will by the parent of the child as per section 50 of this Chapter; (iii) A guardian appointed by the Court under the Guardians and Wards Act, 1890; (iv) A person empowered to act as such by or under any enactment relating to any Court of Wards. (h) "Minor" means a person who has not attained the age of majority as per section 3 of the Majority Act, 1875; (i) "Parent" means a person who has established a parent-child relationship as per section 31 of this Chapter; (j) "Parentage" means the legal relationship between a child and a parent of the child; (k) "Parental Responsibilities and Rights Agreement" means an agreement as per section 37 of this Chapter; (l) "Parenting Plan" means the plan under section 42 of this Chapter; (m) "Parenting Responsibilities and Rights" in relation to a child mean the responsibilities and rights referred to in section 34 of this Chapter; (n) "Presumed Parent" is a person who is presumed to be the parent of the child as per section 46 of this Chapter; (o) "Registering Officer" means the authority as defined in section 3(f) of Chapter I; (p) "Stable union'" means a stable union as defined in section 24 of Chapter I; (q) "Single parent" means a parent who is the only legal parent of the child or is the only parent exercising parental responsibilities and rights in relation to the child for any reason, which includes – (i) death of the other parent; (ii) desertion by the other parent; (iii) demonstration of lack of interest in the affairs of the child by the other parent;

	(iv) termination of parental responsibilities and rights of the other parent under section 41 of this Chapter; Explanation: For the purpose of this subsection, 'desertion' means desertion as defined in Explanation 1 of section 12(1) of Chapter I; (r) "Third party" includes a person who is not the legal parent of the child or a member of a natal family of the child.
Part II **Establishment of Parent-Child Relationship**	
31. Establishment of Parent-Child Relationship.	(1) A parent child relationship is established between a person and a child if – (a) The person is the birth parent of the child; (b) The person has legally adopted the child as per the provisions of the Juvenile Justice Act, 2015 or the Hindu Adoption and Maintenance Act, 1956; (c) The person is the parent of the child under section 31(1) of the Assisted Reproductive Technology (Regulation) Act, 2021; (d) A parentage order has been passed in favour of such a person under section 4(3)(a)(II) of the Surrogacy (Regulation) Act, 2021; (e) There is a presumption of parentage in favour of a person under section 46 of this Chapter unless such presumption has been successfully rebutted; (f) The person has successfully executed an acknowledgement of parentage in relation to the child as per section 33 of this Chapter. (2) A person under sub-section (1) is the legal parent of the child and will have all rights, duties and obligations of a parent.
32. Acknowledgement of Parentage.	(1) A person can acknowledge parentage in relation to the child by – (a) By registering as the parent of the child in the registry of birth of the child, jointly with the legal parent of the child at time of birth, or subsequently with the consent of the legal parent of the child; or

	(b) By executing an acknowledgement deed in relation to the child under section 33 of this Chapter with the consent of the legal parent of the child. (2) A person can acknowledge parentage in relation to the child only if such child does not have a presumed, acknowledged or adjudicated parent other than the legal parent of the child and the person seeking to establish a parent-child relation through acknowledgement in relation to the child.
33. Registration of Acknowledgement Deed.	(1) A person who acknowledges parentage in relation to the child under section 32(b) of this Chapter must execute an acknowledgement deed with the consent of the legal parent of the child. (2) An acknowledgement deed must be – (a) as per the format prescribed in Schedule xx of this Chapter; and (b) registering with the registering officer as per the procedure prescribed. (3) An acknowledgement of parentage is void if at the time of registering the acknowledgement deed a person other than the legal parent of the child and the person seeking to establish parentage is a presumed, acknowledged or adjudicated parent. (4) A successful execution of an acknowledgement of parentage in relation to the child confers on the acknowledged parent all the rights, duties and obligations of a legal parent in relation to such child.
Part III **Parental Responsibilities and Rights**	
34. Parental Responsibilities and Rights.	(1) Parental responsibilities and rights means all the rights, duties, powers, authority and responsibilities which, by law, a parent has in relation to their child and the child's property, and includes – (ii) act as the guardian of the child; (iii) ensure contact with the child; (iv) care for the child; (v) contribute to the maintenance of the child. (2) More than one person can hold parental responsibilities and rights in relation to a child.
35. Parental Responsibilities and	Each parent of a child has parental responsibilities and rights in relation to the child.

Rights of Parents.	
36. Parental Responsibilities and Rights when Parent is Minor.	(1) If one of the parents of the child is a minor – (ii) the parent who is of age of majority will have parental responsibilities and rights in relation to such a child; (iii) once the minor parent acquires age of majority, both parents will have parental responsibilities and rights in relation to the child. (2) If both the parents of the child are minors – (i) the guardians of the minor parents will have parental responsibilities and rights in relation to the child; (ii) the guardians of the minor parents will cease to have parental responsibilities and rights in relation to the child once one of the parents of the child acquires age of majority. Explanation – For the purposes of this section, age of majority has the same meaning as under section 3 of the Majority Act, 1875.
37. Parental Responsibilities and Rights Agreement.	(1) A single parent or a sole person who has parental responsibilities and rights may enter into a parental responsibilities and rights agreement with a third party who has an interest in the care, well-being and development of the child. (2) A parent who has parental responsibilities and rights may, with the consent of the other parent who has parental responsibilities and rights, enter into a parental responsibilities and rights agreement with a third party who has an interest in the care, well-being and development of the child. (3) A person can enter into a parental responsibilities and rights agreement with respect to only those components of parental responsibilities and rights that they hold at the time of the conclusion of the agreement. (4) The court may direct persons to enter into a parental responsibilities and rights agreement in the best interests of the child. (5) A parental responsibilities and rights agreement must be – (i) as per the format prescribed in Schedule xx of this Chapter; and (ii) must be registered with the registering officer per the procedure prescribed; or (iii) must be made on a court order if entered into as per sub-section (4) of this section.

	(6) A person whose parental responsibilities and rights have been suspended, terminated, modified or restricted by a Court order cannot acquire such parental responsibilities and rights via an agreement under this section.
38. Termination or Modification of Parental Responsibilities and Rights Agreement.	(1) A parental responsibilities and rights agreement may be terminated by the registering officer – (a) upon an application by the third party who has acquired such parental responsibilities and rights as per section 37(1) or section 37(2); (b) upon application by a parent or a person who holds parental responsibilities and rights who has entered into a parental responsibilities and rights agreement with a third party as per section 37(1) or section 37(2); (c) in the best interests of the child, upon an application made by any other person acting with the leave of the court. (2) A parental responsibilities and rights agreement may be modified by the registering officer upon a joint application by the parties to such an agreement. (3) A parental responsibilities and rights agreement which has been made upon the order of a court can only be modified or terminated by the Court upon an application by – (a) either of the parties to such a parental responsibilities and rights agreement; or (b) any person who has an interest in the care, well-being and development of the child.
39. Acquisition of Parental Responsibilities and Rights.	(1) A person will acquire parental responsibilities and rights in the following circumstances – (i) If such person has entered into parental agreement with such a person as per section 37(1), section 37(2) or section 37(4) of this Chapter; or (ii) If upon application by such person a Court issues an order vesting parental responsibilities and rights in them under section 41 of this Chapter; or (iii) If such person, being a third party, has contributed to the upbringing and maintenance of the child for a period of at least two years. (2) A person will acquire parental responsibilities and rights in relation to a child under clause (iii) of sub-section (1) only if – (i) The child has a single parent or only a sole person holds parental responsibilities and rights in relation to the child, and

