Family Law at the Crossroads: Tradition, Reform, and Constitutional Morality

Editors

Dr. Karunesh Shukla
Archana Kumari
Shivam Raj

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New Delhi
First Floor, 4598/12-B, 1st Floor,
Padam Chand Marg, Daryaganj,
New Delhi, Delhi 110002
Phone: +91 98 11 66 62 16 (M)
Phone: +91 70 11 60 56 18 (M)

Bengaluru
Jallahalli East
Bengaluru, Karnataka. India.
Phone: +91 98 11 66 62 16 (M)
Email: publisher.integrity@gmail.com

USA
New Jersey
14 Grandview Ave, Upper Saddle River,
NJ-07458, USA
Phone: +14805226504 (M)

London
37 Degree Media
64, Hodder Drive, Perivale, London UB68LL.
United Kingdom.
Phone: +44 7950 78 18 17 (M)
Website: integrityeducation.co.in

For any Query / Feedback
Phone: +91 98 11 66 62 16 (Vineet Sharma)

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Foreword

It is a matter of great satisfaction and I am pleased to present the edited volume titled Family Law at the Crossroads: Traditions, Reforms and Constitutional Morality. This scholarly compilation, edited by Dr. Karunesh Shukla, Ms. Archana Kumari, and Mr. Shivam Raj, Assistant Professors at Amity Law School, Patna, reflects the vibrant academic culture and research-oriented environment that we continuously strive to foster at Amity University Patna.

Family law in India today stands at a critical juncture, where deeply rooted traditions intersect with evolving constitutional values and contemporary social realities. Issues relating to gender justice, equality, individual autonomy, and social reform have increasingly come to the forefront of legal discourse.
In this context, the role of constitutional morality and progressive judicial interpretation has become particularly significant in shaping and re-defining traditional family law frameworks. This edited volume thoughtfully engages with these important themes.

Through a collection of well-researched and insightful contributions, the book examines the dynamic interplay between established legal traditions and the transformative vision of the Constitution. The editors deserve special appreciation for their dedication, scholarly commitment, and intellectual effort in conceptualizing and compiling this important work.

I am confident that this volume will serve as a valuable resource for researchers, legal professionals, academicians, and students interested in understanding the complex relationship between tradition, reform, and constitutional principles in the domain of family law.

I congratulate the editors and contributors for their commendable effort and extend my best wishes for the success and wide readership of this publication.

Prof. (Dr.) Vivekanand Pandey
Vice Chancellor
Amity University Patna

Editors

Dr. Karunesh Shukla, Assistant Professor at Amity Law School, Amity University Patna. He holds a Ph.D. from Banaras Hindu University (BHU), Varanasi. His areas of specialization include Human Rights and Humanitarian Law, Corporate Law, and Constitutional Law. He has taught various subjects such as Criminal Law, Procedural Laws, Law of Contract, and Family Law. With over a decade of combined industrial and academic experience, he has made notable academic contributions through several research papers, book, book chapter, and presentations at national and international conferences.

Ms. Archana Kumari, Assistant professor, Amity Law School, Amity University Patna. Specializes in Corporate Law, Family law, women & Criminal law. Pursuing Ph.D. and is UGC NET qualified. She has 6 years of experience in academics with several papers, book chapters and national and international paper presentations.

Mr. Shivam Raj, Assistant Professor (Law), Amity Law School, Amity University Patna. He specializes in Constitutional Law, Gender Justice and Personal Laws. He has three years of teaching experience and has taught courses on Constitutional Law, Family Law, Gender justice and feminist jurisprudence. He is an active researcher with several papers and chapters published in his name.

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Preface

Family law in India occupies a unique and complex position within the legal system. Rooted deeply in social traditions, religious customs, and cultural practices, it has historically governed intimate aspects of life such as marriage, adoption, succession, and family relationships. However, the rapidly changing social landscape of the twenty-first century has placed family law at a significant crossroads. Questions of equality, individual autonomy, gender justice, and technological transformation have begun to challenge traditional legal frameworks and demand fresh perspectives. The present edited volume, ***Family Law at the Crossroads: Tradition and Transformation***, attempts to engage with these evolving debates and critically examine the tensions between longstanding customs and contemporary constitutional values.

The chapters in this book collectively explore how Indian family law continues to grapple with the dual imperatives of preserving social traditions while responding to the demands of justice, equality, and human rights. The opening chapter provides a jurisprudential examination of adoption law in India, highlighting the doctrinal foundations and contemporary challenges within the legal framework. Subsequent contributions engage with complex and often underexplored issues such as the persistence of polyandry in certain communities and the legal ambiguities that arise when customary practices intersect with codified law.

Several chapters interrogate the gendered dimensions of family law, including the discriminatory patterns in the devolution of property rights and the persistence of patriarchal structures even after death. The volume also brings into focus emerging family forms and evolving notions of kinship. Discussions on rainbow families, LGBTQ+ partnerships, and the legal invisibility of queer and transgender relationships highlight the pressing need to rethink traditional definitions of family within the constitutional promise of dignity and equality.

