Model Code on Indian Family Law

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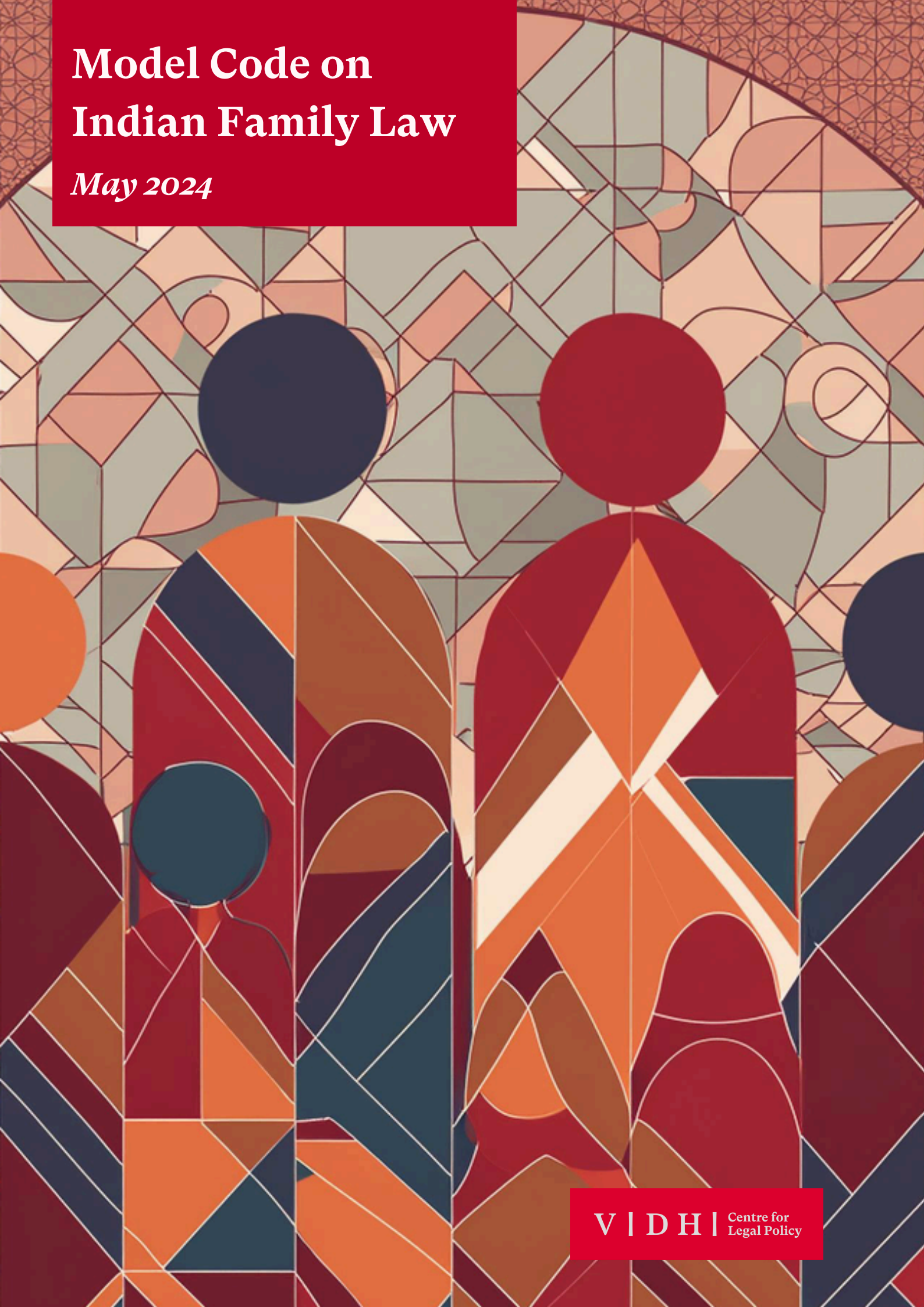

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Glossary

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+ - Lesbian, gay, bisexual, and transgender, and other identities that are not heterosexual or cis-gender

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 particular sexes or genders.

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

List of Abbreviations

Abbreviation	Full Description
ART	Artificial reproductive technologies
ART Act	Assistive Reproductive Technology (Regulation) Act, 2021
BMMA	Bharatiya Muslim Mahila Andolan
CARA	Central Adoption Resource Authority
CrPC	Code of Criminal Procedure, 1973
CWC	Child Welfare Committee
DMA	Dissolution of Muslim Marriage Act, 1939
DV Act	Domestic Violence Act, 2005
GWA	Guardians and Wards Act, 1890
HAMA	Hindu Adoptions and Maintenance Act, 1956
HMA	Hindu Marriage Act, 1955
HMGA	Hindu Minority and Guardianship Act, 1956
HSA	Hindu Succession Act, 1956
HUF	Hindu Undivided Family

IBM	Irretrievable breakdown of marriage
ICMA	Indian Christian Marriage Act, 1872
IDA	Indian Divorce Act, 1869
IPC	Indian Penal Code, 1860
ISA	Indian Succession Act, 1925
JJ Act	Juvenile Justice (Care and Protection of Children) Act, 2015
PAP	Prospective adoptive parents
PMDA	Parsi Marriages and Divorce Act, 1926
PRR	Parental Responsibilities and Rights
RCR	Restitution of conjugal rights
RNM	Relationships in the Nature of Marriage
SAA	Specialised Adoption Agency
SMA	Special Marriages Act, 1954
UCC	Uniform Civil Code
UUCC	Uttarakhand Uniform Civil Code

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Introduction

In July 2023, the Vidhi Centre for Legal Policy ('Vidhi') released a draft Model Code on Indian Family Law 2023[1] ('draft Code 1.0') which provided a first look at what a comprehensive, gender-just and inclusive family law regime in modern India could look like. This exercise was informed by the marriage equality case[2] before the Supreme Court of India ('Supreme Court') and the resurgence of debates around the Uniform Civil Code ('UCC') in light of the 22nd Law Commission inviting public comments on the need for it.

Draft Code 1.0 was an attempt to bring the conversation around family laws back to the issue of an inclusive and gender just legal regime to facilitate meaningful public consultation.[3] It also answered several fundamental questions about the nature of Indian family law asked by the judges in the marriage equality case. Draft Code 1.0 did not present itself as a majoritarian UCC but a progressive, secular and gender just family law code informed by constitutional values. It outlined in great detail the history and politics of the UCC and the debate surrounding it, and the relationship between constitutional law and personal laws while making a principle-based case for reform of family laws informed by constitutional values of equality, liberty, and dignity. The objective of the draft Code was to serve purely as a resource to ground public discussion and debate on family law reforms in India.

Framed in this way, draft Code 1.0 was not an attempt to equalise various personal laws, or "pick and choose" best practices from each of them. Instead, it sought to outline the contents of a gender just, inclusive, and progressive legal family law framework by: (a) reconceptualising the idea of the modern family; (b) laying down the principles that govern such family relationships and the role of the state in the family; and (c) translating these principles into legal provisions.

Public Consultations and Deliberation

Vidhi has been carrying out a series of consultations since the publication of draft Code 1.0. In addition to this, public comments were invited on the draft through platforms such as the Vidhi website, Twitter, and LinkedIn. Broadly, three types of consultations were carried out: first, open public consultations; second, consultations with specific groups; and finally, one on one consultations with specific individuals including academics, practitioners, and members of civil society. These consultations took various forms including: a clause-by-clause discussion on the Code, thematic discussions across various chapters of the Code, general conversations around core policy calls informing the Code, conversations involving lived experiences, and finally, conversations around family law reforms generally.

The first two consultations were hosted in a hybrid format in the cities of New Delhi and Bengaluru and were open to the public at large. These full-day consultations were attended by family law practitioners, scholars, and members of civil society, including representatives from the LGBT+ movement, persons representing interests of those in polyamorous relationships, as well as persons from the women's movement. The public consultations were followed by group consultations with queer persons in West Bengal organised in the office of Sappho for Equality,[4] and one-on-one consultations with Ms. Zakia Soman

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[1] Ayushi Sharma, Kartavi Satyarthi, et al., 'Model Code on Indian Family Law, 2023', Vidhi Centre for Legal Policy, available at <https://vidhilegalpolicy.in/research/model-code-on-indian-family-law-2023/> accessed 11 March, 2024.
[2] *Supriyo @ Supriya Chakraborty & Anr. v Union of India* 2023 SCCOnline SC 1348
[3] Ratna Kapur, 'The UCC: Feminist Interventions?', <http://feministlawarchives.pldindia.org/wp-content/uploads/18.pdf> accessed 11 July 2023.
[4] Sappho for Equality is a registered organisation in Kolkata, West Bengal that works for the rights and social justice of individuals with non-normative gender-sexual orientations, identities, and expressions, especially persons assigned gender female at birth.

(co-founder, Bharatiya Muslim Mahila Andolan), eminent scholar Dr. Tahir Mahmood (Chairperson and Head of Amity Institute of Advanced Legal Studies), Advocate Amrita Shivaprasad (Centre for Child and the Law, National Law School of India University, Bangalore), eminent scholar Dr. Faizan Mustafa (Vice-Chancellor, Chanakya National Law University), and Koyel Ghosh (Managing Trustee, Sappho for Equality).

The objective behind these consultations was to gather feedback from experts and interested members of the public around lived experiences, the reality of the day-to-day practice of family law, and the policy debates surrounding reform and modernisation. The feedback received at these consultations was key to informing further research and a shift in the policy for the purpose of drafting a second version of the Code i.e. **Code 2.0.** These consultations are reflected throughout the text of Code 2.0, and the detailed minutes of each are provided in **Annexure 2.**

While the feedback received at the consultations has been reflected in the commentary and provisions of Code 2.0, this section seeks to outline some of the prominent discussions that took place at the consultations and the responses to them.

First, one of the general comments at the public consultations concerned the principled questions that must precede an exercise that involves drafting a comprehensive family law code, namely the necessity of such a code and the merit of uniformity. It was pointed out that codification and reform of personal and customary laws may be a better alternative to a uniform comprehensive code, and it was possible for all classes of family laws to co-exist. In keeping with this, Code 2.0 does not deem uniformity as a necessary means to achieve equality and justice. Instead, it attempts to demonstrate how concerns of equality and justice may be reflected in a comprehensive family law regime, whatever form such a regime may take. Unlike draft Code 1.0, Code 2.0 does not repeal any personal laws, and similar to the first draft Code, it does not tamper with customary law. This is because Code 2.0 does not position itself as the ideal - the manner in which family laws must be reformed must be deliberated upon in a democratic fashion.

Second, the consultees spoke about the role of alternative dispute resolution mechanisms in addressing family law disputes. It was pointed out that draft Code 1.0's silence on dispute resolution processes and procedural provisions for the implementation of the law resulted in leaving out some parts of family laws that required reform. This concern was raised by practitioners who pointed to challenges associated with a multiplicity of jurisdictions under different family laws, inordinate delays, and challenges involving enforcement of orders. The decision to not reflect procedural provisions continues for Code 2.0. Research revealed very little empirical and theoretical literature concerning procedural aspects of family laws. This lack of research made it challenging to conceptualise an informed procedural framework or recommendations to change existing procedural law. Recommending changes to procedural law requires a comprehensive stand-alone exercise, grounded in empirical research, which was and continues to be beyond the scope of this Code. However, in response to recommendations from practitioners, Code 2.0 houses additional provisions that encourage alternative dispute resolution mechanisms such as mediation and conciliation and recognises the role of competent professionals in assisting courts.

Third, there emerged the issue of atypical family arrangements. While several agreed that family laws must include atypical intimacies, differences of opinion existed when it came to the manner in which they can be included. This pertained largely to the formulation concerning the concept of 'stable unions' in draft Code 1.0, which enabled two persons who were in an intimate relationship to be legally recognised as a union for the purpose of family laws. Unlike marriage, a stable union need not be marital, sexual, or romantic, thus enabling legal recognition of a diversity of intimacies. Such a demand has been voiced time and again, including in a petition[5] filed by a group of queer-feminists during the marriage equality hearings. While

[5] Rituparna Borah & Ors. v Union of India, available at <https://www.scobserver.in/journal/going-beyond-marriage-a-case-for-relational-equality/#:~:text=The%20Rituparna%20Borah%20petition%20was,by%20marriage%2C%20birth%20or%20adoption.>accessed on 11 March, 2024.

agreeing with the principle for legal recognition of such intimacies, concerns were raised about the formulation of 'stable unions'. Criticisms included stable unions mirroring marriage as it continued to focus on dyadic relationships and imposed monogamy as a condition for legal recognition. Further, as draft Code 1.0 permitted persons in marriages to enter into stable unions as well, concerns were raised about such provisions being misused for the purpose of legitimising de-facto bigamous relationships. Code 2.0 continues to retain the concept of 'stable unions'. Legal recognition of intimate relationships that are not marital, romantic, or sexual, allows for the idea of a family to be informed by values of mutual care and dependence instead of merely status-based categories such as marriage. Such a policy focuses on the function as opposed to the form of the family. The concerns relating to de-facto bigamous marriages are addressed by introducing a condition for the existence of a valid stable union, i.e., neither of the parties should be in a valid subsisting marriage. A nomination clause was also present in draft Code 1.0, which allowed stable union partners to nominate each other for decision-making and benefits that are otherwise available only to natal or marital family members. It was suggested during the consultations that it may be beneficial to allow individuals to nominate more than one person under the nomination provision. The earlier formulation is however being retained due to concerns regarding abuse and exploitation. Allowing persons falling outside the purview of stable unions to be nominated for different purposes such as financial decision-making leaves scope for unregulated nominations made through coercion, fraud, or undue influence. Accordingly, under Code 2.0 as well, nomination is allowed to be made only between intimated stable union partners.

Fourth, it was pointed out that some provisions of draft Code 1.0 may not be practically implementable in the current socio-economic context in India. Practitioners shed light on technical issues such as the sensitisation of judges in Tier II and III cities. Others spoke about how policy calls such as removal of prohibited degrees of relationship, a comprehensive regime for stable unions, and rights for polygamous partners may not find social sanction. In light of this, it is important to clarify that the Code is envisaged as a progressive, aspirational document. The law, in such cases, while laying down a regulatory framework also serves the additional purpose of propelling social acceptance. Importantly, lack of social sanction cannot be a ground for denial of rights to groups who are marginalised and may thus have enjoyed limited or no visibility under the law. In fact, history bears testament to staunch opposition to progressive measures in favour of such marginalised groups, which only serves to more strongly underscore the role of the law in ensuring equity. For example, in the debates on the Hindu Code Bill, multiple parliamentarians opposed property rights for daughters on the ground that it would be unacceptable in a patriarchal and patrilocal society like ours where daughters become part of a different family unit.[6] It is recognised that change may be incremental and that the provisions proposed here may not immediately be fully implemented. However, it could still serve to lay down the blueprint for an equitable society and as a driver of social change.

Finally, unlike draft Code 1.0, Code 2.0 has a chapter on Testamentary Succession. The first draft did not touch upon testamentary succession but introduced a provision for digital wills, and emergency wills for everyone. The rationale for introducing a new chapter on testamentary succession is informed by the fact that the Indian Succession Act, 1925 ('ISA'), which governs testamentary succession in India, presents a cumbersome and overly prescriptive framework for the law on wills. The unwieldy and rigorous procedures prescribed by the ISA often make it difficult for the common person to draft, register, and execute a valid will in India. Over-prescription, in the form of 300 odd provisions in the ISA has compromised the efficiency of testamentary law without serving any legitimate policy objective. In light of this, a new chapter on Testamentary Succession has been added to Code 2.0.

In addition to the above, feedback was received for each chapter and the underlying policy calls informing them, as well as the formulation of individual clauses. Where a change has been reflected, commentary has been provided in the respective sections under the relevant chapters. We are grateful to everyone who took

[6] *Dr. Babasaheb Ambedkar: Writings and Speeches* (Vol. 14, Part I, Sections I to III) 4.

the time to engage with draft Code 1.0 and provided us with detailed feedback. Like draft Code 1.0, this Code too continues to be open to further feedback.

Code 2.0

Code 2.0, namely, the **Model Code on Indian Family Law, 2024,** hopes to serve as a definitive resource for public debate and discussion around family law reforms in India. It does not position itself as the only way ahead for family law reforms. The manner in which family law reforms must be achieved, be it codification of personal laws, a comprehensive (opt-in or opt-out) code, or reforms through strategic litigation is a decision that must be arrived at democratically and through thorough debate and deliberation in a transparent manner. Instead, Code 2.0 seeks to provide an illustration of the manner in which some pressing concerns for family law reforms can be reflected in legislation. It also seeks to place in the public domain the extensive deliberations and debates that took place in the course of consultations so that the same can be accessed when debating critical issues surrounding family laws in India.

Two major developments also informed Code 2.0. First, the Supreme Court delivered its much-awaited judgement in the marriage equality case[7] on October 17, 2023. The judgement was delivered with a 3:2 majority with both the majority and minority denying marriage equality on the ground that such wide sweeping legislative changes to guarantee a right to marry for queer persons was the domain of the legislature and not the judiciary. While the minority (Chandrachud J. and Kaul J.) recognised a fundamental right to form a civil union and struck down certain adoption regulations that denied unmarried couples a right to adopt, the majority disagreed. However, all judges were unanimous on the following: there is no fundamental right to marry under the Constitution of India; transgender persons and persons with intersex variations who are in heterosexual relationships can marry under both secular and personal marriage laws; and finally, it is up to the Parliament and the state legislatures to extend the legal framework for marriage to same sex/gender couples. The outcome of this case has pushed the ball to enable marriage equality into the domain of the legislature and thus necessitates an exercise either in the form of amendments to existing family laws or a new set of family laws which are queer inclusive. This is because, as made clear by the Court, any recognition of the right to marry has to be followed by a comprehensive reform of Indian family laws.

Second, the Uttarakhand Legislative Assembly passed the Uttarakhand UCC ('UUCC') in February 2024 which is now in force in the State. Since the UUCC is meant to test the waters at the state level, it can reasonably be viewed as a template for a nation-wide exercise in unifying family law under the same umbrella. While the UUCC makes some welcome strides in the area of succession by guaranteeing men and women equal rights, it falls short of its own purported goals of **Uniformity** and **Gender Justice**. Starting with the more overarching and titular goal of uniformity, the UUCC only unifies the law in certain areas, still retaining, or even creating, disparate regimes in other areas. For instance, it remains silent on adoption and retains a divided regime through the Hindu Adoptions and Maintenance Act, 1956 and adoption under the secular Juvenile Justice (Care and Protection of Children) Act, 2015. Further, it continues with *status quo* by retaining weak regimes for maintenance after divorce and outdated guardianship laws which discriminate based on sex. The UUCC also restricts individual autonomy through its paternalistic regime on consensual live-in relationships which mandates registration for live-in couples, and relies on criminalisation for its enforcement. Code 2.0 notes this and attempts to present an alternative.

Similar to draft Code 1.0, Code 2.0 continues to centre the constitutional values of equality and non-discrimination, liberty and dignity, and inclusion as its core informing principles. It comprises the following three chapters:

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

[7] *Supriyo @ Supriya Chakraborty & Anr. v Union of India* 2023 SCCOnline SC 1348.

marital and non-marital unions is recommended (through the concept of stable unions). 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. **Code 2.0** does not have a separate category for relationships in the nature of marriage ('RNM') and RNMs are to be subsumed within stable unions or marriage, as the case may be. Certain other policy shifts have been made in Code 2.0. The cooling-off period for divorce by mutual consent has been re-introduced in light of public consultations. However, the nature of prescription has been changed from 'default' to 'court discretion'. Stable unions are not allowed to co-exist along with a subsisting marriage, under Code 2.0, so as to discourage de-facto bigamous marriages through the route of stable unions.

Chapter 2: 'Parent Child Relations' recommends a draft framework for regulation of parent-child relations. Like draft Code 1.0, it provides for an expansion of parenthood independent of a person's marital status, gender identity, and sexual orientation, and extends legal recognition to functional parenthood, i.e., parenthood defined by intent to parent as opposed to only genetic or marital links. *Second*, 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. *Third*, 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 is protected. **Code 2.0** reflects certain new features as well, in the form of a modern custody regime, the introduction of rigorous safeguards to protect children, and a new formulation of best interests of the child principle based on parental conduct as opposed to parental capacity or potential.

Chapter 3(A): 'Succession' proposes a framework on succession and inheritance. The proposed framework eliminates prevalent gender discrimination which is otherwise reflected in state-level laws. It does not retain the concept of coparcenary property and Hindu Undivided Families (HUFs) and extends the benefit of intestate succession to different kinds of family structures, i.e., those not based solely on ties through blood and marriage. It also 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. Informed by consultations and lived experiences, **Code 2.0** reserves compulsory shares for the children of the deceased to protect them from disinheritance due to factors such as their gender identity or sexual orientation.

Chapter 3(B): 'Testamentary Succession" presents a scheme to modernise the law of testamentary succession in India. While draft Code 1.0 did not tackle this issue, Code 2.0 does. The proposed scheme replaces the over-prescriptive, formalistic, and cumbersome scheme of the ISA with a simpler, accessible, rational, and actionable law on wills. This law is easier to navigate both for laypersons who can make wills with greater ease, and also by lawyers and judges who can give effect to them with greater efficiency. The scheme also recognises digitally made and virtually witnessed wills. It also extends the privilege of privileged wills to a wider class beyond active servicepersons to include those who are caught in the throes of a natural disaster. Overall, it seeks to both promote and facilitate the making of wills and the disposition of property by testamentary means.

Code 2.0 is presented as a modern and inclusive family law regime which the public can deliberate on, and legislatures can adopt as a progressive statute in tune with the realities of 21st Century India.

Governing Principle

Governing Principle for this Code: Equality and Non-discrimination

Context:
The Constitutional values informing this Code are: Equality and Non-Discrimination, Liberty and Autonomy, and Dignity. As discussed earlier, family laws in India are fraught with discrimination. Such discrimination is present not only in the text of the law as evident with provisions that discriminate on the basis of sex, gender identity and sexual orientation, but often in the manner in which family laws are operationalised by those responsible for their implementation. Further, such discrimination may not only be direct, but may also rear its head in an indirect manner. For instance, the 2017 CARA (Central Adoption Regulation Authority) Regulations on Adoption, require that a couple must be in at least two years of stable marital relationship to be able to adopt a child.[8] While this regulation prevents all unmarried couples and couples who have been in less than 2 years of marriage from adopting a child, it disproportionately affects queer couples as family laws currently do not permit marriage between same-sex/gender persons. Such practices may also become apparent in cases where same-sex/gender couples seek to register their marriage or apply for adoption wherein authorities responsible for registration and determination fitness of prospective adoptive parents respectively may act in a discriminatory manner in refusing or processing such applications. Such concerns have also been highlighted during consultations on draft Code 1.0 wherein it was pointed out that despite a progressive and inclusive legal framework, the on-ground implementation of family laws through various actors will inevitably involve discriminatory or exclusionary practices and behaviour.

Discrimination is prohibited by the State under Article 15(1) of the Constitution on grounds of religion, race, caste, sex, and place of birth.[9] Article 15(2) prohibits discrimination on these grounds in relation to access to shops, public restaurants, hotels and places of public entertainment, or the use of wells, tanks, bathing ghats, roads and places of public resort maintained or dedicated for public use by the State. Article 16(2) prohibits discrimination in employment, on grounds of religion, race, caste, sex, descent, place of birth or residence. These Constitutional provisions provide a general guarantee against discrimination to all citizens on limited grounds in specific practices or acts. While Article 15(1) prohibits discrimination in any act or practice, the protection is provided only against the acts of State. On the other hand while Article 15(2) and 16(2) provide protection against discriminatory acts of individuals, their scope is limited to matters such as public employment and access to public resources.

Discrimination law in India presently faces a number of challenges in that it does not address indirect discrimination and does not account for unlisted grounds of discrimination.[10] Further, the Constitutional mandate on non-discrimination is interpreted by the Courts in a varied manner. This may range from an absolute prohibition on any form of discrimination on the listed grounds, to differentiation being permissible, where the State's identified objective is better achieved through a reasonable classification.[11] Some modern interpretations, however, are moving towards prohibiting actions that aggravate the group disadvantages suffered by an already disadvantaged section of society.[12] Such variation in interpretations allows *prima facie* discriminatory acts or policies to be justified in law. In addition to this, uncodified personal laws and religious customs enjoy special immunity from judicial review. These existing challenges make it essential to

[8] Regulation 5(3), CARA Adoption Regulations, 2017.
[9] Article 15(1), Constitution of India, 1950.
[10] Lalit Panda and Husain Aanis Khan, 'The State Shall Not Discriminate: A Roadmap for The Right Against Discrimination in India' (2023), Vidhi Centre for Legal Policy, available at https://vidhilegalpolicy.in/wp-content/uploads/2023/06/The-State-Shall-Not-Discriminate_Charkha-1.pdf. Last accessed on April 26, 2024.
[11] Ibid at p. 9.
[12] Ibid. at p. 9.

undertake an examination of the effects and impact of this Code on family laws from the lens of discrimination and provide consequent broad protection against discrimination. In matters of personal relationships including through marriage, traditional and non-traditional family structures and ownership of property based on relationships, discrimination may take place on grounds not listed under the Constitution. It can also take place through specific acts or policies not covered within the scope of the non-discrimination provisions of the Constitution.

The Code, in its explicit provisions makes an attempt to diminish various forms of discrimination through law. Equal inheritance rights are available to everyone irrespective of gender or sex. Similarly, access to parenthood is available to everybody irrespective of their gender, sexual orientation or marital status.

Certain distinctions have been identified which may fall within the listed grounds of caste, sex, gender, sexual orientation, religion, place of birth or marital status. For instance, different norms have been prescribed for individuals in a marriage, and individuals in a stable union. The regime on division of matrimonial property, discussed in Chapter 1, is applicable only for parties to a marriage. This distinction is based on the fact that the intrinsic nature of the two kinds of relationships is different and require separate forms of regulation. While the former is marriage as traditionally understood, the latter which has gained visibility in the law only in recent times, makes space for a plurality of intimacies beyond marriage. Therefore, circumstances where different norms for different classes may be justified have been identified and codified in the Code.

Accordingly, there is a need to emphasise non-discrimination as a guiding principle in any law dealing with personal relationships and families and their interactions with society. A non-discrimination provision must provide meaningful protection for the equality, liberty and dignity of an individual.[13]

Proposed Step:
A non-discrimination clause is being provided which prohibits:

(a) Direct and indirect discrimination
(b) Discrimination on the grounds of caste, sex, gender, sexual orientation, religion, place of birth or marital status.
(c) Discrimination by officers of government which covers a wide net to capture all actors who perform functions or exercise powers under the Code.

Additional grounds such as sexual orientation and marital status have been recognised as plausible grounds on the basis of which a person may be discriminated against. These grounds have been identified as relevant to the scope of this Code as specific groups within these "universal orders"[14] are likely to face substantial relative disadvantage in comparison with the other group(s) in the same order[15]. Officers of government who perform functions or exercise powers under this Code have been identified as actors whose discriminatory act or behaviours are prohibited. This is to limit the scope of the clause to discriminatory actions that may take place in implementation of this Code.

The provision is aimed at being a guiding principle in implementation of the Code. Every act or policy that may arise out of the provisions of this Code must be informed by the principles of equality and non-discrimination. The provision may function as an aid in implementation as well as interpretation of the

[13] Lalit Panda and Husain Aanis Khan, 'The State Shall Not Discriminate: A Roadmap for The Right Against Discrimination in India' (2023), Vidhi Centre for Legal Policy, p. 7, available at https://vidhilegalpolicy.in/wp-content/uploads/2023/06/The-State-Shall-Not-Discriminate_Charkha-1.pdf. Last accessed on April 26, 2024.
[14] Khaitan identifies that grounds can exist in two orders – a universal order and a particular order. In the universal order, a ground applies to all individuals, while in a particular order, different instances of a universal ground apply to different individual. For example, while sex is a universal order ground, maleness is a particular order instance of sex. (Tarunabh Khaitan, A Theory of Discrimination Law, Oxford University Press (2015), p. 29.)
[15] For example, queer individuals in comparison with individuals who are cis-gendered and heterosexual in the universal order of sexual orientation, and unmarried individuals in comparison with married individuals in the universal order of marital status.

provisions of the Code. Therefore, while implementing and interpreting this Code, the intent of the provisions must be given preference over the guiding principle.

1. Non-Discrimination.-
No person shall be discriminated against under this Code on the ground of caste, sex, gender, sexual orientation, religion, place of birth, or marital status by any officer of the government performing any functions or exercising any powers.

Chapter I:
Adult Unions

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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 intimacies that may go beyond the traditional notions of families and may be non-marital, non-romantic, or non-natal in nature.

Law on Adult Unions in India

Marriages and adult personal relationships in India are governed by the Hindu Marriage Act, 1955 ('HMA'), the Indian Christian Marriage Act, 1872 ('ICMA'), the Indian Divorce Act, 1869 ('IDA'), the Parsi Marriages and Divorce Act, 1926 ('PMDA'), the Special Marriage Act, 1954 ('SMA') and codified and uncodified Muslim Personal laws. Codified Muslim Personal laws are in the form of the Muslim Personal Law (Shariat) Application Act, 1937 ('Shariat Act'), the Dissolution of Muslim Marriages Act, 1939 ('DMMA'), the Muslim Women (Protection of Rights on Divorce) Act, 1984 (Muslim Women Divorce Act'), the Muslim Women (Protection of Rights on Marriage) Act, 2019 ('Muslim Women Marriage Act'). The SMA is the secular law on marriages and divorce. Additionally, vulnerable parties in a marriage find recognition and protection through provisions in the Protection of Women from Domestic Violence Act (Domestic Violence Act), 2005 ('DV Act'), and section 125 of the Code of Criminal Procedure, 1973 (section 125 Cr.Pc.) Relationships that do not technically fall within the folds of marriage are also recognised as "domestic relationships" through the phrase "relationships in the nature of marriage" in the DV Act.

The legal framework around adult relationships and marriage is largely geared towards a heteronormative understanding of society with fixed ideas of gender roles. A marriage can take place between a biological man and a biological woman. The Supreme Court, recently, in *Supriyo Chakraborty and Ors. v. Union of India (Supriyo)*,[16] ruled against the existence of a fundamental right to marry under the Constitution of India. However, it was recognised that the legislature has the competence to ensure queer inclusivity and extend a statutory right to marry non-heteronormative unions involving persons of the same sex/gender. In *Deepika Singh v. Central Administrative Tribunal*,[17] the Supreme Court also recognised family structures that may not be typical and that may take the form of unmarried partnerships or queer relationships. Accordingly, in this Chapter, an attempt is being made to recognise all classes of adult unions including non-heterosexual unions in marital as well as non-conjugal relationships, non-sexual, and non-romantic relationships, in the form of 'stable unions', for persons of all genders and sexual orientations. Certain aspects of the law on marriage and divorce also take a patronising tone leading to over-regulation. The onerous processes required to be followed to end a marriage through divorce is an example of the same. Thus, this Chapter attempts to introduce provisions that respect the autonomy and dignity of individuals in adult relationships.

Policy Shifts in Code 2.0

Draft Code 1.0 addressed reform for laws on adult-unions by recognising a statutory right to marry for all persons, irrespective of gender identity or sexual orientation. It also extended legal recognition to non-conjugal intimacies by introducing the concept of stable-unions. In matters of maintenance, it recognised vulnerability of the party, as opposed to only gender identity, as the critical consideration and prescribed factors to this end. It also introduced the concept of matrimonial property to ensure robust economic

[16] 2023 SCC OnLine SC 1348.
[17] 2022 SCC OnLine SC 1088.

protections for vulnerable parties post the dissolution of marriage. Code 2.0 continues to reflect these features. However, in light of the feedback received at the consultations and research in pursuance of the same, the following major policy[18] shifts can be witnessed in Code 2.0:

1. **Cooling off period for divorce:** The HMA and the SMA prescribe a minimum cooling off period of 6 months between filing of the first motion for divorce and the second or final motion for divorce. In draft Code 1.0, the requirement of such a cooling off period was removed. However, during consultations, it was observed that parties to marriage may often wish and choose to get back together after filing for divorce. Therefore, in Code 2.0, a policy shift is being undertaken from the existing position of law as well as from draft Code 1.0. A provision has been introduced that provides that cooling off period may be suggested by court in certain cases where it appears that there is a possibility of reconciliation, and not as a matter of default.

2. **Existence of a stable union and marriage simultaneously:** The conditions for a valid stable union, as formulated under draft Code 1.0 did not include the condition of being unmarried at the time of entering into or intimating a stable union. It has been pointed out during consultations that this may encourage parties in a marriage to fraudulently enter into a stable union without informing the other party in the stable union of their marriage and vice versa. Accordingly, in Code 2.0, "neither of the parties is in a subsisting marriage" is being introduced as a condition for being able to enter into a stable union. However, concerns may be raised around the protection of vulnerable parties who may have entered into a stable union with a married party despite the prohibition under this Code. To address this concern, a provision is being added clarifying that where a stable union has not been intimated to the registering officer, and the parties have approached the court for determination of a stable union, the court may decide that the relationship is a stable union despite the existence of a subsisting marriage. Thus, although parties in a marriage are not permitted to enter into a stable union under the scheme of the Code, protections such as maintenance may still be extended to parties who are in a de-facto stable union beyond the scheme of this Code. Additionally, relationships that may be entered into during the subsistence of a valid marriage may also be recognised as a "relationship in the nature of marriage" if the conditions for recognition of a "relationship in the nature of marriage" are fulfilled.

3. **Relationships in the nature of marriage:** In draft Code 1.0, three categories of relationships were being sought to be recognised and regulated: marriages, relationships in the nature of marriage, and stable unions. The provisions on relationships in the nature of marriage ('RNM') recognised certain relationships that display all major socio-legal characteristics of a valid marriage but fall short of marriage due to non-performance or incomplete performance of the ceremonies of marriage, including registration of marriage. These relationships were recognised as a sub-category of marriage under the draft Code 1.0 and all rights flowing from marriage, including maintenance, matrimonial property and inheritance were extended to RNMs, with the presumption of a marriage. The aim behind recognising and regulating RNMs in this form was to protect vulnerable parties who may be left without recourse due to non-recognition. Stable unions on the other hand, were introduced with the dual aim of recognising non-conjugal and atypical intimacies to allow access to benefits otherwise available to family members, as well as the protection of vulnerable parties in relationships (romantic or otherwise), not resembling marriage. Rights of maintenance and inheritance were available to parties in a stable union. Inheritance shares available to stable union parties were to be determined through court discretion. In Code 2.0, RNMs have been merged into the category of stable unions and similar rights have been extended to parties in a stable union as well as an RNM. This is to alleviate any confusion arising out of multiple categories of relationships in law, which may lead to uncertainty of regulation. Fixed shares in inheritance have also been extended to stable union partners in Code 2.0.

[18] Minor policy shifts have not been discussed in this Part and are instead reflected in the draft law directly.

4. **Custody of children on dissolution of stable unions:** Dissolution of stable unions may be at the instance of either of the parties to the stable union. However, there may be situations where the parties were jointly the parents of a child during the subsistence of the stable union. Code 2.0 proposes a provision for determination of the custody plan for any such minor child through court proceedings. This provision has been inserted to safeguard the interests of any child and ensure that a parent is responsible for the care, custody, and maintenance of the child even on separation, or dissolution of the stable union.

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.
Sub-Part 2: Matrimonial Remedies
● Moves towards no-fault theory of divorce by recognising 'irretrievable breakdown of marriage' as a ground for divorce. ● 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 chosen and atypical relationships. ● Extends the right to maintenance to Stable Unions. ● Enables the Stable Union Partners to nominate each other as legal representatives, and for the purpose of accessing benefits. ● Provides statutory recognition to non-marital relationships which may or may not be in the nature of marriage and codifies protections by providing the right to maintenance.

2. Definitions.-

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

(a) "**Acknowledgement Letter**" means a document issued by the Relationship and Marriage Officer under section 26(2);

(b) "**Certification of Registration**" means a certificate issued by the Relationship and Marriage Officer under section 5 or section 7 of this Code;

(c) "**Court**" 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) "**extra-legal marriage**" means a marriage that is void under this Code due to one or both of the parties being in a subsisting valid marriage;

(e) "**extra-legal stable union**" means a relationship that has been recognised as a stable union by a decree of Court despite existence of a subsisting valid marriage or subsisting stable union, in accordance with section 29(4);

(f) "**intimation**" means notification of the existence or the intention to be in a stable union to the Relationship and Marriage Officer, in accordance with the procedure specified under section 26 of this Code;

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

(h) "**Memorandum of Marriage**" means a document containing the details set out in Form A, submitted to the Relationship and Marriage Officer for the purpose of registration of marriage in accordance with section 4 of this Code;

(i) "**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;

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

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

(l) "**Stable Union**" means and includes any relationship intimated as a Stable Union under section 26, or recognised as a stable union by a decree of Court under section 29; and

(m) "**spouse**" in relation to a party to a marriage means the other party to the marriage.

(2) Despite anything contained in sub-section (2)(m) 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(1) 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 irrespective of gender identity or sexual orientation.

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 SMA specifies the minimum age for valid solemnisation of marriage as 18 for 'female' and 21 for 'male'.[19] Similarly, the HMA uses the words 'bride' and 'bridegroom' to specify the minimum age requirements.[20] The provision for prohibited relationships under the SMA relies on the male and female family line to define the degrees of prohibition.[21] Furthermore, both these laws and other personal laws like the ICMA,[22] the IDA,[23] and the PMDA[24] 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 the social and economic rights that are conferred to spouses. Further, due to the non-recognition of queer marriages, queer couples often resort to informal arrangements such as live-in relationships[25] and *Maitri Karars*,[26] which heightens their vulnerabilities by making them susceptible to unnecessary interference and harassment at the hands of their natal families and the society at large as well as to power differentials within the relationship. There are various cases where queer couples have had to resort to court protection to safeguard their life and liberty.[27]

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[19] The Special Marriage Act, 1954, s.4(c).
[20] The Hindu Marriage Act, 1955, s.5(iii).
[21] The Special Marriage Act, 1954, s.2(b) read with Schedule 1.
[22] For instance, Section 60 of the Indian Christian Marriage Act, 1872 uses the terms 'man' and 'woman'.
[23] For instance, Section 10 of the Divorce Act uses the terms 'husband' and 'wife'.
[24] For instance, Section 3(1) of the Parsi Marriage and Divorce Act, 1936 uses the terms 'male' and 'female'.
[25] 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.
[26] '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.
[27] *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.

Thus, the non-recognition of queer marriages and exclusion on the ground of sexual orientation is not only discriminatory[28] but is also violative of their right to choice of partners,[29] right to privacy,[30] right to freedom of expression[31] and the right to autonomy and dignity.[32] Keeping in view the social realities, the jurisprudential developments and the mandate of recognising self-determined gender identities,[33] and the Supreme Court's recognition of the State's prerogative to extend marriage equality to non-heteronormative unions,[34] 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 HMA specifies the minimum age for valid solemnisation of marriage as 18 for women and 21 for men.[35] A similar eligibility standard is set under the Christian,[36] Parsi,[37] and Secular Law.[38] 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[39] years.[40] The Child Marriage Restraint Act, 1929 ('1929 Act'), prescribed the minimum age of marriage as 14 for women and 18 for men which was subsequently raised to 15 for women in 1949.[41] The 1929 Act was again amended in 1978 to raise the minimum age to 18 and 21 for women and men respectively. The 2006 Act has retained the same age till now.[42]

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.[43] Given that marriage has traditionally been seen as a site of procreation and sexual relations, factors such as puberty and the ability to consummate marriage heavily influenced the determination of the minimum age.[44] The primary focus of age of marriage legislations has been to address the concerns associated with early consummation of marriage.[45] Consequently, there has been little to no focus on the intellectual capacity necessary to provide an informed consent to marriage.

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[28] *National Legal Services Authority v Union of India* (2014) 5 SCC 438; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.
[29] *Shafin Jahan v Asokan KM*, (2018) 16 SCC 368.
[30] *K.S. Puttaswamy v Union of India*, (2018) 1 SCC 809.
[31] *Shakti Vahini v Union of India* (2018) 7 SCC 19.
[32] *Navtej Singh Johar v Union of India*, (2018) 10 SCC 1.
[33] *National Legal Services Authority v Union of India* (2014) 5 SCC 438.
[34] Supriyo v Union of India, 2023 SCC OnLine SC 1348.
[35] The Hindu Marriage Act, 1955, s 5(iii).
[36] The Indian Christian Marriage Act, 1872, s.60.
[37] The Parsi Marriage and Divorce Act, 1936, s 3(i)(c).
[38] Special Marriage Act, 1954, s 4(c).
[39] A person can be contracted in marriage even before the attainment of puberty but with the consent of guardians.
[40] Mulla, *Principles of Mahomedan Law*, (Lexis Nexis, 23rd ed., 2021) 403-404.
[41] Child Marriage Restraint Act, 1929, s.2(a).
[42] Prohibition of Child Marriage Act, 2006, s.2(a).
[43] 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.
[44] 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.
[45] Ishita Pande, *Sex, Law and the Politics of Age- Child Marriage in India, 1891-1937* (Cambridge University Press 2020).