	(ii) The single parent or person holding parental responsibilities and rights intends to co-parent the child with such a third party and vice-versa.
40. Exercise of Parental Responsibilities and Rights.	When more than one person holds the same parental responsibilities and rights in respect of a child, each of the co-holders may act without the consent of the other co-holder or co-holders when exercising those responsibilities and rights, except when this Chapter, any other law in force, or an order of the Court, provides otherwise.
41. Grant, Termination, Suspension, Extension or Restriction of Parental Responsibilities and Rights.	(1) Any person under sub-section (2) can apply to a court for an order which – (i) suspends for a period, or terminates, any or all of the parental responsibilities and rights which a specific person has in respect of a child; (ii) grants, extends or restricts the exercise by that person of any or all of the parental responsibilities and rights which a specific person has in respect of a child; (2) An application for an order under sub-section (1) can be made by one of the following persons – (i) a parent holding parental responsibilities and rights; (ii) a person other than a parent who has holds parental responsibilities and rights in relation to the child; (iii) any other person having a sufficient interest in the care, protection, well-being or development of the child. (3) When considering an application under sub-section (1), the court must take into account - (i) the best interests of the child; (ii) the preference of the child if the child is of such age, maturity and at that stage of development where they can form an intelligent preference; (iii) any other factor that should, in the opinion of the Court, be taken into account. (4) The termination, suspension or restriction of a parent's parental responsibilities and rights will not affect – (i) the parents' duty to maintain the child under any law in force; or (ii) the inheritance rights of the child in relation to such a parent under any law in force. (5) An order issued by the court under this section will be an interim order.
42. Parenting Plan.	(1) During the continuance of proceedings related to custody of a child, the court shall invite the parents of a child who have parental responsibilities and rights in relation to such child to mutually arrive at a parenting plan;

	(2) A parenting plan may determine any matter in connection with parental responsibilities and rights in relation to such a child, including – (i) residence of the child; (ii) contact between the child and i. the parent; and ii. any other person; (iii) physical and mental well-being of the child; (iv) financial decisions in relation to the child; (v) decisions in relation to the education of the child; (vi) overall upbringing of the child; (vii) any other matter deemed relevant in relation to the child. (3) Upon agreement on the terms of the parenting plan, the parents of a child shall submit the plan to the concerned court for such court to pass an order for enforcement of the parenting plan. (4) A parenting plan must be as per the format prescribed in Schedule xx of this Chapter and signed by the parents of the child.
Part IV **Maintenance**	
43. Maintenance of Children.	(1) Parents have a duty to maintain their children. (2) Parents shall be responsible for maintaining – (i) Minor children till they attain majority, or (ii) Major children, who are unable to sustain themselves on account of any physical or mental disability or illness or injury. Provided that a step-parent shall be responsible for maintaining a step-child if and only if the step-child has no other living parent.

	Explanation: A physical or mental disability means a disability under the Rights of Persons with Disabilities Act, 2016. (3) While adjudicating a petition for the maintenance of a child, the court will determine the amount of maintenance to be granted. (4) In determining the amount of maintenance under sub-section (c), the court shall take into consideration the following – (i) the income of the parents; (ii) the economic capacity and status of the parents; (iii) the lifestyle enjoyed by the child; (iv) the reasonable needs of the child; (v) the provisions for food, clothing, shelter, education, etc. of the child; (vi) need for any medical attendance, treatment or care of the child; (vii) the best interests of the child; and (viii) any other factors which the court may deem necessary based on the relevant facts and circumstances of each case. (5) The right under this section is without prejudice to the rights of a child to claim maintenance under section 125 of the Code of Criminal Procedure, 1973 or any other law for the time being in force.
Part IV **Miscellaneous Provisions**	
44. Prohibition of discrimination.	(1) A parent-child relationship extends equally to every child and parent, regardless of the gender identity, sexual orientation or marital status of the parent. (2) Every child will have all rights in relation to their parents, including the right to be maintained and the right to inherit movable or immovable property of such parents, under any law in force. (3) The rights of a child under sub-section (2) will not be prejudiced by the fact of whether or not the parents of such a child are in a marital relationship or a stable union.

45. Right to be Named as Single Parent in Birth Register and identity documents.	The single parent of a child has the right to be named as the only parent in the register of births and other identity documents and forms in respect of such child. Explanation 1- For the purpose of this section, identity documents and forms include a Passport issued under section 2(b) of the Passport Act, 1967, the Aadhaar enrolment form under the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 and school certificates issued under the relevant law in force. Explanation 2 – For the purpose of this section, 'single parent' means a parent who is the only legal parent of the child or is the only parent exercising parental responsibilities and rights in relation to the child on account of – (a) the death of the other parent; (b) desertion by the other parent; (c) lack of interest in the affairs of the child shown by the other parent.
46. Presumption of Parentage.	(1) A person will be presumed to be the parent of the child if the child was born during the continuance of a marriage between the birth parent and such person, or within two hundred and eighty days after the dissolution of such marriage, the birth parent remaining unmarried. (2) A person will be presumed to be the parent of the child only if they openly hold out the child to be their child and - (i) The legal parent of the child has consented to the person establishing a parental relationship with the child, (ii) They reside in the same household with the child, (iii) They regularly contribute to the upbringing and maintenance of the child, and (iv) They have established a parental relationship of dependence, bond and care with the child. (3) person who claims to be the parent of the child may – (v) apply for an amendment to be affected to the birth register of the child identifying such person as the parent of the child, if the legal parent consents to such amendment, or upon an order of the court; or (vi) apply to a court for an order confirming their parentage of the child.

	(4) This section does not apply to – (vii) the parent of a child conceived through the rape with the child's birth parent; or (viii) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation under the Assisted Reproductive Technology (Regulation) Act, 2021. (b) A presumption of parentage under this section may be rebutted and competing claims to parentage resolved by a court of competent jurisdiction. Explanation - For the purpose of sub-section (a), marriage includes 'relationships in the nature of marriage' as defined in section 9 of Chapter I.
47. Denial of Parentage.	(1) A presumed parent or alleged genetic parent who wants to deny parentage in relation to a child can apply for a court order affirming their denial of parentage in relation to such child. (2) A successful execution of a denial of parentage discharges the presumed parent or alleged genetic parent from all rights, duties and obligations of a parent in relation to such child. (3) An adjudicated parent cannot deny parentage in relation to the child. Explanation – An alleged genetic parent does not include any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation under the Assisted Reproductive Technology (Regulation) Act, 2021.
48. Child's Right to Privacy in Parentage Suits.	(1) A child has a right to privacy in cases where their parentage is under dispute. (2) A child will not be subject to a DNA test to establish their parentage unless the court, after accounting for the best interests of the child and the child's right to privacy, arrives at the conclusion that there is no other mode of establishing parentage other than a DNA test. (3) For the purpose of sub-section (b), a court will direct a DNA test only if – (a) it is impossible to draw an inference regarding the paternity of the child based on all other evidence; and (b) DNA test is indispensable to establishing the paternity of the child.

	(4) An order for a DNA test by the court for establishing the parentage of a child will be accompanied by reasons recorded in writing.
49. Restrictions on Guardian's Power to Alienate Property.	(1) The guardian of the child has power to do all acts which are necessary or reasonable and proper for the benefit of the child or for the realisation, protection or benefit of the child's estate; but the guardian can in no case bind the minor by a personal covenant. (2) The guardian of the child shall not, without the previous permission of the court, - (i) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the child; or (ii) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the child will attain majority. (3) Any disposal of immovable property by a guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the child or any person claiming under them. (4) No court shall grant permission to the guardian to do any of the acts mentioned in subsection (2) except in case of necessity or for an evident advantage to the child. (5) The Guardians and Wards Act, 1890 (8 of 1890), shall apply to and in respect of an application for obtaining the permission of the court under sub-section (2) in all respects as if it were an application for obtaining the permission of the court under section 29 of that Act, and in particular (i) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of section 4A thereof; (ii) the court shall observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and (iii) an appeal shall lie from an order of the court refusing permission to the guardian to do any of the acts mentioned in sub-section (2) of this section to the court to which appeals ordinarily lie from the decisions of that court.
50. Power to appoint Testamentary Guardian.	(1) A parent who is the guardian of the minor has the right to, by will, appoint a fit and proper person as the guardian for the minor. (2) A parent under sub-section (1) can appoint a guardian in respect of the minor's person or the minor's property or both.