The transformative role of technology and modern reproductive practices is another significant theme addressed in this collection. Issues such as digital divorces, frozen embryo disputes, and surrogacy reflect how advancements in science and digital governance are reshaping family relationships and raising new legal questions that existing frameworks struggle to address. The book further examines the constitutional dimension of family law, particularly the role of constitutional morality in challenging religious patriarchy and reinforcing the fundamental rights of individuals.

Together, the contributions in this volume aim to stimulate meaningful academic dialogue on the future direction of family law in India. By bringing together diverse scholarly perspectives, the book seeks to illuminate the complexities of legal reform in a pluralistic society and to encourage a deeper engagement with the intersection of law, society, and evolving family structures.

It is hoped that this volume will serve as a valuable resource for scholars, researchers, students, and practitioners interested in the dynamic and evolving field of family law. More importantly, it aspires to contribute to the ongoing discourse on how Indian family law can balance tradition with the constitutional ideals of justice, equality, and human dignity.

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1.
Prevalence of the Adoption Law in India: A Jurisprudential Study

Dr. Rajeev Ranjan
HOD, Amity Law School, Patna, Bihar
Dr. Jai Shankar Ojha
Principal, SS Law College, Shahjahanpur, UP

Abstract
Adoption law is a very ancient practice of the Hindu community. But initially, this concept was influenced by patriarchy and gender inequality. But later it was developed without any religious influence and the stigma of patriarchy was ideologically erased by evolution. This writing deals with the ancient concept of Hindu jurisprudence, developments, and lacuna. The Volksgist of the Indian population gradually shaped the adoption law not only in the field of academia but also in realistic perspectives. It began the journey from Hindu jurisprudence and entered into the personal practices of other communities through judicial and statutory intervention. In this writing, it is trying to overcome the entire contemporary problems of adoption practices in India and to explain the subject of adoption necessary for Indian society. Especially in the case of adoption, it contains a study on the deepest root of Hindi jurisprudence, because there are some lacunae in ancient Hindu adoption law. The main concern of the study of how it reaches the domain of Christian and Muslim communities and the second main concern is how this adoption law is considered as a requirement of the right to life under Article 21 of the Indian Constitution.

Introduction
Adoption is the concept of Hindu personal law. It is desire for male offspring was very natural in early Hindu society. The male issue was very important for the family for two purposes; firstly, for the continuance of the family and secondly for the performance of the funeral rituals and offers. Many Scholars-jurists of the Hindu jurisprudence like Manu, Yajnavalkya and Brihaspati mentioned that the requirement of the male offspring is very vital for the Hindu family.

According to Vedas "endless are the world of those who have son, there is no place for the man who is destitute of the male offspring"
According to Yajnavalkya, "Because of the continuity of the family in the world and the attainment of the heaven in the next world through the sons, son's sons and son's son's sons, therefore, women should be loved and protected."[1] The text was enough racist, the cause of love and protection for a woman was the existence and importance of man.
In the Manusmriti, Manu said about the necessity of the Son because according to Manu through a son, man conquers the world, through grandson he obtained immortality, and through his great-grandson, he gains the world of the Son.[2] Again in this statement of Manu, masculinity is being smelled. On the name of the son or on the name of the patriarchy, a violence-based world is invited. Man is the symbol of violence and power so in this condition there is no requirement of the woman as a member of the Manu's society. Again, he said that it is the foremost duty of the man who is sonless to have a son by any means.
Although it is very transparent that the women in ancient Hindu society were not so important, there might be some exceptions. Even with a compliment of नारीसर्वत्रपूज्यते (Women should be worshiped every place), women were the secondary member of the ancient Hindu society of their group.

Hindu Jurisprudence and Hindu Law
Ancient Hindu adoption law is also one of the reasons by which the status of women was very worst in ancient society. The cause of the adoption is gender-biased so it can be said, the change is required in the jurisprudence of the Hindu adoption law and it has done by the upcoming Scholars of the society.

In the case of *Pedda Ammani vs Zamindar Marungapuri*[3] put mention the kinds of Son under the old Hindu law are described.
Aurasa: legitimate son
Kshetraja: Son by the process of *niyoga*, in which the sexual intercourse with the wife or widow of another person with the permission of the husband or Guardian of such woman was known as Niyoga. In Mahabharata, there was the two examples of the sons of Kunti and Madri.

[1]Yajnavalkya, 1-78, Agarwal,R.K., Hindu Law 174 (Central Law Agency, 26thEdn, 2019)
[2]Manusmriti, IX, 137-138.
[3] (1864) 1 IA 282

Gudhaja: Son secretly brought forth by the wife.
Kanina: Son secretly born to an unmarried damsel.
Purika Putra: Son of an adopted daughter.
Sahodhaja: Son born of the wife who is pregnant at time of marriage.
Dattaka: Adopted Son
Krita: Purchased Son
Kritrima: Orphan Adopted son
Svayamdatta: Self-given son
Punarbhava: Son of remarried women
Apavidha: Cast off
Nishad: Son of Brahmin by his Shudra Wife.
This list is not exclusive. With the development of the ages, there was some numerous deductions in list by some jurists of Hindu Jurisprudence. *Parasara,* a jurist of Hindu Law, famous for professing law for Kaliyug, recognizes only four kinds of sons- *Aurasa, Kshetraja, Dattaka*, and *Kritrima.* In Puranic age, it was only two: *Aurasa and Dattaka*. Now we can say that there were only two categories of the son: Natural Born Son and Adopted Son.