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.[46] Such gender-based disparity is discriminatory and directly impinges upon the right to equality of women.[47]

To address this discrimination and to curb child marriages, there have been recommendations to increase the minimum age for women from 18 to 21.[48] The Prohibition of Child Marriage (Amendment) Bill, 2021, also reflected this upwards revision in age.[49] 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.[50] 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.[51] 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 will also uphold the spirit international standards[52] set by the Convention on the Rights of Child,[53] and the Convention on Elimination of Discrimination Against Women[54], which recognise children as any human being below the age of eighteen years. Further, keeping in view the social realities, declaring child marriages as being void *ab initio* will create unintended consequences and therefore the marriage will 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?

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[46] '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.
[47] *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.
[48] 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>.
[49] The Prohibition of Child Marriage (Amendment) Bill, 2021, <https://prsindia.org/billtrack/the-prohibition-of-child-marriage-amendment-bill-2021> accessed 11 July 2023.
[50] *Shafin Jahan* v *Asokan KM*, (2018) 16 SCC 368.
[51] Section 3, The Majority Act, 1875.
[52] 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
[53] 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.
[54] 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/kUIvD9NSGzJ0qw> accessed 11 July 2023.

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

Context:
Bigamy is prohibited and punishable under the SMA[55] as well as the HMA.[56] A marriage between two persons where any of the parties is already married, is void.[57] ICMA prescribes that none of the parties to a marriage should have a living husband or wife for a valid certification of marriage.[58] 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.[59] Under Muslim law, polygyny is permissible but polyandry is prohibited.[60] The Quran and Hadith allow for polygamy but only under highly restricted conditions.[61] 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[62] under Hanafi law and void under Shia law.[63] 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.[64] Therefore, while not expressly prohibited, polygamy is discouraged under Islamic law and jurisprudence.[65]

There has been a consistent call for prohibiting polygamy and establishing monogamy as a mandate across all personal laws.[66] The 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.[67] Similarly, Sucheta Kriplani highlighted that in order to ensure the ideal of equality, the state should not have different sets of moralities for men and women and thus prescription of monogamy is a step in the right direction.[68]

This disapprobation against polygamy mainly stems from the fact that polygamy creates an asymmetry of power within a union and is oppressive for women.[69] Moreover, since polygamy as practised in India is exclusively exercised by men, the system is structurally inegalitarian.[70] 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

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[55] Special Marriage Act, 1954, s 44 r/w Indian Penal Code, 1860, ss 494 & 495.
[56] Hindu Marriage Act, 1955 s.17 r/w Indian Penal Code, 1860 ss 494 & 495.
[57] Special Marriage Act, 1954, s 24(1); Hindu Marriage Act, 1955, s.5(1).
[58] Indian Christian Marriage Act, 1872, s 60(2).
[59] Parsi Marriage and Divorce Act, 1936, ss 4(1) and 4(2).
[60] Mulla, *Principles of Mohamedan Law* (23rd edn, Lexis Nexis, 2017) section 391.
[61] 'An-Nisa', Chapter 4, Holy Quran, translation <https://tanzil.net/#trans/en.sahih/4:1> accessed 11 July 2023
[62] 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.
[63] Dinshaw Fardunji Mulla, *Principles of Mohamedan Law* (23rd edn, Lexis Nexis 2017).
[64] '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).
[65] Tahir Mahmood, *Family Law in India* (1st edn, Eastern Book Company).
[66]'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.
[67] 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.
[68] 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.
[69] *See generally:* Thom Brooks, 'The Problem with Polygamy' 37 Philosophical Topics <https://www.jstor.org/stable/43154559> accessed 11 July 2023
[70] '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.

250 women conducted across 10 states,[71] it was found that in majority of the cases, the wives' consent was not sought[72] and in most cases, the wife was not even informed about the second marriage.[73] Furthermore, the study highlighted that more than half of the women in polygamous marriages suffered from mental health issues and psychological distress.[74] Studies have also shown that women in polygamous marriages are extremely susceptible to violence by their intimate partner.[75]

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,[76] it could be a critical first step to ensure equality within marriages.

Keeping in view the current realities,[77] 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, courts must continue to recognise the rights of women by giving a broad interpretation of the term 'wife'.[78] 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. Additionally, the rights of the second wife to seek maintenance have been codified under clause 18 of this Code, statutorily providing for maintenance to second wives based on court discretion.

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.

Issue: *What should be the law on prohibited degrees of relationship?*

Objective: To remove the legal prescription on prohibited degrees and instead leave regulation to social norms.

Context: 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

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[71] 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.

[72] 90% of the cases, as noted in 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.

[73] 76% of the cases, as noted in 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.

[74] 51% of the cases, as noted in 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.

[75] 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.

[76] 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.

[77] '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.

[78] *Badshah v Urmila Badshah Godse* (2014) 1 SCC 188; *Chanmuniya v Virendra Kumar Singh Kushwaha* (2011) 1 SCC 14.

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.

Proposed Step:
A provision which ensures everyone can enter into a marriage irrespective of their gender identity and sexual orientation, with uniform conditions in relation marriageable age and monogamy.

3. Conditions for a valid marriage.-
A marriage between any two persons, irrespective of their sex, gender identity, or sexual orientation, may be registered under this Code if, at the time of the marriage, the following conditions are fulfilled-

(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 clause (ii)(a) of this section, "mental illness" will have the same meaning as provided under section 2(s) of the Mental Healthcare Act, 2017.

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 PMDA[79] and the ICMA[80] prescribe registration as part of the solemnisation process. Similarly, the solemnisation of marriages under the SMA[81] is through registration by the Marriage Officer. The HMA[82] contains a provision for registration of the marriage, but such registration is not mandatory. The provision enables the State Governments to prescribe the rules for registration. Pursuant to the decision of the Supreme Court in *Seema v Ashwani Kumar*,[83] various states have made legislations[84] providing for compulsory registration of marriages. The detailed procedures for registration are prescribed by respective State Governments.[85]

[79] Parsi Marriages and Divorce Act, 1936, s.6.
[80] Indian Christian Marriages Act, 1872, Parts III & IV.
[81] Special Marriage Act, 1954, chapters II, III.
[82] Hindu Marriage Act, 1955, s 8.
[83] (2006) 2 SCC 578.
[84] 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.
[85] *See*, Registration of Hindu Marriage (Karnataka) Rules 1966; SMA (Kerala Special Marriage Rules, 1958) and Kerala Registration of Marriages (Common) Rules, 2008; Uttar Pradesh Hindu Marriage Registration Rules, 1973.

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.[86] 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.[87] 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.[88] 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 solemnisation 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 will 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[89] under the SMA serves as a notable instance of excessive intrusion, especially in case of inter-faith, inter-class, and inter-caste marriages. The requirement of public display of notice of the intended marriage and the right to raise an objection has become an unwarranted tool of harassment and intimidation. Regularly, petitions are filed in courts praying for police protection from natal families objecting to a marriage.[90] Further, as observed by Chandrachud J. in the marriage equality case, the 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.[91]

The suggested framework incorporates a simple registration process which entails submission of a memorandum of marriage to the Relationship and Marriage Officer. A simple procedure is being provided to introduce clarity and reduce confusion relating to the process and requirements for registration of marriage as presently the procedures differ, not just from one State to another but also from one marriage

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[86] *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."

[87] 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.

[88] '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

[89] Special Marriage Act, 1954, ss 5-8

[90] *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.

[91] Hearings in Supriyo v Union of India, 2023 SCCOnLine SC 1348

registrar's office to another. Exercise of arbitrary discretion may also be reduced by prescribing a broad non-onerous procedure under the Code. A minimal time limit of 7 days is being prescribed for establishing domicile in order to identify the jurisdiction of the Relationship and Marriage Officer. The Relationship and Marriage Officer has been empowered to refuse registration only on limited technical grounds.

4. Process for Registration of marriages under this Code.-

(1) Every marriage will be registered with the Relationship and 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 will submit a Memorandum of Marriage in person in the format as set out under Form A.

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

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

FORM A

The Memorandum of Marriage will 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.

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

(1) On satisfaction of the veracity of the information submitted in the Memorandum of Marriage and the completion of the procedure provided under section 4 of this Code, the Relationship and Marriage Officer will record the particulars in the Register of Marriage maintained by them within 3 days from the date of submission of Memorandum.

(2) The Relationship and 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 will be conclusive proof of the validity and existence of the marriage.

6. Grounds for refusal of registration.-

(1) The Relationship and Marriage Officer will not refuse to register the marriage except on the

following grounds-

(a) The Memorandum does not contain all the information as prescribed in the form; or
(b) The parties do not fulfil one or more of the conditions as specified under section 3 of this Code.

(2) The Relationship and Marriage Officer will 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 provided under sub-section (1)(a), the Relationship and Marriage Officer will give the parties an opportunity to rectify the insufficiency within 15 days from the date of intimation given under sub-section (2).
(4) If the parties successfully rectify the Memorandum of Marriage, the Relationship and Marriage Officer will register the Marriage in accordance with section 5 of this Code.

7. 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 3 of this Code.
(2) The marriage will be registered as per the process prescribed under sections 4, 5 and 6 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.

8. Non-registration not to invalidate marriage.-

A marriage will not be considered invalid merely for failure to register under 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 HMA, the IDA and the SMA 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.[92] Additionally, the SMA 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.[93] The SMA 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.[94] The IDA renders a marriage between two Christians void if one of the parties was impotent at the time of the marriage.[95] Parsi Law only regards bigamy and impotence as grounds of void marriage.[96] Under Muslim Sunni Law, *batil* marriages are void for consanguinity, affinity or fosterage.[97]

Proposed Step:

Taking into consideration modern family structures, the grounds for a void marriage are integrated under one provision. Moreover, the grounds of void marriage will be applicable to all, regardless of gender.

[92] Hindu Marriage Act, 1955, s 11; Indian Divorce Act, 1869, s 19; Special Marriage Act, 1954, s 24.
[93] The Special Marriage Act, 1954, s 24(1) r/w s 4(b).
[94] The Special Marriage Act, 1954, s 24(1) r/w s 4(c).
[95] The Indian Divorce Act, 1869, s 19(1).
[96] The Parsi Marriage and Divorce Act, 1936, ss 4 and 30.
[97] Dinshaw Fardunji Mulla, *Principles of Mahomedan Law* (23rd edn, Lexis Nexis 2017), sections 253, 260-262, 264.

9. Void marriages.-
Any marriage registered under this Code will 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, if any of the conditions specified in section 3(i) and 3(ii) 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:
Current position of law
Grounds of voidable marriage under the HMA 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.[98] The SMA 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.[99] Irregular marriage is a union which confers legitimacy on the children of marriage but does not amount to a lawful marriage.[100] 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.[101] Under Muslim *Shia* law, there is no concept of irregular marriages.

Child 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.[102] Presently, there is an inconsistency in the treatment of child marriage under the 2006 Act, and the SMA which treats child marriage as void. While there have been repeated demands to make all child marriages void *ab initio*[103], 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,[104] and therefore it is important to keep child marriage voidable at the

[98] The Hindu Marriage Act, 1955, s 12.
[99] 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).
[100] Asaf A A Fyzee, *Outlines of Muhammadan Law* (5th edn, Oxford University Press 2008).
[101] Dinshaw Fardunji Mulla, *Principles of Mohamedan Law* (23rd edn, Lexis Nexis 2017), sections 254 -259, 264 & 267.
[102] The Prohibition of Child Marriage Act, 2006, s 3.
[103] '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.
[104] '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.

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.[105]

Voidability for non-consummation of marriage

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 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 relations. Therefore, in this Code, a step-down is envisaged such that absence of sexual relations 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 grounds for voidability may be integrated under one provision. The grounds of voidable marriage will be available to all, regardless of gender.

10. Voidable marriage.-

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

(2) A petition under sub-section (1)(a) 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 will not grant a decree of nullity under sub-section (1)(c) if,—
   (a) proceedings have not been instituted within 1 year after the fact of pregnancy was known; and/or,
   (b) 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 will not grant a decree of nullity under sub-section (1)(d) if,—
   (a) 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
   (b) the petitioner has, out of their 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.

[105] 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.

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:

Current position of law

The fault theory of divorce has been developed in India following divorce laws in the United Kingdom.[106][107] Section 13 of the HMA, section 10(1) of the ICMA, section 32 of the PDMA 1936, section 2 of the DMMA and, section 27 of the SMA provide the fault-based grounds for divorce. Certain laws provide for separate grounds for divorce exclusively available to women.[108] Under Muslim law, these provisions are derived from considerations in other realms of law including criminal law and social welfare legislations.

Retaining fault-based grounds of divorce

It was pointed out during public consultations that since irretrievable breakdown of marriage (IBM) is being introduced under this Code as a ground for divorce, the need for fault-based grounds is lost. However, under section 12 of this Code, IBM is available as a ground for divorce subject to the Court's determination that the relationship has broken down irretrievably to the point of no reconciliation, based on the prescribed factors. These conditions and factors have been provided in order to introduce a check on abandonment of vulnerable parties through divorce. In situations where the relationship does not appear to have broken down irretrievably, especially in case of marriages of a shorter duration, the parties may need to rely on fault-based grounds provided under this provision. Accordingly, certain fault-based grounds have been retained in Code 2.0 with modifications in accordance with modern sensibilities.

Cruelty

During public consultations, concerns were raised about defining "cruelty" as a ground for divorce under section 13(1)(i)(a) of the HMA, since currently, the interpretation of the term varies widely depending on the Court interpreting it. Code 2.0 has deliberately not included a definition of cruelty, owing to the open-endedness that a common law definition has allowed. While there have been some problematic interpretations of the concept of cruelty,[109] the open-endedness has also made space for progressive interpretations of the term in accordance with changing times. Especially in recent years, the concept of cruelty has built upon the foundations laid in *Samar Ghosh v. Jaya Ghosh ('Samar Ghosh')* [110], wherein the Supreme Court emphasised that cruelty can be mental or emotional, and it has a dynamic definition, which changes with time and circumstances, meaning that it cannot have a straitjacket formula or fixed parameters. The spirit of *Samar Ghosh* has allowed for increasingly progressive interpretations, with cruelty now including taunting one's wife,[111] making false promises to move her to another country while living abroad,[112] withholding consent for mutual separation,[113] not seeking treatment for one's mental illness,[114] and marital rape.[115] Meanwhile, arbitrary interpretations of cruelty have been avoided on the same basis – a wife lying

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[106] Malavika Rajkotia, *Intimacy Undone: Marriage, Divorce and Family Law in India* 88 (Speaking Tree Publishers 2017).

[107] 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.

[108] Special Marriage Act, 1954, s 27(1A), Hindu Marriage Act, 1955, s 13(2), Divorce Act, 1869, s 10(2).

[109] C. Sembiam Sivakumar v. V. Sivachitra Devi (2016) 16 SCC 545: non-consummation of marriage by wife.

[110] (2007) 4 SCC 511

[111] *X v. X*, *2022* SCC OnLine Ker 3928

[112] *Subhi N. v. Sreeraj E.*, 2021 SCC OnLine Ker 12117

[113] *Beena M.S. v. Shino G. Babu*, 2022 SCC OnLine Ker 778

[114] *Mary Margret v. Jos P Thomas*, Mat. Appeal No.1119 of 2015, decided on 21-01-2022 (Kerala High Court).

[115] *X v. X*, Mat. Appeal No. 151 of 2015, decided on 30-07-2021 (Kerala High Court).

about her date of birth and *manglik* status before marriage cannot amount to cruelty.[116] In order to allow for this progressive jurisprudence to take its course, any sort of formulaic definition of cruelty may make the concept too static or too narrow, or alternatively, it may create a problem of over-inclusion. It was suggested that a broad definition similar to the provision in the IDA 1869, may be prescribed, which restricts the concept of "cruelty" to a circumstance which creates a reasonable apprehension that it may be harmful or injurious to live with the other party. Such a prescription may not allow evolved interpretations such as the inclusion of emotional and mental cruelty, as this may not be interpreted as being harmful or injurious to life. Thus, this Code has left cruelty to the discretion of the common law, allowing its definition to evolve with and adapt to its circumstances.

Proposed Step:
Ground for divorce are prescribed in 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 sex or gender identity.

11. 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 on the ground that the other party,-

(a) has, after the commencement of marriage, had voluntary sexual intercourse with any person other than the spouse, without the consent of the spouse;
(b) has deserted the applicant for a continuous period of 2 or more years, immediately preceding the petition for divorce;
(c) has treated the applicant with cruelty;
(d) 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;
(e) has been sentenced to imprisonment for an offence for a term exceeding 7 years or more;
(f) has failed to comply with an order granting maintenance under section 18 of this Code;
(g) is in an intimated stable union with another person, or
(h) 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 purposes of sub-clause (b) 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.

Explanation 2- For the purposes of sub-clause (h) of this sub-section, "mental illness" will have the same meaning as provided under section 2(s) 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 on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of 1 year or more after the passing of a decree for judicial separation in a proceeding to which they were parties, under section 14 of this Code.

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

[116] *Kartik Narayan Dhawle v. Vaishali Kartik Dhawle*, 2021 SCC OnLine Bom 241

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

Context:
Divorce by mutual consent is recognised by the HMA, SMA, ICMA, PMDA, and under Muslim Personal law as *Khula* and *Muba'arat*.[117] Moreover, divorce has been granted by Courts on multiple occasions on the ground that the marriage has irretrievably broken down.[118] The cooling off period prescribed in section 13B of the HMA 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*,[119] 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.[120] 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, cannot 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.[121] 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 out of spite or pressure from society.[122][123]Further, while Courts have recognised irretrievable breakdown to be a ground for divorce in certain cases,[124] in other cases Courts tend to impose personal moral considerations of preservation of marriage.[125]

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.[126] Recently, in the case of *Shilpa Sailesh v Varun Sreenivasan,*[127] 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-

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[117]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.
[118] *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.
[119] (2017) 8 SCC 746.
[120] Malavika Rajkotia, *Intimacy Undone: Marriage, Divorce and Family Law in India* 100 (Speaking Tree Publishers 2017).
[121] Malavika Rajkotia, *Intimacy Undone: Marriage, Divorce and Family Law in India* 100 (Speaking Tree Publishers 2017).
[122] Malavika Rajkotia, *Intimacy Undone: Marriage, Divorce and Family Law in India* 82 (Speaking Tree Publishers 2017).
[123] 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."
[124] *Ashok Hurra v Rupa Bipin Zaveri* (1997) 4 SCC 226; *Naveen Kohli v Neelu Kohli* (2006) 4 SCC 558.
[125] *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."
[126] '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.
[127] *Shilpa Sailesh v Varun Sreenivasan*, 2023 SCC OnLine SC 544.

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, the recommended provisions 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.[128] 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,[129] 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 Code 2.0 have been strengthened and comprehensively formulated to expressly consider the economic interests of the party who may suffer grave financial hardship as a result of the dissolution. Additionally, a regime of partial community of property has been proposed in order to safeguard the economic welfare of the parties to the marriage as well as to deter abandonment through divorce.

During public consultations with practising lawyers, it was revealed that in a number of cases the parties may wish to get back together after filing for divorce. Accordingly, the provision providing for 6 months of cooling off period has been retained in Code 2.0, to be recommended by Court in cases only where necessary and appropriate.

12. Divorce by mutual consent.-
(1) A petition for dissolution of marriage by a decree of divorce may be presented to the Court by both the parties to the marriage together, on the following grounds-
    (a) that they have been living separately for a period of 6 months or more;
    (b) that they have not been able to live together; and
    (c) that they have mutually agreed that the marriage should be dissolved.
(2) The court will, 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.
(3) Before passing a decree of divorce under sub-section (2), where it deems necessary to do so, the Court may grant the parties a reasonable period of time upto 6 months to reconcile differences through counselling or any other method as the parties may deem fit, unless-
    (a) the parties have been living separately for a significant period of time; or

[128] *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.
[129] 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."

(b) the Court is satisfied that the marriage has broken down irretrievably on consideration of factors provided in section 13(2).

13. Irretrievable breakdown of marriage.-

(1) A petition for dissolution of marriage by a decree of divorce may be presented to the Court 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-section (1), the Court must take into consideration the following factors:

(a) the period of time for which the parties cohabited after marriage and last date of cohabitation;

(b) any past or ongoing legal proceedings between the parties and the cumulative impact of such proceedings on the personal relationship;

(c) past or ongoing attempts to settle the disputes through intervention of the Court, through mediation or out-of-court settlements;

(d) maintenance of children; and

(e) any other factual considerations that the court may deem relevant during the course of the proceedings.[130]

14. Grounds for judicial separation.-

(1) A petition for judicial separation may be presented to the Court by both the parties to the marriage jointly, or either of the parties to the marriage on any of the grounds specified in section 11 of this Code, and the Court may decree judicial separation, on being satisfied with respect to the following things:

(a) the veracity of the statements made in such petition, and

(b) that there is no legal ground why the application should not be granted.

(2) The court may, on the application by petition of either party and on being satisfied of the veracity of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

15. Alternate Dispute Resolution.-

In deciding a petition filed under section 10, 11, or 12, the Court may refer the case to alternate methods of dispute resolution including mediation and conciliation, along with the appropriate terms of reference.

Issue: Whether restitution of conjugal rights should be retained as a matrimonial remedy?

Objective: To protect the autonomy of parties to a marriage by ensuring a modern legal regime on marriage does not have a provision on restitution of conjugal rights.

Context:

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

Restitution of conjugal rights ('RCR') has been a subject of debate for a significant period of time. The HMA provides for RCR under section 9, SMA provides for RCR under section 22 and the IDA provides for 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.[131] Retaining the availability 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.[132] In *T. Sareetha v Venkata Subbaiah*,[133] the Andhra Pradesh High Court held section 9 of the HMA 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*,[134] the Supreme Court disagreed with this view and upheld the validity of RCR, it continues to be contested in feminist discourse and jurisprudence.[135] 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.[136] Accordingly, the remedy of restitution of conjugal rights is being omitted in this Code.

Proposed Step:
The remedy of restitution of conjugal rights stands omitted.

[131] 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.
[132] 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.
[133] 1983 SCC OnLine AP 90.
[134] (1984) 4 SCC 90.
[135] https://oxfordpoliticalreview.com/2020/10/14/restitution-of-conjugal-rights-an-anathema-to-human-rights/
[136] '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 of, 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 upon the dissolution of marriage. Section 37 of the SMA 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.[137] Section 25 of the HMA provides both the husband and the wife a provision to apply for maintenance in Court, based on the same factors as provided under the SMA.[138] Section 37 of the ICMA gives the district court the power to order grant of maintenance by the husband to the wife according to his own financial ability.[139] Under Muslim personal law and Muslim Women 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.[140]

Further, under the HMA, 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.[141] Similarly, section 36 of the SMA provides for the same right of maintenance *pendente lite* to the wife exclusively.[142]

Section 18 of Hindu Adoption and Maintenance Act, 1956 provides the right to the wife to be maintained by the husband during the subsistence of marriage.[143] Under Muslim personal law and the DMMA, failure on the part of the husband to maintain the wife is a ground for divorce. [144]

Courts have, over time, considered a range of factors while considering an application for grant of maintenance.[145] 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

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[137] Special Marriage Act, 1954, s 37.
[138] Hindu Marriage Act, 1955, s 25.
[139] Indian Christian Marriage Act, 1872, s 37.
[140] Muslim Women (Protection of Rights on Divorce) Act, 1986, s 3; Mulla, Principles of Mahomedan Law, 23rd ed., ss 257(2) & 279.
[141] Hindu Marriage Act, 1955, s 24.
[142] Special Marriage Act, 1954, s 36.
[143] Hindu Adoption and Maintenance Act, 1956, s 18.
[144] Dissolution of Muslim Marriages Act, 1939, s 2(ii).
[145] *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.

the judge. This provision is an endeavour to bring uniformity and certainty in the considerations examined by the court.

Proposed Step:

Factors for grant of maintenance

The proposed provisions 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.[146] 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.[147] 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.

Maintenance pendente lite

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.[148] 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*,[149] where it 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. A time-limit of 60 days has been prescribed for disposal of an application for interim maintenance to ensure that financial relief is available in time, to the party seeking it.

Maintenance during subsistence of marriage

Even today, most marriages in India are aimed at securing financial and economic support for the parties to the marriage, especially for women. Accordingly, in order to ensure a dignified life upon marriage, a provision is made, to allow parties to marriage to apply for maintenance during the subsistence of marriage under this Code. Such maintenance during subsistence of marriage is subject to the condition that the party making the application for maintenance is being excluded from a shared mutual enjoyment of the marital home and associated resources. This provision is aimed at safeguarding economic interests of women in marital relationships taking into consideration the socio-cultural realities which suggest that exclusion from enjoyment of marital home and resources is more likely to affect women.

Maintenance in extra-legal marriages and extra-legal stable unions

While bigamy is outlawed under this Code and a second marriage during the subsistence of the first marriage is considered void, certain individuals may proceed to enter into extra-legal second marriages beyond the purview of what is permitted. Parties in such extra-legal marriages, especially women in heterosexual marriages require protection and security through maintenance, at par with parties in a valid first marriage. Accordingly, a provision has been added, recognising the rights of second wives to claim maintenance under these provisions on maintenance.

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[146] *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.

[147] 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.

[148] Agnes F, *Family Law Vol. II: Marriage, Divorce and Matrimonial Litigation*, 85 (Oxford University Press).

[149] *Savitri v Govind Singh Rawat* (1985) 4 SCC 337.

In case of stable unions, while the Code recognises dyadic relationships as stable unions, individuals may still choose to enter into more than one stable union beyond the purview of the law. In such a case, court has been granted the discretion to recognise these extra-legal stable unions for the purpose of protection of vulnerable parties. Parties to such an extra-legal stable union have been provided rights of maintenance under this draft Code.

Gender-neutrality and protection of vulnerable parties

In the marriage equality case hearings, it was pointed out that the provisions for maintenance under the SMA are not gender-neutral and therefore, fall short in the case of non-heteronormative marriages. Accordingly, under the proposed provision, parties to a marriage may file an application for maintenance, regardless of their gender identity. 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.[150][151] Currently, research indicates 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 a time subsequent to such decree, or upon the dissolution of a Stable Union, the Court on an application made by either of the parties to the marriage or Stable Union, order that the respondent will pay to the applicant such sum as it deems just as maintenance and support.

Explanation- For the purpose of sub-section (1), the sum payable may be a gross amount, or a monthly amount, or any other periodical amount.

(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:[152]
    (a) duration of the relationship;
    (b) the respondent's own income and other property, if any;
    (c) the income and other property of the applicant;
    (d) the needs of the applicant;
    (e) applicant's liabilities, financial responsibilities, or responsibility to maintain dependants;

[150] 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).

[151] 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.

[152] 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.

(f) the age and employment status of the parties;
(g) the residential arrangements of the parties;
(h) any illness or disability;
(i) 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;

Provided that absence of contributions made by the applicant as described in this sub-clause will not disentitle the applicant from claiming maintenance.

(j) protection of vulnerable parties;
(k) preservation of the status of living as it existed during the subsistence of marriage; and
(l) any other circumstances of the case, that the court may deem relevant.

***Explanation*-** For the purpose of this sub-section,

(i) "contributions made" will 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" will 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 7 of this Code, the parties to the marriage may make a provision for payment of a reasonable sum of money by one party to the other upon separation or dissolution of marriage, in the Memorandum of Marriage.
(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 proceedings 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.

***Explanation*:** The phrase "proceedings under this Code" means proceedings before Court and does not

include proceedings before the Relationship and Marriage Officer.

(2) The application for payment of maintenance during the course of the proceedings, in accordance with sub-section (1), will, 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:
    (a) the status of the parties,
    (b) the capacity of the respondent to pay maintenance,
    (c) whether the applicant has any independent income sufficient for his or her support, and
    (d) any other factors that the court may deem relevant.

18. Maintenance during the subsistence of marriage or Stable Union.-
A party to a marriage or Stable Union, may file a petition before the Court, at any time during the subsistence of marriage or Stable Union, for payment of such gross, monthly or periodical sum by the other party, for their maintenance and support, if the party is being excluded from a shared mutual enjoyment of the marital or shared home and associated resources.

19. Maintenance in extra-legal marriages and extra-legal stable unions.-
Any party in an extra-legal marriage or extra-legal stable union, may file a petition before the Court for payment of maintenance and support in accordance with sections 16, 17 and 18 of this Code.

20. Custody of children.-
In the event of dissolution of a marriage, the custody of minor children will be determined as per section 43 of Chapter II 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 in accordance with the principle of shared partnership in marriage.

Context:
Presently, India follows the English doctrine of separation of assets on marriage.[153] It has been argued that under the separation of assets regime of matrimonial property, women as non-financial contributors to the

[153] 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).

family, are at an unfair disadvantage considering that title to properties purchased during the subsistence of a heterosexual marriage rarely vests in women.[154]

It has been estimated in a World Economic Forum Annual Meeting that women own less than 20% of the world's land.[155] 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.[156] The most common mode of acquisition of property for women in India is through inheritance.[157] 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*,[158] 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*,[159] 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.[160] 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.[161] Scholars have also argued that ownership of property in the form of land or house, significantly reduces the risk of marital violence for women.[162] Property ownership can both deter violence and provide an escape if violence occurs.[163] It is argued that the sooner in their lifespan, women own land, the better it is for their social and economic well-being.[164]

Proposed Step:
Accordingly, in this Code, a regime of partial community of property is being introduced, providing that the 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

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[154] 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.

[155] 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

[156] '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

[157] '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).

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

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

[160] ibid.

[161] ibid.

[162] 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.

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

[164] 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).

of domestic responsibilities towards the functioning of the marriage and family are accounted for.[165] 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.[166] This proposal of community of property is based on the principle 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,[167] French Civil Code,[168] Brazilian Civil Code[169] and South African Matrimonial Property laws[170].

It must be highlighted here that the implications of operationalising a matrimonial property regime will have to be considered in concomitance with the macro and micro economic implications of implementing the regime, as well as other property laws such as the laws relating to transfer of property, the Benami Transactions Act, state revenue codes and laws dealing with maintenance of property records. Under the Benami Transactions (Amendment) Act, 2016, it has been clarified that property bought by an individual in the name of a spouse or child is exempted and will not be considered benami property. Accordingly, while dividing assets in accordance with the partial community of property regime, the Court must be cognizant of such transactions where property is purchased by an individual in the name of the another.

21. 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:
- (a) immovable property acquired during the subsistence of the marriage, even if the title is in the name of one of the spouses;
- (b) movable property acquired for the purposes of joint use of the parties; or,
- (c) 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;
- (d) 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:
- (a) any assets acquired by either of the parties before the date of marriage;
- (b) 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;
- (c) any assets acquired by a party as gift for the separate exclusive use of such party;
- (d) goods acquired for the personal and exclusive use of either of the parties to marriage; and
- (e) *stridhana* acquired by a woman for her exclusive ownership and use.

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[165] 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.

[166] 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 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).

[167] Portuguese Civil Code, 1867 (Goa).

[168] 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.

[169] Código Civil, Law No. 10.406 of January 10, 2002 (Brazil).

[170] Matrimonial Property Act, 1984 (South Africa).

(5) Ownership, possession, and administration of the joint matrimonial property will lie jointly with both the parties to marriage.
(6) Neither of the parties to marriage will 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 for the determination of whether an asset is communicated to be part of the joint matrimonial property.

22. 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 section 19(4) 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.

23. 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 11, 12 or 13 of this Code, the parties must also file an application to the Court, 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:

(a) difference in the growth of the exclusive property of both the parties;
(b) compensation for disadvantages faced for being part of the relationship;
(c) needs of the parties;
(d) residential arrangements of the parties;
(e) protection of vulnerable parties;
(f) maintenance and residence of children; or

(g) any other factors that the court may deem relevant to ensure equitable distribution of property.

24. 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 Code.

Possible Alternative

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

The matrimonial property regime prescribed in this Part 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

This part attempts to recognise: (a) relationships in the nature of marriage; and (b) relationships that are outside the bounds of marriage and natal families but are based on mutual love, care and dependence. Such relationships are classified as 'Stable Unions'[171] and cover:

25. Intimacies that are outside the realm of kinship and marriage and may or may not be conjugal, sexual or romantic in nature; and
26. Non-marital cohabitation arrangements, including relationships in the nature of marriage, 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 legal 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 that are otherwise exclusively available to members of natal or marital family. The acknowledgement of intimation will act as a conclusive proof of union.

Issues: What should be the legislative framework for recognising stable unions, and what rights and obligations should flow from it?

Objective:

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 in India 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 or Atypical Families

As an alternative, the concept of 'chosen families' has found prevalence amongst queer communities. Queer persons are often subjected to violence at the hands of their natal families.[172] 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.[173] Therefore, queer individuals tend to detach themselves from their natal families and form their own chosen families. Such relationships can be romantic in nature or can be non-romantic relationships purely based on mutual love,

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[171] 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.

[172] *S. Sushma v Commissioner of Police* 2021 SCC OnLine Mad 2096; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

[173] '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.

care and dependence.[174][175] In a number of cases, even when not threatening violence directly, natal families disown and disinherit queer individuals, leaving people devoid of any comfort and protection that are afforded through a family, in society and in law.[176] 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.[177] 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*[178], 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*[179], 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[180]. 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.

Relationships in the nature of marriage

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.[181] Courts have also granted rights such as the right to maintenance

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[174] 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.

[175] 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.

[176] In a recent Kerala case, the family of a gay man refused to take responsibility for his body or settle medical bills and his partner was compelled to take recourse to seek recourse to court proceedings. See, 'Queer Man's Body Released to Family, Kerala HC Allows Partner To Attend Funeral', the Quint, 8th February, 2024, available at https://www.thequint.com/south-india/kerala-high-court-queer-man-family-body-release-partner

[177] 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.

[178] AIR 2001 All 254.

[179] AIR 2010 SC 3196.

[180] *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.

[181] *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.

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;[182]if the relationship is for sexual purposes only;[183] whether the couple has a shared household; status of financial arrangements; status of children and; domestic arrangements,[184] 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. 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 and providing access to socio-economic rights. The application of these guiding factors should be informed by a modern and equitable understanding of how a marriage between equals would look like.

Therefore, keeping in view the existence of alternate family structures there is a need to re-conceptualise 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[185] and the parties are vested with inheritance rights.[186] Tasmania's Relationships Act, 2003, has provisions for recognising varied forms of personal relationship[187] A personal relationship has been classified as a significant relationship or a caring relationship.[188] 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.[189]Countries like the United Kingdom[190], South Africa[191] and Brazil[192] 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. In the case of *Deepika Singh v Central Administrative Tribunal*,[193] J. Chandrachud noted, "*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."*[194]

Queer individuals, specifically trans-persons are often subjected to violence at the hands of their natal families. In the absence of any recognition to chosen families, such 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 relationships that places its foundation on love, care and respect that does not come from natal families. In the hearings in the *Supriyo* case[195], reference was made to the fact that trans-

[182] *D. Velusamy v D. Patchaiammal* (2010)10 SCC 469.
[183] *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."
[184] *Indra Sarma v V.K.V. Sarma* (2013) 15 SCC 755.
[185] Article 1475, Belgian Civil Code, 2007.
[186] Article 1477, Belgian Civil Code, 2007.
[187] Relationships Act, 2003 (Tasmania).
[188] Relationships Act, 2003 (Tasmania), s 6.
[189] Relationships Act, 2003 (Tasmania), ss 4&5.
[190] Civil Partnerships Act, 2004 - recognises civil partnerships between same-sex couples.
[191] 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.
[192] Article 1723, Brazilian Civil Code - recognises both same-sex and opposite sex Stable Unions.
[193] 2022 SCC OnLine SC 1088.
[194] Ibid, para 26.
[195] 2023 SCC OnLine SC 1348.

persons already have families and adoption is common amongst such families, but these family structures are not recognised under law.

Proposed Step:
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, do not focus on the conjugality, existence of cohabitation or shared household but on mutual love, support, and dependence. This is done with the objective of making space for the whole spectrum of relationships that might exist between queer as well heterosexual individuals.

Queer relationships and atypical families may take many forms which may involve two or more individuals, such as guru-chela relationships or hijra gharanas. Accordingly, it was pointed out during various consultations that imposing monogamy by not permitting individuals to be in multiple stable unions at the same time may extend the baggage of marital relationships to stable unions, as envisaged under this Code and fall short of respecting and acknowledging the plurality of atypical and queer relationships. While this is acknowledged, we encountered a lacuna in qualitative and quantitative research relating to power-dynamics in non-heteronormative relationships. Further, law as an instrument, seeks to provide certainty and stability in relation to rights and obligations of stakeholders that are subject to it. This is in direct conflict with the uncertainty associated with the different forms and inter-personal dynamics that non-heteronormative relationships may involve. Accordingly, to ensure sufficient regulation to ensure protection of vulnerable parties, and for ease of regulation, multiple stable unions are not permitted to co-exist under this Code. It is hoped that with further research and deliberations, recognition and regulation of non-monogamous relationships forming a family, may be incorporated in a progressive family law code. It needs to be seen how such relationships play out with the first step of recognition.

It was also pointed out during consultations that it may be necessary to determine the custody of children and division of assets between parties to a stable union on dissolution of the stable union. Accordingly, provisions have been made in this regard.

25. Stable unions.–
Any two persons will be recognised to be in a stable union, through intimation to the Relationship and Marriage Officer in the manner prescribed under section 26 of this Code, subject to the fulfilment of the following conditions:

(a) both persons have completed the age of 18 years;
(b) 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;
(c) both persons do not have a subsisting marriage and,
(d) both persons do not have a subsisting stable union with any other person.

26. Intimation process for stable unions.-

(1) Any two persons intending to be recognised as being in a stable union, may intimate the Relationship and 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 veracity of the details provided as part of the application submitted under sub-section (1), the Relationship and 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) The Acknowledgement Letter will be conclusive proof of the existence of a stable union.
(4) A stable union will not be considered invalid merely for non-intimation.

(5) The Relationship and Marriage Officer will not refuse to issue an Acknowledgement Letter, except on the following grounds:
   (i) The application does not include all details as set out in Form B; or,
   (ii) The parties do not fulfil any of the conditions provided under section 25.
(6) The process of verification of details under sub-section (2) will be as prescribed in rules made in this behalf by the State Government.

FORM B

The parties submitting the application provided in section 26(1), will 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 (*optional*);
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; and
   iii) the applicant gives free and informed consent to the registration;
f) an affidavit for nomination, if any;
g) signatures of both the parties

27. Rights and obligations arising out of stable unions.-

(1) Both the parties to a stable union will be entitled to maintenance in accordance with section 16, 17, 18 and 19 of this Code.
(2) Both the parties to a stable union will owe each other a duty of respect, mutual support, and assistance.
(3) Both the parties to a stable union will have parental responsibilities and rights in relation to the child that they are jointly the parents of.

***Explanation 1*-** For the purposes of sub-section (3), "parental responsibilities and rights" will have the same meaning as provided in section 37 of Chapter II of this Code.
***Explanation 2*-** For the purposes of sub-section "parent" will have the same meaning as provided under section 34(n) of Chapter II of this Code.

28. Right to nominate stable union partner for certain purposes.–

(1) Both the parties to a stable union, whose existence is being intimated to the Relationship and Marriage Officer, will have the right to make a directive appointing the other partner as a nominated representative for the purposes of:
   (a) claiming social welfare benefits accessible to family members or dependants under laws relating to labour and employment;
   (b) accessing or claiming any beneficial right, title, or interest in Financial Assets;
   (c) taking medical or healthcare decisions on behalf of or for the benefit of the nominating party in case of their incapacity to take such decisions; or
   (d) 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" will 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 will be made through an affidavit that will be submitted along with the intimation application as provided under section 26 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 Relationship and Marriage Officer to whom the intimation of the stable union has been made under section 26 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 Relationship and Marriage Officer to whom the initial intimation of nomination was made under sub-section (2) or sub-section (3).
(5) The nominated partner will 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) will be legally binding and enforceable.

29. 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, the Court may determine the existence of such union, despite the fact that such stable union has not been intimated to the Relationship and Marriage Officer.
(2) The determination under sub-section (1) will be subject to the fulfilment of conditions specified under section 25(a) and 25(b) of this Code.
(3) While considering a petition in accordance with sub-section (1), the court will take into consideration any of the following factors-
    (i) duration of the relationship;
    (ii) intermittent or continuous cohabitation in a shared household;
    (iii) degree of financial dependence or interdependence;
    (iv) degree of mutual support and personal care; or,
    (v) any child that the parties are responsible for as parents.
(4) The Court may make a determination of the existence of a stable union under sub-section (1), regardless of the fact that either of the parties to such union was at the same time, a party to a subsisting marriage or stable union.

Explanation **-** "Intermittent cohabitation" in a shared household means that the parties shared the same place to live, whether or not permanently, and irrespective of whether or not one or both had other places to live

30. 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 Relationship and Marriage Officer, in the format as set out in Form C.
(2) On satisfaction of the veracity of the details provided as part of the application submitted under sub-section (1), the Relationship and Marriage Officer will 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 Relationship and Marriage Officer will ensure that both the parties have knowledge of the fact of dissolution of the stable union.
(4) The process of verification of details under sub-section (2) will be as prescribed in rules made in this behalf by the State Government.

FORM C

The parties submitting the application provided in section 30(1), will 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;
e) copy of petition for custody of child (where applicable); and
f) copy of acknowledgment of Intimation of Stable Union or a decree of a court under section 27, as the case may be.

31. Custody of child on dissolution of stable union.-
In the event of dissolution of a stable union, the custody of minor children will be determined as per section 43 of Chapter II of this Code.

32. Division of assets of stable union.-
In the event of dissolution of a stable union, either of the parties to the stable union may file a petition before Court for determination of right, title and ownership in any assets jointly or individually owned by the parties to the stable union.