	(3) A person appointed as guardian under sub-section (1) acquires guardianship - (a) after the death of the parents of the child; and (b) upon the person's express or implied acceptance of the appointment. (4) If two or more persons are appointed as guardians any one or more or all of them may accept the appointment except if provided otherwise.
51. Factors relevant to determine best interests of the child.	(1) In determining the best interests of the child, the following factors must be taken into consideration, namely- (a) the nature of the relationship between- (i) the child and the parents, or any specific parent; (ii) the child and the immediate relations of the parents, or any specific parent; (iii) the child and any other caregiver relevant in those circumstances; (b) the conduct of the parents, or any specific parent, towards- (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child; (c) the capacity of the parents, or any specific parent, or of any other care-giver, to provide for the day-to-day needs of the child; (d) the capacity of the parents, or any specific parent, or of any other care-giver, to provide for the overall development of the child, including emotional and intellectual development; (e) the likely effect on the child of any change in the child's circumstances in the event of separation from- (i) one or more parents, or (ii) any sibling or other child with whom the child has been living, or (iii) any other care-giver or relative, with whom the child has been living; (f) the need for the child to maintain contact with – (i) one or more parents, or (ii) the extended family of one or more of the parents; (g) the age, maturity and stage of development of the child; (h) any disability and special needs that a child may have; (i) any chronic illness that a child may be suffering from;

	(j) the need to protect the child from any physical or psychological harm, and maltreatment, abuse, neglect, violence or harmful behaviour; and (k) any other factor that a court may deem relevant.
52. Duty of the Court.	(1) While adjudicating matters under this Chapter, the Court will - (a) Ensure that the proceedings are conducted without undue delay and concluded within a reasonable period of time; (b) Facilitate the parties to arrive at mutually agreeable outcomes that promote cooperative parenting unless this risks exposing the child or the parties to violence or harm; (c) Account for the wishes of the child if the child is of such age, maturity and is at the stage of development where they can form an intelligent preference; (d) Account the best interests of the child. (2) A Court may designate a family consultant for the purpose of assisting it with proceedings under this Chapter.
53. Amendments to other Acts and instruments.	The Acts and instruments mentioned in the First Schedule are amended in the manner specified therein.

CHAPTER III **SUCCESSION**	
Part I **Preliminary Provisions**	
54. Application of this Chapter.	(1) Succession to the immovable property of the deceased person shall be governed by this Chapter if the property is situated in India, irrespective of the domicile of the deceased person at the time of death. (2) Succession to any movable property shall be governed by this Chapter if and only if the deceased person was domiciled in India at the time of death. (3) Notwithstanding anything contained in any other law for the time being in force, this Chapter also applies to agricultural land.
55. Abolition of the coparcenary system.	(1) On and after the commencement of this Code, no right to claim any interest in any property of an ancestor during or after their lifetime shall be recognised if it is founded on the mere fact that the claimant was born in the family of the ancestor. (2) All members of an undivided Hindu family governed by *Mitakshara* law holding any coparcenary property on the day this Code comes into force shall, with effect from that day, be deemed to hold it as tenants-in-common as if a partition had taken place among all the members of that undivided Hindu family with respect to such property and as if each one of them is holding their share separately as full owner thereof.
56. Definitions.	In this Chapter, unless the context otherwise requires,– (a) 'Code' means this Act; (b) 'intestate' means the person who has died without having made a valid will with respect to their property or any portion thereof and whose property is to be inherited by heirs in accordance with this Code;

	(c) 'parent' has the same meaning as in sub-section (i) of section 30 of this Code; (d) 'not alive' means not alive at the time of the intestate's death; and (e) 'spouse' means, in relation to the intestate, a person who was married to the intestate at the time of their death, and in relation to an heir of the intestate, a person is married to the heir at the time of the intestate's death.
57. Principles for devolution of property.	Succession of property under this Code shall be guided by the following principles:– (a) gender inclusivity, (b) uniform application to all kinds of property, irrespective of its nature, and bringing within the fold of intestacy and testamentary succession a plurality of family structures.
Part II **Intestate Succession**	
58. Order of succession.	Upon the death of an intestate, the property of the intestate shall be inherited by: (a) the immediate family, (b) If there is no immediate family, the extended family, (c) If there is no immediate or extended family, the distant family, (d) If there is no immediate family, extended family or distant family, the Government.
59. Composition of immediate family.	The immediate family of an intestate consists of: (a) spouse, or spouses in case the intestate has more than one legally married spouse, (b) children, or a spouse of a child only when such child is not alive, (c) grandchildren, only when their parent who is the child of the intestate is not alive, and (d) parents.
60. Composition of extend family.	The extended family of the intestate consists of: (a) great-grandchildren, (b) spouses of grandchildren, (c) siblings, (d) spouses as well as children of siblings who are not alive, and grandchildren of siblings, only when the sibling and their child who is the parent of the grandchild is not alive, and

	(e) grandparents.
61. Composition of distant family.	The intestate's distant family consists of any person related to the intestate in any degree of separation who is not a part of their immediate family or extended family.
General Rules	
62. Rules for devolution among immediate family.	(1) The intestate's separate property shall devolve according to the following rules: (a) Every member of the immediate family alive at the time of the intestate's death shall inherit an equal share of the intestate's property. **Illustration** Facts - X, the intestate, is survived by her wife A, her daughter B, her son C, her daughter-in-law D (who is the widow of his second son E), her son-in-law F (who is the husband of his daughter B), and two grandchildren G and H, whose parents I and J (sons of X) are not alive. Calculation - A, B, C, D, G, and H will inherit X's property equally. F does not receive a share as his wife is alive at the time of X's death. Final Shares - A, B, C, D, G, and H receive 1/6 share each. (b) The intestate's grandchildren and the spouse of the intestate's children, in the branch of each deceased child of the intestate, shall inherit between them one share, which shall be divided equally. **Illustration** Facts - X, the intestate, has two children - A and B. A is married to C and has 2 children - D and E. B is married to F and has 3 children - G, H, and I. A and B both died before X's death. Calculation - The property is first split 2-ways between A and B's branch. In A's branch, the share is divided equally between C, D, and E. In B's branch, the share is divided equally between F, G, H, and I. Final Shares

	C, D, and E will receive 1/6 share each. F, G, H, and I will receive 1/8 share each. (c) If the intestate was in a stable union at the time of death, as per section 24 and 28 of this Code, then the share of the partner shall be determined according to the following rules: (i) In cases where the stable union has been intimated as per section 25 of this Code, the partner shall be entitled to the same rights in the intestate's property as a spouse under this Code, if and only if the partners opt in to the scheme of intestate succession under this Code. (ii) If the partners have not opted in to the scheme of intestate succession under this Code, or, the stable union not having been been intimated, the court has made a determination under section 28 of this Code, then the partner's share (including preferential right of habitation and use over the residential house under section 76 of this Code) shall be determined by a court based on the following factors: (a) financial position of the partner; (b) the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners; (c) any contributions made or actions taken by the spouse(s) and/or the partner(s) during the subsistence of the relationship, which has given rise to a sustained economic benefit or disadvantage; (d) other such factors which may be prescribed. (d) In cases where a court has determined the existence of a relationship in the nature of marriage as per section 9 of this Code, the partner shall be entitled to the same rights in the intestate's property as a spouse under this Code.