33. Transition provision.-
A person designated as a Marriage Officer under the Special Marriage Act, 1954 before the commencement of this Code, may function as the Relationship and Marriage Officer for the purposes of this Code, upon the commencement of this Code, until the appointment of a Relationship and Marriage Officer by the State Government.

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Chapter II:
Parent-Child Relations

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Introduction

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 presents itself as an alternative to the existing regime on guardianship and 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. To this end, it offers an alternative to guardianship as a framework for the purpose of regulation of parent-child relationships. *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, reflected in **Annexure 1,** are aimed at ensuring that a plurality of family forms is reflected in the varied laws on parent-child relations.

Law on Parent-Child Relations in India

In India, parent-child relations are governed by personal laws[196] and the secular law[197] on guardianship. While natural guardianship is governed largely by personal laws, court appointed guardians are governed by secular law (primarily, the Guardians and Wards Act, 1890). 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 had 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. However, in India, 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.[198] 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.[199]

In addition to privileging the father, guardianship laws continue to deem the family as a heteronormative unit which comprises two parents of the opposite sex related to each other by marriage. Under this regime, motherhood is deemed to be biological and fatherhood social, as motherhood is established by the fact of birth and fatherhood through marriage to the birth mother.[200] This is where the concept of legitimacy of the child acquires significance. Section 112[201] 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.[202] In case of 'illegitimate' children or children born

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[196] *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)*; for the Christian and the Parsi law on natural guardianship, *See* Law Commission, 'Consultation Paper: Family Law Reforms', 2018, 85-88).

[197] The Guardians and Wards Act, 1890.

[198] ibid.

[199] *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. Also see sections 19 and 22 of the Births, Deaths and Marriages Registration Act, 1886 – registration of "illegitimate children" is governed by a separate procedure.

[200] Saptarshi Mandal, 'Biology, Intention, Labour: Understanding Legal Recognition of Single Motherhood in India' (2019)15 Socio-Legal Rev 131.

[201] 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.*"

[202] Hindu Minority and Guardianship Act, 1956, s 6.

out of wedlock, the mother is the natural guardian and the father has limited obligations towards such a child.[203] Recently, the Supreme Court held that children born out of void and voidable marriages will have rights in the ancestral property of their parents under the Hindu law.[204] This judgement is an important step towards addressing the discrimination faced by children born out of wedlock but is restricted to only cases of void and voidable marriages, and succession under Hindu law.

At present, the rights of a child within a family are thus largely ***informed by the nature of the relationship between the parents***, with children born out of wedlock often being deemed fatherless and stigmatised as illegitimate. Such a framework discriminates against both, women by deeming them mere custodians, and children born outside of wedlock by denying them certain rights and protections. 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. LGBT+ persons are consequently left out of the present legal framework on parent-child relations.

Parental Authority to Parental Responsibility

While the Indian legal framework on parent-child relations continues to be informed by discriminatory principles, several jurisdictions around the world have affected reform to family laws to address issues of gender equality and queer inclusion. In addition to abolishing the common law principle which deems fathers as the natural guardians of a child, one of the recent trends in child law has been a shift from the common law concept of guardianship and parental authority to that of parental care, as encapsulated by the codification of 'parental responsibilities and rights' in legislation.[205] 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'.[206] 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.[207] 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.[208] A law on parental responsibilities and rights moves away from a parent-centric approach to a child-centric approach by centring 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'[209] when taking decisions with respect to guardianship and custody.[210]

Under the present legal regime, the institution of parenthood and the patriarchal family is informed by parent-child relations being regulated through guardianship laws with fathers being the natural and sole guardians of their children, and parents exercising authority over the child.[211] A parental responsibilities and rights framework marks a departure from the limited imagination of such a legal regime, and seeks to establish an inclusive legal framework that recognises parenthood for all parents independent of their gender identity, sexual orientation, or marital status, and grants equal status to both parents.

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[203] *ABC v State NCT of Delhi* (2015) 10 SCC 1; *Dharmesh Vasantrai Shah v Renuka Prakash Tiwari* 2020 SCC OnLine Bom 697.
[204] *Revanasiddappa & Anr. vs. Mallikarjun & Ors.*, Civil Appeal No 2844 of 2011.
[205] NV Lowe, 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' [1997] International Journal of Law Policy and Family 192.
[206] Scottish Law Commission, Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property (Discussion Paper No. 88, October 1990) 5.
[207] ibid.
[208] South African Law Commission, Review of the Child Care Act (Project 110, December 2002) 58.
[209] Used synonymous with 'best interests of the child'.
[210] 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.
[211] *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).

In the Indian context, 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 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 or family members of the child 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[212] and the Assisted Reproductive Technology (Regulation) Act, 2021[213] as well as common law principles.[214] 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.[215]

I. Parentage

Parenthood (also referred to as 'parentage' in this Code) is the legal relationship between the parent and the child. Traditionally, parentage law viewed parenthood as organised around marriage.[216] 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.

A recent trend in parentage law has been a shift from parenthood being defined by only biology to a model that also recognises functional or intentional parenthood.[217] Functional parenthood allows for recognition of parent-child relations not on the basis of biology or marital status but on the basis of the actual familial relationship between the parent and the child.[218] A functional model thus focuses not on the form of the family, i.e., what a family should look like, but the function, namely what role a family should play. Thus, functional parenthood recognises the intent to parent and the performance of parental responsibilities in relation to the child as the basis of parenthood, as opposed to only the biological relationship between the parent and the child, or marriage between the parents. Such an approach benefits a diversity of family formations – non-marital parents, parents who do not have a genetic link with the child, and queer parents. By focusing on the intention to parent and parental conduct as opposed to status, functional parenthood was initially utilised to recognise parentage of unmarried fathers but was eventually expanded to cover parents who are not biologically related to the child and queer parents.[219]

In light of the Supreme Court's decision in the marriage equality case in 2023, which has pointed to legislative effort as the means to achieve queer inclusion in marriage, it is also critical to think about the

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[212] The Juvenile Justice (Care and Protection of Children) Act 2015, s 2(2).
[213] The Assisted Reproductive Technology (Regulation) Act 2021, s 31(2).
[214] *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.
[215] *See* United Kingdom Children Act 1989; South Africa Children's Act 2005; Children (Scotland) Act 1995, Australia Family Law Act, 1975.
[216] Dougal Nejaime, 'The Nature of Parenthood', The Yale Law Journal, 2017.
[217] Douglas Nejaime, 'Marriage Equality and the New Parenthood', Harvard Law Review [2016], 1187,
[218] Ibid, 1189.
[219] Ibid, 1189.

manner in which laws on parenthood must be reformed to include LGBT+ parents. 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 marry 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 in India thus 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. In the same vein, while single parenthood is recognised in India, parenthood is not recognised for persons who are not in a marital union. Specifically, non-married partners are prohibited from adopting[220] and availing surrogacy and ART services.

II. 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.[221] 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."[222] 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,[223] 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:[224]

(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.

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 secular law on court-appointed guardians, 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.[225] 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.[226]

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[220] 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.
[221] 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.
[222] ibid, 27.
[223] NV Lowe, 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' [1997] International Journal of Law Policy and Family, 195.
[224] Scottish Law Commission, Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property (Discussion Paper No. 88, October 1990) 5.
[225] The Guardian and Wards Act, 1860, ss. 8, 9.
[226] 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.

III. 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.[227] 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*,[228] ('*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".[229] 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.[230] While the ruling in *Githa Hariharan* could be considered encouraging, it remains open to criticism. The most obvious one is that the judgement 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.[231] In keenly contested custody battles, the judgement has been said to not be very useful.[232]

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*).[233] 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.[234]

Unlike Hindus and Muslims, Christians and Parsis are not governed by any specific personal laws when it comes to the 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.[235] 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 over mothers in matters of guardianship.

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.[236] 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*,

[227] HMGA, s 6(a).
[228] (1999) 2 SCC 228.
[229] (1999) 2 SCC 228, para 10.
[230] (1999) 2 SCC 228, para 10.
[231] Flavia Agnes, *Family Law: Marriage, Divorce, and Matrimonial Litigation* (OUP 2011) 252.
[232] ibid.
[233] Dinshaw Fardunji Mulla, *Mulla Principles of Mahomedan Law*, (LexisNexis, 2020) 485.
[234] Law Commission, 'Consultation Paper: Family Law Reforms', 2018, 77.
[235] Indian Divorce Act, 1869, s 42, 43 and 44; Parsi Marriage and Divorce Act, 1936, s 49.
[236] Law Commission, 'Consultation Paper: Family Law Reforms', 2018, 70.

and that both the mother and the father should be regarded, simultaneously, as the natural guardians of a minor."[237] However, these recommendations have largely remained unimplemented.

Policy Shifts in Draft 2.0

The Model Code on Indian Family Law, 2023 addressed reform for laws on parent-child relations by prescribing a framework that had the following features:

(a) It marked a shift from the outdated concept of guardianship which governed parent-child relations in India to a modern framework on parental responsibilities and rights.
(b) It recognised parenthood for all independent of gender identity, sexual orientation and marital status.
(c) It recognised all parents as equal holders of parental responsibilities and rights.
(d) It recognised functional parenthood, wherein the intention to parent and the performance of parental responsibilities were seen as the basis of parenthood in certain cases.
(a) It abolished the concept of the illegitimacy of children.
(b) It recognised 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, upon satisfaction of certain conditions.
(c) It centred the 'best interests of the child' as the defining feature informing policy calls, and centred their agency in decisions involving them.

Such an approach made space for the autonomy of individuals, ensured parental laws were child-centric, and extended legal recognition to a diversity of caretaking arrangements. Code 2.0 continues to reflect these principles. However, in light of the feedback received at the consultations and research in pursuance of the same, the following major policy[238] shifts can be witnessed in Code 2.0:

1. **Parental Responsibilities and Rights Agreements:** One of the key features of draft Code 1.0 was to extend legal recognition to parties who may not be the legal parent of the child but nonetheless undertook parenting in relation to the child. The objective was to ensure inclusion of the diversity of caretaking arrangements including those involving step-parents, queer families, or instances where persons in non-conjugal relationships undertook parenting together. Three routes were provided to enable inclusion: *first*, a court order vesting parental responsibilities and rights, *second*, entering into a parental agreement, and *third*, default acquisition of parental rights if certain prescribed conditions were satisfied. Concerns were raised at the consultation regarding the potential misuse of parental agreements, wherein a parent or a party holding parental rights could enter into a registered agreement with a person of their choice to share parental responsibilities with them. As there were no safeguards or oversight, parties who may not have the best interests of the child in mind may end up acquiring parental rights and this may render the child vulnerable to exploitation.

   Recognising this possibility, Code 2.0 no longer provides for parental agreements. However, it does retain acquisition of parental responsibilities and rights through a Court order, and default acquisition to allow for legal recognition of the diversity of caretaking and parental arrangements beyond the traditional family.

2. **Acknowledgement of Parentage:** Draft Code 1.0 prescribed the ways in which a parent-child relationship was established. One of the routes for establishment of a parent-child relationship and thus being deemed the legal parent of the child was through execution of a voluntary acknowledgement deed in relation to the child with the consent of the legal parent. The purpose of

[237] Law Commission, 'Reforms in Guardianship and Custody Laws in India', 2015, Para 2.3.8.
[238] Minor policy shifts have not been discussed in this Part, and are instead reflected in the draft law directly.

this provision was to enable non-marital parents, specifically the parent who did not give birth to the child, to acquire parenthood through acknowledgement. Draft Code 1.0's provision on voluntary acknowledgment of parentage permitted acknowledgement through two routes: *first*, by being named in the birth certificate with the consent of the legal parent at the time of birth or subsequent to birth, or *second*, through the execution of a voluntary acknowledgement deed. Code 2.0 does away with the route of execution of a voluntary deed of acknowledgement. This is because such a requirement is not necessary when parenthood can be acknowledged through registering as the parent in the birth certificate of the child itself. Additionally, the Births, Deaths and Marriages Registration Act, 1886 already permits fathers of children born out of wedlock to register as the father of the child with the consent of the mother. However, this Act continues to apply only to heterosexual relationships, uses gendered terms such as father and mother, and outdated terms such as 'illegitimate child'. A gender-neutral provision that applies to all parents to permit acknowledgement through being named in the birth registry has been provided for in this draft.

3. **Inclusion of Safeguards:** Code 2.0 provides for further safeguards as compared to draft Code 1.0 to ensure the welfare of the child. Two primary areas reflect such safeguards: *first*, the acquisition of parental rights via a Court order, and *second*, termination and restriction of parental rights via a Court order. Concerns were raised at the consultation that permitting third parties to acquire parental rights, or to move Court for termination and restriction of parental rights could be misused to deprive parents or guardians of their rights and adversely affect children. This may particularly be misused against mothers by extended family given the economic vulnerability of women in heterosexual marriages, or even single mothers. Consequently, Code 2.0 introduces several safeguards to limit the abuse of these provisions. The underlying policy is a shift from capacity to ensure best interests of the child to conduct towards ensuring such interests. Thus, the Court must pay attention to the conduct of the parties in relation to the child as opposed to factors that demonstrate mere potential to ensure the wellbeing of the child.

   This policy has been operationalised as follows: *first*, when it comes to acquisition of parental rights, a Court can issue an order to this effect only if the person has a *demonstrated* interest in the care, protection, well-being and development of the child. Thus, the mere existence of interest or good-faith is not sufficient but such interest must be demonstrated. *Second*, a court can only terminate a party's parental rights if two conditions are satisfied: one, the person demonstrates a consistent unwillingness to perform their parental responsibilities, and two, such termination will not adversely affect the child's well-being. Further, the Court must consider the best interests of the child, as well as the child's preference when issuing such orders.

4. **Marital Presumption of Parentage:** A provision for presumption of parentage is critical to identify who the parent of the child is, if parentage is contested. Usually, it is at the time of dissolution of marriage that alleged genetic fathers contest paternity, particularly if there are allegations of infidelity against the wife.[239] Section 112 of the Indian Evidence Act, 1872 provides for the marital presumption of paternity and deems a person who is married to the mother of the child to be the father of the child if such child is born during the continuance of marriage, or 280 days after the dissolution of marriage, the mother remaining unmarried. The only ground on which this conclusive presumption can be rebutted is if there was no access between the mother and alleged genetic father at the time the child may have been conceived. This presumption is informed by the policy of protecting the child's interests as the husband is presumed to be the father even if he may not be genetically linked to the child, unless proven otherwise. While a presumption of this nature is critical, it continues to be informed by the heterosexual marital family as the only site of parenthood. Consequently, draft Code 1.0 rendered the marital presumption gender neutral, and did away with absence of access between the parties as the only ground for rebuttal of such presumption.

[239] Aparna Ajinkya Firodia v. Ajinkya Arun Firodia, 2023 SCC OnLine SC 161.

Concerns were raised at the consultation regarding this policy shift as it may open up the possibility of challenging paternity on grounds other than access which may harm the child's well-being.

Taking this into account, while the marital presumption continues to be gender-neutral, an additional provision has been introduced which provides that such presumption may only be rebutted on the ground that there was non-access in cases where access is relevant. Thus, for heterosexual parents where conception is a product of sexual relations, access and non-access will continue to be relevant. In cases of other classes of parents, since parenthood may not be informed by sexual relations, other kinds of evidence may be produced. Because parenthood may be achieved through processes like acknowledgement or adoption, sufficient safeguards exist to not allow for easy rebuttals. Further, in addition to the marital presumption, 'holding out' as the basis of presumption of parentage has been retained to account for social or functional parenthood wherein the intention to parent and performance of parental responsibilities in relation to the child establishes parent-child relations. Such a presumption benefits queer parents as well as parents who are not in a marital relationship.

5. **Reforming Custody:** Chapter 1 of draft Code 1.0, which dealt with adult-unions, provided for custody of children. This provision largely mirrored the position of law under secular and personal statutory laws i.e. a court may from time-to-time issue custody orders, while taking into account the best interests of the child. It was flagged at the consultation that the custody regime did not reflect modern developments in comparative statutory law - for instance, it was critical to introduce concepts such as joint guardianship, joint custody, visitation, contact, etc. in the law. Responding to such feedback, two changes have been introduced. *First*, the provision on custody has been shifted from the chapter on adult unions to the chapter on parent-child relations and applies to parents in marital as well as non-marital relationships. *Second*, the outdated concept of guardianship has been replaced by the concept of 'legal custody'.

   Custody has been defined to include: legal custody and physical custody. Understanding parent-child relationships through the outdated framework on guardianship which emphasises 'parental authority' as the basis of such relationships stands replaced in the proposed framework. Instead, contemporary concepts reflected in progressive comparative jurisdictions such as legal custody, physical custody, care, and contact are reflected in this draft to articulate the legal relationship between a parent and a child. Further, specific terms such as joint custody and sole custody have been defined, and the provision on custody now clarifies the factors courts must account for when issuing an order on custody as well as the considerations it must address when issuing orders for joint custody – legal or physical.

6. **Best Interests of the Child:** One significant policy shift in Code 2.0 is the approach taken towards codification of 'best-interests'. Draft Code 1.0 codified best interests to address the concerns about the indeterminacy of the principle, and the application of it reflecting a judge's subjective views regarding the family and the child's welfare. However, it was pointed out at the consultations that prescribing factors may lead to parties misusing the same to malign a parent to deprive them of parental rights. Further, it was pointed out that the manner of codification was based heavily on potential or capacity, often giving the parent or party with more power and resources an unfair advantage in proceedings involving children, especially custody.

   To account for this, while the substantive focus of the draft still remains on a multiplicity of factors, such as contribution to emotional development, nature of the parent-child relationship, and so on, an overarching temperamental shift has occurred in this draft on best interests – instead of looking at the potential or capacity of the parent in their caregiving duties and parental responsibilities, the focus moves to the conduct of the parent. The rationale behind this shift is rooted in both adjudicative and substantive benefits. From a pragmatic perspective, courts can exercise their core competence by determining past facts, rather than speculating about the future. Substantively, the exercise of examining past conduct is less prone to biases, as it does not require determination of

abstract ideas such as the quality of parenting or what constitutes a *successful* childhood. Past caretaking as a factor also corresponds with the child's emotional bonds to the parents or caretakers, parental abilities, and the child's need for stability and continuity. Lastly, past conduct only views time, and not resources, as an investment in the child. This means that the amount of *time* the parent or caregiver spends on caretaking is of relevance, and not the financial resources. This deliberate focus on time ensures that financial contribution is not over-emphasised in the determination of best interests, as such a criterion would tend to favour the financially stronger parent, often biassing the process towards the father, given that men tend to hold more economic power in marriages. In this manner, best interests are better represented by past conduct of the parent and how much time they have dedicated to the child, rather than future potential.

7. **Reproductive Technology and Parenthood:** The recommended amendments to the laws on reproductive technology, namely, the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 marks a major policy shift. In draft Code 1.0, all persons could access surrogacy and ART facilities irrespective of whether they had any medical conditions necessitating surrogacy or ART. This amendment was recommended as the medical conditions which rendered persons eligible to access surrogacy and ART, such as inability to conceive because of infertility, conceptualised parenthood in a manner which applied largely to heterosexual couples. Draft Code 1.0 did away with the need for proof of a medical condition to ensure all persons who wished to access reproductive services could do the same. However, it was pointed out during consultations that removing such criteria could render surrogate persons and donors vulnerable to exploitation, a position that has been argued by many, and thus there was merit in reconsidering the call on loosening eligibility criteria.

   In light of this, the amendments in Code 2.0 reintroduce certain eligibility criteria warranting the necessity of surrogacy or reliance on ART methods. However, the criteria have been expanded beyond those applicable to heterosexual couples. For instance, 'infertility' under the ART Act has been replaced with 'inability to conceive' on account of infertility, or inability to naturally conceive on account of the sex or gender identity of the partners to include same-sex/gender couples within the folds of the law.

Key Features

Key Features
Part 1: Law on Parenthood and Parental Responsibilities and Rights
The first Part lays out the theoretical framework and justification for a law on parenthood and parental responsibilities and rights as an alternative to outdated laws on natural guardianship, 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 functional 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: (a) prescribes conditions for establishment of parent-child relations; (b) codifies parental responsibilities and rights; (c) outlines conditions under which third parties can acquire parental responsibilities and rights to provide legal recognition to a diversity of caretaking arrangements for children; (d) codifies the best interest principle and duty of the Court; and (e) prescribes additional provisions to protect legal rights of parents and children.
Part 2: Amendments to Existing Laws

The Annexure of Amendments, **Annexure 1**, amends laws that regulate parent-child relations in India to ensure they are inclusive of a diversity of parent-child relations beyond the heterosexual conjugal family unit and reflect the principles informing the policy and drafting calls of Chapter II. They amended laws are as follows:

(a) The Guardian and Wards Act, 1860,
(b) The Juvenile Justice (Protection and Care) of Children Act, 2015,
(c) The Surrogacy (Regulation) Act, 2021,
(d) The Assisted Reproductive Technology (Regulation) Act, 2021, and
(e) The Maintenance and Welfare of Parents and Senior Citizens Act, 2007

34. Definitions.–
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 the birth parent 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;
  (iii) has abandoned the child where abandoned child has the same meaning as defined under section 2(1) of the Juvenile Justice (Care and Protection) Act, 2015;

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

(d) **"care"**[240] of the child includes –
  (i) within a person's capacity, providing the child with:
    I. a suitable place to live;
    II. 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;
  (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;
  (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;
  (xi) providing for any special needs that the child may have; and,
  (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; and
  (ii) having physical custody of the child, or if the child does not reside with the person, then –
    I. communicating, on a regular basis, with the child in-person by visiting the child or being visited by the child,
    II. communicating, on a regular basis, with the child in any other manner, including through written correspondence, or via phone calls or any other form of

[240] 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.

electronic communication;[241]

(f) **"court"** means court as defined under section 2(c) of Chapter I of this Code;

(g) **"custody"** means legal custody and physical custody of the minor;

(h) **"guardian"** means guardian as defined in section 4(2) of the Guardians and Wards Act, 1890 and includes all persons who have legal custody of the minor;

(i) **"legal custody"** means having the responsibility and right for the care of the person of a minor or of their property or of both their person and property;

(j) **"joint custody"** means joint legal custody and joint physical custody of the minor;

(k) **"joint physical custody"** means that each person will have significant periods of physical custody of the minor and custody will be shared to ensure the minor's frequent and continuing contact with each person;

(l) **"joint legal custody"** means that each person will have the responsibility for the care of the person of a minor or of their property or of both their person and property;

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

(n) **"parent"** means a person who has established a parent-child relationship as per section 35 of this Code;

(o) **"parentage"** means the legal relationship between a child and a parent of the child;

(p) **"parenting plan"** means the plan under section 44 of this Code;

(q) **"parental responsibilities and rights"** in relation to a child mean the responsibilities and rights referred to in section 37 of this Code;

(r) **"physical custody"** means the responsibility and right to reside with and supervise the minor;

(s) **"presumed parent**" is a person who is presumed to be the parent of the child as per section 49 of this Code;

(t) **"Registering Officer"** means the authority as defined in section 2(k) of Chapter I of this Code;

(u) **"stable union'"** means a stable union as defined in section 2(l) of Chapter I of this Code;

(v) **"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 –
  (i) death of the other parent;
  (ii) desertion by the other parent;

Explanation: For the purpose of this subsection, 'desertion' means desertion as defined in Explanation 1 of

[241] 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.

section 11(1) of Chapter I of this Code;

(w) **"sole physical custody"** means that a minor will reside with and be under the supervision of only one person, subject to the power of the Court to order contact;

Explanation: For the purpose of this subsection, 'contact' means contact as defined in sub-section (e) of this section but does not include physical custody;

(x) **"sole legal custody"** means only one person will have the responsibility and right for the care of the person of a minor or of their property, or of both their person and property; and,

(y) **"third party"** includes a person who is not the parent of the child or a member of a natal family of the child.

Issue: Who is a parent?

Objective: To recognise parenthood for all, independent of gender identity, sexual orientation or marital status.

Context:
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 parenthood to a diversity of parents independent of gender identity, sexual orientation, marital status, and presence or absence of 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 or **functional parenthood** is a key/decisive factor to recognise parenthood. Laws on adoption, for instance, recognise intention to parent as the basis of parenthood, but do not provide recognition to non-marital parents.[242] Comparative case law[243] also demonstrates the challenges queer persons have experienced where 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, centring marriage as the basis of joint parenthood leaves out non-marital parents. Consequently, extending legal protection to such parents,

[242] 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'.
[243] Dougal Nejaime, 'The Nature of Parenthood', The Yale Law Journal, 2017.

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'.[244] This has been done to *firstly*, 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 ART to become parents.[245] 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.[246] Recognising the social dimensions of parenthood wherein the intention to parent and actual parenting 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 in India (see clauses (a) to (d)), the proposed provision expands parenthood by using gender-neutral language and by also 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.

Proposed Provision:

35. 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 (Care and Protection of Children) 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(iii)(a)(II) of the Surrogacy (Regulation) Act, 2021;
  (e) there is a presumption of parentage in favour of a person under section 49 of this Code, unless such presumption has been successfully rebutted; or,
  (f) the person has successfully executed an acknowledgement of parentage in relation to the child as per section 36 of this Code.

(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: How does one acknowledge parentage?

[244] 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 factors 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).

[245] 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.

[246] *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.

Objective: To enable persons irrespective of gender identity, sexual orientation, and marital status to voluntarily acknowledge their parentage in relation to a child and establish a parent-child relationship with such a child.

Context:
As marriage continues to be treated as key to joint legal parenthood, parents who are not in a marital relationship may find it challenging to establish a legal relationship with a child despite being the parent of the child. 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.

Position under Muslim personal law and common law
Presently, both Muslim personal law as well as common law demonstrate that an intention to parent plays a critical role in determining the legal parent or guardian 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.[247] 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.[248] Similarly, in *Mohd Arman v Union of India*,[249] 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.

Current position under statutory law
In a similar vein, statutory law also recognises the rights of both single parents and unmarried parents to acquire parenthood through acknowledgment. Section 8(1)(ab)[250] of the Registration of Births and Deaths Act, 1969 ('1969 Act')[251] states that in the case of single parents or unwed mothers, the "parent" is bound to register the birth. This requirement extends the obligation, and therefore the right, to single parents and unmarried mothers to acknowledge parenthood through their child's birth certificate. This entitlement is extended directly to fathers who are not married to the birth mother as well. Under section 19[252] of the Births, Deaths, and Marriages Registration Act, 1886 ('1886 Act') the mother, along with the father acknowledging paternity, can jointly register their child. These provisions do not require the mother and father to be in a marital relationship and thus allow for single parents, unmarried mothers, and fathers not married to the mothers, to cement their acknowledged parenthood through registration and issuance of the child's birth certificate. However, the provisions under the 1969 Act and the 1886 Act continue to be gendered, as they recognise only heterosexual relationships and a largely binary understanding of gender identities involving only the father and the mother. Their usage of outdated terms such as "illegitimate" child to refer to a child born to unmarried parents is also in dire need of revision.

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[247] Dinshah Fardunji Mulla, *Mulla Principles of Mahomedan Law*, (LexisNexis, 2020), 476.
[248] Dinshah Fardunji Mulla, *Mulla Principles of Mahomedan Law*, (LexisNexis, 2020), 477.
[249] LPA No. 249 of 2016, decided on January 23, 2017 (P&H).
[250] Section 8(1)(ab) of the Registration of Births and Deaths Act, 1969: "Persons required to register births and deaths.—(1) It shall be the duty of the persons specified below to give or cause to be given, either [orally or in writing with signature], according to the best of their knowledge and belief, within such time as may be prescribed, information to the Registrar of the several particulars [including the Aadhaar number of parents and the informant, if available, in case of birth,] required to be entered in the forms prescribed by the State Government under sub-section (1) of section 16,— (...) (ab) in respect of birth of a child to a single parent or unwed mother from her womb, the parent;"
[251] As amended by s.7 of the Registration of Births and Deaths (Amendment) Act, 2023
[252] Section 19 of the Births, Deaths, and Marriages Registration Act, 1886: "Duty of Registrar to register births and deaths of which notice is given.—Every Registrar of Births and Deaths of notice of a birth or death within the local area or among the class for which he is appointed, shall, if the notice is given within the prescribed time and in the prescribed mode by a person authorized by this Act to give the notice, forthwith make an entry of the birth or death in the proper register book. Provided that (...) (b) he shall not enter in the register the name of any person as father of an illegitimate child, unless at the request of the mother and of the person acknowledging himself to be the father of the child."

Proposed step:
Drawing from the above, a gender-neutral provision for acknowledging parentage has been codified in this Code. Draft Code 1.0 permitted voluntary acknowledgement by being named as the parent of the child in the birth certificate with consent of the legal parent or through execution of an acknowledgement deed subsequent to birth. Concerns were raised at the consultation, specifically by child rights advocates about the potential misuse of this provision and the necessity for safeguards to protect the best interests of the child. It had been recommended that in case of non-marital parents, the second parent may adopt the child as per the provisions of the JJ Act in order to acquire legal parenthood.

Despite these concerns, Code 2.0 continues to reflect the policy position followed in draft Code 1.0. The only difference is that under Code 2.0, registering as the parent of the child with the consent of the legal parent is sufficient to constitute acknowledgement. The need for execution of an acknowledgment deed has been done away with to make the process less cumbersome. This policy choice is informed by two factors. *First*, requiring a non-marital parent to adopt in order to acquire parenthood while married parents are automatically deemed parents based on their marital status creates a discriminatory regime, as it privileges marriage as the basis of parenthood. As one of the objectives of this Code is to reflect a modern regime for family law regulation, which accommodates a variety of family formations, it is critical to ensure that the nature of the relationship between the parents (marital or non-marital) is not the only basis of establishing parenthood. *Second*, as present laws already permit non-marital parents to register as parents together in the birth register, the need to disturb the *status quo* was not deemed necessary.

A gender-neutral provision on voluntary acknowledgement benefits non-marital parents, queer parents, as well as persons who may want to take on the role of a legal parent of the child by providing for the establishment of 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.[253]

Proposed Provision:

36. Voluntary acknowledgement of parentage –

(1) Any person may acknowledge parentage in relation to the child by getting named as the parent of the child in the Birth Register, 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 as per the procedure prescribed.

(2) A person may acknowledge parentage under sub-section (1), only if such child does not have a presumed, acknowledged, or adjudicated parent, other than the legal parent of the child under sub-section (1) and the person seeking to establish a relationship with the child through acknowledgement.

(3) A person can acknowledge parentage under sub-section (1) if the child has only one legal parent.

Issue: What are parental Responsibilities and rights?

Objective: To replace the outdated framework of natural guardianship which regulates parent-child relations with a progressive and modern framework on 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[254] and parental rights[255] are defined in different

[253] Leslie Joan Harris, Voluntary Acknowledgments of Parentage for Same-Sex Couples, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 469-70 (2012).
[254] *See* UK Children Act 1989, s 2; Children (Scotland) Act 1995, s 2.
[255] *See* UK Children Act 1989, s 3; Children (Scotland) Act 1995, s 1.

provisions. In South Africa, 'parental responsibilities and rights' are articulated in a single provision.[256] 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[257], 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 a non-exhaustive 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 outdated term "guardianship" and adopts the formulation of "legal custody", "contact" and "care". As discussed earlier, guardianship laws are an outdated approach towards regulation of parent-child relationships and must be modernised. The concepts of guardianship and custody only make 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 Code prescribes a shift towards a modern approach on parent-child relations that focuses on parental rights existing for the purpose of performing parental responsibilities, the outdated common law understanding of parental authority (as evident in the language of guardianship) stands replaced with contemporary concepts such as custody (legal and physical), contact and care. Further, Code 2.0 explicitly clarifies that parental responsibilities and rights exist only *vis-a-vis* a minor child and removes the word 'authority' from the earlier version of the definition.

Proposed Provision:

37. Parental responsibilities and rights.-
(1) Parental responsibilities and rights mean all the rights, duties, powers, and responsibilities which, by law, a parent has in relation to their minor child and such minor child's property, and includes-
(i) having legal custody of the child;
(ii) ensuring contact with the child;
(iii) ensuring care of the child, and
(iv) contributing to the maintenance of the child.
(2) More than one person may hold parental responsibilities and rights in relation to a child.

Issue: Who holds Parental Responsibilities and Rights?

Objective: To clarify that all parents hold parental responsibilities and rights irrespective of gender identity, sexual orientation, or marital status.

Context:

[256] South Africa Children's Act 2005, s 18.
[257] NV Lowe, 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' [1997] International Journal of Law Policy and Family 195.

Two major trends have been witnessed in laws on allocation of parental responsibilities and rights. In Australia,[258] all parents automatically acquire parental responsibilities and rights. In the UK,[259] Scotland,[260] and South Africa,[261] 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.[262] 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,[263] 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.[264] 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.[265] 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.[266]

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[267] that assumes that mothers are caretakers while an unmarried father can only exercise parental responsibilities if he is a 'meritorious father'. In fact, a minor empirical study[268] carried out in the UK demonstrates that most unmarried fathers did not agree with the law denying them automatic parental responsibilities and rights.[269] 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.[270] It has also been argued that such distinction between married and unmarried fathers is not in the 'best interests of the child', the concept which serves as the underlying thrust for a parental responsibilities framework.[271] 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.

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[258] Australia Children's and Young People Act 2008, s 16, Division 1.2.3.
[259] UK Children's Act, 1989, s 4.
[260] Children (Scotland) Act 1995, ss 4 and 4A.
[261] South Africa Children's Act 2005, ss 19, 20 and 21.
[262] NV Lowe, 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' [1997] International Journal of Law Policy and Family 198, 199.
[263] South African Law Commission, Review of the Child Care Act (Project 110, December 2002) 70.
[264] NV Lowe, 'The Meaning and Allocation of Parental Responsibility - A Common Lawyer's Perspective' [1997] International Journal of Law Policy and Family 198.
[265] Saptarshi Mandal, 'Biology, Intention, Labour: Understanding Legal Recognition of Single Motherhood in India' (2019)15 Socio-Legal Rev 131.
[266] 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.
[267] *Navtej Johar v Union of India* (2018) 10 SCC 1, para 393 (Chandrachud, J.)
[268] 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).
[269] 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.
[270] ibid 153.
[271] ibid 158.

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.[272] 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.[273] 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:
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*."[274] The proposed provision also reflects this principle.

In case of parents who are minors, the South African[275] 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.

Proposed Provisions:

38. Parental responsibilities and rights of parents.–
Each parent of a child has parental responsibilities and rights in relation to the minor child.

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

(2) If both parents of the child are minors –
  (a) the guardians of the minor parents will have parental responsibilities and rights in relation to the child;
  (b) 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.

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[272] *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.
[273] *Tulsa & Ors v Durghatiya & Ors.* (2008) 4 SCC 520; *Bharatha Matha & Anr. v R Vijaya Renganathan & Ors.* AIR 2010 SC 2685.
[274] 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.
[275] South Africa Children's Act, 2005, s 19(2).

Issue: How does one acquire parental responsibilities and rights?

Objective: To articulate the manner in which parental responsibilities and rights can be acquired.

Context:

PRR under draft Code 1.0

As discussed earlier, draft Code 1.0 provided for three routes to acquire parental responsibilities and rights, namely: a) by entering into a parental responsibilities and rights agreement ('PRR agreement'), b) default acquisition upon satisfying certain conditions, and c) through an order of a Court. The objective behind provisions on a PRR agreement was to enable parties to get legal recognition for non-traditional parental arrangements to account for the fact that India is home to a diversity of caretaking arrangements involving persons who are not the legal parents of a child. For instance, in her work on motherhood, Amrita Nandy (2017)[276] 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. The purpose of a PRR agreement was to centre the autonomy of persons who wanted to engage in a joint parental arrangement and extend legal recognition to them.

Legitimate concerns were raised at consultations about the possibility of a PRR agreement being misused as there was no judicial or administrative oversight. Specifically, it was pointed out that such arrangements may be exploited for the purpose of trafficking children. It was recommended that safeguards be put in place to prevent the same. Further, it was pointed out that community caretaking arrangements are already prevalent and robust and thus there is no need to disturb the same through codification of a PRR agreement. Taking note of these concerns, Code 2.0 does away with the provision on PRR agreements. However, along the lines of draft Code 1.0, it provides two routes for acquisition of parental responsibilities and rights, namely:

(a) acquisition through a Court order, and
(b) default acquisition if certain conditions are satisfied.

PRR in Code 2.0

A provision on default acquisition of parental rights and responsibilities has been retained in Code 2.0 to allow for recognition of atypical parental arrangements and to provide for a less cumbersome alternative to Court appointments under the GWA. Indian case law has noted that when it comes to determining who the legal guardian of a child is, the intention to parent is critical, as opposed to a mere biological link with the child or a court order appointing a person as the guardian of the child.[277] Consequently, third parties who do not have a legal or familial relationship with the child can act as guardians of the child. A default acquisition provision is thus reflective of Indian common law principles wherein the intent to parent has been crucial in deciding who has legal guardianship of the child.[278] Second, 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.[279] Thus, a corresponding provision under this Code for acquisition of the broader set of parental rights through a Court order has also been provided for.

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[276] Amrita Nandy, *Motherhood and Choice: Uncommon Mothers, Child Free Women* (Zubaan, 2017).
[277] *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.
[278] *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.
[279] 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).

Proposed Step:
A draft provision which recognises two routes for acquisition of parental responsibilities and rights. *First*, through a Court order, if they have a demonstrated interest in the care and upbringing of the child. *Second*, default acquisition if certain conditions are satisfied.

Under Code 2.0, additional safeguards have been introduced for Court ordered acquisition of parental responsibilities and rights. This has been done by: *first*, outlining the factors a Court must take into account when considering an application for acquisition which includes the best interests of the child, and the child's own preferences; s*econd*, by stipulating that a Court may vest rights in a person only if they have a *demonstrated* interest in the care, protection, well-being and development of the child. Mere interest or good-faith is no longer sufficient and such interest must be demonstrated through conduct.

Proposed Provision:

40. Acquisition of parental responsibilities and rights by Court order.-

(1) A person will acquire parental responsibilities and rights if a Court issues an order vesting parental responsibilities and rights in such person, on an application filed by the person.

(2) 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**;** and
(iii) any other factor that should, in the opinion of the Court, be taken into account.

(3) A Court will issue an order for vesting of parental responsibilities and rights under sub-section (1) only if the person has a demonstrated interest in the care, protection, well-being, and development of the child.

Like draft Code 1.0, under Code 2.0, 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. This condition mitigates the possibility of conflicts and disputes that such a default regime may give rise to with multiple parties, including both parents, acquiring responsibilities upon satisfying the prescribed conditions. The term single parent has been defined broadly for the purpose of this provision and includes cases where the other parent has passed away, the other parent has deserted the child, and finally, drawing from Indian common law, where the other parent demonstrates a consistent lack of interest in the affairs of the child. *Second*, default acquisition is restricted to third parties who engage in caregiving and whom the single parent or the 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.

Proposed Provision:

41. Default acquisition of parental responsibilities and rights:

(1) A person will acquire parental responsibilities and rights by default, if such person, being a third party, has contributed to the upbringing, care and maintenance of the child for a period of at least two years.

(2) A person will acquire parental responsibilities and rights under sub-section (1) only if-
   (a) the child has a single parent or only a sole person holds parental responsibilities and rights in relation to the child, and
   (b) the single parent or sole person holding parental responsibilities and rights intends to co-parent the child with such a third party and vice-versa.

Explanation- For the purpose of this section, "single parent"[280] 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 –

(a) death of the other parent;
(b) desertion by the other parent;
(c) demonstration of a consistent lack of interest in the affairs of the child by the other parent.

Issue: What is the manner of exercise of parental responsibilities and rights?

Objective: To clarify the manner of exercise of parental responsibilities and rights.

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 nor desirable, a position which is reflected in the UK's Children's Act, 1989.[281] 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.[282]

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 in clause 49 of this Chapter.

Proposed Provision:

42. 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, unless this Code, or any other law in force, or an order of the Court, provides otherwise.

Issue: What is the regime for custody of children?

Objective: To prescribe a modern regime for custody of children in the event of separation of parents.

Context: Presently, under Indian marriage laws,[283] courts are empowered to pass orders for the custody of the child. However, *first* the application of these provisions is limited to cases of only dissolution of marriages, and not separation of non-marital partners, and, *second*, these provisions largely prescribe the general power of the Court to issue orders while accounting for the welfare or best interests of the child. In the course of our consultations, it was indicated that it is critical to clarify that courts may provide for joint custody of the child, such terms must be defined in the law itself, and safeguards must be put in place to protect the child.

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[280] 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).
[281] Sally Sheldon, 'Unmarried Fathers and Parental Responsibility: A Case for Reform' [2001] Feminist Legal Studies 95.
[282] South African Law Commission, Review of the Child Care Act (Project 110, December 2002) 74.
[283] The Divorce Act, 1869, ss 41, 42, and 43; The Parsi Marriage and Divorce Act, 1936, s 49; Hindu Marriage Act, s 26.

Proposed Step:
A provision on custody which applies to all parents irrespective of marital status and provides for the factors that must be considered by the Court when issuing a custody order. Further, the provision also clarifies the duty of the Court when directing joint legal custody or joint physical custody. Thus, the definitions section of this Chapter now provides definitions of terms such as: custody, legal custody, physical custody, joint legal custody, joint physical custody, sole legal custody, and sole physical custody. As explained earlier, the term 'legal custody' has replaced the concept of guardianship.

Proposed Provision:

43. Custody of minor child.-

(1) In the event of separation of parents, including through dissolution of a marriage or a stable union, the Court will, during the course of dissolution proceedings under section 11 or section 30 of Chapter I of this Code, or upon an application filed by a parent, make an order deciding the custody of the child.
(2) In deciding custody, whether joint custody or sole custody, the Court will -
    (a) consider the best interests of the child;
    (b) take into account the intelligent preference of the child; and
    (c) comply with its duty as prescribed under section 55 of this Chapter.
(3) In making an order of joint legal custody, the Court will specify the circumstances under which consent of both parents has to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent.
(4) In making an order of joint physical custody, the Court will specify the manner in which such an arrangement will be operationalised and ensure that such an arrangement does not render the child or the parent at the risk of violence or harm.
(5) The Court will, in addition to custody, also issue an order for maintenance of the child as per section 45 of this Code.
(6) Orders under this section are of an interim nature and may be modified upon application by either parent.

Issue: What is a parenting plan?

Objective: To enable parents to mutually arrive at a parenting plan in the course of custody proceedings.

Context:
A parenting plan could be employed in the event of separation of parents. An indicative draft parenting plan has been made available on the E-courts Services website,[284] and it has either been approved by certain High Courts[285] or is being used as a guidance document by them[286]. Pursuant to their adoption by the High Courts, these guidelines have 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, these guidelines can be codified.[287]

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[284] Standard Parenting Plan, Website of Ecourt Services <https://districts.ecourts.gov.in/sites/default/files/Parenting%20Plan%28final%29.pdf> accessed 25 May 2023.
[285] Child Access and Custody Guidelines is approved by the Himachal Pradesh High Court <https://hphighcourt.nic.in/pdf/ParentingPlan032014.pdf> accessed 25 May 2023.
[286] 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.
[287] 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).

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.[288] 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 parties who are separating arrive at a mutually workable parenting plan.[289]

Proposed Step:
As mentioned above, parenting plans must be resorted to in the event of a dispute regarding the custody of a child. In such cases, the onus is on the court to nudge the parties to arrive at a parenting plan, while also ensuring that they have complete autonomy in arriving at the terms of such a plan. As per feedback received at the consultations, wherein it was pointed out that if parenting plans were made mandatory, the failure to arrive at such a plan may lead to inordinate delays, it has been made discretionary under Code 2.0. Thus, while it is the responsibility of a Court to encourage a parental plan, it is up to the parents to choose to adopt one. Additionally, a provision has been added wherein Courts will appoint a competent professional such as a counsellor or child therapist, based ideally on the choice of parents, to assist them in arriving at a parenting plan. Once finalised, the parenting plan must be approved by the court, and enforced like any other order of the court.

44. Parenting plan.–
(1) During the course of proceedings related to the custody of a child under section 43, the Court will invite the parents of a child to mutually arrive at a parenting plan.
(2) If the parents agree to a parenting plan under sub-section (1), the Court will appoint a competent professional, based on the choice of the parents so far as possible, to guide and assist them in arriving at such a plan.
(3) A parenting plan may determine any matter in connection with parental responsibilities and rights in relation to such a child, including –
    (a) residence of the child;
    (b) contact between the child and the parent, and contact between the child and any other person;
    (c) physical and mental well-being of the child;
    (d) financial decisions in relation to the child;
    (e) decisions in relation to the education of the child;
    (f) overall upbringing of the child; or,
    (g) any other matter that the parties or the Court deem relevant in relation to the child.
(4) Upon agreement on the terms of the parenting plan, the parents of a child will submit the plan to the Court for it to pass an order for enforcement of the parenting plan.
(5) A parenting plan must be in accordance with such format as may be prescribed.

Issue: What is the regime for maintenance of children?

Context:
At present, secular laws governing the maintenance of children by parents are Section 125 of the Code of

[288] Law Commission of India, Reforms in Guardianship and Custody Laws in India (257th Report, May 2015) 78.
[289] 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.

Criminal Procedure 1973 ('CrPC') and Section 38 of the Special Marriage Act, 1954.[290] The language of Section 125 of the CrPC 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.[291]

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[292] 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 minor 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 minor 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*[293] have been relied on to list factors that the court shall consider to determine the amount of maintenance.

Proposed Provision:

45. Maintenance of children.–
(1) Parents have a duty to maintain their children.
(2) Parents will maintain –
    (a) minor children till they attain majority, or
    (b) 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 will have a duty to maintain a step-child if the step-child does not have a living parent or has been deserted by their parent.

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

(3) On filing of an application, Court may direct a parent to maintain a major child if it deems the circumstances are such that the major child cannot maintain themselves and such maintenance is

[290] Section 38- Custody of children.— the court may pass orders for custody, maintenance and education of minor children.
[291] 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.
[292] 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.
[293] (2021) 2 SCC 324.

critical to their reasonable well-being.

Illustration One: A is a major child who is pursuing her education in university and does not have a source of income to cover her educational or living expenses at university. The Court may direct the parents to continue to maintain A to cover her educational and living expenses.

Illustration Two: B is an unmarried major daughter who could not pursue an education or secure a job. The Court may direct the parents to maintain B till she is financially secure and can maintain herself.

Illustration Three: C is a major child who is a transgender person and is not able to secure a job on account of discrimination based on their gender identity. The Court may direct the parents to maintain C till they secure a job and can maintain themselves.

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

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

(a) the income of the parents;
(b) the economic capacity and status of the parents;
(c) the lifestyle enjoyed by the child;
(d) the reasonable needs of the child;
(e) the provisions for food, clothing, shelter, education, etc. of the child;
(f) need for any medical attendance, treatment or care of the child; and
(g) any other factors which the Court may deem necessary based on the relevant circumstances of each case.

(6) 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

Provision: Prohibition of discrimination against parents and against children born out of wedlock

Context:
Existing laws on parent-child relations continue to be discriminatory against several classes of parents. *First*, parenthood is recognised largely for heterosexual persons in a conjugal relationship. *Second*, the mother is deemed the sole guardian of a child born out of wedlock. F*inally*, 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. A progressive law on parent-child relations should not reflect these policies.

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.

46. 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.

Provision: 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.[294] Taking note of a decision of the Supreme Court,[295] 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.[296] This right must be extended to all single parents, irrespective of gender identity. Draft Code 1.0 defined a single parent as someone who was the only legal parent of the child or the only parent exercising parental responsibilities and rights on account of - (a) death of the other parent, (b) desertion by the other parent, or (c) lack of interest in the affairs of the child shown by the other parent. Concerns were raised at the consultation regarding the definition including the provision on 'lack of interest' as this could be misused to deny a person parenthood in relation to their child. In order to address this concern, the definition of single parent has been modified to only include cases of death of the other parent or desertion by the other parent. The term "desertion" has been defined sufficiently widely in Chapter I of the Code to account for cases where the second parent is wilfully absent from the life of the child for prolonged periods of time.

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.

Proposed Provision:

47. 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 a child.

***Explanation*-** 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 for the time being in force.

Provision: Modification, suspension, termination of parental responsibilities and rights

Context:

[294] *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.
[295] *ABC v State NCT of Delhi* (2015) 10 SCC 1.
[296] 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.

Under Indian guardianship laws,[297] courts are 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 in appointing and revoking guardianship.[298] As parental responsibilities and rights can be granted by a Court order (including to parties other than parents), it is critical to provide for a provision which allows for termination, suspension, extension, or restriction of the same.

Proposed Step:
A provision should be included which specifies who can apply for termination, suspension, extension, or restriction of parental responsibilities and rights and outlines the factors a court must consider while issuing an order to such effect. Draft Code 1.0 permitted a party who had "sufficient interest in the care, protection, well-being, or development of the child" to move Court under the provision. Concerns were raised that such a provision could be subject to misuse by natal family members to deprive parents, specifically mothers of parental rights. In order to address this concern, safeguards have been introduced as follows:

(a) *First*, a third party can move Court only if they have a "demonstrated interest in the care, protection, well-being and development of the child". Thus, interest can no longer be *sufficient* but must be *demonstrated*. Moreover, such interest must be demonstrated in relation to all four components i.e. care, protection, well-being, and development of the child, and not some of the components, as was the case with draft Code 1.0.

(b) *Second*, a Court can terminate, suspend, or restrict someone's parental responsibilities and rights only if such person demonstrates a *consistent unwillingness* to carry out parental responsibilities and such an order does not adversely affect the child's well-being.

Proposed Provision:

48. Termination, suspension, extension or restriction of parental responsibilities and rights.–

(1) A person under sub-section (2) may file an application before Court to–
  (a) suspend, or terminate, any or all of the parental responsibilities and rights which a person has in respect of a child; or,
  (b) extend or restrict the exercise by a person of any or all of the parental responsibilities and rights which a 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 –
  (a) a parent;
  (b) a person other than a parent who holds parental responsibilities and rights in relation to the child; or,
  (c) any other person having a demonstrated interest in the care, protection, well-being, and development of the child.

(3) When considering an application under sub-section (1), the Court must take into account –
  (a) the best interests of the child;
  (b) 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**;** and
  (c) any other factor that should, in the opinion of the Court, be taken into account.

[297] The Guardians and Wards Act, 1890, s 39 and the Hindu Minority and Guardianship Act, 1956, s 13.

[298] 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.

(4) A Court will terminate, suspend, or restrict parental responsibilities and rights of a person in relation to the child only if –
    (a) such person demonstrates a consistent unwillingness to perform their parental responsibilities and rights; and
    (b) such termination, suspension and restriction will not adversely affect the child's physical, mental, and emotional well-being.

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

(6) An order issued by the Court under this section will be an interim order.

Provision: Presumption of parentage

Context:
Section 112 of the Indian Evidence Act, 1872 provides for presumption of paternity of the father during the continuance of a valid marriage. The provision provides that a person will be presumed to be the father of the child if (a) he is married to the mother, and (b) the child was born during the continuance of the marriage or within 280 days of the marriage dissolving, the mother remaining unmarried. Section 112 serves as conclusive proof of paternity and the only ground on which it can be rebutted is that the parties to the marriage did not have access[299] to each other at the time the child may have been conceived. In this context, the Supreme Court has noted that the marital presumption protects social parentage over biological parentage.[300] The intention behind this provision is to safeguard the child's rights by attaching unimpeachable legitimacy to such child[301] as opposed to the paternity of the father. Thus, the provision deems the mother's husband to be the father even if he is not biologically related to such a child.

While section 112 centres the interests of the child by ensuring their legitimacy, it applies only in cases of heterosexual marriages and conceptualises parentage as largely biological thus leaving out a range of parents from its scope including unmarried parents and queer parents. Comparative law[302] demonstrates that in jurisdictions where queer and non-marital parenthood are recognised at par with marital heterosexual parenthood, the presumption of paternity has been modified to accommodate a diversity of parent-child relations.

Proposed Step:
In light of the expansion of parenthood beyond the marital, biological, and heterosexual, the presumption of paternity has to be conceptualised again so as to accommodate the newly recognised forms of parent-child relations. Draft Code 1.0 expanded the presumption in the following manner:
(a) It used the gender-neutral term 'parentage' to include persons of all gender identities and sexual orientations.
(b) The marital presumption was extended to same-sex marriages by doing away with absence of access as the only basis of rebutting parentage. Consequently, the presumption could be rebutted on grounds other than 'non-access'.

[299] Access has been interpreted by the Supreme Court to mean opportunity for sexual intercourse and not cohabitation, Aparna Ajinkya Firodia v. Ajinkya Arun Firodia, 2023 SCC OnLine SC 161, [37] - [42].
[300] Ibid, Para 2.
[301] Ibid, Para 34.
[302] United States Uniform Parentage Act, 2017; Douglas Nejaime, 'Marriage Equality and the New Parenthood', Harvard Law Review [2016].

(c) It introduced parentage by 'holding out' wherein persons who held themselves out to be the parent of the child were deemed to be the legal parent of the child if they also satisfied the other conditions prescribed in the provision. The 'holding out' presumption also reflected the common law position in India where the intent to parent and actual parenting has been held to be the decisive factor in determining the legal guardian of the child. The rationale behind 'holding out' was to go beyond the marital presumption as it covered parents who were not in a marital relationship, as well as to recognise functional parenthood, i.e., parents who were not biologically related to the child but for all intents and purposes performed a parental role.[303]
(d) It prescribed the procedure for making a claim of parentage and for denial of parentage.

It was pointed out at the consultation that the rationale behind a conclusive presumption of paternity (which could be rebutted only if absence of access was established) was to protect the child's legitimacy. Thus, section 112 created a legal fiction wherein a man would be deemed to be the father of the child even in cases where he may not be the biological father. In contrast, the presumption under draft Code 1.0 did away with non-access as the only ground for rebutting parentage, thus emphasising the marital relationship as the basis of parentage. The rationale behind this policy call was to de-centre biology as the basis of parenthood and instead shift to a functional model by extending the marital presumption to cover same-sex marriages. Additionally, given a denial of parentage could only be executed on the basis of a Court order and DNA tests could not be ordered as a routine matter, draft Code 1.0 provided for sufficient safeguards to protect the interests of the child.

Code 2.0 remains largely consistent with draft Code 1.0 in terms of policy. However, under draft Code 1.0, as the ground of non-access was no longer the sole basis for rebutting paternity by fathers, the provision also opened up the possibility of using a wide range of evidence that could be used to successfully rebut paternity. In that sense, the policy informing the provision shifted from protecting the interests of the child to one which focused on establishment of parentage. In order to address the concern wherein the interests of the child may be compromised by allowing a large body of evidence other than access to rebut parentage, a new provision has been introduced. Code 2.0 now provides that a marital presumption of parentage may be rebutted only on the ground of lack of access in cases where such access is relevant for establishment of parentage, thus limiting its application to largely heterosexual marriages. Since in case of same-sex marriages, parenthood may not be biological but rather functional for one of the parents, evidence other than non-access may be relied upon to rebut the marital presumption.

Proposed Provision:

49. Presumption of parentage.-

(1) A person will be presumed to be the parent of the child if the child was born during the subsistence 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 presumption of parentage under sub-section (1) may be rebutted only on the ground that the person and birth parent did not have access to each other at any time when the child could have been conceived, only when such access is relevant for the establishment of parentage.

[303] 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).

(3) 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 -
    (a) the legal parent of the child has consented to the person establishing a parental relationship with the child;
    (b) they reside in the same household with the child;
    (c) they regularly contribute to the care and maintenance of the child; and
    (d) they have established a parental relationship of dependence, bond and care with the child.

(4) A person who claims to be the parent of the child may –
    (a) apply for an amendment to be effected in the Birth Register 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
    (b) apply to a Court for an order confirming their parentage of the child.

(5) This section does not apply to –
    (a) the parent of a child conceived through the rape of the child's birth parent; or
    (b) 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.

(6) A presumption of parentage under this section may be rebutted and competing claims to parentage may be resolved by a Court.

50. Denial of parentage –
(1) A presumed parent or alleged genetic parent who seeks to deny parentage in relation to a child may file an application before Court, affirming their denial of parentage in relation to such child.
(2) An order of Court affirming denial of parentage made under sub-section (1) 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.

Provision: Child's right to privacy in parentage suits

Context:
The Supreme Court has recently ruled in *Aparna Ajinkya Firodia v Ajinkya Arun Firodia ('Aparna Ajinkya),*[304] that children have a right to privacy in cases where such child's parentage is disputed and provides for exceptional circumstances under which such a child can be subject to a DNA test to determine parentage.

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.

Proposed Provision:

[304] 2023 SCC OnLine SC 161.

51. 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 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 (2), a Court will direct a DNA test only if it is impossible to draw an inference regarding the parentage of the child based on all other evidence.
(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.

Provision: 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.

52. Restrictions on guardian's power to alienate property –

(1) The guardian of the minor 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 minor's estate but the guardian can in no case bind the minor by a personal covenant.
(2) The guardian of the minor will not, without the previous permission of Court -
    (a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor, or
    (b) 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 minor 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 minor or any person claiming under them.
(4) No Court will 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 minor.
(5) The Guardians and Wards Act, 1890 will 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[305] of that Act, and in particular—
    (a) proceedings in connection with the application will be deemed to be proceedings under that Act within the meaning of section 4A thereof;
    (b) the Court will observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and
    (c) an appeal will 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.

Provision: Parent's right to appoint testamentary guardians

Context:

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

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.[306] The mother has such a right but only after the father.

Proposed Step:
A provision authorising a parent who is also has legal custody 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.

Proposed Provision:

53. Power to appoint testamentary guardian.–
(1) A parent who has legal custody of the minor child 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 child's person or property or both.
(3) A person appointed as guardian under sub-section (1) acquires guardianship -
    (a) after the death of the parents of the minor 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.

Provision: 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[307] and can lead to arbitrariness.[308] 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.

It must be mentioned that in crucial determinations with respect to a minor child, 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.[309] 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:

[306] Guardians appointed via a will are known as 'testamentary guardians'.
[307] Archana Parashar, 'Welfare of Child in Family Laws - India and Australia', NALSAR Law Review, Vol. 1.
[308] David D. Meyer, 'The Constitutionality of Best Interests Parentage', Will and Mary Bill of Rights Journal, 14, 879.
[309] 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.

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.[310] 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.[311]

As discussed above, the codification of the principle of best interests of the child has undergone a policy shift from draft Code 1.0. While draft Code 1.0 focused on the capacity or the potential of a person to ensure the best interest of the child, Code 2.0 focuses on conduct. Specifically, sub-sections (1)(c) and (1)(d) focus on the *past conduct* of the parent, rather than their future capacity or speculated potential. This emphasis is rooted in both adjudicative and policy-related concerns. From the court's perspective, their core expertise lies in determining past facts and not speculating about the potential future. So courts are better positioned to look at best interests by determination of existing facts rather than contemplating either parent's "capacity" for caretaking.[312] It also removes the confounding variables of subjectivity, especially in deciding questions such as preferred parenting styles, classifying a "successful" childhood, and so on. Past caretaking as a factor also corresponds with the child's emotional bonds to the parents, parental abilities, and the child's need for stability and continuity.[313] Lastly, "past conduct" is explained as having a deliberate focus on the time spent on such caretaking responsibilities. This means that the amount of time the parent spends on caretaking is of relevance, and not the financial resources. This deliberate focus on time ensures that financial contribution is not over-emphasised in the determination of best interests, as such a criterion would tend to favour the financially stronger parent, biassing the process towards the father or the higher-income parent. In this manner, best interests are better represented by past conduct of the parent and how much time they have dedicated to the child, rather than future potential.

Proposed Provision:

54. Factors relevant to determine best interests of the child.–

(1) In determining the best interests of the minor child, the following factors will be taken into consideration when relevant, namely-

(a) the nature of the relationship between-

(i) the child and the parent;

(ii) the child and any person exercising parental responsibilities and rights; or,

(iii) the child and any other caregiver;

(b) the conduct of the parents, or any person holding parental responsibilities and rights, towards the child;

(c) the manner of exercise of parental responsibilities and rights by the parent, or any person holding parental responsibilities and rights, in respect of the child;

(d) the conduct of the parent, a person holding parental responsibilities and rights, or any other caregiver, in providing for the day-to-day needs of the child;

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[310] 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.

[311] 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.

[312] Katharine T. Bartlett, 'Prioritizing Past Caretaking in Child Custody Decision-making', Law and Contemporary Problems, (2014) 77, 29.

[313] Elizabeth S. Scott and Robert E. Emery, 'Gender Politics and Child Custody: The Puzzling Persistence of the Best Interests Standard', Law and Contemporary Problems (2014) 77, 69.

(e) the conduct of the parents, a person holding parental responsibilities and rights, or any other caregiver, in providing for the overall development of the child, including the emotional and intellectual development;
(f) the likely effect on the child of any change in the child's circumstances including in the event of separation from-
  (i) one or more parents,
  (ii) any sibling or other child with whom the child has been living, or
  (iii) any person exercising parental responsibilities and rights, or any other caregiver, with whom the child has been residing;
(g) 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;
(h) the age, maturity and stage of development of the child;
(i) any disability and special needs of the child;
(j) any chronic illness that a child may be suffering from;
(k) the need to protect the child from any physical or psychological harm, and maltreatment, abuse, neglect, violence or harmful behaviour; and,
(l) any other factor that the Court may deem relevant.

Provision: 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.[314] 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.[315] 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.[316] 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.[317] A clause that encourages courts to consult competent professionals such as child psychologists may also assist courts in taking informed decisions.[318]

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

Proposed Provision:

55. Duty of the Court.–

[314] Flavia Agnes, Family Law: Marriage, Divorce, and Matrimonial Litigation (OUP 2011) 256-257.
[315] 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).
[316] Australia Family Law Act, 1975, Part VII, Division 12A, 69ZN.
[317] *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).
[318] Australia Family Law Act, 1975, Part III, Division 1, 11A.

(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 it 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 for the best interests of the child.
(2) The Court will designate a family consultant for the purpose of assisting it with proceedings under this Chapter.
(3) The Court may, if it deems appropriate, refer the parties to alternative methods of dispute resolution, including mediation and conciliation.

Provision: Adoption of children

Context:
The secular Juvenile Justice (Care and Protection) of Children Act, 2015 provides a comprehensive regime for adoption of children for all, irrespective of their religious identity. Code 2.0 explicitly provides that all adoptions will take place as per the provisions of this Act, in addition to recommending amendments to the Act (see, Annexure 1) to recognise adoption by all irrespective of gender identity, sexual orientation or marital status.

Proposed Step:
A provision which clarifies that all adoptions will take place according to the provisions of the Juvenile Justice (Care and Protection) of Children Act, 2015.

Proposed Provision:

56. Adoption of children.–
The adoption of minor children will be as per the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015.

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Chapter III: Succession

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Chapter 3A: Intestate Succession

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Introduction

Law on Succession in India

Inheritance and succession in India are governed by the Indian Succession Act, 1925 ('ISA'), The Hindu Succession Act, 1956 ('HSA'), and uncodified Muslim Personal Law. For Christians and Parsis, the ISA contains dedicated provisions and serves as the personal law regime applicable to these communities. The part of the ISA applicable to Christians is also the secular law that applies to non-Hindus who get married under the SMA. For Hindus married under the SMA, the HSA continues to apply.

These laws govern two different aspects of succession: testamentary succession and intestate succession. The law on testamentary succession governs various aspects of wills. Intestate succession schemes apply in the absence of a will or where all the property of the deceased is *not* disposed of through a will. Default heirs and their shares are laid down in the law.

These default rules allocate the property of the deceased to members of their family, following rigid relationship rules based on legal status. This legal status is generally granted through marriage or consanguinity (blood relations). For the most part, functional relationships do not affect inheritance, although a potential heir who murders the deceased may lose their inheritance. Although intestacy statutes are only default rules, avoided relatively easily by executing a will or transferring property through various non-probate means, these rules control the distribution of property upon death for a significant number of people.

Intestacy rules are important not only because they provide rules for the transfer of property when someone dies without a will, but also because they provide the definitions for terms used in wills. The term 'heirs' is understood based on intestacy statutes and terms like spouse and parent are usually given the meaning provided by the intestacy statutes. In addition, intestacy statutes have an expressive function. They serve as a statement of what society considers family to be and shape social norms by recognising and legitimising relationships.

Policy Shifts in Code 2.0

This Chapter of the Code proposes a model framework for intestate succession. 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. While it retains status-based categories for the purpose of determining heirs and laying down shares, space is also made for incorporating the functional nature of relationships. This is especially significant in light of modern social developments where monogamous marital units are no longer the rule.

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, 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.

Lastly, to safeguard the interests of existing heirs, this Chapter proposes a mixed regime of maintenance for immediate family members and dependants of the deceased and compulsory shares for certain other heirs.

In light of the feedback received at the consultations and research in pursuance of the same, the following major policy shifts[319] can be witnessed in Code 2.0:

1. **Compulsory shares for children:** Wills and even intestate succession schemes may sometimes not make adequate provision for the deceased person's heirs and dependants. In draft Code 1.0, we had proposed a maintenance regime to protect the rights of these heirs.[320] Members of the deceased person's immediate family and any other dependants could approach the court for maintenance. This regime would apply irrespective of the applicant getting a share through a will and/or the default intestate succession scheme. Various factors were laid down for the court's consideration while granting such maintenance, such as the applicant's ability to earn an independent income and the intention of the deceased to disinherit the applicant in the past.

   Despite incremental steps such as the 2005 Amendment to the HSA, which granted daughters equal rights in coparcenary property,[321] daughters continue to be denied their rightful share in property. This resistance to giving daughters property is well-documented[322] and was reiterated at the consultations.

   For queer persons too, one of the most pressing concerns was being denied shares in the family property and wealth on account of a person's identity. Several attendees pointed out how family members had indicated that they would be left out of the will, or would not be granted a share in the family property.

   A maintenance regime would *prima facie* address these concerns by allowing the wronged person to move the Court for financial benefits. However, it was pointed out that maintenance provisions, such as those under the Hindu Adoptions and Maintenance Act, 1956 ('HAMA'), may be utilised in highly contested disputes. A person who is already disadvantaged and vulnerable may not be in the position to approach a court for maintenance.

   In light of these observations, Code 2.0 moves towards a hybrid regime – while we maintain the option for maintenance, a compulsory shares regime has also been introduced for certain categories of heirs. Children of the deceased will now compulsorily get at least half of the share that has been laid down for them in the intestate succession scheme.

2. **Reduced role of judicial discretion in succession:** Draft Code 1.0 utilised judicial discretion to accommodate functional relationships in the scheme of succession to move beyond a purely status-based approach. For instance, the same inheritance regime as spouses would apply in case of partners in an intimated stable union.[323] On the other hand, the Court would determine inheritance shares for partners in cases where the Court determined the existence of a stable union, but it was not intimated by the partners.[324]

   Similarly, in case of extra-legal polygamous relationships (whether more than one marriage or stable union), the Court would determine each respective partner's/spouse's share based on a variety of factors such as the duration of the respective relationships, the degree of financial interdependence between the partners, etc.[325] In both these cases, courts would assess the nature of the relationship

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[319] Minor policy shifts have not been discussed in this Part and are instead reflected in this Code directly.
[320] See sections 71-75 of draft Code 1.0 and sections 71-75 of this Chapter of the Code below.
[321] See the commentary to section 55 of this Chapter of the Code for details.
[322] 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).
[323] See section 62(1)(c)(i) of draft Code 1.0.
[324] See section 62(1)(c)(ii) of draft Code 1.0.
[325] See section 62(f) of draft Code 1.0.

and accordingly try to establish the presumed intention of the deceased and what share they would have wanted to allot to the person concerned. A mere establishment of status would not entitle one to a share. The relative lack of visibility of such relationships under the law, and thus reliable precedent, were the primary reasons why shares were not allocated for such parties.

However, while fairness and capturing the intention of the deceased are and should be hallmarks of succession schemes, they should also be characterised by certainty, ease of administration, and efficiency. Consultees opined that a succession scheme must necessarily lay down shares for each party, and that this exercise cannot be left to the discretion of courts as that would create uncertainty and cause protracted disputes.

In line with the position in other jurisdictions, Code 2.0 now extends the spousal regime of inheritance to all stable union partners while providing them with the choice of opting out of this scheme. Courts have been empowered to reduce the share of the partner based on factors such as the financial position of the partner.[326]

In case of extra-legal polygamous relationships, the valid spouse or stable union partner will inherit the default share allocated for them under the scheme. The subsequent spouse/partner may approach the court for an inheritance share.[327]

3. **Modification of the succession scheme to account for non-conjugal family units:** In draft Code 1.0, a single succession scheme was laid down for all parties, irrespective of their marital status. The parents, children and spouse would inherit together. In the absence of spouse(s) and children, the parents would inherit the entire property of the deceased.[328]

   It was pointed out that siblings are an integral part of people's lives and rank among their closest relations. Especially in the absence of the conjugal family unit, i.e., children and spouses, the siblings should be the preferred heirs of the deceased alongside the parents. Accordingly, this draft includes two separate schemes of succession.[329] The first will apply where the deceased person has spouse(s) and/or children. The spouse(s), children and the parents will be members of the immediate family and will inherit equal shares in the deceased person's property. In the absence of spouse(s) and children, the parents and siblings will be part of the immediate family and will inherit equal shares in the deceased person's property.

Key Features

The Chapter is divided into three 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.

[326] See section 62(1)(c) of this Chapter of the Code.
[327] See section 62(1)(e) of this Chapter of the Code.
[328] See sections 58 and 59 of draft Code 1.0.
[329] See sections 58 and 59 of this Chapter of the Code.

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 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.	**Protecting Immediately 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. ● Lays down a compulsory shares regime to protect children of the deceased from disinheritance due to factors such as their gender and sexual orientation.

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 goal of gender justice.

Context:
The scope and manner of coverage of agricultural land under succession laws has been a contentious issue. In question has 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.[330] 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,[331] 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.[332] The Shariat Act, on the other hand, completely excludes agricultural land from its purview.[333]

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[330] Constitution of India, 1950 Seventh Schedule, List II, Entry 18.
[331] See below, 'State laws on agricultural land'.
[332] *Tukaram Genba Jadhav & Ors. v Laxman Genba Jadhav & Anr*. AIR 1994 Bom 247.
[333] 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 competence over succession. Thus, only provincial governments had the competence to legislate on matters relating to agricultural land, including succession.

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.[334] 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.[335] In its recent landmark judgment in *Babu Ram v Santokh Singh*,[336] 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.[337] The Supreme Court thus held that Parliament is in fact competent to legislate on the devolution of agricultural land as the 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

States can be grouped into three categories based on their treatment of succession to agricultural land:

1. Succession governed by personal law – in Rajasthan,[338] Madhya Pradesh,[339] and Telangana.[340]

2. Succession governed by specific State laws - Unmarried daughters and unmarried sisters are low in

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[334] *Balkaur Singh v Gurmail Singh* 2006 SCC OnLine P&H 1257; *Subramaniya Gounder v Easwara Gounder* 2010 SCC On Line Mad 4546.
[335] Law Commission of India, *Consultation Paper on Reform of Family Law* (August 2018) 134.
[336] *Babu Ram v Santokh Singh* (2019) 14 SCC 162.
[337] ibid [10].
[338] Rajasthan Tenancy Act 1955, s 40.
[339] The Madhya Pradesh Land Revenue Code, 1959 s 164.
[340] Andhra Pradesh (Telangana Area) Tenancy Act 1956 s 40 (read with the commentary to section 40).

the order of succession in Delhi.[341] Married daughters and sisters are not included as heirs. In Himachal Pradesh,[342] Haryana,[343] and Punjab,[344] 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,[345] Himachal Pradesh,[346] Haryana,[347] and Punjab,[348] and along with the male descendants in Uttar Pradesh[349] and Uttarakhand.[350]

In Uttar Pradesh[351] and Uttarakhand,[352] 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.[353] 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).[354]

3. Lack of clarity on law governing succession – in West Bengal, Kerala, Tamil Nadu, Karnataka, Odisha, Maharashtra, Bihar, and Gujarat. In such States, agricultural land is subject to the 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.[355] Some States such as Kerala,[356] Tamil Nadu,[357] and Andhra Pradesh[358] 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 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.

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[341] The Delhi Land Reforms Act 1954, s 50.
[342] The Himachal Pradesh Tenancy and Land Reforms Act 1972, s 45.
[343] The Punjab Tenancy Act 1887, s 59.
[344] ibid.
[345] The Delhi Land Reforms Act 1954, s 50.
[346] The Himachal Pradesh Tenancy and Land Reforms Act 1972, s 45.
[347] The Punjab Tenancy Act 1887 s 59.
[348] ibid.
[349] The Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950, s 171.
[350] ibid.
[351] ibid.
[352] ibid.
[353] See, for example, The Delhi Land Reforms Act, 1954 s 51; The Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950, s.172.
[354] ibid.
[355] Mulla, *Principles of Mahomedan Law* (20th ed., LexisNexis 2020) 4-7.
[356] Muslim Personal Law (Shariat) Application (Kerala Amendment) Act 1963.
[357] Muslim Personal Law (Shariat) Application (Madras Amendment) Act 1949.
[358] Muslim Personal Law (Sharial) Application (Andhra Pradesh) (Andhra Area) Amendment Act 1949.

Gender anomalies occur on three counts in these laws:

a. Definition of family: In some states like Haryana,[359] Delhi,[360] Punjab,[361] Rajasthan,[362] Uttar Pradesh,[363] and Andhra Pradesh,[364] the family unit consists of the cultivator, his/her spouse, minor sons and unmarried minor daughters. In Bihar,[365] Himachal Pradesh,[366] and Madhya Pradesh,[367] 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,[368] while in Kerala family units include the cultivator, his/her spouse and unmarried minor children[369]. 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.[370]

b. Additional land for sons: In Delhi,[371] Haryana,[372] Punjab,[373] and Uttar Pradesh,[374] 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,[375] Rajasthan,[376] Gujarat,[377] Madhya Pradesh,[378] Maharashtra,[379] Andhra Pradesh,[380] and Tamil Nadu,[381] 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.[382]

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.[383] 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,

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[359] The Haryana Ceiling on Land Holdings Act 1972, Explanation 1 to section 3(f).
[360] The Delhi Land Holdings (Ceiling) Act 1960 s 2(d).
[361] The Punjab Land Reforms Act,1972, s 3(4).
[362] The Rajasthan Imposition of Ceiling on Agricultural Holding Act 1973, s 2(f).
[363] The Uttar Pradesh Imposition of Ceiling on Land Holdings Act 1960, s 3(7).
[364] The Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1973, s 3(f).
[365] Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act 1961, s 2(ee).
[366] The Himachal Pradesh Ceiling on Land Holdings Act 1972, s 3(e).
[367] The Madhya Pradesh Ceiling on Agricultural Holdings Act 1960, s 2(gg).
[368] Tamil Nadu land Reforms (Fixation of Ceiling on Land) Act 1961, s 3(14).
[369] The Kerala Land Reforms Act 1963, s 2(14).
[370] 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.
[371] The Delhi Land Holdings (Ceiling) Act 1960, s 3(7).
[372] The Haryana Ceiling on Land Holdings Act 1972, s 3(q).
[373] The Punjab Land Reforms Act 1972, s 5(1).
[374] The Uttar Pradesh Imposition of Ceiling on Land Holdings Act 1960, s 5(3)(a).
[375] The Himachal Pradesh Ceiling on land Holdings Act 1972, s 4(4).
[376] The Rajasthan Imposition of Ceiling on Agricultural Holding Act 1973, s 2(m).
[377] The Gujarat Agricultural Lands Ceiling Act 1960, s 6(3-C).
[378] The Madhya Pradesh Ceiling on Agricultural Holdings Act 1960, s 7(2).
[379] The Maharashtra Agricultural Lands (Ceiling on Holdings) Act 1961.
[380] The Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act 1973, s 4-A.
[381] Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act 1961.
[382] The Kerala Land Reforms Act 1963, s 82.
[383] Bina Agarwal, 'Gender and Legal Rights in Agricultural Land' (1995) 30(12) Economic and Political Weekly 39, 46.

irrespective of their age or marital status.[384] 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,[385] 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,[386] and a large number of these laws have also been placed in the Ninth Schedule of the Constitution.[387] 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.[388]

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.[389] 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.[390] It was further argued that women's needs were anyway provided for through dowry.[391] 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.[392] Some warned that it would thus be impossible to give a daughter a share in her father's land without affecting agricultural yield.[393]

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.[394] This sentiment was echoed by Dr. Ambedkar who was of

[384] ibid.
[385] Other states include Haryana, Himachal Pradesh and Punjab.
[386] This provision prevents courts from testing the constitutionality of certain categories of laws from being tested on the touchstone of fundamental rights.
[387] Constitution of India 1950, A. 31B.
[388] *Ambika Prasad Mishra v State of UP* (1980) 3 SCC 179.
[389] Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India* (Cambridge University Press 2013), 206-207.
[390] ibid 206.
[391] Bina Agarwal, 'Gender and Legal Rights in Agricultural Land' (1995) 30(12) Economic and Political Weekly 39, 48.
[392] 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
[393] ibid.
[394] *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.

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.[395]

The reasoning presented above can be called into question on multiple grounds.

Firstly, the effect of fragmentation on agricultural productivity is contested as different studies have yielded contradictory findings.[396] Some experts have stated that there is no noteworthy evidence of an adverse size effect on output.[397] 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.[398]

Secondly, if the rationale is efficiency-based, it can be argued that comprehensive agricultural rights for women will increase productivity.[399] 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.[400]

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.[401] 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.[402] On the contrary, it is often the women who cultivate and tend to the land that is held by the men in the family once they migrate in search of employment.[403] Thus, if fragmentation of agricultural land and absentee landholders are undesirable, inheritance-related policy measures should be focussed on countering these issues, such as through measures for consolidation of landholdings,[404] instead of preventing women from inheriting agricultural land based on gendered assumptions. A possible alternative is that inheritance laws should have a first option clause. If an heir plans

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[395] Constituent Assembly of India (Legislative) Debates (9 April 1948) 3651.

[396] 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.

[397] Bina Agarwal, 'Are We Not Peasants Too? Land Rights and Women's Claims in India' (2002) 21 SEEDS 6.

[398] 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.

[399] Bina Agarwal, 'Are We Not Peasants Too? Land Rights and Women's Claims in India' (2002) 21 SEEDS 6.

[400] ibid 5, 6.

[401] 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.

[402] Bina Agarwal, 'Are We Not Peasants Too? Land Rights and Women's Claims in India' (2002) 21 SEEDS 6.

[403] ibid.

[404] 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

on selling agricultural land inherited from A, the other heirs of A who have inherited other part(s) of the agricultural land(s) from A, and are already cultivating it or plan on cultivating it, may be given a preferential right to acquire that land. A fair consideration mechanism would also have to be put in place in such cases. Persons could also be allowed to specifically allocate agricultural land to heirs who are cultivating it, to prevent its fragmentation while mandating adequate compensation for other heirs who are deprived of this land. However, a thorough study of the economic and productivity implications of these measures is necessary before they are incorporated into any law.

Approximately 60% of the total land area in India is agricultural land.[405] 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.[406] 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.[407] Indirect advantages arise in various ways: owned land can serve as collateral for credit or as a mortgageable or saleable asset during a crisis.[408] 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.[409] 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.[410] 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 not be excluded from the scope of this Code to allow equitable inheritance rights for all persons in agricultural land, irrespective of gender.

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*,[411] 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

[405] World Bank, 'Agricultural land (% of land area) - India' <https://data.worldbank.org/indicator/AG.LND.AGRI.ZS?locations=IN> Accessed 29 May 2023.
[406] 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.
[407] Bina Agarwal, 'Are We Not Peasants Too? Land Rights and Women's Claims in India' (2002) 21 SEEDS 5.
[408] ibid.
[409] Bina Agarwal, 'Gender and Command Over Property: A Critical Gap in Economic Analysis and Policy in South Asia' (1994) 22(10) World Development 1455.
[410] See Bina Agarwal and others, 'Which Women Own Land in India? Between Divergent Data Sets, Measures and Laws' (2020) GDI Working Paper 2020-043.
[411] *Thilliammal v Thandavamurthy* 2007 SCC OnLine Kar 17.

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:

57. 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.

Issue: Should the coparcenary system be continued?

Objective:
Align the law on succession with modern socio-legal realities.

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,[412] 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,[413] 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 subunit 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 birth right 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 rationale informing the system was the moral obligation of the coparceners (i.e., the specified male members of the family) to maintain and provide for the other members of their family. According to the Supreme Court,[414] six legal rules govern the use, devolution, and alienation of property in coparcenaries. Known as the 'incidents' of coparcenership, these rules are:

[412] Primarily the eastern region of India – including West Bengal, Odisha, Assam etc.
[413] The remainder of India.
[414] *State Bank of India v Ghamandi Ram* AIR 1969 SC 1330.

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[415] 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.

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 as it is grounded in an anachronistic, patriarchal idea of a joint family where only a son has a birth right in ancestral property and which was out of sync with social reality. 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.[416] By abolishing the concept of the coparcenary's collective ownership over property, and 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.[417] Ultimately, however, this proposal was dropped, and the concept of coparcenary property was retained in the HSA.[418] 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.[419]

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[415] In addition to a large number of other female heirs.
[416] *Dr. Babasaheb Ambedkar: Writings and Speeches* (Vol. 14, Part I, Sections I to III) 4, 276.
[417] ibid.
[418] 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).
[419] 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 1/4. See Poonam Pradhan Saxena, 'Succession Laws and Gender Justice' in Amita Dhanda and Archana Parashar (eds.) *Redefining Family Law in India* (Routledge India 2008).

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,[420] a host of other states reformed the coparcenary system to make unmarried daughters coparceners.[421] 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.[422] The shares which devolve on the heirs of the person are vested 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.[423]

Further, the concept 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. However, upon the commencement of the 2005 Amendment Act, she becomes a member of the smaller subunit 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.

Joint Hindu families are permitted to set up entities known as 'Hindu Undivided Families' (HUFs). First envisioned by the British under the Income Tax Act 1922, HUFs continue to be recognised under the current law as distinct entities for the purpose of computation of income tax. By channelling their own individual incomes to HUFs set up along with other family members, individuals habitually reduce their own taxable income. In addition, every benefit/exemption/deduction that can be availed by the individual can also be availed by the HUF, further reducing the effective tax payable.

The situation is muddled further by the decision of the Supreme Court in *Uttam v Saubhag Singh*,[424] which effectively held that upon the death of an existing coparcener, the property that devolves would cease to be joint family property. This effectively sets in motion a time-frame within which all existing HUFs will cease to exist.[425] However, a reading of the HSA would show that new coparcenaries can continue to come into existence, since the Act does not abolish the right by birth in coparcenary property. Thus, even once an existing coparcenary is partitioned, but a new son or daughter is born to the person who holds such property, a new coparcenary will come into existence. A new HUF can further be set up in this case. The result is that new coparcenaries will continue being set up and being dissolved as and when a coparcener dies. Such children will also possibly be a part of two coparcenaries, set up by both their parents if they are Hindus. How these rights will play out in reality will probably again be up to the courts to clarify.