	(e) If at the time of death, the intestate is part of more than one validly solemnised marriage, then each spouse shall receive one share each. (f) If at the time of death, the intestate is part of more than one marriage, or more than one stable union, or a marriage and a stable union (whether void or voidable) then the share of the spouse(s) and/or the partner(s), as the case may be, shall be determined by a court based on the following factors: (i) the nature of relationship between the parties; (ii) the period of de facto separation between the parties; (iii) the financial position of the spouse(s) and/or the partner(s) in a stable union or relationship in the nature of marriage, including any independent source of income; (iv) the degree of financial dependence or interdependence, or any arrangements for financial support, between the parties; (v) any contributions made or action taken by the spouse(s) and/or the partner(s) during the subsistence of the relationship, which has given rise to a sustained benefit or economic disadvantage; (vi) the number of heirs of the intestate who are entitled to a share; and (vii) other such factors as may be prescribed, and while determining the collective share of the spouse(s) and/or partner(s), the court may proportionately reduce the shares of the other heirs of the intestate. Explanation.– For the purposes of this sub-section: (i) "contributions made" shall include any action which seeks to contribute to the welfare of the intestate and/or their family, such as acquiring, conserving, or improving the property of the intestate and/or their family, looking after the home or caring for the family; and

	(ii) "economic disadvantag" shall include foregoing an independent income or making a substantial financial contribution. (2) The intestate's share in the partial community of property regime shall devolve according to the following rules: (a) the spouse shall not receive a share, (b) the share shall be divided equally between the other members of the intestate's immediate family, and (c) clause (b) of sub-section (1) shall apply to the devolution of property under this sub-section.
63. Rules for devolution among extended family.	The following rules shall apply to the devolution of property among members of the extended family– (5) The intestate's great-grandchildren and the spouse of the intestate's grandchildren, in the branch of each deceased grandchild of the intestate, shall together take one share, which shall be divided equally. **Illustration** Facts - X, the intestate, has 2 children - A and B. A has 2 children - C (who is married to C1 and has 3 children C2, C3, and C4) and D (who is married to D1 and has 2 children D2 and D3). B has 1 child - E (who is married to E1 and has no children). A, B, C, D, and E all died before X's death. Calculation - X's property is first split 3 ways between the branches of the 3 grandchildren - C, D, and E. In C and D's branches, the share is divided equally between the spouse and the children. In E's branch, the spouse takes the whole share. Final Shares C1, C2, C3, and C4 will receive 1/12 share each of X's property. D1, D2, and D3 will receive 1/9 share each of X's property. E1 will receive 1/3 share of X's property. (6) All the siblings shall together take one share, which shall be divided equally. (7) The spouses, children, and grandchildren in the branch of each sibling or child of the sibling, as the case

	may be, shall together take one share, which shall be divided equally. **Illustration** Facts - X has two siblings - A and B - who both died before X's death. A has left behind a spouse C and one child - D. B has left behind a spouse E, daughter F, two grandchildren - G and H (who are the children of I - B's son who died before X's death). Calculation - X's share is first split two ways between the branches of A and B. In A's branch, the share is divided equally between C and D. In B's branch, the share is split in three ways between E, F, and I's branch. In I's branch, the share is split equally between G and H. Final Shares C and D will receive 1/4 share in X's property. E and F will receive 1/6 share in X's property. G and H will receive 1/12 share in X's property. (8) All the grandparents shall together take one share, which shall be divided equally. **Illustration** Facts - X is survived by his siblings A, B, and C, his paternal grandfather D and his maternal grandmother E. Calculation - A, B, and C together take one share. D and E together take one share. Final Shares A, B, and C will receive 1/6 share each of X's property. D and E will receive 1/4 share each of X's property.
64. Rules for devolution among distant family.	(1) Amongst members of the distant family related to the intestate in different degrees of separation, a member with fewer degrees shall exclude any other member with more degrees.

	Illustration Facts - X has left behind his parent's sibling's child Y and his sibling's great-grandchild Z. Calculation - Y is separated from X by four degrees and Z by five degrees. The former wholly excludes the latter. Final Shares - Y will inherit all of X's property. (2) Multiple members of the distant family with the same degree of separation shall inherit equally. **Illustration** Facts - X has left behind his parent's sibling's child Y and his sibling's grandchild Z. Calculation - Both Y and Z are separated from X by four degrees and thus share equally. Final Shares - Y and Z = 1/2. (3) For the purpose of this section, the counting of degrees of separation shall be based on the following rules:– (a) counting of degrees of separation shall start with the intestate, (b) degrees of separation refer only to degrees of ascent and degrees of descent, and **Illustration** Facts - X leaves behind his parent's sibling's grandchild A, his sibling's child's spouse B, and his sibling's grandchild C. Calculation - X is separated from A by five degrees, and from C by four degrees. B is not a member of X's distant family as they are not related to X through a degree of ascent or descent. Final Shares - C inherits all of X's property.

	(c) there shall be no distinction between degrees of ascent vis-a-vis degrees of descent. **Illustration** Facts - X has left behind his parent's sibling's child Y and his sibling's grandchild Z. Calculation - Both Y and Z are separated from X by four degrees. While Y is separated by two degrees of ascent and two degrees of descent, Z is separated by one degree of ascent and three degrees of descent. Both inherit equally. Final Shares - Y and Z will receive 1/2 share in X's property.
Special Rules	
65. When an heir is conceived but not born at the time of death.	(1) A child who was conceived by the time of the intestate's death and is subsequently born alive, shall be deemed to be a 'child' for the purposes of this Code. (2) Such a child shall inherit their share of the intestate's property as if they had been born before the death of the intestate. (3) The inheritance shall be deemed to have taken effect from the date of the intestate's death.
66. When the intestate's child is conceived and born after the intestate's death.	(1) The intestate's child who is conceived after the intestate's death under this section and is subsequently born alive, shall inherit their share of the intestate's property as if they had been born before the death of the intestate, subject to the following conditions: (a) The intestate's spouse must have given written notice of their intention to use preserved reproductive material or an embryo for the conception of a child, through assisted reproductive technology (with or without a surrogate), to other members of the immediate family, within such period as may be prescribed. (b) The reproductive material must be preserved in accordance with section 22(2) and section 24(1)(f) of the Assisted Reproductive Technology (Regulation) Act, 2021.

	(c) The reproductive material must be utilised in accordance with the written consent of the intestate under section 22(1)(a) of the Assisted Reproductive Technology (Regulation) Act, 2021. (d) The child must be born no later than such anniversary of the intestate's death as may be prescribed. (e) The spouse must not have remarried after the intestate's death and before the birth of the child. (2) The inheritance shall be deemed to have taken effect from the date of the intestate's death. Explanation.– For the purposes of this section, the term 'spouse' shall include a partner in a stable union or a relationship in the nature of marriage, and the term 'remarries' shall include entering into a stable union or a relationship in the nature of marriage.
67. When individuals die simultaneously.	When multiple persons have died in circumstances which make it difficult to determine the order of their deaths, then for the purposes of devolution of property under this Code, the elder shall be deemed to have died before the younger, until the contrary is proved.
68. When an heir is a murderer.	(1) A person who is convicted for the murder or abetment of murder of the intestate shall be disqualified from inheriting any share in the intestate's property. (2) A person who is convicted for the murder or abetment of murder of any other person shall be disqualified from inheriting any property in furtherance of the succession to which he or she committed or abetted the commission of the murder. (3) If any person is disqualified from inheriting any property under sub-sections (1) or (2), it shall devolve as if such person had died before the intestate.
69. When no heir is present.	(1) If the intestate has left no heir in their immediate, extended, or distant family, then the intestate's property shall devolve on the Government. (2) The Government shall take the property subject to the same obligations and liabilities as any other heir.