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.[426] 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'.[427] The ideals which a joint family traditionally espoused no longer bear a close nexus to the system's actual

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[420] Kerala Joint Family (Abolition) Act 1976.
[421] 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.
[422] Hindu Succession Act, 1956 s 6(3).
[423] Sir Dinshaw Fardunji Mulla, *Hindu Law* (24th edition, 2022) 1161.
[424] (2016) 4 SCC 68.
[425] 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.
[426] JP Singh, 'Nuclearisation of Household of Family in Urban India' (2003) 52(1) Sociological Bulletin 53.
[427] ibid.

operation. The sole purpose that the coparcenary and HUF system still faithfully serves is to provide tax benefits to the *karta* of the HUF.[428] 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".[429] The Commission goes further and outrightly places the country's revenue requirements above "deep-rooted sentiments".[430]

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)[431] 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.[432] 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 interlock is not available to Muslims, Christians, Parsis or Jews and hence is a perverse legal privilege for the Hindu business family".[433]

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.

Proposed Step:

For the reasons listed above, we propose the abolition of the coparcenary system and thus the right that male and female lineal descendants acquire in their ancestral property.

To effectuate this, we adopt the model followed in Kerala. Thus, the right by birth is abolished and no person will be able to claim an interest in any property by virtue of being a coparcener. With this, the distinction between ancestral property and self-acquired property also becomes non-existent.

The law also needs to specify what the fate of existing coparcenary property will be. To ensure fair division of property once a law of this nature comes into force, we propose that a notional partition will be deemed

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[428] 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."

[429] Law Commission of India, 'Consultation Paper on Reform of Family Law' (2018) 132.

[430] ibid 133.

[431] Eleanor Newbigin, *The Hindu Family and the Emergence of Modern India: Law, Citizenship and Community* (Cambridge 2013) 93-128.

[432] 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.

[433] 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.

to take place. The shares of all the coparceners will get crystallised, and they will hold them separately as full and complete owners. Thus, they will be free to deal with the property as they wish.

The Kerala model was criticised as it had failed to provide daughters with rights in existing coparcenaries. Once those coparcenaries dissolved, only the existing *male* coparceners received equal, separate shares of the coparcenary property.

However, under the HSA, daughters are now assumed to have a right in the coparcenary property by birth, irrespective of whether their father passed away before or after the 2005 Amendment. [434] Thus, once an existing coparcenary dissolves, daughters will get a share in the property once a deemed partition is affected.

Similarly, the concept of HUFs as a separate tax category should be abolished. Corresponding amendments will have to be made to the relevant taxation laws to effectuate this.

Proposed Provision:

58. 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 date of coming into force of this Code 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 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 Code.

Context:
Issues with the existing position of law:
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.[435] Section 112 has been amended

[434] Vineeta Sharma v Rakesh Sharma & Ors., (2020) 9 SCC 1(SC).
[435] *KS Lakshmikantharaju v Sowbhagya N* AIR 2019 Karn 99.

under Chapter II of this Code to be queer-inclusive and account for a plurality of family structures. The marital presumption of parentage now extends to all marriages, and not just heterosexual marriages which was the case under section 112. Moving beyond just marriage and blood relations for the establishment of parentage, 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.

Under existing law, 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. The Code attempts to fill this void in Chapter II, thus impacting the inheritance rights of various categories of children.

Inheritance rights of various categories of children under existing law and under the Code:

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*,[436] 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[437] 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).[438] 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".[439] 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 II of this 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 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 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

[436] *Basavarajappa v Gurubasamma* (2005) 12 SCC 290.
[437] *Joyce v Shameela Nina* (RFA 849 of 2010).
[438] See, e.g., Succession Act, 1964 (Scotland) section 23(1); French Civil Code 1966, Article 358C.
[439] Law Commission of India, *Report No. 110: Indian Succession Act, 1925* (1985).

includes ancestral property is pending for a larger bench's consideration.[440] 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.[441] 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.[442] 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 Code, the presumption of parentage 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 marriage.[443] 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.[444] Under the ISA too, in the case of *Jane Anthony v Siyath*,[445] 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 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 and thus stands abolished. 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.[446]

Under Chapter II of this Code, the presumption of parentage has now been extended to children born out of both heterosexual and queer marriages, as well as to those parents who take on the role of a functional parent (through 'holding out') irrespective of whether the parents are married, in a stable union, in a live-in relationship or otherwise. Consequently, if a parent-child relationship is established as per section 32 of this Code, the child will be covered by the inheritance regime proposed irrespective of whether the parents are married or not. In keeping with this position and the recommendation of the Law Commission of India,[447] full inheritance rights under this Chapter of the Code will accrue to children irrespective of the marital status of the parents and vice versa.

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[448]).

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[440] *Revanasidappa & Ors. v. Mallikarjuna & Ors.* (2011) 11 SCC 1.
[441] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford 2009).
[442] Christian Marriage and Divorce Act 1955, s 87.
[443] *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.
[444] *Bharat Matha & Anr. v Vijay Renganathan & Ors.* AIR 2010 SC 2685; *Tulsa & Ors. v Durghatiya* AIR 2008 SC 1193.
[445] 2008 SCC OnLine Ker 503.
[446] See, for example, *Trimble v Gordon* 430 US 762 (1977).
[447] Law Commission of India, *Report No. 110: Indian Succession Act, 1925* (1985).
[448] See commentary to section 61 of this Code on the overall scheme of devolution.

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 Code extends the legal regime for marriage and stable unions to queer persons. The presumption of parentage provided under section 49 of Chapter II of this Code is inclusive of persons of all gender identities and sexual orientations. It is now not restricted to just biological mothers and their husbands but extends to any person who may be in a marriage with the birth parent of a child, irrespective of the gender and sexual orientation of the person, as well as to cases where a person holds themselves out as the parent of the child subject to certain conditions. Where relevant, the presumption under this Code 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.[449] 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.[450] 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.[451] 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 Code, in section 69.

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.[452] Chapter II of this Code moves beyond this approach to recognise diverse forms of parent-child relations that are premised on the intent to parent and the performance of parental responsibilities in relation to the child. Consequently, biological ties and marital relations are no longer the only basis of parenthood. Social parenthood is now recognised through provisions on acknowledgement of parentage under section 36 of Chapter II, and the presumption of parentage under section 49 which applies to persons holding themselves out as parents. This may be especially relevant in the context of queer parents in case of stable unions generally, and children of nonmarital parents, as elaborated upon in Chapter II.

As explained below,[453] intestate succession schemes are designed based on 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 validity under the law so far. Thus, in cases where a person has been presumed to be the parent of a child under section 49 of Chapter II of this Code or has been adjudicated as the parent of a child or has acknowledged their parentage in relation to the child, the

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[449] Assisted Reproductive Technology Act 2021, s 31; Surrogacy (Regulation) Act 2021, section 4(iii)(II).
[450] Surrogacy (Regulation) Act 2021, Section 4(iii)(a)(II),
[451] Assisted Reproductive Technology Act 2021, s 31.
[452] 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 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 Code safeguard against this possibility.
[453] See the section on 'Rationale Behind Succession Schemes" below.

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:

59. Definitions.–
In this Chapter, unless the context otherwise requires,–
(a) **'Code'** means this Act;

(b) **'extra-legal marriage'** has the same meaning as under section 2(1)(d) of Chapter I this Code;

(c) **'extra-legal stable union'** has the same meaning as under section 2(1)(e) of Chapter I of this Code;

(d) **'gift'** has the same meaning as in section 122 of The Transfer of Property Act, 1882;

(e) **'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;

(f) **'parent'** has the same meaning as in section 34(n) of Chapter II of this Code;

(g) **'predeceased'** means died before the time of the intestate's death;

(h) **'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; and

(i) **'stable union'** has the same meaning as under section 2(1)(l) of Chapter I of this Code.

Issue: How can this Chapter of the 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 Code (the executive) as well as 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 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,[454] the court is required to read down or read into the legislation.

Proposed Provision:

60. 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, a plurality of family structures.

[454] *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.[455] 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.[456] Thus, the law looks at not only what the deceased wanted but also what the deceased ought to have wanted.[457] 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.[458] As

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[455] 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).
[456] 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.
[457] ibid.
[458] ibid.

scholars have noted,[459] 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 scenarios, such as in adoption, inheritance rights are granted through the creation of a specific legal status.[460]

With this 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[461]).

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,[462] 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.[463]

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.[464] 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, 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.[465] The first essential is to give any entitled quota-sharer his

[459] 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).
[460] Hindu Adoption and Maintenance Act 1956, s 12.
[461] See the commentary to section 65 of this Code below on succession in case of stable unions.
[462] 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.
[463] Noel J. Coulson, *A History of Islamic Law* (Edinburgh 1964); Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009).
[464] ibid.
[465] Lucy Carroll, 'The Hanafi Law of Intestate Succession: A Simplified Approach' (1983) 17(4) Modern Asian Studies 629.

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.[466]

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.[467] For instance, in Iraq, a daughter or son's daughter excludes from succession the deceased's brothers, sisters and other remote legal heirs.[468] In Tunisia, the daughter takes all property by way of *radd* even in the presence of male agnates such as a brother or uncle.[469] 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.[470]

Muslim personal law[471] 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*, *Aliyasantana*, and *Nambudri*.[472] 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).[473] A catena of legislations governing specific aspects of Hindu succession law were also in force across the country - 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[474]). Undertaken as a comprehensive codification exercise, the HSA was able to make significant reforms to the prevailing gender imbalance in

[466] Lucy Carroll, 'The Hanafi Law of Intestate Succession: A Simplified Approach' (1983) 17(4) Modern Asian Studies 629.
[467] See for example, Muslim Family Laws Ordinance 1961 (Pakistan); Code of Personal Status 1953 (Syria).
[468] The Civil Code of Iraq 1951, Articles 1188 and 1189.
[469] Personal Status Code, 1956.
[470] Noel J. Coulson, *A History of Islamic Law* (Edinburgh 1964); Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009).
[471] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009).
[472] Sarasu Esther Thomas, *BM Gandhi's Family Law* (Eastern Book Company 2nd edn., 2023) 63.
[473] Sarasu Esther Thomas, *BM Gandhi's Family Law* (Eastern Book Company 2nd edn., 2023) 63.
[474] See Hindu Succession Act, 1956, s.17.

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.[475]

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.[476] Further, under the HSA, succession to the property of a male intestate and a female intestate is governed by wholly distinct rules.[477] In case of the latter, succession is governed by the general principle that property reverts to the source from which she received it.[478] Hindu personal law[479] 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.[480]

These schemes of intestacy, as several commentators have noted, may not align with modern family structures.[481] 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.[482]

ii) As discussed previously, separate schemes of succession have been laid down for male and female intestates who are married.[483] Female intestates' property devolves on the husband's heirs first and only 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 acquired property 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*[484] and *Ganny Kaur v. State of NCT of Delhi*[485].

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[475] Mitakshara school - Gotraja Sapinda, Samanodakas, and Bandhusunder; Dayabhaga school - Sapindas, Sakulyas, and Bandhus.
[476] See commentary to section 58 of this Code.
[477] See Hindu Succession Act 1956, ss 8-16.
[478] Sir Dinshaw Fardunji Mulla, *Hindu Law* (24th edition, 2022) 1451.
[479] Hindu Succession Act 1956, s 18.
[480] See Hindu Succession Act 1956, Schedule.
[481] 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.
[482] See the Schedule to the Hindu Succession Act, 1956.
[483] See Hindu Succession Act 1956, ss 8-16.
[484] 2009 (7) SCALE 51.
[485] AIR 2007 Del 273.

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).[486]

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.[487] 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.[488] Further, under Shia Law, a childless widow is not entitled to immovable property as inheritance.[489]

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. [490]

c) Lack of queer inclusivity:

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.[491] As the Supreme Court observed in *NALSA v. Union of India*, 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 exercise of their rights.[492] 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*,[493] though that case pertained to marriage rights);

[486] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009).
[487] Noel J. Coulson, *A History of Islamic Law* (Edinburgh 1964).
[488] Lucy Carroll, The Hanafi Law of Intestate Succession: A Simplified Approach (1983) 17(4) Modern Asian Studies 629.
[489] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009).
[490] See The Indian Succession Act, 1925 ss. 42 and 43.
[491] See, for example, The Schedule to the Hindu Succession Act, 1956.
[492] *National Legal Services Authority v Union of India* (2014) 5 SCC 438.
[493] (2019) 4 Mad LJ 503.

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.[494]

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.[495]

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 *abadi* sites and the order of succession.[496] 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.[497] Vastly cumbersome is the requirement that individuals must apply for a transgender certificate without which they cannot avail any benefits or protection under the framework of the 2019 Act.[498] 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).[499] Since gender has been read within 'sex' in Article 15,[500] laws should not discriminate against transgender persons only because of their identities. Un-gendering 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 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.[501] 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

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[494] 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.

[495] See, Karan Gulati and TusharAnand, 'Inheritance Rights of Transgender Persons in India' (2021) NIPFP Working Paper Series.

[496] The Uttar Pradesh Revenue Code (Amendment) Act, 2020, clauses 2, 9(1) and 9(2).

[497] 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.

[498] Transgender Persons (Protection of Rights) Rules 2019, Rule 3.

[499] 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.

[500] *National Legal Services Authority v Union of India* (2014) 5 SCC 438 [75].

[501] See The Hindu Succession Act, 1956, The Schedule; The Indian Succession Act 1925, ss. 33-35

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.[502] 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.[503] 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.[504] He excludes the siblings of the deceased, while the mother would inherit along with such siblings.[505] 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 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.[506] In other jurisdictions, such as Goa,[507] the lineal descendants inherit to the exclusion of other heirs. In yet other jurisdictions, spouses, children and parents inherit together,[508] while a few others allow the parents to inherit in the absence of spouses and/or children[509].

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.[510] 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

[502] The Hindu Succession Act 1956, ss 8-16.
[503] See The Hindu Succession Act, 1956, The Schedule; The Indian Succession Act 1925, ss 33-35.
[504] The Indian Succession Act 1925, ss. 42 and 43.
[505] ibid.
[506] Inheritance and Trustees' Powers Act 2014, s 1.
[507] The Goa Succession, Special Notaries and Inventory Proceeding Act 2012, s 52.
[508] See, for example, Family Code 1999 (Azerbaijan).
[509] See, e.g., the scheme of succession in Intestate Succession Act 1987, section 1 (South Africa).
[510] See Indian Succession Act 1925, ss 36-40.

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.[511]

The general rule is that descendants are given priority over ascendants and ascendants are given priority over collateral heirs such as siblings.[512] 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.[513]

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 inherits to the total exclusion of the subsequent ones.

Composition of the categories:

1. *Immediate family* –

The Code proposes two alternate compositions of the immediate family category:

Where there is a spouse and/or child (or the spouse or child of a predeceased child): 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[514] in India[515] and the cases of neglect and abandonment of senior citizens that

[511] 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.
[512] 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).
[513] ibid.
[514] 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.
[515] 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.

regularly come to light.[516] 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.[517] 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.

When there is no spouse *and* lineal descendant (and the spouse or child of a predeceased child): In the absence of a marital, nuclear family unit, the immediate family will comprise the parents of the deceased and the siblings of the deceased.

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.

4. *Step-parents and step-children* – Almost as a rule, the inheritance rights of step-parents and step-children in each other's property have been a tricky arena for legislators worldwide. In most jurisdictions, the step-child – that is, a child of the deceased person's surviving spouse, but not of the deceased – enjoys no intestate succession rights with regard to the deceased, and vice versa.[518] This position may be easy to explain: the right to intestate succession is still usually based on formal criteria such as consanguinity or marriage rather than the functional nature of the relationship. Secondly, it would be difficult to justify a situation in which a person is entitled to enjoy simultaneous intestate succession rights in two different families, since the stepchild or stepparent could also inherit from their own biological child or parent, as the case may be. And, finally, there are practical ways to address any perceived unfairness, such as through formal adoption or express provision by will.

There are some exceptions. In the United States, the Uniform Probate Code proposes allowing step-children and step-parents to inherit in the absence of all other relatives.[519] In Poland, step-parents inherit in the absence of all other heirs – only if the parents of the child are dead.[520] The Code follows the position under the Uniform Probate Code. Step-parents and step-children will inherit in the absence of all other relatives.

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[516] 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).
[517] The Maintenance and Welfare of Parents and Senior Citizens Act 2007, section 4.
[518] 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.
[519] The Uniform Probate Code, 1969, section 2-103(b).
[520] The Polish Civil Code, 2009, art 934, section 2.

In case the step-parent is the legal parent of the child, by virtue or adoption or holding out or any other methods specified in Chapter II of this Code, the step-parent will inherit as a legal parent- i.e., a member of the immediate family.

Proposed Provisions:

61. 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 distant family, the step-parent or the step-child, as the case may be,
Provided that the step-parent is not a legal parent as per section 35 of Chapter II of this Code, in which case the step-parent and the step-child will inherit as immediate family, and
(e) If there is no immediate family, extended family, distant family, or step-parent or step-child, the Government.

62. Composition of immediate family.
(1) 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 predeceased,
(c) grandchildren, only when their parent who is the child of the intestate is predeceased, and
(d) parents.
(2) In the absence of:
(a) a spouse, or spouses in case the intestate has more than one legally wedded spouse, and
(b) children or spouses of children when such children are predeceased, and
(c) grandchildren when their parent who is the child of the intestate is predeceased,
the immediate family of an intestate consists of parents and siblings.

63. 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.

64. 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 to 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 a stable union 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.[521] 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 nurture burden, and iii) women being confined to relatively low-paid jobs.[522] 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.[523]

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

[521] 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.
[522] B. Sivaramayya, *Matrimonial Property Law in India* (Oxford University Press 1999).
[523] Kamala Sankaran, 'Family, Work and Matrimonial Property' in Amita Dhanda & Archana Parashar (eds.) *Redefining Family Law in India in India* (Routledge India 2008).

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.

Under the partial community of assets regime prescribed above under Chapter I of this 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.[524] 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[525] and the United States.[526]

Issue: What should the scheme of devolution be in the case of stable unions?

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 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.[527] 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,[528] but the general position remains undefined. Thus, even

[524] See section 73 of this Chapter of the Code.
[525] Civil and Commercial Code of Argentine Republic, 2014, Article 3576.
[526] The Uniform Probate Code, 1969, section 102-A.
[527] *Chanmuniya v Chanmuniya Virendra Kumar Singh Kushwaha* (2011) 1 SCC 141; *Indra Sarma v V.K.V. Sarma* AIR 2014 SC 309.
[528] *Dhannulal & Ors v Ganeshram & Anr.* AIR 2015 SC 2382.

though the inheritance rights of children born out of such relationships have in some cases been recognised,[529] the rights of partners vis-a-vis each other remain vague.

On the other hand, non-conjugal relationships do not enjoy even this limited legibility under the law. There have been structured demands, especially from the queer community, for the extension of a variety of rights, including inheritance rights, to such relationships for the effective realisation of the idea of a family beyond ties of blood and marriage.[530]

Proposed Step:
Considering that Chapter I of this Code grants legal recognition to stable unions and specifically empowers courts to determine whether such a relationship exists, inheritance rights should also be extended to partners in such cases.

Due to the fluid nature of such relationships, a default regime that accounts for the diverse forms they may take becomes difficult to prescribe.[531] Some jurisdictions automatically extend the inheritance regime applicable to spouses to relationships that resemble such stable unions.[532] The logic is that spousal relationships enjoy a certain degree of preference in succession schemes due to certain factors – the centrality of the spousal unit to the life of the deceased, an assumed high level of financial interdependence or care, the functioning of a marriage as an economic partnership, and the need for ensuring independent living for the surviving spouse. This warrants a significant share in the estate of the deceased.

These rationales can be extrapolated to stable unions as well. The tests laid down for the recognition of such relationships specifically focus on the extent of shared financial arrangements between the parties and the presence of mutual support and personal care.[533] It can be said that deceased persons with surviving stable union partners would want to provide for them, the surviving partner would need support, and that stable union partners are an economic unit in the same way as spouses. Thus, a sizable share in the estate of the deceased should be provided for stable union partners in the same way as spouses. Moreover, such a regime may be crucial to secure the rights of vulnerable parties in such relationships to help overcome unequal distributions of wealth and power, for instance those based on historical inequality between men and women.

Laying down definite shares also becomes important to provide predictability, certainty, and ease of administration – crucial defining characteristics of succession regimes. However, this should not be at the cost of making space for a functional approach to relationships and attempts at aligning succession schemes with the intention of the deceased. It cannot be denied that a purely status-based approach may not be a one-fit-all approach due to the vast configuration of relationships that could fall under the category of stable unions. There is also the issue of lack of judicial precedent and these relationships having enjoyed relatively limited legibility under the law so far.

To strike a balance between the varying goals, the Code proposes permitting judicial discretion, exercised within a framework of statutory guidance for achieving fair outcomes.

The presumptive, default inheritance share of a stable union partner would thus be the same as a spouse. In the case of stable unions that are intimated as per sections 25 and 26 of Chapter I of this Code, partners will have the option of opting out of the default spousal regime through a provision in the nomination form

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[529] *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.
[530] Rituparna Borah v Union of India, writ petition filed in 2023, available at https://www.scobserver.in/wp-content/uploads/2023/01/Rituparna-Borah-and-Ors.-v.-UoI_Redacted.pdf <accessed 15 May 2024>.
[531] See Chapter 1 above for details about the stable union framework and the plurality of family structures it aims to recognise.
[532] See, for example, Relationships Act, 2003 (Tasmania) and Reciprocal Beneficiaries Act, 1997 (Hawaii).
[533] See section 29 of Chapter I of this Code.

provided in section 28 of Chapter I of this Code. Partners can then choose to dispose of their property as they choose through wills.

If the court finds that a stable union exists as per section 29 of Chapter I of this Code, the spousal inheritance share will be available for the surviving stable unions partner by default. However, this share could be reduced based on evidence that the deceased would prefer a smaller share for the surviving partner, based on factors such as the financial position of the stable union partner; the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners, and the financial needs of other heirs and any caretaking provided by them to the deceased.

There are various advantages when it comes to this model of guided discretion:

- Effectuating the deceased's intention becomes more likely;
- It avoids trying to pin down and enlist every possible variation, which tend to result in over-inclusion or under-inclusion in many cases;
- Through guided discretion, a court can address the needs of survivors in some form;
- It helps to improve results for those who die intestate and their families, without unduly increasing administrative costs and the court's burden.

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 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 3 and section 25 of Chapter I of this Code respectively, 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 extra-legal polygamous relationships nonetheless, especially those in a position of vulnerability or economic dependency.[534] 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.[535]

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[534] Partners for Law in Development, 'Rights in Intimate Relationships' (2010), <https://www.academia.edu/15497286/Rights_in_Intimate_Relationships> accessed 29 May 2023.
[535] Partners for Law in Development, 'Rights in Intimate Relationships' (2010), <https://www.academia.edu/15497286/Rights_in_Intimate_Relationships> Accessed 29 May 2023.

Existing laws attempt to recognise the rights in such relationships in limited ways. Section 18 of the HAMA, for instance, recognises the need for this protection by recognising the right to maintenance of other living wives[536] and of concubines[537] (however anachronistic the term may be). Similarly, the Supreme Court also, in certain cases, has extended maintenance rights to second wives in extra-legal polygamous marriages. The term 'wife' under section 125 of the Code of Criminal Procedure, 1973 ("CrPC") has been interpreted broadly to include second wives as well. This has been fact-specific, though. In *Badshah v Urmila Badshah Ghose*,[538] the court observed that marriage between parties was proved, even though it was not a legally valid marriage. The husband had not disclosed the fact of earlier marriage to his second wife (the claimant) and could not be permitted to deny the benefits of maintenance based on deception.

Any new law that comes into force must pay sufficient heed to granting rights in areas such as maintenance and succession for vulnerable parties in such extra-legal relationships. Statutory codification of such rights would help in guaranteeing them and in guiding courts on their application.

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.[539] Similarly, under Muslim personal law, all widows together take one share in the property of the deceased.[540] 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.

In other cases of extra-legal polygamous marriages and/or stable unions, strict portions for each partner are challenging to lay down. Multiple configurations of relationships may arise, where an abundance of factors may affect the rights of both parties in each scenario. For example, how many partners are there in the picture? Which partner did the deceased have the most durable relationship with? With whom were their finances intertwined? What was the nature of these relationships?

A possible alternative is to allow judicial determination of the inheritance shares in such cases to ensure proper apportionment of the estate of the deceased between the various partners. However, this would leave the inheritance regime rife with uncertainty and prone to mandatory litigation, which may go on for years. The estate of the deceased and the property it consists of may necessarily end up being without an owner for years.

Just like with stable unions,[541] the Code proposes permitting guided judicial discretion. One's status as a legally valid spouse or stable union partner should grant them a default inheritance share. Subsequent partners in extra-legal polygamous marriages and/or stable unions may approach the court to claim a share in inheritance. The court may grant a share based on an evaluation of the quality of the relationship between the deceased person and the claimant and the needs of the surviving spouse/stable union partner. The court may also proportionately reduce the intestate shares of the other heirs to satisfy the share being granted to such a partner.

Proposed Provision:

65. Rules for devolution among immediate family.–

[536] The Hindu Adoptions And Maintenance Act 1956, s 18(d).
[537] The Hindu Adoptions And Maintenance Act 1956, s 18(e).
[538] Badhsah v Urmila Badshah Ghose (SC) SLP (Crl) No. 8596/2013, decided on October 18, 2013.
[539] The Hindu Succession Act 1956, section 10.
[540] 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).
[541] See the commentary above on inheritance rights for partners in stable unions.

(1) The intestate's 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, respectively (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.

Illustration
Facts - X, the intestate, is survived by two siblings - A and B, and his father, C. His spouse, Z, passed away a few years ago. X has no surviving children or grandchildren.
Calculation - A, B and C will inherit X's property equally. They will each get a share in the property of X.
Final Shares
A, B and C will receive 1/3 share each.

(c) If the intestate was in a stable union at the time of death, as per sections 25, 26 and 29 of Chapter I 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 sections 25 and 26 of this Code, the partner shall be entitled to the same rights in the intestate's property as a spouse under this Code,

(ii) The partners may opt out of the intestate succession regime applicable under sub-section (i) above through the nomination form provided under section 28 of Chapter I of this Code;

(iii) If the stable union has not been intimated, and the court has made a determination under section 29 of Chapter I of this Code, the partner shall be entitled to the same rights in the intestate's property as a spouse under this Code;

(iv) On a claim being filed by the other heirs, the court may reduce the share due under sub-section (iii) based on the following factors:

A. length of the partnership;
B. financial position of the partner;
C. the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners;
D. the financial needs of other heirs and any caretaking provided by them to the deceased;
E. other such factors as may be prescribed.

Illustration:
Facts: At the time of her death, A was in a relationship with B. Upon A's death, B applies to the court for a share in A's property, claiming that they were in a stable union. A also has a daughter, C, from a previous marriage. The Court finds that A and B were in a stable union as per section 29 of Chapter I this Code.
Calculation of shares: The inheritance scheme applicable for spouses will be applicable in such cases. C will also inherit her share as if she was inheriting alongside a spouse.
Final Shares:
B and C will receive 1/2 share each.

(d) 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.

Illustration:
Facts: A is survived by two validly married spouses, B and C. He is also survived by two children, E and F, from his marriage with B.
Calculation of shares: The property will be split into four parts. B, C, E and F will get one share each.
Final Shares:
B, C, E and F will get 1/4 share each.

(e) If at the time of death, the intestate is in extra-legal polygamous marriage(s) and/or extra-legal polygamous stable union(s), the partner(s) in the extra-legal marriage(s) and/or stable union(s) may claim a share in the estate of the deceased, and the Court shall determine their share based on the following factors:

(i) the nature of relationship between the parties;
(ii) the financial position of the claimant partner, including any independent source of income;
(iii) the degree of financial dependence or interdependence, or any arrangements for financial support, between the parties;
(iv) any contributions made or action taken by the partner during the subsistence of the relationship, which has given rise to a sustained benefit or economic disadvantage;
(v) the number of heirs of the intestate who are entitled to a share; and
(vi) other such factors as may be prescribed,

and while determining the share of the partner, the court may proportionately reduce the intestate shares of the heirs of the deceased.

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.

Illustration
Facts: A was in a valid marriage with B at the time of his death. A had also performed a marriage ceremony with C while his marriage with B was in subsistence. However, the marriage with C was invalid because A was already in an existing marriage.
Allocation of share: Upon A's death, B will get the share due for a spouse under the intestate succession scheme in this section. C may apply to the court for an inheritance share. The court will decide her claim based on the factors laid down in this section. If the court awards her a share, it may proportionately reduce the share of the other heir, in this case the spouse, B.

(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 (a) and (b) of sub-section (1) shall apply to the devolution of property under this sub-section.

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.[542]

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.[543]

[542] The Indian Succession Act 1925, section 48.
[543] The Hindu Succession Act 1956, section 12.

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:

66. 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.

67. 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.[544] The ISA,[545] the HSA,[546] and Muslim personal law[547] 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.[548] In terms of this principle, foetuses could be treated as already born if this was to their benefit.[549] 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.[550] 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.

Proposed Provision:

68. 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

[544] Karl Heinz Neumayer, 'Intestate Succession' in *International Encyclopedia of Comparative Law* (IECL 2002) vol 5, ch 3
[545] Indian Succession Act 1925, s 27(c), s 50(a).
[546] Hindu Succession Act 1956, s 20.
[547] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009).
[548] *The Digest of Justinian* (University of Pennsylvania Press A Watson tr. 1986).
[549] Johnston D., 'The Renewal of the Old' (1997) Cambridge Law Journal 80-95.
[550] 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.

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.[551] 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[552] and New South Wales[553] have thus excluded posthumous conception cases from inheritance to avoid indefinite delays.

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[554] and Austria[555] 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.

Proposed Provision:

69. 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:

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[551] Nilkita Doval, 'Life Uninterrupted' (*Open the Magazine*, 2021) <https://openthemagazine.com/feature/life-uninterrupted/> accessed 29 May 2023.
[552] 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.
[553] Succession Act 2006, section 3(2); Estate of K (1996) 5 Tas R 365
[554] Law 14/2006, 26 May.
[555] Civil Code of Austria 1811, sections 545 and 546.

(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 as per applicable laws.
(c) The reproductive material must be utilised in accordance with the written consent of the intestate as per applicable laws.
(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 and the term 'remarries' shall include entering into a stable union.

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[556] in order to avoid difficulty in ascertaining property rights.[557]

Proposed Step:
The same position can be retained to avoid difficulty.

Proposed Provision:

70. 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:
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

[556] Hindu Succession Act 1956, s 21.
[557] *Jayantilal Mansukhlal and Anr. v Mehta Chhanalal Ambalal* AIR 1968 Guj 212.

to the heirs of the offender, who are also equally disqualified.[558] 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.[559]

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.

Proposed Provision:

71. 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 they 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*[560] 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 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

[558] *Vellikannu v. R. Singaperumal* (2005) 6 SCC 622.
[559] *GS Sadashiva v MC Srinivasan* AIR 2001 Kant 453.
[560] (2008) 12 SCC 541.

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.

Proposed Provision:

72. 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 - Protecting the Inheritance Rights of Immediate Family and Dependants

Issue: Should a spouse 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 may need preferential rights over the shared family home to live the remainder of life in dignity 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.[561] 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.[562]

The need for providing right of habitation and use to spouses sharing a family home has been recognised in multiple jurisdictions,[563] including Goa.[564] 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.[565] 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.[566]

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.)[567] where the deceased would own only a certain part of the family home.[568]

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.[569] Not only is the provision

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[561] 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.
[562] ibid 497-498.
[563] 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)
[564] The Goa Succession, Special Notaries and Inventory Proceeding Act 2012, section 82 ("2012 Goa Act").
[565] 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.
[566] ibid.
[567] The term joint family does not carry the same meaning as the Hindu undivided family
[568] Kamala Sankaran, 'Family, Work and Matrimonial Property' in Amita Dhanda & Archana Parashar (eds) *Redefining Family Law in India* (Routledge India 2008).
[569] ibid.

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 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.[570]

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 stable unions (as provided under section 65(1)(c)(i) of this Chapter of the Code, if the stable union is intimated or once a court determines that a stable union exists, the same rights as a surviving spouse will accrue to partners in such cases). The right to habitation will not be available if the partners have opted out of the inheritance regime applicable for surviving spouses under this Chapter.

In cases where any combination of spouses and/or stable union partners coexists as explained earlier, the validly married spouse or valid stable union partner, as the case may be, will have this right. For extra-legal polygamous partners and/or spouses, these rights may be determined through an order of the Court, as per section 65(1)(e) of this Chapter of the Code. 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.[571] 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.

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[570] ibid.
[571] 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 Goa Succession, Special Notaries and Inventory Proceeding Act, 2012, 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[572] or a limited right of habitation being created for the spouse to provide them with an opportunity to find a suitable alternative.[573]

Proposed Provision:

73. 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.

Explanation.– For the purposes of this section, the term 'remarries' includes entering into a stable union.

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?

[572] French Civil Code 2006, Articles 764-766.
[573] See German Civil Code BGB, 2002, section 1969.

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.[574] 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.[575]

For those who follow the *Mitakshara* school under Hindu law,[576] the coparcenary system also serves as a guarantee of rights in property. Lineal descendants up to three generations acquire a right in their ancestral property by birth. This right cannot be alienated by any other coparcener and will vest in each coparcener as their separate property once such a property is partitioned. This partition may take place upon the death of any coparcener or when a coparcener demands such a partition. The 2005 Amendment, which made daughters coparceners at par with sons, proved crucial as it guaranteed for daughters a share in their ancestral property which could not be taken away from them. However, it must be borne in mind that this protection did not extend to other female heirs such as the mother, the wife, or the sister.

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.[577] In the former, a pre-ordained fixed share is conferred on certain specified heirs of the deceased and such devolution is automatic and compulsory.[578] 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, the idea

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[574] Sir Dinshaw Fardunji Mulla, *Hindu Law* (24th edition, 2022) 1451.
[575] Asaf A. Fyzee, *Outlines of Muhammadan Law* (Oxford India Paperbacks 2009); Tahir Mahmood, *Family Law in India* (EBC 2023).
[576] Please see the commentary to section 58 of this Chapter of the Code.
[577] 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.
[578] 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.

of marriage as a partnership, the assets of which should be fairly distributed when the partnership comes to an end on death.

The United Kingdom 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 in Australia[579] and New Zealand.[580]

Over time, there has been a shift away from compulsory 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.[581] 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.[582] 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.[583]

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 dependent 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.[584] Stringent conditions have also been laid down for claiming maintenance, such as not having attained the age of majority in the case of a son and being unmarried in the case of a daughter.[585] Not only is this provision based on archaic patriarchal logic of the daughter requiring financial support only until she

[579] See Family Provision Act, 1982.
[580] See Family Protection Act, 1955.
[581] Kenneth Reid and others, 'Comparative Perspectives' in Kenneth Reid and others (eds.) *Comparative Succession Law, Volume III: Mandatory Protection* (Oxford University Press 2020).
[582] 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.
[583] 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.
[584] The Hindu Adoptions and Maintenance Act 1956, section 21.
[585] The Hindu Adoptions and Maintenance Act 1956, section 21(iv) & section 21(v).

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.[586] Such a person also 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 Code and the preferential right of habitation provided for spouses under section 73 of this Chapter, such a fixed share may not be necessary when it comes to spouses. The next set of provisions under this Chapter, however, specifically deals with the protections afforded to children.

For other categories of heirs, the maintenance provisions may themselves be fortified to grant adequate security. 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.[587] 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 Code, the court may order them to pay maintenance from the proceeds of the alienation to the applicant.

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*

[586] Transfer of Property Act 1882, s 39.
[587] *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.

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."[588]

As such, a scheme on maintenance may be created with the following features based broadly on the provisions of HAMA and global best practices:[589]

- 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 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.

Proposed Provisions:

74. Order of maintenance.–
The following persons for whom reasonable financial provision has not been made by the testator'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 an extra-legal marriage or an extra-legal stable union 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,

[588] Sir Dinshaw Fardunji Mulla, *Hindu Law* (24th edition, 2022) 1456.
[589] 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).

(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.

75. 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.

76. 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 54 of Chapter II 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.

77. 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 75 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.

78. 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 74 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 will 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 76 of this Code, including but not limited to the remarriage of a spouse who is receiving maintenance.

Issue: How should the heirs of the deceased be protected from disinheritance?

Objective: To lay down compulsory shares for certain heirs of the deceased that cannot be alienated through a will.

Context and Proposed Step:
A concern that has been voiced time and again in the context of succession rights is that of disinheritance through wills, both of women[590] and queer persons[591]. Some persons have demanded that heirs be

[590] Madhu Kishwar, *Co-ownership rights for wives: A solution worse than the problem*, Manushi, Vol. 84.
[591] This was revealed in course of consultations carried out with queer persons at the office for Sappho for Equality on November 23, 2023.

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.[592] Hence a change in law, while an important step forward, cannot be assumed to change the situation on the ground.[593] In such a scenario, a minimum share being reserved in the property which certain heirs will compulsorily inherit may be the way forward.

It may seem counterintuitive that after weighing the merits of the discretionary and compulsory shares systems above, and recommending an elaborate maintenance regime based on judicial discretion, we now propose a system of compulsory shares for certain categories of heirs. However, it emerged at our consultations that vulnerable parties may not be in the position to approach courts for maintenance. Moreover, maintenance in India till now has generally been granted in highly contested disputes. Hence, despite the complexities that a system of compulsory shares may give rise to, it may be imperative to reserve a portion of the deceased person's estate for groups which are particularly at the risk of disinheritance. The Code proposes such a regime for the children of the deceased. In case of predeceased children, this protection will be available to the child of the predeceased child, i.e., the grandchild of the deceased.

This Code lays down adequate provisions for the protection of spouses, through the partial community of assets regime,[594] preferential right of habitation in the residential house[595] and maintenance provisions. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 was passed specifically to protect the rights of senior citizens and would take care of the needs of the parents of the deceased. An additional compulsory share may thus not be required for these categories of heirs.

As noted above,[596] there are many regimes that place limits on testamentary dispositions. Some limit the quantum of property that can be alienated through a will,[597] while others guarantee a minimum share for certain specified heirs[598]. The former model has been criticised for its rigidity and for the onerous restrictive limits it places on the freedom of testation. This Code goes with the latter model, reserving 1/2 of the intestate share due to children as a compulsory share. Hence, despite any stipulations to the contrary in a will, the children of the deceased will get at least 1/2 of the share that they would have received through intestate succession. The compulsory share has been decided based on a survey of comparative literature, to strike a balance between freedom of testation and the needs of the protected heirs as well as to adequately balance the interests of both the protected heirs and the other heirs. However, in the absence of empirical research on disinheritance and its prevalence in India, there is an unavoidable element of arbitrariness to this figure.

There are multiple reservations when it comes to a compulsory shares system, like its rigidity may not allow for entirely just results tailored to the circumstances. It is also focussed on status alone and does not allow for consideration of actual financial need. In this it closely follows traditional law of intestate succession, which must also lay down definite shares for the heirs of the deceased.

There are also practical concerns, just like with any scheme of intestate succession, such as preventing fragmentation of land and family businesses. For the former, as we noted above,[599] provisions relating to

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[592] 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).
[593] ibid.
[594] See sections 21-24 of Chapter I of this Code.
[595] See section 73 of this Chapter of the Code.
[596] See commentary to sections 74-78 of this Chapter of the Code.
[597] The Italian Civil Code, article 536.
[598] The Hungarian Civil Code, section 7:75.
[599] See the commentary to section 57 of this Chapter of the Code above, on the coverage of agricultural land under succession laws.

consolidation of landholdings could be the way forward.

Some countries have put provisions in place to ensure the continuity and stability of businesses. In Poland, businesses are protected from claims arising from compulsory portions. Relevant parties may request a reduction in or a postponement of the compulsory portion, or they may make payments towards the compulsory portion in instalments. In Norway, businesses can be allocated to one or more of the descendants in a will, provided the will has been confirmed by the Norwegian king, or all descendants are of full age and have consented to the arrangement.[600] Italy allows a people who owns, or are shareholders in, a business, to enter into a family pact with those entitled to a forced share. Through these pacts, they can make a lifetime transfer of the business, or of the shares in the business, to only one or some of their descendants. The transferee has to compensate the heirs entitled to a compulsory portion in money or through assets, as may be agreed, unless they renounce that right.[601]

Similar corresponding provisions could be introduced in India as well to preserve businesses after a survey of how businesses may be affected by a compulsory shares regime.

Proposed Provisions:

79. Reservation of compulsory shares for certain heirs:
(1) Children of the deceased shall inherit at least half of the inheritance share allocated to them in section 65(1)(a) of this Code, irrespective of any stipulation to the contrary in any will of the deceased.

(2) In case of a predeceased child, subsection (1) shall apply to the children of such a child, i.e., the grandchildren of the deceased.

(2) The base for calculating the compulsory share under sub-section (1) shall be as laid down in section 80.

(3) Sub-section (1) shall be subject to the preferential right of habitation of the spouse provided in section 73 of this Code.

(4) It is clarified that in the absence of the heirs specified in sub-section (1) and (2), the deceased shall have complete freedom of testation regarding their will(s).

80. Valuation of the estate for the purpose of determining the compulsory share:
(1) The base of the compulsory share shall be the net value of the estate at the time of the death of the deceased.