Part III Testamentary Succession	
70. Amendment of Indian Succession Act.	(1) After section 63 of the Indian Succession Act, the following sections shall be inserted, namely:— "63A. Recognition of digital wills.– (1) Notwithstanding anything contained in any other law for the time being in force, digital wills shall be recognised as valid wills under this Act. (2) A digital will must comply with the following requirements: (a) It must be written and readable only through an electronic device, (b) It must be digitally signed by the testator, or by another individual in the testator's name in the presence and by the direction of the testator. (c) The signature of the testator, or the signature of the person signing for them, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. (d) It must be attested by two or more witnesses, each of whom has seen the testator sign or affix their mark to the will or has seen some other person sign the will, in the presence and direction of the testator, or has received from the testator a personal acknowledgement of their signature or mark, or of the signature of such other person; and each of the witnesses must digitally sign the will in the presence of the testator. However, it will not be necessary that more than one witness be present at the same time, and no particular form of attestation will be necessary except the digital signature. *Illustrations:* (a) 'A' dictated a will to her brother 'B', who typed the will on a computer. 'A' then digitally signed the will on the computer in the presence of and along with two witnesses. The will is a digital will. (b) 'A' wrote her will with a stylus on a tablet device. Thereafter, she signed it digitally in the presence of and along with two witnesses. The will is a digital will.

	(c) 'A' dictated a will to her brother 'B', who typed the will on a computer. Thereafter, the will was printed, and 'A' signed the printout of the will in the presence of and along with two witnesses. The will is not a digital will under this section. (d) 'A' recorded an audio on an electronic device dictating her testamentary wishes. This is not a digital will since it is not written or readable. (e) 'A' used a voice recognition software on her mobile phone to dictate her will. The software converted her spoken words to text, which was later digitally signed by 'A' in the presence of and along with two witnesses. This is a digital will. (3) For the purposes of this section and the Act, digitally signing a will means affixing a digital signature issued by a Certifying Authority licensed by the Controller of Certifying Authorities under the Information Technology Act, 2000. (4) The following Acts shall apply to digital wills in such amended form as may be prescribed: (a) Indian Evidence Act, 1872, and (b) Information Technology Act, 2000. 63B. Presence includes 'virtual presence'.– (1) For the purposes of sections 63, 63A and 70 of the Act, 'presence' includes 'virtual presence' as well. (2) For the purpose of sub-section (1) of this section, 'virtual presence' means the relationship of two or more individuals in different locations communicating in real time to the same extent as if the individuals were physically present in the same location.[776] *Illustrations:*

[776] Borrowed from Section 2(2), Uniform Electronic Wills Act, 2019.

	(a) 'A' made a digital will and signed it in the presence of 'B' and 'C'. A, B and C were connected on video call. The requirements of section 63 are complete as B and C were present virtually. (b) 'A' made a digital will and signed it in the presence of 'B' and 'C'. A, B and C were physically in the same room during the signing of the will. The requirements of section 63 are complete as B and C were in the presence of the testator. (c) 'A' made a will in the month of April 2023. However, in June, on a video call with 'B' and 'C' he wrote a declaration to revoke the will, which was digitally signed by 'A' along with and in the presence of B and C. The will is validly revoked under section 70. (2) After section 65 of the Indian Succession Act, the following section shall be inserted, namely:— "65A. Extension of privileged wills to civilians.– (1) Notwithstanding anything contained in Section 65, any person stuck in situations of a calamity, earthquake, accident, fire or a similar situation wherein the person reasonably believes that death is imminent may make a privileged will under Section 65. **Illustrations:** (a) 'A' along with others is stuck in a house in the middle of an earthquake. He is qualified to make a privileged will under this section. (b) 'A' was driving to work when his car met with a severe accident. He was taken to the hospital. He is qualified to make a privileged will under this section." (3) In section 63 and section 66, after the words "solider, airman, or mariner", the words "civilians stuck in certain situations" shall be inserted.
Part IV **Maintenance of Immediate Family & Strangers**	

71. Order of maintenance.	The following persons for whom reasonable financial provision has not been made by the intestate's will or by way of intestate succession may apply to a court for an order of maintenance under this Part: (a) Members of the immediate family of the deceased person; (b) A partner who was in a stable union with the deceased person; (c) A partner who was in a relationship in the nature of marriage with the deceased person; (d) Step-parents if and only if the step-parent is childless and their spouse who was the parent of the intestate is not alive; (e) Step-children if and only if the step-child has no parent other than the step-parent; (f) Any person in relation to whom the deceased person holds parental rights and responsibilities under Chapter II of this Code; and (g) Any other person who immediately before the death of the deceased person was being maintained either wholly or partly by the deceased. Explanation.– For the purposes of this section, (i) 'reasonable financial provision' means such financial provision as would be sufficient for the reasonable maintenance of the applicant; and (ii) an applicant shall be treated as 'being maintained' by the deceased person, either wholly or partly, if the deceased person was making a substantial contribution (financial or otherwise) towards the reasonable needs of that person, but shall not include arrangements where the deceased person was paying full and valuable consideration to the applicant in an arrangement of a commercial nature.
72. Forms of maintenance.	Upon receiving an application under this Part, the court may make one or more of the following orders for the maintenance of the applicant: (a) an order for periodical payments or a lump-sum payment from the deceased person's estate based on such terms and conditions as may be specified in the order, (b) an order for the creation of a charge on such portion of the deceased person's estate based on such terms and conditions as may be specified in the order,

	(c) an order to provide for the reasonable needs of the applicant including food, clothing, residence, education, and medical treatment, (d) an order to any person who has received a share in the deceased person's estate to make payment to the applicant out of the estate or out of consideration that they have received by alienating the share, (e) an order to any person who has acquired for consideration a portion of the deceased person's estate to make payment to the applicant out of that portion, provided such person had received notice of the application under this Part, and (f) other such orders of a similar nature.
73. Factors to be considered for maintenance.	While passing an order under this Part, the court shall consider the following factors: (a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future, including the standard of living of the applicant during the deceased person's lifetime, and the independent income, if any, of the applicant, (b) any physical or mental incapacity of the applicant; (c) the financial resources and financial needs which any other person entitled to apply for an order of maintenance under this Part has or is likely to have in the foreseeable future; (d) the financial resources and financial needs which any person who has received a share in the deceased person's estate has or is likely to have in the foreseeable future; (e) any obligations which the deceased person had towards the applicant in their lifetime; (f) best interests of the applicant child, as provided under section 51 of this Code; (g) any contributions made by a spouse or a partner during the subsistence of the relationship, which may have given rise to a sustained benefit for the relationship and/or an economic disadvantage for the spouse/partner; (h) the size and nature of the deceased persons' estate; (i) the intention of the deceased person to defeat a potential order of maintenance under this Part by making a Will; (j) the intention of the deceased person to disinherit heirs based solely on grounds such as gender and sexual orientation; and

	(k) any other similar factor, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant. Explanation.– For the purposes of this section: (i) 'contributions made' shall include any action which seeks to contribute to the welfare of the deceased person and/or their family, such as acquiring, conserving, or improving the property of the deceased person and/or their family, looking after the home or caring for the family; and (ii) 'economic disadvantage' shall include making a substantial financial contribution and/or foregoing an independent income, independent ability to accumulate wealth, growth in career and profession, or such other disadvantages that the court may determine arising out of the relationship.
74. Interim order of maintenance.	(1) Upon receiving an application under this Part, the court may pass an interim order of maintenance subject to such conditions and restrictions as may be specified in the order. (2) A court may pass an interim order under this section only if it is satisfied that a prima facie case is made out that the applicant is entitled to an order of maintenance based on the factors enlisted in section 73 of this Code. (3) An interim order of maintenance may provide for all or any of the reliefs enlisted in section 72 of this Code. (4) An interim order of maintenance shall remain valid till the final disposal of the application or until such period as the court may direct.
75. Discharge or variation of order of maintenance.	(1) An order of maintenance made by a court under this Part may be varied, discharged, partially and/or temporarily suspended by the court upon an application made under this section. (2) An application under this section may be made by any person who is entitled to apply for an order of maintenance under section 71 of this Code or by a person upon whom an obligation has been placed under the order of maintenance.