(2) The shares of the other heirs received through intestate succession will not be affected in satisfying the compulsory share.

(3) When calculating the net value of the estate, legacies and testamentary burdens shall not be taken into consideration as encumbrances.

[600] The Norwegian Inheritance Act, section 33(2), deals with the price that has to be paid for taking over the business and when it has to be paid.
[601] Italian Civil Code, article 768.

Chapter 3B: Testamentary Succession

Table of Contents

Introduction

Chapter 3(B): 'Testamentary Succession" presents a scheme to partially modernise the law of testamentary succession in India. While draft Code 1.0 did not tackle this issue, Code 2.0 does. The proposed scheme replaces the over-prescriptive, formalistic, and cumbersome scheme of the Indian Succession Act, 1925 ('ISA') with a simpler, accessible, rational, and actionable law on wills. In addition to presenting the foundational concepts of the law of will-making in a coherent, readable manner, the law is also drafted in plain language, making it easier to navigate both for laypersons who can make wills with greater ease, and also by lawyers and judges who can give effect to them with more efficiency. The ISA is largely based on the Wills Act, 1837 of the United Kingdom. To ensure continuity in the law while drafting this chapter, select common law jurisdictions, where modern variants of the Wills Act, 1837 of the United Kingdom are in force, have been relied upon. These include New Zealand, Australia, the United Kingdom, and South Africa.

The law shifts from a regime of formal compliance - where wills may be declared invalid for failing to comply with rigid formalities - to the globally accepted 'harmless error' standard - where the court is instructed to ignore lapses by the will-maker which do not affect the substance of the will, as long as the will-maker's intention to give away their property in a particular manner is apparent. To enable Indians domiciled outside India to make wills in relation to their property which is still in India, this chapter instructs courts to find a will made in a foreign jurisdiction valid, as long as it complies with the legal requirements in that country. This represents a recognition of global trends in succession legislation, which have moved away from cumbersome formality requirements and have accorded greater flexibility to the testator.

In the light of the difficulties brought about by the pandemic, where it was impossible to secure multiple persons to witness the execution of a will in-person, this framework also recognises digitally made and virtually witnessed wills. For this purpose, it relies on the precedent set by the Uniform Electronic Wills Act - drafted as a model template in the United States and adopted across various states. It also extends the privilege of privileged wills to a wider class beyond active soldiers, sailors, and airmen to include those who are caught in the throes of a natural disaster. Overall, it seeks to both promote and facilitate the making of wills and the disposition of property by testamentary means.

Apart from instructing courts to expedite the implementation of uncontested wills, the proposed framework does not overhaul the administration of estates (including the process of granting probate and letters of administration) and leaves this, for now, to the ISA. Although the ISA sets out a common, nation-wide framework, administration of estates varies from state to state depending on the rules set out by the jurisdictional High Court. Proposing a new framework for the same will require an empirical study to be conducted across the country to identify problems and bottlenecks in this area, and a detailed consultation with judges and lawyers will be required to devise solutions. This is an exercise which is, for now, beyond the scope of Code 2.0.

A simple, accessible, rational, and actionable law on wills:

This Chapter presents a scheme to modernise the law of testamentary succession in India. It presents an alternative to the over-prescriptive, formalistic, and cumbersome scheme of the ISA with a simpler, accessible, rational, and actionable law on wills. It presents the foundational concepts of the law of will-making in a coherent, readable manner, to make it easier to navigate for laypersons who can make wills with greater ease, and also for lawyers and judges who can give effect to them with more efficiency.

A law on wills which gives primacy to a will-maker's intention:

The law shifts from a regime of formal compliance (where wills may be declared invalid for failing to comply with rigid formalities) to the globally accepted 'harmless error' standard. Here, the court is instructed to ignore lapses by the will-maker which do not affect the substance of the will, as long as the will-maker's intention to give away their property in a particular manner is apparent.

A global law on wills:

To enable Indians domiciled outside India to make wills in relation to their property which is still in India, this Chapter instructs courts to find a will made in a foreign jurisdiction valid, as long as it complies with the legal requirements in that country. This represents a recognition of global trends in succession legislation, which have moved away from cumbersome formality requirements and have accorded greater flexibility to the testator.

A law on wills which enables digital will-making and virtual witnessing:

In the light of the difficulties brought about by the pandemic, where it was impossible to secure multiple persons to witness the execution of a will in-person, this framework also recognises digitally made and virtually witnessed wills. For this purpose, it relies on the precedent set by the Uniform Electronic Wills Act - drafted as a model template in the United States and adopted across various states. It also extends the benefit of privileged wills to a wider class beyond active soldiers, sailors, and airmen to include those who are caught in the throes of a natural disaster. Overall, it seeks to both promote and facilitate the making of wills and the disposition of property by testamentary means.

A law on wills with minimum disruption to the existing legal framework:

The ISA is largely based on the Wills Act, 1837 of the United Kingdom. In 1865, the British enacted a law on will-making in India. They used English law as the base, picking and choosing provisions from multiple provincial laws already in force in India and adding rules laid down by courts for validating and interpreting wills. Over time, community-specific legislations to regulate wills made by Hindus and Muslims were enacted and courts continued to issue varying interpretations. In 1925, the British Parliament decided to consolidate these diverse laws into one—the ISA. In a way, the conceptual foundation of the ISA is the Wills Act, 1837, over which was added a set of principles derived from case law developed by English courts as well as British judges in Indian courts. Other common law jurisdictions have followed a similar legacy. However, while reforming their colonial-era laws on wills, lawmakers were careful to use the Wills Act, 1837 of the United Kingdom as a base template, which was then simplified and altered as per contemporary needs. This was done to ensure continuity in the law and minimise the chances of disruption to the system in place for making and implementing wills. To achieve the same purposes while drafting this Chapter, select common law jurisdictions, where modern variants of the Wills Act, 1837 of the United Kingdom are in force, have been relied upon. These include New Zealand, Australia, the United States of America, and South Africa.

Administration of estates left under the Indian Succession Act:

Apart from instructing courts to expedite the implementation of uncontested wills, the proposed framework does not present an alternative framework for the administration of estates (including the process of granting probate and letters of administration). Although the ISA sets out a common, nation-wide framework, administration of estates varies from state to state depending on the rules set out by the jurisdictional High Court. Proposing a new framework for the same will require an empirical study to be conducted across the country to identify problems and bottlenecks in this area, and a detailed consultation with judges and lawyers will be required to devise solutions. This is an exercise which is, for now, beyond the scope of this Chapter.

Part I - Introductory Provisions

81. Definitions.-

In this Chapter, unless the context otherwise requires,-

(a) **"administrator"** means the person appointed by the court to prove the will and give effect to it;

(b) **"court"** means the probate court under applicable law;

(c) **"creditor"** means a person to whom the will-maker owes a debt at the time of death;

(d) **"disposition"** means the act of giving away of property to a person under the will;

(e) **"executor"** means a person named by the will-maker in the will to prove the will and give effect to it;

(f) **"letters of administration"** means a document granted to an administrator to give effect to the dispositions in the will;

(g) **"probate"** means the process of proving a will as valid under applicable law;

(h) **"property"** means:
(i) movable and immovable property,
(ii) self-acquired and ancestral property,
(iii) tangible or intangible property, and
(iv) a share, interest, or right in any such property;

(i) **"regular will"**, for the purposes of Part V of this Chapter, is a will made by complying with the requirements under Part II of this Chapter;

(j) **"three requirements for a valid will"** means the requirements enlisted under section 85(1);

(k) **"will"** means a document that:
(i) is made by a natural person; and
(ii) does any or all of the following things:
A. gives away property to which the person is entitled at the time of their death; or
B. gives away property to which the administrator or executor appointed by the person becomes entitled after the person's death; or
C. appoints an executor to prove and give effect to the will.

82. Manner of fulfilment of requirements under this Chapter.-

The following requirements, wherever they appear in this Chapter, may be satisfied as follows:

(a) that a document must be in writing - the document may be handwritten, typed and printed, or typed electronically,
(b) that a document must be signed or attested - the document may be signed or attested physically or electronically,
(c) that an action may be performed orally - the action may be performed and recorded through video and/or audio means, and

(d) that witnesses must be present - the presence may be in-person or virtually over video conferencing, and the witnesses may be located inside or outside India.

83. Standard & burden of proof under this Chapter.-

(1) Wherever this Chapter requires a person to establish a fact, or the court to satisfy itself of a fact, the standard of proof shall be that of balance of probabilities.

(2) If the will appears to be rational and legible, then it shall be presumed to be valid, and the burden to show that it is not shall shift to the person who is opposing the will.

Part II - Making a valid will

84. Who can make a valid will.-

Any person who is not a minor and is of sound mind may make a will.

85. The three requirements for a valid will.-

(1) The following requirements must be complied with to make a valid will:

(a) A will must be in writing, and the will-maker does not need to use any technical terms, as long as their intentions to dispose of their property in a particular manner are made clear;

(b) The will-maker must—

(i) sign the document; or

(ii) direct another person to sign the document on their behalf in their presence; and,

(c) At least two witnesses must—

(i) be in the presence of the will-maker when the will-maker complies with sub-section (2), and

(ii) each sign and attest the document in the will-maker's presence.

(2) To comply with sub-section (1)(c):

(a) the witnesses do not need to be in the presence of each other, as long as they are each in the presence of the will-maker while signing and attesting the will,

(b) no particular form of words shall be necessary while attesting the will, and

(c) the witnesses do not need to know that the document which they are signing and attesting is a will.

(3) It is not compulsory to register a will.

86. Validity of a will when it does not comply with the requirements.-

(1) This section applies to a document that—

(a) appears to be a will,

(b) does not comply with the three requirements for a valid will, and

(c) came into existence inside or outside India.

(2) The court may make an order declaring the document referred to in sub-section (1) to be a valid will, if it is satisfied that the document clearly expresses the intention of the deceased person to give away their property in a particular manner upon death.

(3) While making this declaration, the court shall —

(a) construe the document as a whole;

(b) examine the circumstances surrounding the signing and witnessing of the document;

(c) consider evidence regarding the intention of the deceased person to give away their property in a particular manner upon death; and
(d) ignore any harmless errors made by the will-maker or the witnesses which do not affect the substance of the document.

(4) If the document has been made outside India and complies with the law in force in the country in which it has been made, the court shall declare the will to be valid.

Part III - Special provisions relating to witnesses

87. Executor as witness to a will.-
A person who is appointed as an executor of a will may also be a witness to the will.

88. When a witness cannot receive a disposition under a will.-
A disposition of property under a will is invalid if-
(a) it is made to a witness, and/or
(b) it is made to a spouse or a stable union partner of the witness, and/or
(c) the property would pass to a person claiming under the witness or the witness' spouse or stable union partner.

89. When a witness can validly receive a disposition under a will.-
(1) Section 88 does not apply in the following circumstances:
(a) In addition to the witness or any of the persons in section 88 who is receiving a disposition, there are at least two other witnesses who are not enlisted in section 88,
(b) The disposition is by way of repayment of a debt owed by the will-maker, or
(c) All the persons who would benefit if the disposition to the said witness were to be declared invalid:
(i) have the legal capacity to give consent, and
(ii) give their consent in writing as part of the will or in the course of the probate proceedings.

(2) Even if the circumstances under sub-section (1) do not exist, the court may, of its own accord, find the disposition valid if it is satisfied that the will-maker knew of the disposition and its ultimate beneficiary, and the will clearly expresses the intention of the will-maker to give away their property in a particular manner.

Part IV - How to change, revoke, and revive a will

90. Changing a will.-
(1) A will-maker can change a valid will by:
(a) Making a change directly to the text of the will, or
(b) Describing the change in a note written in the will.

(2) If the change is being made electronically, it must be made in track mode or using other similar means such that the change is apparent in the document.
(3) To be valid, the change must also satisfy the three requirements of a valid will, as set out under section 85(1).
(4) Even if the change does not satisfy the three requirements of a valid will, the court may use its power under section 86 to find a change valid.

91. Revoking a will.-

(1) A will-maker can revoke a valid will or a part of it by:
  (a) subsequently making another valid will;
  (b) preparing a document which:
    (i) clearly spells out an intention to revoke the will or a part of it, and
    (ii) satisfies the three requirements of a valid will; or
  (c) destroying (or directing another person to destroy in their presence) the will or a part of it with the intention of revoking the will or that part.

(2) Even if the revocation does not satisfy the requirements under sub-section (1) of this section, the court may use its power under section 86 to find the revocation valid.

92. Reviving a will.-

(1) A will-maker can revive a will or a part of it which had been revoked under section 91 by:
  (a) complying with the three requirements for a valid will afresh, or
  (b) making an addendum to the will (known as a codicil) which:
    (i) clearly spells out the intention to revive the revoked will or part of it, and
    (ii) satisfies the three requirements of a valid will.

(2) When a will is revived under sub-section (1), it will be deemed to have been made–
  (a) on the date on which the revival is done, if the revival is under sub-section (1)(a); or,
  (b) on the date when it was originally made, if the revival is under sub-section (1)(b), unless the will-maker has expressed a contrary intention in the codicil.

Part V - Special testamentary actions

93. To whom this part applies.-

This part applies to persons:
  (a) who are in 'active service' as defined under the Army Act, 1950, the Air Force Act, 1950, or the Navy Act, 1957, or
  (b) who find themselves unable to satisfy the three requirements of a valid will owing to a natural disaster as defined under the Disaster Management Act, 2005.

94. Kinds of special testamentary actions.

(1) Special testamentary actions are actions related to will-making which the persons mentioned in section 93 may perform without the need to comply with the formalities set out under section 95(3).

(2) The following kinds of special testamentary actions may be performed:
  (a) Making a will under this part,
  (b) Changing a regular will or a will made under this part,
  (c) Revoking a regular will or a will made under this part, and
  (d) Reviving a regular will or a will made under this part.

95. How to undertake special testamentary actions.-

(1) Special testamentary actions can be performed by using any form of words as long as there is a clear intention on the part of the will-maker to perform that action.

(2) The special testamentary action may be undertaken either in written form or orally.

(3) The requirements contained under the following provisions need not be fulfilled while undertaking special testamentary actions:
  (a) Section 85,
  (b) Section 88,

(c) Section 90 (1), (2), & (3), and
(d) The words "in their presence" in section 91(1)(c).

96. How long can a special testamentary action remain valid for.-

(1) This section applies when:
(a) a special testamentary action has been performed, and
(b) the will-maker in question has ceased to be a person described in section 93.

(2) The special testamentary action will remain valid for one year from the date on which the will-maker ceased to be a person described in section 93.

97. Proof of special testamentary actions.-

(1) Notwithstanding anything contained in any other law which is in force, special testamentary actions may be proved in court through the use of any evidence that the court deems sufficient.

(2) If the will-maker is a person described in section 93(b) then the burden to prove that the will-maker was unable to satisfy the three requirements of a valid will, will be on the executor or administrator under the applicable law or any person benefiting under the will.

Part VI - Interpretation of wills

98. The court's tasks and duties while interpreting a will.-

(1) While interpreting a will, the court's tasks shall be to give effect to:
(a) the words of the will, and
(b) the intentions of the will-maker.

(2) Subject to sub-section (1), the court's duties shall be:
(a) to strive to uphold the validity of a will, and
(b) to achieve the distribution of the property of the will-maker instead of allowing the assets to remain undistributed.

99. Use of the will-maker's life while interpreting a will.-

(1) To correctly interpret the words used in a will and gather the intentions of the will-maker, the court may look into every relevant aspect of the will-maker's life, such as the will-maker's relationship with those who will benefit under the will, and the particulars of the property disposed of in the will.

(2) While undertaking this exercise, the court shall have due regard for the right to privacy of every person concerned.

100. Basic rules of interpretation to be followed by the court.-

(1) The court shall use the following basic rules of interpretation while construing a will:
(a) The will must be construed as a whole,
(b) All words must be given their plain, ordinary meaning, unless otherwise required by the context,
(c) When there are two inconsistent clauses, the clause which appears later in the will, will override the former,
(d) Other documents which have not been made a part of the will but have been clearly referred to in it may be referred to by the court to interpret the will.

(2) In addition to the above rules, the court may use any rule of interpretation recognised in law which enables it to perform its tasks and fulfil its duties under this Part.

101. Use of external evidence by court to give effect to wills.-

(1) This section applies when the language used in a will is such that it makes the will or a part of it:
   (a) meaningless,
   (b) *prima facie* ambiguous or in light of surrounding circumstances (which cannot include the testamentary intentions of the will-maker) and because of this, the court is unable to give effect to the will.

(2) The court may use external evidence to interpret the will or the part of it which is meaningless or ambiguous, and this external evidence includes the testamentary intentions of the will-maker.

102. Correction of will by a court.-

(1) This section applies when the court is satisfied that a will which is otherwise valid fails to carry out the intentions of the will-maker:
   (a) because it contains a clerical error, or
   (b) it contains a substantive error which makes the will, or a disposition contained in it, inoperative, or
   (c) because it does not give effect to the instructions issued by the will-maker in case the will-maker did not themselves prepare the will.

(2) The court may make an order correcting the will in such manner as it deems fit to give effect to the intentions of the will-maker.

(3) In such an order, the court may:
   (a) supply words into a will, or
   (b) omit particular words from a will.

(4) While making an order under this section, the court shall consider the same factors as under section 86.

Part VII - Special rules while giving effect to dispositions under wills

103. Disposition which cannot be given effect to.-

The following dispositions will not be given effect to in a will:
   (a) a disposition which is contrary to any law for the time being in force, or
   (b) a disposition which is dependent upon the fulfilment of an impossible condition.

104. Disposition which depends on the fulfilment of a condition.-

(1) This section applies when:
   (a) a disposition depends on the fulfilment of a particular condition, and
   (b) the will-maker has not indicated the degree to which the condition needs to be fulfilled.

(2) If the court is of the opinion that the person concerned has substantially fulfilled the condition, it shall give effect to the disposition.

105. Disposition of property to a predeceased lineal descendant.-

(1) This section applies when:

(a) the child or any other lineal descendant (for e.g. child, grandchild etc. of the will-maker has received a disposition under a will, and
(b) this person dies before the death of the will-maker, but
(c) is survived by their own lineal descendant.

(2) The disposition will still remain valid, and the property will pass to the surviving lineal descendant of the person who had originally received the disposition.

106. Disposition of a sum of money with a description of how it is to be enjoyed.-

(1) This section applies when a will-maker has left a sum of money to a person and has added a description of the manner in which the sum is to be enjoyed.

(2) The person is entitled to receive the sum, but does not need to enjoy it in the described manner.

107. Disposition of property with a charge, lien etc.-

(1) This section applies when there is a pledge, charge, lien, or any other third-party interest over a property which has been disposed of under the will.

(2) The person who has been given the property under the will may only take it subject to such interest.

108. Disposition of property over which the will-maker does not have complete title.-

(1) This section applies when even after the will-maker's death, the will-maker's title to a specific property disposed of in the will is not complete.

(2) Any action which needs to be undertaken to complete the title must be undertaken by:
(a) the executor or administrator acting under Part IX of the applicable law in collaboration with the person to whom the property in question has been given in the will, and
(b) at the cost of the property left behind by the will-maker.

109. Disposition of shares in a company.-

(1) This section applies when the will-maker has disposed of shares in the will.

(2) When the will-maker has expressed an intention to dispose of all shares that they owned to a single person as a whole, then such person:
(a) cannot choose to accept only certain shares and refuse to take the others, and
(b) must take all the shares together as a single whole.

(3) If any amount of money is due in relation to the shares:
(a) at the time of the will-maker's death: then this amount shall be paid out of the property of the will-maker,
(b) after the will-maker's death: then this amount shall be paid by the person to whom the shares have been disposed of under the will.

110. Dispositions which are specific and/or demonstrative.-

(1) This section applies when:
(a) more than one disposition has been made of the same property,
(b) one of the dispositions is specific - i.e., the disposition is of the property itself (for e.g., a flat), and
(c) another disposition is demonstrative - i.e., the disposition is from the proceeds of the property (for e.g., maintenance from rent collected by leasing out the flat).

(2) The court shall first give effect to the specific disposition, and only after that, to the demonstrative disposition.

111. Disposition of interest arising from a sum of money.-

(1) This section applies when:
   (a) the disposition consists of interest or any other produce arising from a principal sum of money, and
   (b) no other disposition in the will affects this principal sum or the interest or produce arising from it.

(2) The person to whom the disposition has been made shall be entitled to receive both the interest/produce as well as the principal sum.

112. Disposition to a creditor.-

(1) This section applies when the will-maker makes a disposition of property to a creditor.

(2) Unless it is evident from the text of the will that the will-maker intended to dispose of the property to the creditor to discharge the debt, the creditor is entitled to both the property as well as the debt.

113. Disposition of property which has already been partly disposed of.-

(1) This section applies when a will-maker makes a valid will and then disposes of or otherwise loses their interest in some property which had been disposed of in the will.

(2) The disposition in the will is valid only with respect to that part of the property to which the will-maker is still entitled at the time of death.

114. Disposition where the item described is not available in the will-maker's property.-

(1) This section applies when a disposition in a will describes an item in general terms, but there is nothing in the property of the will-maker which matches the description.

(2) The executor or administrator acting under Part IX of the Indian Succession Act, 1925 shall make all reasonable efforts to acquire the item using the funds available in the residuary pool described in section 116.

115. Disposition of property in fractional parts, when one part fails.-

(1) This section applies when:
   (a) A will disposes of the will-maker's property in more than one part,
   (b) The disposition of any one of those parts fails, and
   (c) This failure is not because the will-maker was not entitled to the property at the time of death.

(2) If the will contains a special rule for the disposition of a part that fails, any failed part shall be disposed of according to that rule.

(3) If there is no such special rule in the will, the part which has failed will be distributed among the other parts proportionately.

116. Disposition of property in the residuary pool in a will.-

(1) This section applies when all the property described in a will has been distributed and some property remains which could not be distributed because the disposition was invalid or could not be given effect to for any other reason.

(2) This property shall form part of the 'residuary pool'.

(3) A will-maker may name a specific person or persons who shall inherit from this residuary pool.

(4) No particular form of words is necessary for sub-section (3) to apply, as long as the intention of the will-maker is clear.

117. Disposition to an executor under a will.-

(1) This section applies when a person who has been named as an executor in a will has also been given a disposition under the will.

(2) Such a person cannot receive the disposition unless they:
   (a) prove the will in accordance with applicable law, or
   (b) show a clear intention to act as the executor in compliance with any conditions laid down in the will.

118. Probate and administration of wills.-

The probate of a will and its administration shall be undertaken under applicable law.

119. Expedition of proceedings in case of uncontested wills.-

(1) This section applies when a will is uncontested (i.e., when no one challenges the probate of the will under applicable law).

(2) The court shall make every reasonable effort to expedite the probate and administration proceedings to ensure that the will can be given effect to as soon as possible after the will-maker's death.

ANNEXURE 1

RECOMMENDATION OF AMENDMENTS

Introduction

The Code provides an illustration of what a progressive and modern legal regime for regulation of parent-child relations may look like. However, parent-child relations are regulated across several laws besides those on natural guardianship. For instance, the secular Guardian and Wards Act, 1890 prescribes the procedure for Court appointment of guardians. The Juvenile Justice (Care and Protection of Children) Act, 2015 is the secular law on adoption, while the Hindu Adoption and Maintenance Act, 1956 ('HAMA') is the Hindu personal law on adoption. In 2021, two new laws were introduced to regulate reproductive technology namely the Surrogacy (Regulation) Act, 2021, and the Assisted Reproductive Technology (Regulation) Act, 2021. Finally, the Birth, Deaths and Marriage Registration Act, 1886 and the Registration of Birth and Deaths Act, 1969 prescribe the procedure for registration of births as well as manner in which marital and non-marital parents can register as the legal parents in the birth certificate of children. All these laws view parenthood as the exclusive domain of married heterosexual couples, and in some cases single parents. It was thus deemed critical to illustrate how these laws may be modified to reflect the principles informing the drafting of Chapter II of the Code 2.0. The objective is to ensure these laws are updated to reflect modern principles, are inclusive of LGBT+ persons, and finally make space for the diversity of parental arrangements. The amendments to these laws are merely illustrative and are not comprehensive or exhaustive. The intention is to demonstrate the possible routes through which these laws may be amended to ensure inclusion. This Annexure comprises four parts: Part I on guardianship, Part II on adoption, Part III on reproductive technology, and Part IV on maintenance of parents.

Part I
Court Appointed Guardians for Minors

Much of the law concerning natural guardianship of a minor is derived from personal laws (across religions).[602] 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.[603]

The GWA prescribes the procedure for the District Court to appoint a guardian for both the person as well as property of the minor.[604] 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.[605] 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.[606]

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.[607] 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.[608]

In order to make the GWA more child-centric, and align it with the principles proposed under Chapter II of Code 2.0, certain amendments are being proposed, as follows.

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

Context:
Under the GWA, 'welfare of the minor' as well as 'best interests of the child'[609] are the cardinal principles which determine where guardianship and custody lie.[610] 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 of guardians.[611] 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 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 Code as well as principles laid down in existing case law, while the language in some others need to be modernised.

It must be noted that it has time and again been pointed out, including by peer reviewers and during the course of consultations, that the GWA is outdated and must be redrafted. However, practitioners also

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[602] Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) Family Law Quarterly 441.
[603] Flavia Agnes, *Family Law: Marriage, Divorce, and Matrimonial Litigation* (OUP 2011) 246.
[604] An application in this regard can be made to the District Court under the Guardians and Wards Act 1890, s 9.
[605] Asha Bajpai, 'Custody and Guardianship of Children in India' (2005) 39(2) Family Law Quarterly 441.
[606] The Guardians and Wards Act, 1890, s 8.
[607] The Guardians and Wards Act, 1890, s 25(1).
[608] The Guardians and Wards Act, 1890, s 25(1).
[609] Referred to as 'best interests of the child' in this paper.
[610] See, the Guardians and Wards Act, 1890, ss 7 and 17.
[611] The Guardians and Wards Act, 1890, s 17.

pointed out that family lawyers use the GWA in innovative ways to extend recognition to atypical families as it allows parties who are not the parent or a member of the natal family to be appointed as the guardian of the minor if that is in their best interest. As the GWA is largely procedural, a call has been taken to not disturb it. However, certain amendments have been proposed.

Proposed Step:
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 Code. To give full effect to the best interest principle, and to align court-appointed guardianship with the principles informing Chapter II the 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.

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 the Code on Family Indian Law, 2024.***	As Chapter II of the 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— (i) the parents of the minor if they are residing in any State to which this Act extends,	**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 34(v) of Chapter II of the Code on Indian Family Law, 2024.***	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)*.[612] 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.[613] To give

[612] (2015) 10 SCC 1.
[613] *ABC v State NCT of Delhi* (2015) 10 SCC 1, paras 24, 25.

			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 purpose of this proviso, the definition of single parent is to be drawn from this 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 existing or previous relations of the proposed guardian with the minor or his property. (3) If the minor is old enough to	**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 will consider that preference.***	Currently, 17(1) 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 continue 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.[614] This would, as the Law Commission noted in its 257th Report, "*remove the possibility of the appointment of a guardian without first assessing welfare*".[615] Essentially, all other considerations must be made subordinate to the best interests of the minor.[616] As the primary consideration in appointing a guardian for a minor will be the 'best interests of the child', the consideration of personal law on the issue has been removed. Personal law across religions prioritises the father as the natural guardian. For all practical purposes,

[614] Law Commission of India, Reforms in Guardianship and Custody Laws in India (257th Report, May 2015) 68, Annexure II.
[615] ibid 56.
[616] 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.

	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.		Courts across have been using the 'best interests principle' in appointing guardians for minors (even in cases where their natural guardians are alive). Further, to modernise 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— (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	**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 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 section***	This provision concerns the preferential right of certain persons to be regarded as natural guardians.[617] 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.[618] 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 the welfare of the minor children.[619] In its current form, section 19 could also conflict with section 17, under which welfare is supposed to be the paramount

[617] Law Commission of India, Reforms in Guardianship and Custody Laws in India (257th Report, May 2015) 56.
[618] 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.
[619] *Rosy Jacob v Jacob A Chakramakkal* (1973) 1 SCC 841, para 15.

	Court of Wards competent to appoint a guardian of the person of the minor.	***17(1) will be the paramount consideration.***	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: 1. Clause (a) of section 19 be repealed, and 2. 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 child of another minor Member of that family.	**Capacity of minors to act as guardians** — ***A minor cannot 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.
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	**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***	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.[620] The Law Commission has repeatedly alluded

[620] 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.

	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 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.	***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 will be of paramount consideration.*** ***(5) The Court will 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.***	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.[621] 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: 1. In sub-section (1), replace "arrest" with the requirement to return the ward to the custody of their guardian; 2. 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.[622] Two further changes are also being recommended: 1. *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); 2. *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

[621] 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.
[622] Law Commission of India, Reforms in Guardianship and Custody Laws in India (257th Report, May 2015) 68-69.

			order under sub-section (1).

Part II
Adoption Laws

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 ('JJ Rules'),[623] and the Adoption Regulations, 2022 ('2022 Regulations')[624] issued by the Central Adoption Resource Authority ('CARA'). Among all of the personal laws in India, it is only the HAMA that permits adoption. No other personal law permits adoption. Concerns have been raised regarding the HAMA as adoptions under it are based on the execution of a private deed. Thus, there is no institutional supervision, neither are there safeguards built into the law to protect children from possible exploitation.[625] It has been suggested that adoptions under the HAMA must be registered and one manner of achieving this is by ensuring that the processes followed under the JJ Act are also followed for HAMA adoptions. While this draft does not amend HAMA to that end, it is critical to flag this concern. The JJ Act, unlike HAMA, provides a secular framework for adoption under which aspiring adoptive parents who intend to adopt children can proceed, without being inhibited by their respective personal laws.[626] It also provides for rigorous safeguards to ensure the best interests of the potential adoptive child.

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.[627] 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.[628] 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.[629] Prospective adoptive parents ('PAPs') can apply to a Specialised Adoption Agency ('SAA')[630] in the manner provided under the 2022 Regulations.[631] 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).[632] 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.[633] 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.[634]

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[623] The Juvenile Justice (Care and Protection of Children) Model Rules, 2016 <https://cara.nic.in/PDF/english%20model%20rule.pdf> accessed 27 April 2023.
[624] The Adoption Regulations 2022 <https://cara.nic.in/PDF/adoption%20regulations%202022%20english_27.pdf> accessed 27 April 2023.
[625] Sara Bardhan and Neymat Chadha, 'The Challenges and Unaddressed Issues of Child Adoption Practices in India', The Wire <https://thewire.in/society/challenges-issues-child-adoption-practices-india> accessed 12 March, 2024.
[626] See *Shabnam Hashmi v Union of India* (2014) 4 SCC 1.
[627] JJ Act, s 2(2).
[628] JJ Act, s 27.
[629] JJ Act, s 30(xi).
[630] 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.
[631] JJ Act, s 58(1).
[632] JJ Act, s 58(2).
[633] JJ Act, s 58(3).
[634] JJ Act, s 61.

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?

Context:
At present, section 57 of the JJ Act along with Regulation 5 of the 2022 Regulations 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.[635] 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.[636] Consequently, non-marital partners are deemed ineligible to adopt under the JJ Act. While the minority in *Supriyo* struck down this notification on the grounds of excessive delegation and noted that non-marital couples must be permitted to adopt, the majority disagreed. The Code is in agreement with the minority on this issue. In addition to restrictions on non-marital partners, 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 Step:
It is proposed that section 57 of the JJ Act and Regulation 5 of the 2022 Regulations 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.

[635] 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.
[636] JJ Regulations, Regulation 5.

Proposed Amendments:

Provision (Act, Regulation, Rule)	Current Provision	Amended Provision	Principle
Section 1(a)	**No existing provision.**	***'Intimated Stable Union' means a stable union under section 26(2) of Chapter I of the Code on Indian Family Law, 2024.***	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.	**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: 1. 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. 2. 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.[637] Further the provision of post-adoption supervision under the JJ Act acts as a safeguard to mitigate the possibility of adopted children being abused by the adoptive parent(s).

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

	(5) Any other criteria that may be specified in the adoption regulations framed by the Authority.		
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 a 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	**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 a 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 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	The following modifications have been made to this provision: 1. Eligibility criteria for couples has been expanded to include married couples and persons in stable unions. 2. The above principle has also been reflected in the provision regarding the minimum period of stability. 3. Gender based restrictions on adoption have been deleted. 4. 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.

	cases of relative or step-parent adoption. (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.	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.** (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.	

	(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.		

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

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.[638]

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.[639] 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.[640]

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.[641] 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.

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[638] The Juvenile Justice (Care and Protection of Children) Act, 2015, s 2(60).
[639] The Juvenile Justice (Care and Protection of Children) Act, 2015, s 35(3).
[640] The Juvenile Justice (Care and Protection of Children) Act, 2015, s 38(4).
[641] 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.

Proposed Amendments:

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 months time to	**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	The following modifications have been made to the provision: 1. 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. 2. 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 draws from a similar provision in the South

	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.	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 will take the same into consideration.***	African Children's Act, 2005.[642]
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.*** ***(2) The post-adoption agreement may include the following –*** ***(a) communication, including in-person visits between the surrendered child and the surrendering parent or guardian of such child;*** ***(b) sharing of information, including***	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. 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.[643]

[642] *See* South Africa Children's Act, 2005, s 233(3).
[643] *See* South Africa Children's Act, 2005, s 234.

		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 will 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 will 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.***	
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	**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	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.

	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.	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.***	

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

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.[644] 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 Step:
An enabling provision which allows a second prospective 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. These amendments have been recommended to the JJ Regulations.

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

Proposed Amendments:

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 34(n) of Chapter II of the Code on Indian Family Law, 2024.	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 the 2022 Regulations	**No existing provision.**	***In case of adoption of a child or children by a second prospective parent the legal parents and second prospective parent will have to register on the Designated Portal and provide relevant documents by uploading the same online through the Designated Portal.*** ***Documents to be uploaded at the time of registration***	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 intimated stable union. 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

		(6) Adoption of child or children by a second prospective 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)] along with*** ***(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 in such format as may be prescribed.*** ***(3) In case the child has two legal parents, consent of both legal parents, the second prospective 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 in such format as may be prescribed.*** ***(5) Proof that both parents (legal parent and second prospective parent) are in an intimated stable union.*** ***(6) Any other document as may be prescribed by CARA.***	five years of age and an enabling clause which allows CARA to prescribe further documentary proof for second parent adoptions.

Part III - Reproductive Technology and Parenthood

Two laws regulate the use of reproductive technology and parenthood in India: *first*, the Surrogacy (Regulation) Act, 2021 ('Surrogacy Act') which regulates the use of surrogate services, and *second*, the Assisted Reproductive Technology (Regulation) Act, 2021 ('ART Act') which regulates the use of assisted reproductive technologies[645] (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. It must be noted that the constitutionality of both these laws has been challenged before the Supreme Court and the hearings were underway at the time of drafting of this Code. Petitions argue that these Acts unreasonably exclude certain classes of people from their purview, thus reinforcing a myopic view of the family. Beyond discrimination, the policies informing these laws have also been challenged.[646] While these are critical issues that also impact parenthood - this Part only suggests amendments to eligibility criteria in order to ensure all classes of parents are eligible to access parenthood under the two laws.

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

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 an intimated 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 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.

[645] Hereinafter referred to as ART(s).
[646] Gursimran Kaur Bakshi, 'Amendments required to make surrogacy workable, says Supreme Court while hearing the petitions <challenging the constitutionality of the Surrogacy Act', https://theleaflet.in/amendments-required-to-make-surrogacy-workable-says-supreme-court-while-hearing-petitions-challenging-the-constitutionality-of-surrogacy-act/#:~:text=A%20public%20interest%20litigation%2C%20challenging,Trivedi%20and%20Ajay%20Rastogi.> accessed on March 5, 2024.

Proposed Amendments:

I. Definitions

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 intimated stable union under section 26(2) of Chapter I of the Code on Indian Family Law, 2024.***	The definition of couple has been expanded to include intimated 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 only medical necessity as a precondition for being able to use surrogacy services as even queer couples have been bought within the ambit of the law. Further, 'gestational surrogacy' has been defined.[647]
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

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

			parent.
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 section 4(iii)(b).	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 following purposes, namely: (a) when an intending couple has a medical indication necessitating gestational surrogacy:	**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 has a medical condition which necessitates gestational surrogacy, or the couple cannot conceive naturally on account 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 eligibility criteria have been expanded to also include couples who cannot conceive naturally on account of the sex or gender identity of the

	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 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;	***the sex or gender identity of the partners.*** ***(b) the intending couple of Indian origin or intending person has obtained a certificate of recommendation from the Board on an application made in such form and manner as prescribed;*** ***(c) the surrogacy is only for altruistic surrogacy purposes;*** ***(d) the surrogacy is not for commercial purposes or for commercialisation of surrogacy or surrogacy procedures***; ***(e) the surrogacy is not for producing children for sale, prostitution or any other form of exploitation; and*** ***(f) Any other conditions as may be specified by regulations made by the Board are satisfied.*** ***(iii) A couple of Indian origin or an intending person who intends to avail surrogacy, will 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.***	partners. This expands the class of persons who can use the services of a surrogate and allows for inclusion of same-sex/gender couples.
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: —	b) the surrogate ***parent*** is in possession of an eligibility certificate issued by the appropriate authority on fulfilment of the following conditions, namely: —	The following modifications have been made to this provision: (a) Married woman has been replaced with "married person" and 'surrogate

	(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:	(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:	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 4(c)(I)	(*c*) an eligibility certificate for intending 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;	(*c*) 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.***	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 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 child' clarifies that only biological relatedness is not the only basis of parentage and a child's rights vis-a-vis one's parents.
	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.

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

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/ parent. 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 expanded 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 intimated stable union under section 26(2) of Chapter I of the Code on Indian Family Law, 2024.*** ***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 intimated 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	***"inability to conceive" means -*** ***(a) an inability to conceive after one year of***	"Infertility" has been replaced with "inability to conceive" to include

	other proven medical condition preventing a couple from conception;	***unprotected coitus or other proven medical condition preventing a couple from conception; or (b) the inability to naturally conceive a child on account of the sex or gender identity of the partners.***	heterosexual couples who may be infertile, as well as same sex couples who cannot conceive naturally.
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 will 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— (a) obtain semen from males between twenty-one years of age and fifty-five years of age, both inclusive;	**Sourcing of gametes by assisted reproductive technology banks. —** (1) .... (2) The banks shall— (a) obtain semen from ***semen donors*** between twenty-one years of age and fifty-five years of age, both inclusive;	Replacing 'males' with 'semen donors' and 'females' with 'oocyte donors' will ensure that persons of all gender identities can be semen and oocyte donors.

	(b) obtain oocytes from females between twenty-three years of age and thirty-five years of age; and (c) ….	(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 their genetic parents; and*** ***(b) any other information concerning the genetic parents once such child reaches the age***	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 genetic parent [648] vis-a-vis the gamete donor's right to privacy.[649] Such a provision also follows the South Africa approach[650] wherein the child has the right to information about their genetic

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

		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***.	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.

Part IV - Maintenance of Parents by Children

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

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.[651] HAMA is the only codified personal law that governs the law for the maintenance of parents for Hindus, Buddhists, Jains, or Sikhs.[652] HAMA places an equal duty on the son and daughter to maintain aged and infirm parents unable to maintain themselves.[653] The other personal laws, however, are neither codified nor impose an obligation on all children to maintain parents.[654] The 2007 Act was enacted to provide for secular and effective provisions for the maintenance and welfare of parents and senior citizens.[655]

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.[656] An amendment to that effect has been proposed to the 2007 Act, and it is currently pending before the Lok Sabha.[657]

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'[658] for determining the quantum of maintenance under the 2007 Act.

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[651] Mulla, *Principles of Mahomedan Law* (LexisNexis, 20th Edn) ch XIX; Mayne, *A Treatise on Hindu Law and Usage* (Higginbotham and Co, 1892) ch XIV.
[652] The Hindu Adoption and Maintenance Act 1956, s 20.
[653] Ibid.
[654] 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.
[655] The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, Preamble.
[656] 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.
[657] 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.
[658] 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 section 3 of 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.***[659]	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 34(n) of Chapter II of the Code on Indian Family Law, 2024 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 will be entitled to make an application under section 5[660] of this Act.***	Step-parent has been included within the scope of this provision subject to certain conditions.

[659] See, The Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill 2019, cl 2(b).

[660] 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[661] subject to section 4(A) of this Act.***	

[661] 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 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 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.	**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 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.***	Factors that the Tribunal under the 2007 Act may take into consideration for determining the amount of maintenance have been articulated.

ANNEXURE 2

MINUTES OF CONSULTATIONS

In order to inform Code 2.0 with a multiplicity of perspectives on family law, we conducted public and individual consultations across the country. The consultees ranged from eminent family/personal law scholars and practitioners to queer rights and women's rights activists. The rationale was to ensure that the Code 2.0 was representative of such viewpoints and interests, along with gathering feedback on whether the Code truly fulfils its vision. In the spirit of transparency, all our consultation minutes are shared below. We would once again like to thank all our consultees for their time and insightful contributions, which substantially aided the re-drafting of the Code.

MODEL CODE ON INDIAN FAMILY LAW 2023
MINUTES FROM NEW DELHI CONSULTATION

Date of consultation: 5.8.2023

Consultees: Advocate Amala Dasarathi (also sharing Dr. Prabha Kotiswaran's comments), Advocate Ashish David, Advocate Abhijay Negi, Dr. Sourav Mandal, Dr. Rukmini Sen, Prof. Diksha Sanyal, Dr. Saumya Uma, Advocate Chinmay Kanojia, Nishtha Nishant, Advocate Anil Malhotra, Advocate Malavika Rajkotia, Advocate Mrunalini Deshmukh, Advocate Supriya Juneja, Prof. Surabhi Singh and Advocate Anannya Ghosh.

The Vidhi Centre for Legal Policy organised the first consultation for the Model Family Law Code on the 5th of August, 2023 in New Delhi. The consultation was attended by family law practitioners, academics and members of civil society. A brief summary of the discussions at the consultation for each chapter of the Model Family Law Code, namely: Adult Unions, Parent-Child Relations, and Succession is shared below.

Vidhi Attendees: Aditya Prasanna Bhattacharya, Swapnil Tripathi, Ayushi Sharma, Anuradha Bhattacharya, Ritwika Sharma, Mayuri Gupta, Aditya Phalnikar, Kartavi Satyarthi, Rakshita Goyal, and Namrata Mukherjee

SESSION 1: ADULT UNIONS

Registration

- Registration process must be as simple as possible.
- The notice and objection regime, in practicality, also helps in checking polygamy, which in turn helps in protecting rights of women who may be part of bigamous marriages against their will.
- Marriage registration can be done at the gram panchayat level also, processes can be moved online as much as possible.
- Implementation of *Shakti Vahini v. Union of India*[662], especially for marginalised communities.

Dissolution of marriage

- Effect of irretrievable breakdown on couples who wish to get back together and get married soon after the dissolution of marriage.
- Fault grounds may be remodelled and reduced, especially venereal diseases.

Procedure

- Provisions for mediation could be included within the Code.
- Access to pre-litigation centres and non-judicial fora ensuring access to justice at the *tehsil* or *taluk* level.
- Time constraints within maintenance proceedings.
- Question of jurisdiction of courts with respect to cases under Muslim Women (Protection of Rights on Divorce) Act, 1986

Stable Unions

- Nomenclature of "stable unions" may be reconsidered since it seems to focus on monogamous relationships.
- Monogamy in stable unions may be reconsidered.
- The intimation process may provide more guidance into the requirements at the stage of intimation, for formulation of Rules/delegated legislation in this regard.

[662] (2019) 7 SCC 192

- Consequences and implications of dissolution of the stable union must be closely examined, for example, what happens if there is a child in the picture, how is protection of vulnerable parties ensured etc.
- Clarity is needed on the interrelationship between relationships in the nature of marriage and stable unions.
- Flexibility may be provided to nominate more than one person for different functions, one partner for healthcare decisions, one partner for joint bank accounts etc.
- Provision to outlaw the influence of one's parents may be included.
- Domestic violence in a stable union setup (intimated or non-intimated).
- Consideration of how hijra gharanas may be incorporated into the concept of stable unions
- Provision for long distance relationships and link to cohabitation, recognition of 'living apart together' couples, non-cohabiting couples, and foreign marriages.

Maintenance

- Inclusion of caste and class context of care work.
- Legal pluralism in maintenance.
- May consider something of the nature of a trust like the *waqf* board for grant of maintenance where the husband is unable to provide.
- Maintenance from other members of family where husband may not be able to provide, eg. section 4 of Muslim Women (Protection of Rights on Divorce) Act 1986.
- Greater focus may be needed on judicial precedents on Muslim maintenance laws; better appreciation of section 3 of Muslim Women (Protection of Rights on Divorce) Act, 1986.
- Maintenance rights of second wives and widows.
- Provisions for execution of maintenance order.
- Inspiration may be taken from the Canadian law on maintenance on determining the quantum of maintenance.

General comments

- Use of illustrations.

SESSION 2: PARENT-CHILD RELATIONS

General Remarks

- Concepts of 'joint custody'/'joint parenting/'shared parenting'' must be defined. Re-consider the definition of 'single parent'.
- The codification of best interests, care, and contact may render them further vulnerable to misuse by parties during custody proceedings.
- Excessive prescription in legislation can create more loopholes for abuse. Adequate scope should be left for judicial discretion and common law.
- Law must be designed to ensure agency of the child, parental autonomy and mitigate sex stereotyping which plays out in custody cases. It is critical to divorce concept of 'economic capacity' from best interest formulation as it often disadvantages women.
- Strengthen non-adversarial processes to respond to child custody disputes. Role of mediation to be further explored in such disputes.
- It is critical to have separate concepts for 'primary caregiver' and 'secondary caregiver'.
- Maintenance for major children should be reconsidered - cannot be limited to physical or mental inability to maintain themselves.

Parental Responsibilities and Rights ('PRR') Agreements

- Parental agreements as a framework locate parental relationships within the domain of contract law - this may not be the ideal framework for regulation of parent-child relationships.
- Parenting plans should not reinforce existing stereotypes concerning the roles of each parent. The clause on 'parenting plan' is too prescriptive and should be reconsidered. Discretion of the court should be retained.

Joint Parenting/Custody

- Collaborative parenting is not feasible in cases involving families in conflict. The law should ensure parents are not forced to collaborate in the name of 'best interests of the child'.

- Orders for joint/shared parenting should have due regard for the best interest of the child but at the same time must be cognisant of the parent's autonomy and relationship.

Guardians and Wards Act, 1890 ('GWA')

- The GWA is outdated and merits reform so as to ensure it does not reinforce gender stereotypes concerning guardianship and prioritises the best interests of minors.

Areas requiring further attention

- Role of other caretakers, such as grandparents, who often become custodians.
- Ableist clauses to be removed from surrogacy laws, right to know parent to be extended to 'surrogate parent', law must also protect surrogates from exploitation, law must balance between reproductive autonomy and ethics.
- How will conflicts be resolved in case of disagreements regarding exercise of parental rights?
- Role of law for vulnerable children, including children of sex workers, children with disabilities.

SESSION 3: SUCCESSION

Agricultural land

Agricultural land definition should be included. Some States have wide definitions, inclusive of land which is not used for agricultural purposes, such as forest land in Chhattisgarh.

Categorisation of heirs

Under the current scheme of intestate succession in the draft Code 1.0, the parents, spouse and children form part of the immediate family and exclude other heirs from inheritance. All three categories get an equal share in the property on the death of the person. For people who do not have a spouse and children, siblings may be included in the immediate family.

Inheritance regime for stable unions

The draft Code 1.0 currently allows persons in stable unions to 'opt in' for the regime applicable to spouses. Low levels of legal literacy may prevent people from opting in unless such an option is explicitly presented to people, such as in the form of a checklist while intimating a stable union. A default regime, with the option of opting out, may be more effective.

Maintenance

- Maintenance provisions, such as those under the Hindu Adoptions and Maintenance Act, 1956, are usually utilised only in highly contested disputes.
- A person who is already disadvantaged and vulnerable may not be aware of the remedies available to them or be in the position to approach a court for maintenance.
- Courts have a history of deference towards the intention of the deceased. Mere fact of exclusion of a person from inheritance, explicitly or implicitly, may lead to the judiciary refusing to grant maintenance.
- The difference in implementation of maintenance provisions at the State and district level should be accounted for. For instance, interim maintenance is seldom granted at the district level.
- Creation of an automatic system for devolution of maintenance could help- such as through the creation of a trust or through a procedure similar to the grant of maintenance to army spouses.

Fixed shares which cannot be alienated through a will

To make a fixed shares provision effective and limit *inter vivos* disposal of property, a clawback mechanism like under the Insolvency and Bankruptcy Code, 2016 can be included, where assets that were alienated with the intention of defeating insolvency are extracted from the company.

Drafting changes

Amendments to state agricultural laws and income tax provisions that would be inconsistent with the draft Code 1.0 should be added.

MODEL CODE ON INDIAN FAMILY LAW 2023
MINUTES FROM BANGALORE CONSULTATION

Date of consultation: 2.9.2023

Consultees: Advocate Sumitra Acharya, Jasmine Lovely George (Hidden Pockets Collective), Dr. Mercy Deborah (JGLS), Dr. Sarasu Esther Thomas (NLS), Shraddha Chaudhary, Akkai Padmashali, Basit Manham, Advocate Amrita Shivaprasad, Flavia Agnes, Thoujal Khuman, Advocate Kaveri Thimmaiah, Advocate Chethana V , Koyel Ghosh (Sappho for Equality), Minakshi Sanyal (Sappho for Equality), Santa Khurai, Advocate Sindu Vasudev, Advocate Priyanka Bhat, Advocate Manoranjini Thomas, Advocate Ritika Prasad, Advocate Tarjani Desai, Advocate Geetha SP, Advocate Hari Ram, Advocate Mangala.

Vidhi Attendees: Kartavi Satyarthi, Rakshita Goyal, and Namrata Mukherjee

GENERAL REMARKS

- The need for uniformity needs to be examined upfront before delving into the nitty gritties of a uniform code. It is possible for laws to co-exist.
- There is a possibility that a uniform code would be largely Hindu, or largely Christian (in case of succession) impacting the representation of religious diversity in family laws.
- The perspective of the working class and the effect of caste dynamics needs to be taken into consideration in family laws.
- Examine the possibility of codifying and reforming different personal laws as opposed to a Code.
- Identify the issues with customary laws and how they need to be addressed.
- Identify whether the draft is aiming at an ideal law or a practical law that a government is likely to come up with.

SESSION 1: ADULT UNIONS

Degrees of prohibited relationships

- Question on whether the idea is to remove the notion of incest altogether or leave it to be regulated by social customs and moralities? Whether it is a challenge to the immoral nature of incest?
- The explanation or rationale on removing prohibited degrees from the report may be better explained.
- Issues of power dynamics in relationships that fall within prohibited degrees.
- The scientific argument around genetic abnormalities relating to inbreeding propagates the idea that marriages are for procreation.
- Whether *sapinda* relationships should be included while elaborating on prohibited degrees of relationship.
- Marriages within prohibited degrees and *sapindas* are often promoted to retain social and economic wealth within the family and community/caste.

Matrimonial remedies

- There should be uniform jurisdiction for divorce, there is confusion regarding civil courts and district courts. Special Marriage Act and Indian Divorce Act cases go to different places. Definition of courts must be made consistent.
- The period of time that needs to have passed post marriage for filing of divorce may be reconsidered.
- Need to consider caste, class and gender disparities in no-fault grounds of divorce, certain safeguards must be there.
- Removal of Restitution of Conjugal Rights might be detrimental for women considering marriage as an economic safety net, resumption of cohabitation might also mean resumption of economic safety.
- Protection of sexual minorities on dissolution of marriage.
- Need to give a broad definition of “cruelty” or to leave it to the discretion of the court. Cruelty may be brought within the ambit of what can be “harmful or injurious to live” in line with the Indian Christian Marriage Act, so grounds like refusal to have sex may not be read as cruelty.

- Does judicial separation need to be retained as a matrimonial remedy since it is highly underused.
- Provision for a course on gender sensitisation or pre-marital counselling.
- Provisions/guidelines governing private consultation with the child for custody/ inclusion of child psychology and child rights experts instead of advocates and judges. Provisions governing the number of court visits a child has to make to court.

Alimony & Maintenance

- Enforcement of maintenance orders should be made easier.
- A system for calculating growth in the net worth of the parties maybe in the nature of an affidavit of assets and liabilities might not work out in an Indian setting considering that a lot of income is held in cash/black and a real assessment of net worth might not be possible especially considering different socio-economic groups.
- Provision for filing specific expenses in the form for assessing net worth, because many women do not believe what they spend on children counts towards expenses.
- Provision for return of articles.
- Consider a provision on protection orders during the course of maintenance and other matrimonial proceedings.
- Prescription of a time limit for mediation and conciliation.
- Currently, there are no rules or guidelines on appearance in person and litigants are required to appear in person for hearings where they might not be needed. Clearer provisions on when a party is required in person.
- Need to relook at the fault-based grounds for divorce, why there is a need for mental illness to be a ground for divorce.
- What happens if an order of imprisonment is overturned in an appeal.
- Maintenance in cases where husband is not well-off; provision for a waqf board like entity.
- Consideration for marriage expenses in calculating the amount for maintenance; compensation for breaking off engagement and marriage last minute.
- Provision saying that the amount of *mehr* cannot be offset with the maintenance amount. *Mehr* is paid over and above the amount of maintenance awarded by the court decided with the consent of the parties at the time of marriage.

Matrimonial Property

- In the Indian scenario, the money is not all white, there is non-salaried income and hidden income which is not put on paper.
- In practice, the husband might take over the entire property of the wife through this regime.
- It is dangerous to put in the provision without a deeper study.
- The concept of matrimonial property has not worked out in Goa.
- Property is a complex concept in India and this must be accounted for when devising a matrimonial property regime.

Registration & Age requirements

- *Arun Kumar v. Inspector General of Registration*,[663] interpretation of the word "bride" to include trans-women.
- Need to enlist the consequences of marriage below 18 years of age, whether void or valid and the remedies available to parties.
- Registration rules for destination weddings and foreign marriages, currently there is no clarity on this.
- There should be uniformity in the registration process.
- Registration continues to be difficult for inter-faith, inter-caste, queer couples.
- Need for definition of marriage as a concept.

Void and voidable marriages

- Addition of "undue influence" as a ground for voidability (same as Indian Contract Act).

[663] Madras High Court, W.P. (MD) No. 4125/2019

Stable Unions

- Use of the phrase "informal arrangements" to describe live-in relationships.
- The practice in Muslim families is polygyny and not polygamy.
- Indian society has always had non-monogamous relationships. Non-monogamy is not as radical as it sounds.
- The scheme of the Code is heavily in favour of monogamy.
- Rights under the Domestic Violence Act must be included.
- Exception may be carved out in the grounds of divorce dealing with adultery, since the ground of adultery may be otherwise misused, as stable unions are allowed to exist even if either of the parties are in a subsisting marriage.
- Financial implications of stable unions, for example, concessions relating to stamp duty.
- Inclusion of trans persons, and protection of rights of transitioning trans persons.
- In Manipur, stable unions are fairly popular.
- Rights of transgender persons outside the ambit of the basic defined fundamental rights, rights against discrimination.

SESSION 2: PARENT-CHILD RELATIONS

Context

- More thorough literature review.
- Look at the Constitution and why exclusion of certain classes of parents amounts to discrimination.
- Lived Experiences and Anecdotal Evidence to be made part of theory.
- Peruse comparative case law on parent-child relations.
- The draft is not child-centric. Need to ensure more active participation of the child and ensure they have autonomy. Consider the role of 'fit parent' and 'guardian ad litem'.
- Provisions on 'parent-child' abduction must be envisaged, including cross-border abduction.
- May consider adding provisions on 'emancipation of child'.
- The Guardianship and Wards Act may need an update but is otherwise a good law to account for various kinds of guardians including atypical guardians.
- Law on visitation must be clearly articulated in the draft.

Definitions

- 'Guardian': The definition is limited and must be inclusive to cover atypical guardians.
- 'Birth parent': Also include 'abandoning parent' along with 'surrendering parent' under exclusion.
- 'Single Parent': Reconsider the definition in light of the fact that single parents have the right to be named as the sole parent in the birth certificate of the child under certain conditions (clause 45). Reconsider the open-ended phrase 'lack of interest in the affairs of the child'. May consider replacing it with 'neglect and abuse'.
- 'Care': Too prescriptive and may create scope for bias. Instead incorporate guiding principles.

Establishment of Parent-Child Relations

- How will the clause on 'holding out' play out in relation to third parties who are not the parent? Need to foresee circumstances where any third party can 'hold out' and consequences of such holding out.
- 'Acknowledgement Deed': Clause on 'acknowledgement' needs to be accompanied by safeguards. It may be automatic for marriage and stable unions.
- Is there a 'right to parenthood' - should it be framed as a right?
- Role of 'step-parent' under this draft must be explored. As well as other guardians who are not parents.

Parental Responsibilities and Rights

- Denying minors parental responsibilities and rights may negatively affect the rights of the minor mother given that usually the minor parent in India is the mother.
- Must be cognisant of the fact that grandparents may not always act in the 'best interests of the child' - must make space for minor parents to hold parental responsibilities and rights.
- Must grant parental autonomy to minors.

- There must be an order of preference when multiple parties hold 'parental responsibilities and rights'.
- Code must clarify what happens in the event of conflict between multiple holders of 'PRR'. One way would be to have Categories of PRR holders and an order of preference.
- 'Parental Responsibilities and Rights Agreement': The law must clarify the basis on which PRR agreements can be entered into i.e. there must be legitimate grounds to enter into PRR agreements. Further, there must be sufficient safeguards, particularly to prevent trafficking.
- 'Unilateral Termination of PRR' agreement may be reconsidered. Grounds may be mentioned as well as consequences of termination, especially on the child.
- In case of conflict between co-holders exercising PRR, what happens? - Law must clarify.
- "Termination of PRR': Open to misuse. Must reconsider this clause as well as codify what constitutes an 'unfit parent' given trends of misuse. Also giving *locus* to 'any person who has sufficient interest …' under clause 41(2)(iii) may lead to misuse.

Parenting Plan

- May lead to delays in proceedings.
- The Court must have discretion to advise parents to enter into a parenting plan, and it should not be mandatory.

Single Parent

- Definition to be 'reconsidered'.
- What happens when one of the parents is deceased?
- The clause on 'right of single parent to be named as sole parent on birth certificate' may be misused and needs to be reconsidered.
- Define the term 'unfit parent'.

Role of Experts

- Experts such as child psychologists must be a mandatory part of proceedings involving children.
- Role for parental counselling in the law, especially during proceedings and conflicts.
- Only experts who have competence must be appointed as mediators in matters involving parent-child relations.

Maintenance

- Clauses on maintenance must ensure there is a correlation between the degree of care and duty to maintain.
- What happens to 'major' children, say college going children who are of age of majority?

Adoption

- There need to be safeguards for 'informal adoptions'.
- Incorporate doctrine of 'relating back'.

SESSION 3: SUCCESSION

Judicial discretion in succession

- Historically, heirs have been entitled to inheritance based on their status and relation to the deceased.
- Succession should not be left to the discretion of courts, and succession schemes must lay down clear shares.

Categories of heirs

- Certain categories of heirs, who are entitled to inheritance under current succession schemes, do not feature in the list of heirs in the draft Code 1.0.
- For instance, a step-mother is entitled to inheritance if her husband (and the deceased person's father) is not alive, under the Hindu Succession Act, 1956.

Coparcenary system in Hindu Law and limits on testamentary powers under Muslim Law

- The coparcenary system in Hindu Law and the limitation on quantum of property that can be disposed through wills in Muslim Law both serve to protect the inheritance rights of certain categories of heirs, such as daughters, who are more likely to be disinherited otherwise.
- Abolishing these systems may adversely impact such heirs' rights.

Inheritance rights for children conceived after the death of the deceased

- Inheritance schemes provide for the rights of children who have been conceived at the time of the death of the deceased but are born later.
- Posthumous conception may not need to be provided for at this stage, and laws relating to assisted reproduction and surrogacy may deal with these situations instead.

Privileged wills and digital wills

- Both privileged wills and digital wills may be prone to misuse in a country like India.
- Since the framework around use of information technology is still developing, it may not be appropriate to extend legal recognition to digital wills yet.

MODEL CODE ON INDIAN FAMILY LAW 2023
MINUTES FROM CONSULTATION WITH ZAKIA SOMAN

Date of consultation: 17.10.2023

Consultee: Zakia Soman, Leader and Founder, Bhartiya Muslim Mahila Andolan (BMMA)

Vidhi Attendees: Rakshita Goyal, Namrata Mukherjee, Surbhi Sachdeva, and Kartavi Satyarthi

General comments

- While we work on the UCC, there is a need to mobilise civil society.
- UCC is demonised from the perspective of religious communities citing deprivation of cultural identity.
- There is a need to build social awareness and sensitise judiciary, government, people about various reforms needed in family laws.
- Codified personal laws should be revisited and Muslim personal law should be codified.
- UCC is the next best option after codification of existing Muslim personal laws
- Reform "from within the community" translates to nothing except reinforcing patriarchal ideas of the Muslim clergy.

Non-negotiables in a UCC

- Minimum age of marriage should be enforceable in all communities including the Muslim community.
- Unilateral divorce should not be allowed → divorce by mutual consent is ideal. Divorce in absence of one party should not happen because marriage is also an economic institution. In reality, even though triple *talaq* is banned, people are still pronouncing triple *talaq* or through *talaq-i-hasan* mode, still without the consent of the wife.
- With respect to guardianship and children → in the eyes of law, father and mother should be equal, blatantly excluding mother's rights to the child should not be allowed.
- Sharing of property and gender parity in ownership of property.
- *Muta/halala* marriages should not have a place.
- Alternative dispute resolution mechanisms through religious institutions like *qazis/darul qaza*/caste panchayat are welcome and valid, but they have to be made accountable to the Constitution as well as the law of the land including UCC. There should be a mechanism in place for accountability.
- *Qazis* or *pundits* in religious institutions may be tasked with the registration of marriage to make it a simple and accessible process.
- Some affirmative provisions that may be considered in a UCC:
    a. Consent before marriage as a mandatory principle
    b. *Mehr* or compulsory dower
    c. Adoptions - Muslims cannot adopt under personal laws
    d. Some groups should engage with the glaring aspects of SMA such as the notice and objection regime. Love *jihaad* laws make it extremely difficult for interfaith couples to get married, this may be addressed
    e. Unrelated but entry of women in religious places
    f. Maintenance of old parents

Divorce, maintenance, and matrimonial remedies

- UCC may be operationalised in a way that initially it is voluntary, to ensure greater participation and warming up by communities.
- Monogamy - in Islam, polygamy is permitted under strict conditions, it is never encouraged. BMMA's studies on the lives of first wives and second wives reveal that both end up having psychological and economic distress in a polygamous marriage.
- Irretrievable breakdown of marriage - eventually women will be the losers if unilateral divorce is allowed. This provision will be abused against women. Especially in smaller towns, due to a

variety of sociological, economic and other reasons, women do not want to leave their husbands. An option is to make it available only to women.

- Maintenance in absence of a husband has not been codified.
- *Talaq-i-ahsan* is an acceptable form of divorce as it involves a 90-day period of consultation, discussion, arbitration between the husband and wife. Even *khula*, while can be at the instance of the wife, the right has to be sought from the husband and there are conditions attached such as giving up *mehr*.
- Joint matrimonial property is a good idea.
- Voluntary acknowledgement of parenthood has worked out well in reality, but would benefit from some legal or statutory backing.

MODEL CODE ON INDIAN FAMILY LAW 2023
MINUTES FROM CONSULTATION WITH QUEER GROUPS

Date of consultation: 23.11.2023

Consultees: Community Consultation at the Sappho Office, Kolkata

Sappho for Equality ('Sappho'), an LGB organisation in Kolkata provided us an opportunity to carry out a consultation with community members and crisis workers in the Sappho Office.

Vidhi Attendee: Namrata Mukherjee

This consultation took place in the presence of Koyel Ghosh, Managing Trustee, Sappho for Equality. The names of the attendees have not been shared for privacy reasons.

Adult Unions

The primary concerns of the attendees pertaining to clarifying the position of law regarding marriage and civil unions, and the right to cohabit with their partner. There was consensus that marriage laws must be inclusive of all queer persons.

Parent-Child Relations

Parenthood, via the route of adoption and surrogacy, was another issue that was touched upon. There was consensus that laws on parenthood must be made inclusive of all queer persons, and existing laws on adoption and surrogacy be accordingly amended.

Succession

One of the most pressing concerns concerned being denied the right to shares in the family property and wealth on account of a person's queer identity. Several attendees pointed out how family members had indicated that they would be left out of the will, or would not be granted a share in the family property on account of their identity. Concerns were also raised about one's share in the money deposited in their parent's bank account if they were not named as a nominee, or their name was removed as a nominee, and the parent's died in-estate.

MODEL CODE ON INDIAN FAMILY LAW 2023
MINUTES FROM CONSULTATION WITH DR. TAHIR MAHMOOD

Date of consultation: 12.12.2023

Consultee: Dr. Tahir Mahmood, Chairman & Head of Amity Institute of Advanced Legal Studies

Vidhi Attendees: Kartavi Satyarthi, Aditya Phalnikar, and Surbhi Sachdeva

Recommended Books for Further Research

- Principles of Hindu Law – Tahir Mahmood (2014)
- Muslim Law in India and Abroad – Tahir Mahmood (2nd ed., 2016)
- Supreme Court on Muslim law – Tahir Mahmood (2nd ed., 2016)

What provisions can be incorporated into a UCC?

- Muslim Women's Divorce Act 1986:
    - It is constitutionally valid, but its maintenance provision is to be applied in compliance with the apex court's *Shah Bano* ruling of 1985.
- For a divorced woman's maintenance:
    - Under the CrPC there is a condition to not indulge in adultery.
    - A divorced woman's sexual conduct should not be ground for denying the woman maintenance.
- Under modern Hindu law, if a mother has changed religion, children have no obligation to pay maintenance.
    - Muslim law has a good provision that regardless of religion, one must pay maintenance to their needy parents.
- Past maintenance (retrospectively asking for maintenance) should be allowed.

Safeguards for irretrievable breakdown of marriage to make sure woman gets maintenance

- Mutual consent should be necessary for marriage, but the couple should not have to go to court.
    - Since it is a private affair, the procedure for divorce by mutual consent should also be allowed as an extrajudicial process.
- Supported establishment of tribunals/extra-judicial set-ups for divorce, which would comprise only of experts on family law, not of judges.
- Doctrine of precedent is not needed in judicial family law system – each case needs to be decided on its own facts, given the nature of the field.
- In *Benazir Heena* case the court mentioned divorce by mutual consent in Muslim law.

Abolition of coparcenary

- The 2005 Hindu Succession Act 1956 still recognizes joint family and coparcenary systems. It should be either derecognized or allowed also to other communities.
- Everyone should be the master of their own property.
- People should have complete rights to decide what to do with their property:
    - Muslim law does not allow complete testamentary freedom, which is unfair.
    - In Sunni law, you can't increase the wife's share more than 12.5%, which is unreasonable.
    - People should have absolute rights for disposing of their property as they wish.

Inheritance

- Intestate Inheritance law should be the same whether the deceased was a man or a woman (as it is under Muslim law). Under Hindu Succession it is different for men and women.
- Surviving spouse, children and parents should be preferential heirs in all cases.
- Polygamy should be completely abolished.

On marriage equality

- Opposed the idea of same-sex marriage on the grounds that it was against the social ethos and ethics.
- Civil unions can be considered an alternative for same-sex relations.
- On civil unions:
    - For succession/adoption: there should be separate provisions for queer couples.
    - There may be a special law for live-in relationship. Marriage laws should not cover it.

MODEL CODE ON INDIAN FAMILY LAW 2023
MINUTES FROM CONSULTATION WITH ADV. AMRITA SHIVAPRASAD

Date of consultation: 12.12.2023

Consultee: Advocate Amrita Shivaprasad

This one-on-one conversation with Advocate Amrita Shivaprasad focused on the chapter on parent-child relations.

Vidhi Attendee: Namrata Mukherjee

Acknowledgement and Presumption of Parentage

- As opposed to acknowledgement, provisions on adoption under the JJ Act may be tweaked to allow for atypical families such as non-marital partners or queer partners to adopt a child via the route available for relative or step-parent adoption.
- Presumption of parentage - other members may also be deemed legal parents.

Parental Rights and Responsibilities Agreements

- Certain things are working well in law, including community caretaking arrangements. There is no need to codify or disturb them.
- Legal recognition of caregivers, and certain rights of such a class could be recognised in the law, as opposed to concepts such as Parental Responsibilities and Rights agreements.

Best Interests of the Child

- Best Interests of the Child must be codified but must shift focus from the relationship between the parent and person concerned, to the actions of the person - i.e. who does the work of emotional, mental, physical and psychological care. Move away from 'capacity' or 'potential' to actual behaviour of the person.

Lacuna in Law

- The law is largely silent on the duties of fathers and their family for children born out of wedlock when the relationship between the mother and father is not in the nature of marriage. In such cases the mother is solely responsible for the child including upbringing and finances. This lacuna needs to be addressed by imposing certain obligations on the father.

Mediation and Court Proceedings

- Mediation and other non-adversarial processes must be deployed to address disputes involving children. Courts should be the last resort.
- Courts must consult competent and trained professionals such as social workers, psychologists, etc. when dealing with disputes involving children.
- 'Reasonable period of time' must be defined with an upper limit. The JJ Act can be a framework that can be consulted in this regard.
- Innovative remedies that can be awarded during interim custody must be considered and codified.

MODEL CODE ON INDIAN FAMILY LAW 2023
MINUTES FROM CONSULTATION WITH KOYEL GHOSH

Date of consultation: 12.12.2023

Consultee: Koyel Ghosh, Managing Trustee, Sappho for Equality

This one-on-one conversation with Koyel Ghosh to receive feedback specifically on the formulation of stable unions. As Sappho for Equality was one of the petitioners in the *Supriyo vs. Union of India* seeking recognition for chosen families, this conversation was specifically organised to solicit inputs on the form of stable unions which seeks to extend legal recognition to chosen families under the draft Code 1.0.

Vidhi Attendees: Kartavi Satyarthi and Namrata Mukherjee

General Remarks
The conversation was opened with an explanation of the form and the rationale behind the concept of stable unions in the draft Code 1.0.

On the merit of stable unions
It was agreed that there is a need for the law to provide for a framework to recognise chosen families and thus the concept of stable unions which recognises non-conjugal, non-marital intimacies and make space for a diversity of intimate relationships to be recognised was important.

On prohibitions on entering stable unions
In response to concerns at the consultations that permitting a person in a valid marriage to enter into a stable union simultaneously would lead to legitimisation of de-facto bigamous marriages given their prevalence in India, Koyel pointed out that this may be a barrier for persons who are forced into marriages against their will, cannot exit marriages, and in cases where persons have not legally divorced their partner given the hurdles of the process. It was however agreed that possibility for abuse and exploitation make it difficult to provide rights under law.

On dissolution of stable unions
Under the first draft, a stable union could be dissolved unilaterally by one person in such a union. Concerns were raised that such unilateral dissolution could be misused and there must be some accountability in the event that a person seeks to leave a stable union. Such ease of dissolution would be specifically harmful in case persons in such a union have children, or property, or bank-accounts together and a certain degree of institutional oversight may be considered. A formulation incorporating recourse to legal proceedings in case of dissolution in cases where children or assets may be involved, was accepted.

THE CODE

MODEL CODE ON INDIAN FAMILY LAW, 2024	
A comprehensive, gender-just and inclusive family law code for India	
GUIDING PRINCIPLE	
1. Non-discrimination.	No person shall be discriminated against under this Code on the ground of caste, sex, gender, sexual orientation, religion, place of birth, or marital status by any officer of the government performing any functions or exercising any powers.
CHAPTER I **ADULT UNIONS**	
Part I: Framework for Marriage	
2. Definitions.	(1) In this Code, unless the context otherwise requires,– (a) **"Acknowledgement Letter"** means a document issued by the Relationship and Marriage Officer under section 26(2); (b) **"Certification of Registration"** means a certificate issued by the Relationship and Marriage Officer under section 5 or section 7 of this Code; (c) **"Court"** 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) **"extra-legal marriage"** means a marriage that is void under this Code due to one or both of the parties being in a subsisting valid marriage;

(e) **"extra-legal stable union"** means a relationship that has been recognised as a stable union by a decree of Court despite the existence of a subsisting valid marriage or subsisting stable union, in accordance with section 29(4);

(f) **"intimation"** means notification of the existence or the intention to be in a stable union to the Relationship and Marriage Officer, in accordance with the procedure specified under section 26 of this Code;

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

(h) **"Memorandum of Marriage"** means a document containing the details set out in Form A, submitted to the Relationship and Marriage Officer for the purpose of registration of a marriage in accordance with section 4 of this Code;

(i) **"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;

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

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

(l) **"stable union"** means and includes any relationship intimated as a stable union under section 26, or recognised as a stable union by a decree of Court under section 29; and

(m) **"spouse"** in relation to a party to a marriage means the other party to the marriage.

(2) Despite anything contained in sub-section (2)(m) 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(1) of this Code.

3. Conditions for a valid marriage.	A marriage between any two persons, irrespective of their sex, gender identity, or sexual orientation, may be registered under this Code if, at the time of the marriage, the following conditions are fulfilled- (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 clause (ii)(a) of this section, "mental illness" will have the same meaning as provided under section 2(s) of the Mental Healthcare Act, 2017.
4. Process for registration of marriages under this Code.	Every marriage will be registered with the Relationship and Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of at least 7 days; (1) The parties to the marriage will submit a Memorandum of Marriage in person in the format as set out under Form A. (2) The Memorandum will be accompanied by proof of age of both parties. (3) The Memorandum will be signed by both the parties and two witnesses before the Relationship and Marriage Officer. **FORM A** The Memorandum of Marriage will 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 the 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.
5. Procedure to be followed upon receipt of Memorandum of Marriage.	(1) On satisfaction of the veracity of the information submitted in the Memorandum of Marriage and the completion of the procedure provided under section 4 of this Code, the Relationship and Marriage Officer will record the particulars in the Register of Marriage maintained by them within 3 days from the date of submission of the Memorandum. (2) The Relationship and 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 will be conclusive proof of the validity and existence of the marriage.
6. Grounds for refusal of registration.	(1) The Relationship and Marriage Officer will not refuse to register the marriage except on the following grounds- (a) The Memorandum does not contain all the information as prescribed in the form; or (b) The parties do not fulfil one or more of the conditions as specified under section 3 of this Code. (2) The Relationship and Marriage Officer will intimate the parties about the refusal within 7 days from the date of submission of the Memorandum of Marriage. (3) Where the refusal is on the ground provided under sub-section (1)(a), the Relationship and Marriage Officer will give the parties an opportunity to rectify the insufficiency within 15 days from the date of intimation given under sub-section (2). (4) If the parties successfully rectify the Memorandum of Marriage, the Relationship and Marriage Officer will register the marriage in accordance with section 5 of this Code.
7. 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 3 of this Code. (2) The marriage will be registered as per the process prescribed under sections 4, 5 and 6 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 a marriage under this section.
8. Non-registration not to invalidate marriage.	A marriage will not be considered invalid merely for failure to register under this Code.
9. Void marriages.	Any marriage registered under this Code will 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, if any of the conditions specified in section 3(i) and 3(ii) of this Code have not been fulfilled.
10. Voidable marriage.	(1) Any marriage under this Code will be voidable and may be annulled by a decree of nullity at the instance of either of the parties if,— (a) such party was under the age of 18 at the time of marriage; (b) either of the parties refuses to cohabit with the other party;

	(c) if their spouse was pregnant at the time of marriage through another person and the fact of the pregnancy was not known to either of the parties at the time of marriage; or (d) the consent of such party to the marriage was obtained by coercion, fraud, or undue influence, as defined in the Indian Contract Act, 1872. (2) A petition under sub-section (1)(a) 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 will not grant a decree of nullity under sub-section (1)(c) if,— (a) proceedings have not been instituted within 1 year after the fact of pregnancy was known; and/or, (b) 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 will not grant a decree of nullity under sub-section (1) (d) if,— (a) 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 (b) the petitioner has, out of their 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.
11. 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 on the ground that the other party,- (a) has, after the commencement of marriage, had voluntary sexual intercourse with any person other than the spouse, without the consent of the spouse; (b) has deserted the applicant for a continuous period of 2 or more years, immediately preceding the petition for divorce; (c) has treated the applicant with cruelty; (d) 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; (e) has been sentenced to imprisonment for an offence for a term exceeding 7 years or more; (f) has failed to comply with an order granting maintenance under section 18 of this Code; (g) is in an intimated stable union with another person, or (h) 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 purposes of sub-clause (b) 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. **Explanation 2-** For the purposes of sub-clause (h) of this sub-section, "mental illness" will have the same meaning as provided under section 2(s) 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 on the ground that there has been no resumption of cohabitation between the parties to the marriage for a period of 1 year or more after the passing of a decree for judicial separation in a proceeding to which they were parties, under section 14 of this Code.
12. Divorce by mutual consent.	(1) A petition for dissolution of marriage by a decree of divorce may be presented to the Court by both the parties to the marriage together, on the following grounds- (a) that they have been living separately for a period of 6 months or more; (b) that they have not been able to live together; and (c) that they have mutually agreed that the marriage should be dissolved. (2) The court will, 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. (3) Before passing a decree of divorce under sub-section (2), where it deems necessary to do so, the Court may grant the parties a reasonable period of time upto 6 months to reconcile differences through counselling or any other method as the parties may deem fit, unless- (a) the parties have been living separately for a significant period of time; or (b) the Court is satisfied that the marriage has broken down irretrievably on consideration of factors provided in section 13(2).
13. Irretrievable breakdown of marriage.	(1) A petition for dissolution of marriage by a decree of divorce may be presented to the Court 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-section (1), the Court must take into consideration the following factors: (a) the period of time for which the parties cohabited after marriage and last date of cohabitation; (b) any past or ongoing legal proceedings between the parties and the cumulative impact of such proceedings on the personal relationship;

	(c) past or ongoing attempts to settle the disputes through intervention of the Court, through mediation or out-of-court settlements; (d) maintenance of children; and (e) any other factual considerations that the court may deem relevant during the course of the proceedings.
14. Grounds for judicial separation.	(1) A petition for judicial separation may be presented to the Court by both the parties to the marriage jointly, or either of the parties to the marriage on any of the grounds specified in section 11 of this Code, and the Court may decree judicial separation, on being satisfied with respect to the following things: (a) the veracity of the statements made in such petition, and (b) that there is no legal ground why the application should not be granted. (2) The court may, on the application by petition of either party and on being satisfied of the veracity of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.
15. Alternate Dispute Resolution.	In deciding a petition filed under section 10, 11, or 12, the Court may refer the case to alternate methods of dispute resolution including mediation and conciliation, along with the appropriate terms of reference.
16. Permanent alimony and maintenance.	(1) At the time of passing any decree of judicial separation or divorce or at a time subsequent to such decree, or upon the dissolution of a stable union, the Court on an application made by either of the parties to the marriage or stable union, order that the respondent will pay to the applicant such sum as it deems just as maintenance and support. **Explanation-** For the purpose of sub-section (1), the sum payable may be a gross amount, or a monthly amount, or any other periodical amount. (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: (a) duration of the relationship; (b) the respondent's own income and other property, if any; (c) the income and other property of the applicant; (d) the needs of the applicant; (e) applicant's liabilities, financial responsibilities, or responsibility to maintain dependants; (f) the age and employment status of the parties;

	(g) the residential arrangements of the parties; (h) any illness or disability; (i) 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; Provided that absence of contributions made by the applicant as described in this sub-clause will not disentitle the applicant from claiming maintenance. (j) protection of vulnerable parties; (k) preservation of the status of living as it existed during the subsistence of marriage; and (l) any other circumstances of the case, that the court may deem relevant. **Explanation-** For the purpose of this sub-section, (i) "contributions made" will 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" will 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 7 of this Code, the parties to the marriage may make a provision for payment of a reasonable sum of money by one party to the other upon separation or dissolution of marriage, in the Memorandum of Marriage. (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 proceedings 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. **Explanation-** The phrase "proceedings under this Code" means proceedings before Court and does not include proceedings before the Relationship and Marriage Officer. (2) The application for payment of maintenance during the course of the proceedings, in accordance with sub-section (1), will, 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: (a) the status of the parties, (b) the capacity of the respondent to pay maintenance, (c) whether the applicant has any independent income sufficient for his or her support, and (d) any other factors that the court may deem relevant.
18. Maintenance during the subsistence of marriage or stable union.	A party to a marriage or stable union, may file a petition before the Court, at any time during the subsistence of marriage or stable union, for payment of such gross, monthly or periodical sum by the other party, for their maintenance and support, if the party is being excluded from a shared mutual enjoyment of the marital or shared home and associated resources.
19. Maintenance in extra-legal marriages and extra-legal stable unions.	Any party in an extra-legal marriage or extra-legal stable union, may file a petition before the Court for payment of maintenance and support in accordance with sections 16, 17 and 18 of this Code.
20. Custody of children.	In the event of dissolution of a marriage, the custody of minor children will be determined as per section 43 of Chapter II of this Code.
21. 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: (a) immovable property acquired during the subsistence of the marriage, even if the title is in the name of one of the spouses; (b) movable property acquired for the purposes of joint use of the parties; or, (c) 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; (d) 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: (a) any assets acquired by either of the parties before the date of marriage; (b) 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; (c) any assets acquired by a party as gift for the separate exclusive use of such party; (d) goods acquired for the personal and exclusive use of either of the parties to marriage; and (e) stridhana acquired by a woman for her exclusive ownership and use. (5) Ownership, possession, and administration of the joint matrimonial property will lie jointly with both the parties to marriage. (6) Neither of the parties to marriage will 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 for the determination of whether an asset is communicated to be part of the joint matrimonial property.
22. 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 section 19(4) of this Code. (1) 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. (2) 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.
23. 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 11, 12 or 13 of this Code, the parties must also file an application to the Court, 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: (a) difference in the growth of the exclusive property of both the parties; (b) compensation for disadvantages faced for being part of the relationship; (c) needs of the parties; (d) residential arrangements of the parties; (e) protection of vulnerable parties; (f) maintenance and residence of children; or, (g) any other factors that the court may deem relevant to ensure equitable distribution of property.
24. 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 Code.
Part II: Framework for Stable Unions	
25. Stable unions.	Any two persons will be recognised to be in a stable union, through intimation to the Relationship and Marriage Officer in the manner prescribed under section 26 of this Code, subject to the fulfilment of the following conditions: (a) both persons have completed the age of 18 years;