	(3) While considering an application made under this section, the court shall take into account all relevant circumstances which it was required to take into account while passing the order of maintenance as well any material change of circumstances in any of the factors enlisted in section 73 of this Code, including but not limited to the remarriage of a spouse who is receiving maintenance.
76. Preferential rights of a spouse in a residential house.	(1) If at the time of the intestate's death, (i) either the intestate alone or the intestate and the spouse collectively owned the residential house; and (ii) the residential house was, at the time of the death of the intestate, occupied by the intestate and their spouse as their principal place of residence, the surviving spouse shall have the right to exclusive habitation of the residential house and the right to use the movable and other objects intended for the comfort and service of the house. Explanation: If the intestate, at the time of their death, was in more than one validly solemnised marriage, then each such spouse shall have the right to habitation and use (but not to exclusive habitation in case multiple such spouses lived in the same residential house as their principal place of residence with the deceased) under this section. (2) If at the time of the intestate's death, the residential house in which the intestate owns a share is jointly occupied or owned by the intestate's family, the surviving spouse shall have the right to exclusive habitation of the portion of the residential house owned by the intestate and the right to use the movable and other objects intended for the comfort and service of such portion. (3) If the spouse remarries, rights under this section shall stand terminated upon the solemnisation of such marriage. (4) If upon an application by the owner or part-owner of the residential house, the court determines that the value of the rights of the spouse in the residential house exceeds the share of the spouse in the intestate's property, the spouse shall pay such sum, as may be determined by the court, to the owner or part-owner.

	(5) This section shall also apply to a property over which the intestate alone or the intestate and the spouse collectively have a heritable leasehold right, subject to the terms and conditions contained in the concerned lease agreement. Explanation.– For the purposes of this section, the term 'spouse' includes a partner in a relationship which is in the nature of marriage as per section 9 of this Code, and the term 'remarries' includes entering into a stable union.
CHAPTER IV **MISCELLANEOUS PROVISIONS**	
77. Power to make rules.	The Government may make rules to carry out all or any of the provisions of this Code.
78. Repeal and Savings.	(1) The Acts enlisted in the First Schedule are repealed to the extent mentioned therein. (2) Without prejudice to the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), the repeals in sub-section (1)– (a) affect any other law in which the repealed enactment has been applied, incorporated or referred to; (b) affect the validity, invalidity, effect or consequences of anything already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing under the repealed enactment; (c) affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed or recognised or derived by, in or from any enactment hereby repealed; (d) revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force.

	FIRST SCHEDULE Amendments *(see section 53)* 1. In the Guardians and Wards Act 1890,— (a) For section 11, the following section shall be substituted, namely:— "**Procedure on admission of application**.— (1) If the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing thereof, and cause notice of the application and of the date fixed for the hearing— (a) to be served in the manner directed in the Code of Civil Procedure (5 of 1908) on— (i) the parents of the minor if they are residing in any State to which this Act extends, Provided that the requirement of serving notice may be dispensed with where an application has been made by a 'single parent' as defined under section 1(q) of the Chapter II of this Code." (b) For section 17, the following section shall be substituted, namely:— "**Matters to be considered by the Court in appointing guardian.**— (1) In appointing or declaring the guardian of a minor, the best interests of the minor should be of paramount

	consideration. (2) The Court shall have regard to the *best interests of the minor* and the character and capacity of the proposed guardian and their nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or their property. (3) If the minor is of the age, maturity and is at the stage of development where they can form an intelligent preference, the Court shall consider that preference." (c) For section 19, the following section shall be substituted, namely:— "**Guardian not to be appointed by the Court in certain cases.**—Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person— (b) of a minor, whose parent is living and is not, in the opinion of the court, unfit to be guardian of the person of the minor, or, (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor. Provided that in determining whether a person is unfit to be a guardian under clause (b), the best interests of the minor as required under sub-section (1) of section 17 shall be the paramount consideration."

	(d) For section 21, the following section shall be substituted, namely:— "**Capacity of minors to act as guardians** — A minor is incompetent to act as a guardian." (e) For section 25, the following section shall be substituted, namely:— "**Proceedings for custody of ward.**— (1) Notwithstanding anything contained in section 19, if a ward leaves or is removed from the custody of a guardian of their person, or is not in the custody of the guardian entitled to such custody, the Court, if it is of the opinion that it will be for the best interest of the ward to return to the custody of their guardian or to be placed in his custody, may make an order for their return, or for such minor being placed in the custody of the guardian, as the case may be. (2) For the purpose of enforcing the order, the court may exercise the power conferred on a Magistrate of the first class by section 97 of the Code of Criminal Procedure, 1973. (3) The residence of a ward against the will of their guardian with a person who is not their guardian does not of itself terminate the guardianship. (4) For the purpose of an order under sub-section (1), the best interest of the minor shall be of paramount consideration. (5) The court shall not make an order under this section in respect of a child who is of the age, maturity and is at the stage of development where they can form an intelligent preference, without taking into consideration the preference of the child." 2. In the Juvenile Justice (Care and Protection of Children) Act, 2015,—

	(a) In section 30, for clause (xia), the following clause shall be substituted, namely:— "(xia) in the case of adoption of a surrendered child, facilitating and assisting in the preparation of a post adoption agreement between the prospective adoptive parents and the parent or guardian of the surrendered child;" (b) For section 35, the following section shall be substituted, namely:— **"Surrender of children.—** (1) A parent or guardian, who for physical, emotional and social factors beyond their control, wishes to surrender a child, shall produce the child before the Committee. (2) If, after the prescribed process of inquiry and counselling, the Committee is satisfied, a surrender deed shall be executed by the parent or guardian, as the case may be, before the Committee. (3) The parents or guardian who surrendered the child, shall be given two months' time to reconsider their decision and in the intervening period the Committee shall either allow, after due inquiry, the child to be with the parents or guardian under supervision, or place the child in a Specialised Adoption Agency, if he or she is below six years of age, or a children's home if he is above six years. (4) The Committee may allow the parents or guardian who have surrendered the child to retain custody of the child, under the supervision of the Committee, till the child is legally adopted as per section 63; (5) If the parents or guardian of the surrendered child have any preference with respect to the prospective adoptive parents, the Committee shall take the same into consideration."

	(c) After section 35, the following section shall be inserted, namely:— "(*35A)* **Post-adoption Agreement** — (1) Subject to consent of all parties involved, the prospective adoptive parents may enter into a post-adoption agreement with the parents or guardian of a surrendered child before the issuance of an adoption order by the District Magistrate under section 61: Provided that the post-adoption agreement will have effect only after it is approved by the District Magistrate. (2) The post-adoption agreement may include the following – (a) communication, including in-person visits between the surrendered child and the parent or guardian of such child; (b) sharing of information, including educational and medical information concerning the child; (c) sharing of any other information as provided in the adoption regulations framed by the authority. (3) A post-adoption agreement will not be entered into without the consent of the surrendered child if the child is of the age, maturity and stage of development to understand the implications of such an agreement. (4) The Committee shall assist the prospective adoptive parents and the parent or guardian of a surrendered child in preparing a post-adoption agreement and counsel them on the implications of such an agreement. (5) In finalising the terms of the post-adoption agreement, the best interests of the surrendered

	child shall be of paramount consideration. (6) An application for amendment, revocation or termination of a post-adoption agreement may be made to the District Magistrate by - (a) one of the parties to the agreement; or (b) the adopted child." (d) For section 57, the following section shall be substituted, namely:— **"Eligibility of prospective adoptive parents.—** (1) The prospective adoptive parents shall be physically fit, financially sound, mentally alert and highly motivated to adopt a child for providing such child a good upbringing. (2) In the case of a married couple, or persons in an acknowledged stable union consent of both parties for adoption is required. (3) A single or divorced person is eligible to adopt. (4) Any other criteria that may be specified in the adoption regulations framed by the Authority." (e) For section 61, the following section shall be substituted, namely:— "**Procedure for disposal of adoption proceedings.—** (1) Before issuing an adoption order, the District Magistrate shall satisfy itself that— (a) the adoption is for the welfare of the child; (b) due consideration is given to the wishes of the child having regard to the age and understanding of the child; and

	(c) that neither the prospective adoptive parents has given or agreed to give nor the specialised adoption agency or the parent or guardian of the child in case of relative adoption has received or agreed to receive any payment or reward in consideration of the adoption, except as permitted under the adoption regulations framed by the Authority towards the adoption fees or service charge or child care corpus. (1A) Before issuing an adoption order with respect to a surrendered child under section 61, the District Magistrate may approve a post-adoption agreement between the prospective adoptive parents and the parent or guardian of a surrendered child as per section 35A." 3. In the Surrogacy (Regulation) Act, 2021,— (a) In section 2,– (i) For clause (h), the following clause shall be substituted, namely,— ""couple" includes: (a) legally married persons, (b) persons in an acknowledged stable union under section 23(2) of Chapter I of this Code." (ii) For clause (r), the following clause shall be substituted, namely,— ""intending couple" means a couple who intend to become parents through surrogacy: Explanation I: Surrogacy refers to only 'gestational surrogacy'. Explanation II: 'gestational surrogacy' means a practice by which a surrogate person carries a child for the intending couple or intending person through implantation of embryo in their womb and the child is not genetically related to the surrogate person."