	(b) 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; (c) both persons do not have a subsisting marriage and, (d) both persons do not have a subsisting stable union with any other person.
26. Intimation process for stable unions.	(1) Any two persons intending to be recognised as being in a stable union, may intimate the Relationship and 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 veracity of the details provided as part of the application submitted under sub-section (1), the Relationship and 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) The Acknowledgement Letter will be conclusive proof of the existence of a stable union. (4) A stable union will not be considered invalid merely for non-intimation. (5) The Relationship and Marriage Officer will not refuse to issue an Acknowledgement Letter, except on the following grounds: (i) The application does not include all details as set out in Form B; or, (ii) The parties do not fulfil any of the conditions provided under section 25. (6) The process of verification of details under sub-section (2) will be as prescribed in rules made in this behalf by the State Government. **FORM B** The parties submitting the application provided in section 26 (1), will 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 (optional); (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; and iii) the applicant gives free and informed consent to the registration; (f) an affidavit for nomination, if any; (g) signatures of both the parties

27. Rights and Obligations arising out of stable unions.	(1) Both the parties to a stable union will be entitled to maintenance in accordance with section 16, 17, 18 and 19 of this Code. (2) Both the parties to a stable union will owe each other a duty of respect, mutual support, and assistance. (3) Both the parties to stable union will have parental responsibilities and rights in relation to the child that they are jointly the parents of. **Explanation 1-** For the purposes of sub-section (3), "parental responsibilities and rights" will have the same meaning as provided in section 37 of Chapter II of this Code. **Explanation 2-** For the purposes of sub-section "parent" will have the same meaning as provided under section 34(n) of Chapter II of this Code.
28. Right to nominate stable union partner for certain purposes.	(1) Both the parties to a stable union, whose existence is being intimated to the Relationship and Marriage Officer, will have the right to make a directive appointing the other partner as a nominated representative for the purposes of: (a) claiming social welfare benefits accessible to family members or dependants under laws relating to labour and employment; (b) accessing or claiming any beneficial right, title, or interest in Financial Assets; (c) taking medical or healthcare decisions on behalf of or for the benefit of the nominating party in case of their incapacity to take such decisions; or (d) 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" will 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 will be made through an affidavit that will be submitted along with the intimation application as provided under section 26 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 Relationship and Marriage Officer to whom the intimation of the stable union has been made under section 26 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 Relationship and Marriage Officer to whom the initial intimation of nomination was made under sub-section (2) or sub-section (3). (5) The nominated partner will 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) will be legally binding and enforceable.
29. 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, the Court may determine the existence of such union, despite the fact that such stable union has not been intimated to the Relationship and Marriage Officer. (2) The determination under sub-section (1) will be subject to the fulfilment of conditions specified under section 25(a) and 25(b) of this Code. (3) While considering a petition in accordance with sub-section (1), the court will take into consideration any of the following factors- (i) duration of the relationship; (ii) intermittent or continuous cohabitation in a shared household; (iii) degree of financial dependence or interdependence; (iv) degree of mutual support and personal care; or, (v) any child that the parties are responsible for as parents. **Explanation-** "Intermittent cohabitation" in a shared household means that the parties shared the same place to live, whether or not permanently, and irrespective of whether or not one or both had other places to live (4) The Court may make a determination of the existence of a stable union under sub-section (1), regardless of the fact that either of the parties to such union was at the same time, a party to a subsisting marriage or Stable Union.
30. 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 Relationship and Marriage Officer, in the format as set out in Form C. (2) On satisfaction of the veracity of the details provided as part of the application submitted under sub-section (1), the Relationship and Marriage Officer will 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 Relationship and Marriage Officer will ensure that both the parties have knowledge of the fact of dissolution of the stable union. (4) The process of verification of details under sub-section (2) will be as prescribed in rules made in this behalf by the State Government. **FORM C** The parties submitting the application provided in section 30(1), will 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; (e) copy of petition for custody of child (where applicable); and (f) copy of acknowledgment of Intimation of stable union or a decree of a court under section 27, as the case may be.
31. Custody of child on dissolution of stable union.	In the event of dissolution of a stable union, the custody of minor children will be determined as per section 43 of Chapter II of this Code.
32. Division of assets of stable union.	In the event of dissolution of a stable union, either of the parties to the stable union may file a petition before Court for determination of right, title and ownership in any assets jointly or individually owned by the parties to the stable union.
33. Transition provision.	A person designated as a Marriage Officer under the Special Marriage Act, 1954 before the commencement of this Code, may function as the Relationship and Marriage Officer for the purposes of this Code, upon the commencement of this Code, until the appointment of a Relationship and Marriage Officer by the State Government.
CHAPTER II PARENT-CHILD RELATIONS	
Part I Preliminary Provisions	
34. Definitions	In this Code, unless the context otherwise requires,– (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 the birth parent 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; (iii) has abandoned the child where abandoned child has the same meaning as defined under section 2(1) of the Juvenile Justice (Care and Protection) 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 a person's capacity, providing the child with:

	I. a suitable place to live; II. 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; (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; (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; (xi) providing for any special needs that the child may have; and, (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; and (ii) having physical custody of the child, or if the child does not reside with the person, then – I. communicating, on a regular basis, with the child in-person by visiting the child or being visited by the child, II. communicating, on a regular basis, with the child in any other manner, including through written correspondence, or via phone calls or any other form of electronic communication; (f) **"court"** means Court as defined under section 2(c) of Chapter I of this Code; (g) **"custody"** means legal custody and physical custody of the minor; (h) **"guardian"** means guardian as defined in section 4(2) of the Guardians and Wards Act, 1890 and includes all persons who have legal custody of the minor; (i) **"legal custody"** means having the responsibility and right for the care of the person of a minor or of their property or of both their person and property; (j) **"joint custody"** means joint legal custody and joint physical custody of the minor;

	(k) **"joint physical custody"** means that each person will have significant periods of physical custody of the minor and custody will be shared to ensure the minor's frequent and continuing contact with each person; (l) **"joint legal custody"** means that each person will have the responsibility for the care of the person of a minor or of their property or of both their person and property; (m) "**minor"** means a person who has not attained the age of majority as per section 3 of the Majority Act, 1875; (n) **"parent"** means a person who has established a parent-child relationship as per section 35 of this Code; (o) **"parentage"** means the legal relationship between a child and a parent of the child; (p) **"parenting plan"** means the plan under section 44 of this Code; (q) **"parental responsibilities and rights"** in relation to a child mean the responsibilities and rights referred to in section 37 of this Code; (r) **"physical custody"** means the responsibility and right to reside with and supervise the minor; (s) **"presumed parent**" is a person who is presumed to be the parent of the child as per section 49 of this Code; (t) **"registering officer"** means the authority as defined in section 2(k) of Chapter I of this Code; (u) **"stable union'"** means a stable union as defined in section 2(l) of Chapter I of this Code; (v) **"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 – (i) death of the other parent; (ii) desertion by the other parent; **Explanation**- For the purpose of this subsection, 'desertion' means desertion as defined in Explanation 1 of section 11(1) of Chapter I of this Code;

	(w) **"sole physical custody"** means that a minor will reside with and be under the supervision of only one person, subject to the power of the Court to order contact; **Explanation-** For the purpose of this subsection, 'contact' means contact as defined in sub-section (e) of this section but does not include physical custody; (x) **"sole legal custody"** means only one person will have the responsibility and right for the care of the person of a minor or of their property, or of both their person and property; and, (y) **"third party"** includes a person who is not the parent of the child or a member of a natal family of the child.
Part II **Establishment of Parent-Child Relationship**	
35. 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 (Care and Protection of Children) 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(iii)(a)(II) of the Surrogacy (Regulation) Act, 2021; (e) there is a presumption of parentage in favour of a person under section 49 of this Code unless such presumption has been successfully rebutted; or, (f) the person has successfully executed an acknowledgement of parentage in relation to the child as per section 36 of this Code. (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
36. Voluntary acknowledgement of parentage.	(1) Any person may acknowledge parentage in relation to the child by getting named as the parent of the child in the Birth Register, 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 as per the procedure prescribed. (2) A person may acknowledge parentage under sub-section (1), only if such child does not have a presumed, acknowledged, or adjudicated parent, other than the legal parent of the child under sub-section (1) and the person seeking to establish a relationship with the child through acknowledgement.

	(3) A person can acknowledge parentage under sub-section (1) if the child has only one legal parent.
Part III **Parental Responsibilities and Rights**	
37. Parental responsibilities and rights.	(1) Parental responsibilities and rights mean all the rights, duties, powers, and responsibilities which, by law, a parent has in relation to their minor child and such minor child's property, and includes- (i) having legal custody of the child; (ii) ensuring contact with the child; (iii) ensuring care of the child, and (iv) contributing to the maintenance of the child. (2) More than one person may hold parental responsibilities and rights in relation to a child.
38. Parental responsibilities and rights of parents.	Each parent of a child has parental responsibilities and rights in relation to the minor child.
39. Parental responsibilities and rights when parent is minor.	(1) If one of the parents of the child is a minor – (a) the parent who is of age of majority will have parental responsibilities and rights in relation to such a child; (b) as soon as the minor parent acquires age of majority, both parents will have parental responsibilities and rights in relation to the child. (2) If both parents of the child are minors – (a) the guardians of the minor parents will have parental responsibilities and rights in relation to the child; (b) 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.
40. Acquisition of parental responsibilities and rights by Court order.	(1) A person will acquire parental responsibilities and rights if a Court issues an order vesting parental responsibilities and rights in such person, on an application filed by the person. (2) 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; and (iii) any other factor that should, in the opinion of the Court, be taken into account.

	(3) A Court will issue an order for vesting of parental responsibilities and rights under sub-section (1) only if the person has a demonstrated interest in the care, protection, well-being, and development of the child.
41. Default acquisition of parental responsibilities and rights:	(1) A person will acquire parental responsibilities and rights by default, if such person, being a third party, has contributed to the upbringing, care and maintenance of the child for a period of at least two years. (2) A person will acquire parental responsibilities and rights under sub-section (1) only if- (a) the child has a single parent or only a sole person holds parental responsibilities and rights in relation to the child, and (b) the single parent or sole person holding parental responsibilities and rights intends to co-parent the child with such a third party and vice-versa. **Explanation-** For the purpose of this section only, "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 – (a) death of the other parent; (b) desertion by the other parent; (c) demonstration of a consistent lack of interest in the affairs of the child by the other parent
42. 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, unless this Code, any other law in force, or an order of the Court, provides otherwise.
43. Custody of minor child.	(1) In the event of separation of parents, including through dissolution of marriage or a stable union, the Court will, during the course of dissolution proceedings under section 11 or section 30 of Chapter I of this Code, or upon an application filed by a parent, make an order deciding the custody of the child. (2) In deciding custody, whether joint custody or sole custody, the Court will - (a) consider the best interests of the child; (b) take into account the intelligent preference of the child; and (c) comply with its duty as prescribed under section 55 of this Chapter. (3) In making an order of joint legal custody, the Court will specify the circumstances under which consent of both parents has to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent. (4) In making an order of joint physical custody, the Court will specify the manner in which such an arrangement will be operationalised and ensure that such an arrangement does not render the child or the parent at the risk of violence or harm. (5) The Court will, in addition to custody, also issue an order for maintenance of the child as per section 45 of this Code. (6) Orders under this section are of an interim nature and may be modified upon application by either parent.
44. Parenting plan.	(1) During the course of proceedings related to custody of a child under section 43, the Court will invite the parents of a child to mutually arrive at a parenting plan.

	(2) If the parents agree to a parenting plan under sub-section (1), the Court will appoint a competent professional, based on the choice of the parents so far as possible, to guide and assist them in arriving at such a plan. (3) A parenting plan may determine any matter in connection with parental responsibilities and rights in relation to such a child, including – (a) residence of the child; (b) contact between the child and the parent, and contact between the child and any other person; (c) physical and mental well-being of the child; (d) financial decisions in relation to the child; (e) decisions in relation to the education of the child; (f) overall upbringing of the child; or, (g) any other matter that the parties or the Court deem relevant in relation to the child. (4) Upon agreement on the terms of the parenting plan, the parents of a child will submit the plan to the Court for it to pass an order for enforcement of the parenting plan. (5) A parenting plan must be in accordance with such format as may be prescribed.
45. Maintenance of children.	(1) Parents have a duty to maintain their children. (2) Parents will maintain – (a) Minor children till they attain majority, or (b) 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 will have a duty to maintain a step-child if the step-child does not have a living parent or has been deserted by their parent. **Explanation-** A "physical or intellectual disability" has the same meaning as given under the Schedule to the Rights of Persons with Disabilities Act, 2016. (3) On filing of an application, Court may direct a parent to maintain a major child if it deems the circumstances are such that the major child cannot maintain themselves and such maintenance is critical to their reasonable well-being. **Illustration One-** A is a major child who is pursuing her education in University and does not have a source of income to cover her educational or living expenses at University. The Court may direct the parents to continue to maintain A to cover her educational and living expenses.

	Illustration Two- B is an unmarried major daughter who could not pursue an education or secure a job. The Court may direct the parents to maintain B till she is financially secure and can maintain herself. **Illustration Three-** C is a major child who is a transgender person and is not able to secure a job on account of discrimination based on their gender identity. The Court may direct the parents to maintain C till they secure a job and can maintain themselves. (4) While adjudicating a petition for the maintenance of a child, the Court will determine the amount of maintenance to be granted. (5) In determining the amount of maintenance under sub-section (4), the Court shall take into consideration the following – (a) the income of the parents; (b) the economic capacity and status of the parents; (c) the lifestyle enjoyed by the child; (d) the reasonable needs of the child; (e) the provisions for food, clothing, shelter, education, etc. of the child; (f) need for any medical attendance, treatment or care of the child; and (g) any other factors which the Court may deem necessary based on the relevant circumstances of each case. (6) 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.
Part IV **Miscellaneous**	
46. 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.
47. Right to be named as single parent in birth	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 a child.

register and identity documents.	**Explanation-** 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 for the time being in force.
48. Termination, suspension, extension or restriction of parental responsibilities and rights.	(1) A person under sub-section (2) may file an application before Court to– (a) suspend, or terminate, any or all of the parental responsibilities and rights which a person has in respect of a child; or, (b) extend or restrict the exercise by a person of any or all of the parental responsibilities and rights which a 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 – (a) a parent; (b) a person other than a parent who holds parental responsibilities and rights in relation to the child; or, (c) any other person having a demonstrated interest in the care, protection, well-being, and development of the child. (3) When considering an application under sub-section (1), the Court must take into account – (a) the best interests of the child; (b) 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; and (c) any other factor that should, in the opinion of the Court, be taken into account. (4) A Court will terminate, suspend, or restrict parental responsibilities and rights of a person in relation to the child only if – (a) such person demonstrates a consistent unwillingness to perform their parental responsibilities and rights; and (b) such termination, suspension and restriction will not adversely affect the child's physical, mental, and emotional well-being. (5) The termination, suspension, or restriction of a parent's parental responsibilities and rights will not affect – (a) the parents' duty to maintain the child under any law in force; or (b) the inheritance rights of the child in relation to such a parent under any law in force. (6) An order issued by the Court under this section will be an interim order.

49. Presumption of parentage.	(1) A person will be presumed to be the parent of the child if the child was born during the subsistence 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 presumption of parentage under sub-section (1) may be rebutted only on the ground that the person and birth parent did not have access to each other at any time when the child could have been conceived, only when such access is relevant for the establishment of parentage. (3) 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 - (a) the legal parent of the child has consented to the person establishing a parental relationship with the child; (b) they reside in the same household with the child; (c) they regularly contribute to the care and maintenance of the child; and (d) they have established a parental relationship of dependence, bond and care with the child. (4) A person who claims to be the parent of the child may – (a) apply for an amendment to be effected in the birth register 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 (b) apply to a Court for an order confirming their parentage of the child. (5) This section does not apply to – (a) the parent of a child conceived through the rape of the child's birth parent; or (b) 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. (6) A presumption of parentage under this section may be rebutted and competing claims to parentage may be resolved by Court.
50. Denial of parentage.	(1) A presumed parent or alleged genetic parent who seeks to deny parentage in relation to a child may file an application before Court, affirming their denial of parentage in relation to such child. (2) An order of Court affirming denial of parentage made under sub-section (1) 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.

51. . 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 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 (2), a Court will direct a DNA test only if it is impossible to draw an inference regarding the parentage of the child based on all other evidence. (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.
52. . Restrictions on guardian's power to alienate property.	(1) The guardian of the minor 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 minor's estate but the guardian can in no case bind the minor by a personal covenant. (2) The guardian of the minor will not, without the previous permission of Court - (a) mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor, or (b) 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 minor 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 minor or any person claiming under them. (4) No Court will 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 minor. (5) The Guardians and Wards Act, 1890 will 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— (a) proceedings in connection with the application will be deemed to be proceedings under that Act within the meaning of section 4A thereof; (b) the Court will observe the procedure and have the powers specified in sub-sections (2), (3) and (4) of section 31 of that Act; and (c) An appeal will 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.
53. Power to appoint testamentary guardian.	(1) A parent who has legal custody of the minor child 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 child's person or property or both. (3) A person appointed as guardian under sub-section (1) acquires guardianship -

	(a) after the death of the parents of the minor 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.
54. Factors relevant to determine best interests of the child.	(1) In determining the best interests of the minor child, the following factors will be taken into consideration when relevant, namely- (a) the nature of the relationship between- (i) the child and the parent; (ii) the child and any person exercising parental responsibilities and rights; or, (iii) the child and any other caregiver; (b) the conduct of the parents, or any person holding parental responsibilities and rights, towards the child; (c) the manner of exercise of parental responsibilities and rights by the parent, or any person holding parental responsibilities and rights, in respect of the child; (d) the conduct of the parent, a person holding parental responsibilities and rights, or any other caregiver, in providing for the day-to-day needs of the child; (e) the conduct of the parents, a person holding parental responsibilities and rights, or any other caregiver, in providing for the overall development of the child, including the emotional and intellectual development; (f) the likely effect on the child of any change in the child's circumstances including in the event of separation from- (i) one or more parents, (ii) any sibling or other child with whom the child has been living, or (iii) any person exercising parental responsibilities and rights, or any other caregiver, with whom the child has been residing; (g) 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; (h) the age, maturity and stage of development of the child; (i) any disability and special needs of the child; (j) any chronic illness that a child may be suffering from; (k) the need to protect the child from any physical or psychological harm, and maltreatment, abuse, neglect, violence or harmful behaviour; and, (l) any other factor that the Court may deem relevant.
55. Duty of 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 it 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 for the best interests of the child. (2) The Court will designate a family consultant for the purpose of assisting it with proceedings under this Chapter. (3) The Court may, if it deems appropriate, refer the parties to alternative methods of dispute resolution, including mediation and conciliation.
56. Adoption of children.	The adoption of minor children will be as per the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015.
CHAPTER III-A INTESTATE SUCCESSION	
Part I Preliminary Provisions	
57. 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.
58. 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.
59. Definitions.	In this Chapter, unless the context requires otherwise - (a) **"Code"** means this Act; (b) **"extra-legal marriage"** has the same meaning as under section 2(1)(d) of Chapter I this Code; (c) **"extra-legal stable union"** has the same meaning as under section 2(1)(e) of Chapter I of this Code; (d) **"gift"** has the same meaning as in section 122 of The Transfer of Property Act, 1882; (e) **"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; (f) **"parent"** has the same meaning as in section 34(n) of Chapter II of this Code; (g) **"predeceased"** means died before the time of the intestate's death; (h) **"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;

	(i) **"stable union"** has the same meaning as under section 2(1)(l) of Chapter I of this Code.
60. 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, a plurality of family structures.
Part II **Intestate Succession**	
61. 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 distant family, the step-parent or the step-child, as the case may be provided that the step-parent is not a legal parent as per section 35 of Chapter II of this Code, in which case the step-parent and the step-child will inherit as immediate family, and (e) if there is no immediate family, extended family, distant family, or step-parent or step-child, the Government.
62. Composition of immediate family.	(1) 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 predeceased, (c) grandchildren, only when their parent who is the child of the intestate is predeceased, and (d) parents. (2) In the absence of: (a) a spouse, or spouses in case the intestate has more than one legally wedded spouse, and (b) children or spouses of children when such children are predeceased, and (c) grandchildren when their parent who is the child of the intestate is predeceased, the immediate family of an intestate consists of parents and siblings.
63. 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 grandparents.
64. 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.
65. Rules for devolution among immediate family.	(1) The intestate's 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 One-

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, respectively (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 Two-

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.

Illustration Three-

	Facts - X, the intestate, is survived by two siblings - A and B, and his father, C. His spouse, Z, passed away a few years ago. X has no surviving children or grandchildren. Calculation - A, B and C will inherit X's property equally. They will each get a share in the property of X. Final Shares: A, B and C will receive 1/3 share each. (c) If the intestate was in a stable union at the time of death, as per sections 25, 26 and 29 of Chapter I 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 sections 25 and 26 of this Code, the partner shall be entitled to the same rights in the intestate's property as a spouse under this Code, (ii) The partners may opt out of the intestate succession regime applicable under sub-section (i) above through the nomination form provided for under section 28 of Chapter I of this Code; (iii) If the stable union has not been intimated, and the court has made a determination under section 29 of Chapter I of this Code, the partner shall be entitled to the same rights in the intestate's property as a spouse under this Code; (iv) On a claim being filed by the other heirs, the court may reduce the share due under sub-section (iii) based on the following factors: (1) length of the partnership; (2) financial position of the partner; (3) the degree of financial dependence or interdependence, and any arrangements for financial support, between the partners; (4) the financial needs of other heirs and any caretaking provided by them to the deceased; other such factors as may be prescribed.

	Illustration Four- Facts: At the time of her death, A was in a relationship with B. Upon A's death, B applies to the court for a share in A's property, claiming that they were in a stable union. A also has a daughter, C, from a previous marriage. The Court finds that A and B were in a stable union as per section 29 of Chapter I this Code. Calculation of shares: The inheritance scheme applicable for spouses will be applicable in such cases. C will also inherit her share as if she was inheriting alongside a spouse. Final Shares: B and C will receive 1/2 share each. (d) 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. **Illustration Five-** Facts: A is survived by two validly married spouses, B and C. He is also survived by two children, E and F, from his marriage with B. Calculation of shares: The property will be split into four parts. B, C, E and F will get one share each. Final Shares: B, C, E and F will get 1/4 share each. (e) If at the time of death, the intestate is in extra-legal polygamous marriage(s) and/or extra-legal polygamous stable union(s), the partner(s) in the extra-legal marriage(s) and/or stable union(s) may claim a share in the estate of the deceased, and the Court shall determine their share based on the following factors: (i) the nature of relationship between the parties; (ii) the financial position of the claimant partner, including any independent source of income; (iii) the degree of financial dependence or interdependence, or any arrangements for financial support, between the parties;

(iv) any contributions made or action taken by the partner during the subsistence of the relationship, which has given rise to a sustained benefit or economic disadvantage;

(v) the number of heirs of the intestate who are entitled to a share; and

(vi) other such factors as may be prescribed,

and while determining the share of the partner, the court may proportionately reduce the intestate shares of the heirs of the deceased.

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.

Illustration Six-

Facts: A was in a valid marriage with B at the time of his death. A had also performed a marriage ceremony with C while his marriage with B was in subsistence. However, the marriage with C was invalid because A was already in an existing marriage.

Allocation of share: Upon A's death, B will get the share due for a spouse under the intestate succession scheme in this section. C may apply to the court for an inheritance share. The court will decide her claim based on the factors laid down in this section. If the court awards her a share, it may proportionately reduce the share of the other heir, in this case the spouse, B.

(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

clause (a) and (b) of sub-section (1) shall apply to the devolution of property under this sub-section.

66. 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 One-** 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 Two-** 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 Three-** 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.
67. 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 One-** 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 Two-** 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 Three-** 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 Four-** 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.
68. 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.
69. 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 as per applicable laws. (c) The reproductive material must be utilised in accordance with the written consent of the intestate as per applicable laws. (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 and the term 'remarries' shall include entering into a stable union.
70. 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.

71. 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 they 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.
72. 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 **Protecting the Inheritance Rights of Immediate Family and Dependants**	
73. 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. **Explanation.–** For the purposes of this section, the term 'remarries' includes entering into a stable union.
74. Order of maintenance.	The following persons for whom reasonable financial provision has not been made by the testator'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 an extra-legal marriage or an extra-legal stable union 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.
75. 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.
76. 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 54 of Chapter II 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.
77. 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 75 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.

78. 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 74 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 will 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 76 of this Code, including but not limited to the remarriage of a spouse who is receiving maintenance.
79. Reservation of compulsory shares for certain heirs.	(1) Children of the deceased shall inherit at least half of the inheritance share allocated to them in section 65(1)(a) of this Code, irrespective of any stipulation to the contrary in any will of the deceased. (2) In case of a predeceased child, subsection (1) shall apply to the children of such a child, i.e., the grandchildren of the deceased. (3) The base for calculating the compulsory share under subsection (1) shall be as laid down in section 80. (4) Subsection (1) shall be subject to the preferential right of habitation of the spouse provided in section 73 of this Code. (5) It is clarified that in the absence of the heirs specified in sub-section (1) and (2), the deceased shall have complete freedom of testation regarding their will(s).
80. Valuation of the estate for	(1) The base of the compulsory share shall be the net value of the estate at the time of the death of the deceased. (2) The shares of the other heirs received through intestate succession will not be affected in satisfying the compulsory share. (3) When calculating the net value of the estate, legacies and testamentary burdens shall not be taken into consideration as encumbrances.
CHAPTER IIIB TESTAMENTARY SUCCESSION	
Part I: Introductory Provisions	
81. Definitions	In this Chapter, unless the context otherwise requires: **(a) "administrator"** means the person appointed by the court to prove the will and give effect to it;

	(b) "court" means the probate court under applicable law; **(c) "creditor**" means a person to whom the will-maker owes a debt at the time of death; **(d) "disposition"** means the act of giving away of property to a person under the will; **(e) "executor"** means a person named by the will-maker in the will to prove the will and give effect to it; **(f) "letters of administration**" means a document granted to an administrator to give effect to the dispositions in the will; **(g) "probate"** means the process of proving a will as valid under applicable law; **(h) "property"** means: (i) movable and immovable property, (ii) self-acquired and ancestral property, (iii) tangible or intangible property, and (iv) a share, interest, or right in any such property; **(i) "regular will",** for the purposes of Part V of this Chapter, is a will made by complying with the requirements under Part II of this Chapter; **(j) "three requirements for a valid will"** means the requirements enlisted under section 85(1); and **(k) "will"** means a document that: (i) is made by a natural person; and (ii) does any or all of the following things: A. gives away property to which the person is entitled at the time of their death; or B. gives away property to which the administrator or executor appointed by the person becomes entitled after the person's death; or C. appoints an executor to prove and give effect to the will.
82. Manner of fulfilment of requirements under this Chapter.	The following requirements, wherever they appear in this Chapter, may be satisfied as follows: (a) that a document must be in writing - the document may be handwritten, typed and printed, or typed electronically, (b) that a document must be signed or attested - the document may be signed or attested physically or electronically,

	(c) that an action may be performed orally - the action may be performed and recorded through video and/or audio means, and (d) that witnesses must be present - the presence may be in-person or virtually over video conferencing, and the witnesses may be located inside or outside India.
83. Standard & burden of proof under this Chapter.	(1) Wherever this Chapter requires a person to establish a fact, or the court to satisfy itself of a fact, the standard of proof shall be that of balance of probabilities. (2) If the will appears to be rational and legible, then it shall be presumed to be valid, and the burden to show that it is not shall shift to the person who is opposing the will.
Part II- Making a Valid Will	
84. Who can make a valid will.	Any person who is not a minor and is of sound mind may make a will.
85. The three requirements for a valid will.-	(1) The following requirements must be complied with to make a valid will: (a) A will must be in writing, and the will-maker does not need to use any technical terms, as long as their intentions to dispose of their property in a particular manner are made clear; (b) The will-maker must— (i) sign the document; or (ii) direct another person to sign the document on their behalf in their presence; and, (c) At least two witnesses must— (i) be in the presence of the will-maker when the will-maker complies with sub-section (2), and (ii) each sign and attest the document in the will-maker's presence. (2) To comply with sub-section (1)(c): (a) the witnesses do not need to be in the presence of each other, as long as they are each in the presence of the will-maker while signing and attesting the will, (b) no particular form of words shall be necessary while attesting the will, and (c) the witnesses do not need to know that the document which they are signing and attesting is a will. (3) It is not compulsory to register a will.
86. Validity of a will when it does not comply with the requirements.	(1) This section applies to a document that— (a) appears to be a will, (b) does not comply with the three requirements for a valid will, and (c) came into existence inside or outside India.

	(2) The court may make an order declaring the document referred to in sub-section (1) to be a valid will, if it is satisfied that the document clearly expresses the intention of the deceased person to give away their property in a particular manner upon death. (3) While making this declaration, the court shall — (a) construe the document as a whole; (b) examine the circumstances surrounding the signing and witnessing of the document; (c) consider evidence regarding the intention of the deceased person to give away their property in a particular manner upon death; and (d) ignore any harmless errors made by the will-maker or the witnesses which do not affect the substance of the document. (4) If the document has been made outside India and complies with the law in force in the country in which it has been made, the court shall declare the will to be valid.
Part III- Special provisions relating to witnesses	
87. Executor as witness to a will.	A person who is appointed as an executor of a will may also be a witness to the will.
88. When a witness cannot receive a disposition under a will.	A disposition of property under a will is invalid if: (a) it is made to a witness, and/or (b) it is made to a spouse or a stable union partner of the witness, and/or (c) the property would pass to a person claiming under the witness or the witness' spouse or stable union partner.
89. When a witness can validly receive a disposition under a will.	(1) Section 88 does not apply in the following circumstances: (a) In addition to the witness or any of the persons in section 88 who is receiving a disposition, there are at least two other witnesses who are not enlisted in section 88, (b) The disposition is by way of repayment of a debt owed by the will-maker, or (c) All the persons who would benefit if the disposition to the said witness were to be declared invalid: (i) have the legal capacity to give consent, and (ii) give their consent in writing as part of the will or in the course of the probate proceedings. (2) Even if the circumstances under sub-section (1) do not exist, the court may, of its own accord, find the disposition valid if it is satisfied that the will-maker knew of the disposition and its ultimate beneficiary, and the will clearly expresses the intention of the will-maker to give away their property in a particular manner.

Part IV- How to change, revoke and revive a will	
90. Changing a will.	(1) A will-maker can change a valid will by: (a) Making a change directly to the text of the will, or (b) Describing the change in a note written in the will. (2) If the change is being made electronically, it must be made in track mode or using other similar means such that the change is apparent in the document. (3) To be valid, the change must also satisfy the three requirements of a valid will, as set out under section 85(1). (4) Even if the change does not satisfy the three requirements of a valid will, the court may use its power under section 86 to find a change valid.
91. Revoking a will.	(1) A will-maker can revoke a valid will or a part of it by: (a) subsequently making another valid will; (b) preparing a document which: (i) clearly spells out an intention to revoke the will or a part of it, and (ii) satisfies the three requirements of a valid will; or (a) destroying (or directing another person to destroy in their presence) the will or a part of it with the intention of revoking the will or that part. (2) Even if the revocation does not satisfy the requirements under the above sub-section (1), the court may use its power under section 86 to find the revocation valid.
92. Reviving a will.	(1) A will-maker can revive a will or a part of it which had been revoked under section 91 by: (a) complying with the three requirements for a valid will afresh, or (b) making an addendum to the will (known as a codicil) which: (i) clearly spells out the intention to revive the revoked will or part of it, and (ii) satisfies the three requirements of a valid will. (2) When a will is revived under sub-section (1), it will be deemed to have been made– (a) on the date on which the revival is done, if the revival is under sub-section (1)(a); or, (b) on the date when it was originally made, if the revival is under sub-section (1)(b), unless the will-maker has expressed a contrary intention in the codicil.
Part V - Special testamentary actions	
93. To whom this part applies.	This part applies to persons: (a) who are in 'active service' as defined under the Army Act, 1950, the Air Force Act, 1950, or the Navy Act, 1957, or

	(b) who find themselves unable to satisfy the three requirements of a valid will owing to a natural disaster as defined under the Disaster Management Act, 2005.
94. Kinds of special testamentary actions.	(1) Special testamentary actions are actions related to will-making which the persons mentioned in section 93 may perform without the need to comply with the formalities set out under section 95(3). (2) The following kinds of special testamentary actions may be performed: (a) Making a will under this part, (b) Changing a regular will or a will made under this part, (c) Revoking a regular will or a will made under this part, and (d) Reviving a regular will or a will made under this part.
95. How to undertake special testamentary actions.	(1) Special testamentary actions can be performed by using any form of words as long as there is a clear intention on the part of the will-maker to perform that action. (2) The special testamentary action may be undertaken either in written form or orally. (3) The requirements contained under the following provisions need not be fulfilled while undertaking special testamentary actions: (a) Section 85, (b) Section 88, (c) Section 90 (1), (2), & (3), and (d) The words "in their presence" in section 91(1)(c).
96. How long can a special testamentary action remain valid for.	(1) This section applies when: (a) a special testamentary action has been performed, and (b) the will-maker in question has ceased to be a person described in section 93. (2) The special testamentary action will remain valid for one year from the date on which the will-maker ceased to be a person described in section 93.
97. Proof of special testamentary actions.-	(1) Notwithstanding anything contained in any other law which is in force, special testamentary actions may be proved in court through the use of any evidence that the court deems sufficient. (2) If the will-maker is a person described in section 93(b) then the burden to prove that the will-maker was unable to satisfy the three requirements of a valid will, will be on the executor or administrator under the applicable law or any person benefiting under the will.
Part VI - Interpretation of wills	
98. The court's tasks and duties while interpreting a will.	(1) While interpreting a will, the court's tasks shall be to give effect to: (a) the words of the will, and

	(b) the intentions of the will-maker. (2) Subject to sub-section (1), the court's duties shall be: (a) to strive to uphold the validity of a will, and (b) to achieve the distribution of the property of the will-maker instead of allowing the assets to remain undistributed.
99. Use of the will-maker's life while interpreting a will.	(1) To correctly interpret the words used in a will and gather the intentions of the will-maker, the court may look into every relevant aspect of the will-maker's life, such as the will-maker's relationship with those who will benefit under the will, and the particulars of the property disposed of in the will. (2) While undertaking this exercise, the court shall have due regard for the right to privacy of every person concerned.
100. Basic rules of interpretation to be followed by the court.	(1) The court shall use the following basic rules of interpretation while construing a will: (a) The will must be construed as a whole, (b) All words must be given their plain, ordinary meaning, unless otherwise required by the context, (c) When there are two inconsistent clauses, the clause which appears later in the will, will override the former, (d) Other documents which have not been made a part of the will but have been clearly referred to in it may be referred to by the court to interpret the will. (2) In addition to the above rules, the court may use any rule of interpretation recognised in law which enables it to perform its tasks and fulfil its duties under this Part.
101. Use of external evidence by court to give effect to wills.	(1) This section applies when the language used in a will is such that it makes the will or a part of it: (a) meaningless, (b) prima facie ambiguous or in light of surrounding circumstances (which cannot include the testamentary intentions of the will-maker) and because of this, the court is unable to give effect to the will. (2) The court may use external evidence to interpret the will or the part of it which is meaningless or ambiguous, and this external evidence includes the testamentary intentions of the will-maker.
102. Correction of will by a court.	(1) This section applies when the court is satisfied that a will which is otherwise valid fails to carry out the intentions of the will-maker: (a) because it contains a clerical error, or (b) it contains a substantive error which makes the will, or a disposition contained in it, inoperative, or (c) because it does not give effect to the instructions issued by the will-maker in case the will-maker did not themselves prepare the will. (2) The court may make an order correcting the will in such manner as it deems fit to give effect to the intentions of the will-maker. (3) In such an order, the court may:

	(a) supply words into a will, or (b) omit particular words from a will. (4) While making an order under this section, the court shall consider the same factors as under section 86.
Part VII - Special rules while giving effect to dispositions under wills	
103. Disposition which cannot be given effect to.	The following dispositions will not be given effect to in a will: (a) a disposition which is contrary to any law for the time being in force, or (b) a disposition which is dependent upon the fulfilment of an impossible condition.
104. Disposition which depends on the fulfilment of a condition.	(1) This section applies when: (a) a disposition depends on the fulfilment of a particular condition, and (b) the will-maker has not indicated the degree to which the condition needs to be fulfilled. (2) If the court is of the opinion that the person concerned has substantially fulfilled the condition, it shall give effect to the disposition.
105. Disposition of property to a predeceased lineal descendant.	(1) This section applies when: (a) the child or any other lineal descendant (for e.g. child, grandchild etc.) of the will-maker has received a disposition under a will, and (b) this person dies before the death of the will-maker, but (c) is survived by their own lineal descendant. (2) The disposition will still remain valid, and the property will pass to the surviving lineal descendant of the person who had originally received the disposition.
106. Disposition of a sum of money with a description of how it is to be enjoyed.	(1) This section applies when a will-maker has left a sum of money to a person and has added a description of the manner in which the sum is to be enjoyed. (2) The person is entitled to receive the sum, but does not need to enjoy it in the described manner.
107. Disposition of property with a charge, lien etc.	(1) This section applies when there is a pledge, charge, lien, or any other third-party interest over a property which has been disposed of under the will. (2) The person who has been given the property under the will may only take it subject to such interest.
108. Disposition of property over which the will-maker does not have complete title.	(1) This section applies when even after the will-maker's death, the will-maker's title to a specific property disposed of in the will is not complete. (2) Any action which needs to be undertaken to complete the title must be undertaken by: (a) the executor or administrator acting under Part IX of the applicable law in collaboration with the person to whom the property in question has been given in the will, and

	(b) at the cost of the property left behind by the will-maker.
109. Disposition of shares in a company.	(1) This section applies when the will-maker has disposed of shares in the will. (2) When the will-maker has expressed an intention to dispose of all shares that they owned to a single person as a whole, then such person: (a) cannot choose to accept only certain shares and refuse to take the others, and (b) must take all the shares together as a single whole. (3) If any amount of money is due in relation to the shares: (a) at the time of the will-maker's death: then this amount shall be paid out of the property of the will-maker, (b) after the will-maker's death: then this amount shall be paid by the person to whom the shares have been disposed of under the will.
110. Dispositions which are specific and/or demonstrative.	(1) This section applies when: (a) more than one disposition has been made of the same property, (b) one of the dispositions is specific - i.e., the disposition is of the property itself (for e.g., a flat), and (c) another disposition is demonstrative - i.e., the disposition is from the proceeds of the property (for e.g., maintenance from rent collected by leasing out the flat). (2) The court shall first give effect to the specific disposition, and only after that, to the demonstrative disposition.
111. Disposition of interest arising from a sum of money.	(1) This section applies when: (a) the disposition consists of interest or any other produce arising from a principal sum of money, and (b) no other disposition in the will affects this principal sum or the interest or produce arising from it. (2) The person to whom the disposition has been made shall be entitled to receive both the interest/produce as well as the principal sum.
112. Disposition to a creditor.	(1) This section applies when the will-maker makes a disposition of property to a creditor. (2) Unless it is evident from the text of the will that the will-maker intended to dispose of the property to the creditor to discharge the debt, the creditor is entitled to both the property as well as the debt.
113. Disposition of property which has already been partly disposed of.	(1) This section applies when a will-maker makes a valid will and then disposes of or otherwise loses their interest in some property which had been disposed of in the will. (2) The disposition in the will is valid only with respect to that part of the property to which the will-maker is still entitled at the time of death.
114. Disposition where the item described is not available in the will-maker's property.	(1) This section applies when a disposition in a will describes an item in general terms, but there is nothing in the property of the will-maker which matches the description. (2) The executor or administrator acting under Part IX of the Indian Succession Act, 1925 shall make all reasonable efforts to acquire the item using the funds available in the residuary pool described in section 116.

115. Disposition of property in fractional parts, when one part fails.	(1) This section applies when: (a) A will disposes of the will-maker's property in more than one part, (b) The disposition of any one of those parts fails, and (c) This failure is not because the will-maker was not entitled to the property at the time of death. (1) If the will contains a special rule for the disposition of a part that fails, any failed part shall be disposed of according to that rule. (2) If there is no such special rule in the will, the part which has failed will be distributed among the other parts proportionately.
116. Disposition of property in the residuary pool in a will.	(1) This section applies when all the property described in a will has been distributed and some property remains which could not be distributed because the disposition was invalid or could not be given effect to for any other reason. (2) This property shall form part of the 'residuary pool'. (3) A will-maker may name a specific person or persons who shall inherit from this residuary pool. (4) No particular form of words is necessary for sub-section (3) to apply, as long as the intention of the will-maker is clear.
117. Disposition to an executor under a will.	(1) This section applies when a person who has been named as an executor in a will has also been given a disposition under the will. (2) Such a person cannot receive the disposition unless they: (a) prove the will in accordance with applicable law, or (b) show a clear intention to act as the executor in compliance with any conditions laid down in the will.
118. Probate and administration of wills.	The probate of a will and its administration shall be undertaken under applicable law.
119. Expedition of proceedings in case of uncontested wills.	(1) This section applies when a will is uncontested (i.e., when no one challenges the probate of the will under applicable law). (2) The court shall make every reasonable effort to expedite the probate and administration proceedings to ensure that the will can be given effect to as soon as possible after the will-maker's death.

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