	(iii) For clause (s), the following clause shall be substituted, namely,— ““Intending person” means an Indian person who intends to become a parent through surrogacy;” (iv) For clause (zd), the following clause shall be substituted, namely,— ““Surrogacy” means a practice whereby a *person* bears and gives birth to a child for an intending couple or *intending person* with the intention of handing over such child to the intending couple or *intending person* after the birth of the child;” (v) For clause (zg), the following clause shall be substituted, namely,— “‘surrogate parent’ means a person agrees to bear a child (who is genetically related to the intending couple or intending person) through surrogacy from the implantation of embryo in their womb and fulfils the conditions as provided in sub-clause (b) of clause (iii) of Section 4;” (b) In section 4:– (i) For clause (ii), the following shall be substituted, namely,— “(ii) A surrogacy or surrogacy procedure will be performed only if the following conditions are satisfied – (a) the intending couple or intending person of Indian origin has obtained a certificate of recommendation from the Board on an application made in such form and manner as prescribed; (b) the surrogacy is only for altruistic surrogacy purposes; (c) the surrogacy is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures; (d) the surrogacy is not for producing children for sale, prostitution or any other form of exploitation; and (e) Any other conditions as may be specified by regulations made by the Board are satisfied.”

	(ii) Clause (iii)(a)(I) shall be omitted; (iii) In clause (iii), for sub-clause (b), the following sub-clause shall be substituted, namely,— "(b) the surrogate ***parent*** is in possession of an eligibility certificate issued by the appropriate authority on fulfilment of the following conditions, namely: — (I) no person, other than a married person having a child of her own and between the age of 25 to 35 years on the day of implantation, shall be a surrogate parent or help in surrogacy by donating her egg or oocyte or otherwise; (II) a willing person shall act as a surrogate parent and be permitted to undergo surrogacy procedures as per the provisions of this Act: Provided that the intending couple or the intending person shall approach the appropriate authority with a willing person who agrees to act as a surrogate parent;" (III) no person shall act as a surrogate parent by providing her own gametes; (IV) no person shall act as a surrogate parent more than once in her lifetime:" (iv) For clause (c)(I), the following clause shall be substituted, namely,— "an eligibility certificate for intending couple or intending person is issued separately by the appropriate authority on fulfilment of the following conditions, namely,-

	(I) the parties to the intending couple or the intending person must be between 23 to 55 years old." (c) For section 8, the following section shall be substituted, namely,— "Rights of surrogate child.— A child born out of surrogacy procedure, shall be deemed to be the legal child of the intending couple or intending person and the said child shall be entitled to all the rights and privileges available to a legal child under any law for time being in force." (d) In section 4(iii)(a)(II), section 7, section 8, for the words 'intending woman', the words 'intending person' shall be substituted; 4. In the Assisted Reproductive Technology (Regulation) Act, 2021,— (a) In section 2, in sub-section (1)– (i) For clause (a), the following clause shall be substituted, namely,— ""assisted reproductive technology" means all techniques that attempt to obtain a pregnancy by handling the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive system of a person who can conceive and carry a child;" (ii) For clause (e), the following clause shall be substituted, namely,— ""Commissioning couple" includes: (a) legally married persons; and (b) persons in an acknowledged stable union under section 23(2) of Chapter I of this Code who are unable to conceive a child and who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the services authorised of the said clinic or bank;"

	(iii) For clause (h), the following clause shall be substituted, namely,— ""gamete donor" means a person who provides sperm or oocyte with the objective of enabling the commissioning couple or commissioning person to have a child;" (iv) Clause (j) shall be omitted; (v) For clause (u), the following clause shall be substituted, namely,— ""commissioning person" means any person above the age of twenty-one years who approaches an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the authorised services of the clinic or bank." (b) For section 21(g), the following section shall be substituted, namely,— "(g) the clinics shall apply the assisted reproductive technology services to persons above the age of twenty one years and below the age of fifty five years." (c) In section 27, (i) In sub-section (2), a. For the word "males", the words "semen donors" shall be substituted. b. For the words "females", the words "oocyte donors" shall be substituted. (ii) In sub-section (6), the word "woman", the words "ovary donor" shall be substituted. (d) For section 31, the following section shall be substituted, namely,— "**31. Rights of a child born through assisted reproductive technology. —** (1) The child born through assisted reproductive technology shall be deemed to be the legal child of the commissioning couple or commissioning person and the said child shall be entitled to all the rights and privileges available to a natural child only from the commissioning couple under any law for the time being in force."

	(e) After section 31, the following section shall be inserted, namely,— "**31A. Child's Right to Information about Genetic Parent.–** (1) A child born as a result of assisted reproductive technology has a right to – (a) any medical information concerning their genetic parents; and (b) any other information concerning the genetic parents once such child reaches the age of majority under the Majority Act, 1872. (2) Subject to the provisions of this Act, information disclosed in terms of sub-section (1) will not reveal the identity of the gamete donor." (f) In sections 21, 22, 24, 25, and 33, for the word 'woman', wherever it occurs, the words 'commissioning person' shall be substituted. 5. In the Maintenance and Welfare of Parents and Senior Citizens Act, 2007,— (a) In section 2,– (i) For clause (a), the following clause shall be substituted, namely,— ""Children" in relation to a parent means children and grandchildren who have attained the age of majority as per the Majority Act, 1875." (ii) For clause (b), the following clause shall be substituted, namely,— ""maintenance" includes provisions for food, clothing, housing, safety and security, medical attendance, healthcare, treatment and all other necessary support to ensure the holistic wellbeing, dignity, and quality of life of an individual" (iii) For section clause (d), the following clause shall be substituted, namely,— ""parent" means a parent as defined in section 1(i) of Chapter II of the Family Law Code and includes step-parents."

	(b) In section 4,– (i) For sub-sections (1), (2), and (3), the following sub-sections shall be substituted, namely,— " (1) Subject to this provision, a parent or a senior citizen who cannot maintain themselves shall be entitled to make an application under section 5 of this Act. (2) A parent or grand-parent under sub-section (1) can make a claim for maintenance against their children: Provided that a step-parent can make a claim of maintenance from their step-child only if such step-parent is childless. (3) A childless senior citizen under sub-section (1) can make a claim of maintenance against their relative subject to section 4(A) of this Act." (ii) Sub-section (4) shall be omitted. (e) After section 4, the following section shall be inserted, namely,— "**4A.Duty of relative to maintain.–** (1) A person who is a relative of a senior citizen and who has sufficient means has an obligation to maintain them if such relative– (a) is in possession of the property of the senior citizen, or (b) will inherit the property of the senior citizen. (2) When more than one relative is entitled to inherit the property of a senior citizen, the maintenance shall be payable by such relative in the proportion to the share of property they inherit." (f) For section 9, the following section shall be substituted, namely,— "**Order for maintenance —**(1) If the children or relatives, as the case may be, neglect or refuse to maintain a senior citizen who is unable to maintain themselves, the Tribunal may, on

	being satisfied of such neglect or refusal, order such children or relatives to make a monthly allowance at such monthly rate for the maintenance of such senior citizen, as the Tribunal deems fit and to pay the same to such senior citizen as the Tribunal may, from time to time, direct. (1) While deciding an application for the maintenance of a parent or senior citizen, the Tribunal shall take into consideration (i) the income of the children or relative; (ii) the economic capacity and status of the parent or senior citizen; (iii) the standard of living of the parent or senior citizen; (iv) the reasonable needs of the parent or senior citizen to achieve holistic wellbeing, dignity and overall quality of life; (v) the provisions for food, clothing, shelter, etc. of the parent or senior citizen; (vi) the need for any medical attendance, treatment or care of the parent or senior citizen; or (vii) any other factors which the Tribunal may deem necessary based on the relevant facts and circumstances of each case." 6. In the Adoption Regulations, 2022,— (a) In regulation 2,– (i) For clause (4), the following clause shall be substituted, namely:— "'Parent' means a parent as defined under section 1(i) of Chapter II of this Code." (ii) For clause (26), the following clause shall be substituted, namely:—

	""step parent" means a person who is married to the parent of a child, but who is not the legal parent of such a child." (iii) For clause (27), the following clause shall be substituted, namely:— ""step parent adoption" means the process by which a person becomes the legal parent of the child or children of their spouse." (iv) After clause (23), the following clauses shall be inserted, namely:— "'*(23A)* 'Second parent adoption' means adoption as per Entry 6 of Schedule VI of these regulations. *(23B)* 'Single parent' means a person who is the only legal parent of the child.'" (v) After clause (25), the following clause shall be inserted, namely,— *(26)* 'Single parent' means a person who is the only legal parent of the child.' (b) After Entry 5 within Schedule VI, the following entry shall be inserted, namely:— "(6) Adoption of child or children by a second parent – In case of adoption of a child or children by a second parent the legal parents and second parent will have to register on the Designated Portal and provide relevant documents by uploading the same online through the Designated Portal as stated above in cases of in-country adoption alongwith: (1) At the time of registration, all requisite documents to be uploaded on the Designated Portal as stated above in cases of in-country Adoption [(1)-(9)] as required. (2) A recent photograph of the child or children to be adopted. (1) In case the child has a single parent, consent of the single parent to adoption by the second parent as per the format prescribed in Schedule xx.

	(2) In case the child has two legal parents, consent of both legal parents, the second parent adopting the child or children as provided in the Schedule xx of the Adoption Regulations along with relevant documents mentioned thereof. (3) Consent of the child to be adopted by the second parent if the child is of five years of age or above as per the format prescribed in Schedule xx. (4) Proof that both parents (legal parent and second parent) are in an acknowledged stable union. (5) Any other document as may be prescribed by CARA." (c) In regulation 5,– (i) For clauses (1), (2), and (3), the following clauses shall be substituted, namely:— "(1) The prospective adoptive parents shall be physically, mentally, emotionally and financially capable, they shall not have any life threatening medical condition and they should not have been convicted in criminal act of any nature or accused in any case of child rights violation. (2) Any prospective adoptive parent, irrespective of their marital status and whether or not they have biological children, can adopt a child subject to following, namely:- (a) the consent of both the partners for the adoption shall be required, in case of a married couple or an acknowledged stable union; (2) No child shall be given in adoption to a couple unless the prospective adoptive parents have a stable relationship for a period of at least two years except in case of relative or step-parent adoption. (3) The age of prospective adoptive parents, as on the date of registration, shall be counted for

	deciding the eligibility and the eligibility of prospective adoptive parents to apply for children of different age groups shall be as under:- (ii) For clause (5)-(9), the following clauses shall be substituted, namely:– "(5) In case of married couples and parties in an acknowledged stable union, the composite age of the prospective adoptive parents shall be counted." (6) The age criteria for prospective adoptive parents shall not be applicable in case of relative adoptions and adoption by step-parent. (7) The minimum age difference between the child and either of the prospective adoptive parents shall not be less than twenty-five years. (8) The prospective adoptive parents have to revalidate their Home study report after a period of three years. (9) The seniority of the prospective adoptive parents who have not received a single referral within three years shall be counted from their date of registration except those who have crossed composite years of one hundred ten years." 7. The Circular issued by the Central Adoption Resource Authority dated 16/06/2022 (Office Memorandum CARAICA013/1/2022) shall stand abrogated. 8. In the Surrogacy (Regulation) Rules, 2022, Rule 14 shall be omitted. 9. In the Indian Evidence Act, for section 112 following section shall be substituted, namely,– "**112. Presumption of Parentage -**

	(f) A person will be presumed to be the parent of the child if the child was born during the continuance of a marriage between the birth parent and such person, or within two hundred and eighty days after the dissolution of such marriage, the birth parent remaining unmarried. (g) A person will be presumed to be the parent of the child if they openly hold out the child to be their child and - (i) The legal parent of the child has consented to the person establishing a parent-like relationship with the child, (ii) They reside in the same household with the child, (iii) They contribute to the upbringing and maintenance of the child, and (iv) They have established a parent-like relationship of dependence and care with the child. (h) person who claims to be the parent of the child may – (i) apply for an amendment to be affected to the birth register of the child identifying such person as the parent of the child, if the legal parent consents to such amendment, or upon an order of the court; or (ii) apply to a court for an order confirming their parentage of the child. (i) This section does not apply to – (i) the parent of a child conceived through the rape with the child's birth parent; or (ii) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation under the Assisted Reproductive Technology (Regulation) Act, 2021. (j) A presumption of parentage under this section may be rebutted and competing claims to parentage resolved by a court of competent jurisdiction. **Explanation -** For the purpose of sub-section (a), marriage includes relationships in the nature of marriage as defined in Chapter I of this Code." 10. In the Registration of Births and Deaths Act 1969,–

	(a) After section 2(1)(e), the following section shall be inserted, namely – "2(1)(ea). Single parent means a parent who is the only legal parent of the child or is the only parent exercising parental responsibilities and rights in relation to the child on account of – (d) the death of the other parent; (e) desertion by the other parent; or (f) lack of interest shown in the affairs of the child by the other parent; (b) After section 15 of the Registration of Births and Deaths Act, 1969, the following section shall be inserted, namely,– **"15A. Modification of entry in the register of births and deaths** – (3) The Registrar may cause an entry in the register of births and deaths to be amended to allow a person to be named as the legal parent in respect of a child if - (c) A single parent has been named in the register as the only legal parent of the child and such parent consents to the person being named as the other parent of the child, or (d) A competent court has ordered that such person be named in the register as a legal parent of the child. **(2) For the purposes of subsection (1), an entry will be modified in the register of births and deaths within such time and in such manner as may be prescribed."**
	SECOND SCHEDULE Repeals *See section 78* 1. Divorce Act, 1869 - the whole

	2. Indian Christian Marriage Act, 1872 - the whole 3. Indian Succession Act, 1925 - Parts II, III, IV, and V 4. Parsi Marriage and Divorce Act, 1936 - the whole 5. Muslim Personal Law (Shariat) Application Act, 1937 - the whole 6. Dissolution of Muslim Marriages Act, 1939 - the whole 7. Hindu Marriage Act, 1954 - the whole 8. Special Marriage Act, 1954 - the whole 9. Hindu Succession Act, 1956 - the whole 10. Hindu Adoptions and Maintenance Act, 1956 - Chapter III 11. Hindu Minority and Guardianship Act, 1956 - the whole

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www.vidhilegalpolicy.in
Vidhi Centre for Legal Policy
A-232, Defence Colony
New Delhi – 110024
011-43102767/43831699
vidhi@vidhilegalpolicy.in