In the Modern Hindu Law, finally only three are practiced;

- Legitimate
- Illegitimate
- Adopted

But the adopted son is a very important and recognized son in the classification of son in Hindu jurisprudence regardless of the ages.

Aim and Objective of Adoption in Hindu Law
Although, the origin of the custom of adoption law has been lost in antiquity. Sometime it is more than mere religious requirement and the natural desire of the family or spouse.
On the basis of the aim and objective of the doctrine of Adoption may be bifurcated into two segments:

Religious Purposes
The religious objectives of adoption include that the adopted son is required for the execution of the religious duties of the adoptive father. Because if the son does not perform religious rituals, then his father does not get salvation. Moksha is assumed as essential features in the next world.

With the help of male adoption, the maintenance of the masculinity and patriarchy was achieved in family also. Here it is necessary to mention that the masculinity and patriarchy is also very special feature of the Ancient Hindu Family.

Secular Purposes

According *to Dattaka Mimansa,* men should adopt a son for the religious purpose, but even without this purpose, son may be adopted. On the place of funeral cake, water and rites, son may be adopted for celebration of name and due perpetuation of lineage. In fact some earlier evidences are about the daughter adoption. In *Mithala* region the *Kritrima* form of adoption was permitted. Thus, religious motive of adoption may be included the secular motive.

Post- Independence Era and Hindu Adoption Law

In the year of 1955 and 1956 The Hindu Code Bill was passed in the several parts and one part was the Hindu adoption and maintenance Act 1956. It was very evident in that time period how this code was opposed by the Hindu radicals in India. Pan India there where the several organizations including RSS, *Hindu Mahasabha* and other religious organizations which were opposing this Hindu code bill because in this Hindu code bill some rights were provided to the Hindu women and the radical organization treated these rights were in opposition of the Abstract of Hindu jurisprudence. Dr *Ambedkar* was the real architect of the Hindu code bill he was very serious for the women rights in India and for that he resigned from his post of a Law Minister. After the enactment of the Hindu Adoption and Maintenance Act 1956 some important changes was made by this Act. The changes are followings[4]:

Sections 7 and 8 of this Act mention that the female also may be adopted.

A virgin, divorcee or widow is entitled to adapt and the wife can also add up with the consent of her husband (Section 8 of this Act).

Male can only adopt also by the consent of his wife and wives if any (section 7)

Father and mother both have equal right to give a child in adoption and he or she can't give the child in adoption without the consent of the counter spouse. (section 9)

Adaptive must be the of below 15 years of age and unmarried unless the custom permits such adoption (section 10)

[4]Agarwal,R.K., *Hindu Law* 179 (Central Law Agency, 26thEdn, 2019)

The ceremony of *Datta Homam* is not essential. (section 11)
If the child of the opposite sex is adapted there must be the difference of 21 year in the age of adaptor and the adoptee.
And very important it is not necessary that the adaptor and the adaptor must be of the same caste the only requirement is that both must be Hindu.

Muslim Law and Adoption Practices

Among the Muslims, there is no specific law of adoption. The Muslim personal law is governed according to The Shariat Application Act 1937 which regulates the scope and jurisdiction of Islamic law in India. Traditionally there was no space for adoption law in the Islamic personal law in India but it was adapted in India by the case of *Shabnam Hashmi*[5]. She is a social activist and filed the petition requesting Court to declare the right to adopt and to be adapted as a fundamental right is significant, but the chief justice of that time Justice *Sathasivam* did not accept this plea and clarify that the Juvenile Justice act allowed the people belonging to any religion to adopt a child.
Actually, in Muslim law, there was the concept of the legitimacy of children and that legitimate children must be the product of lawful wedlock between husband and wife. As a corollary of this, the children born outside the lawful wedlock are illegitimate. The woman guilty of having an illicit relationship is punishable as *Zina*. The Muslim law-givers condemned all sexual relationships outside wedlock as illicit and also provided punishment. Muslim law has a very hard approach towards the legitimacy of children and the liberal concept like adoption is not allowed in the Muslim personal law. But now the situation is changed after the judgment of the *Shabnam Hashmi* Case.

Christian Law on Adoption Practices

Regarding Christian law, there are three laws, the Christian Marriage Act, 1872, the Indian Divorce Act, 1869 (as amended in 2001), and the Indian Succession Act, 1925, which deals with Christian family law, making no mention of adoption. In this context, *Philips Alfred Malvin vs V.J. Gonsalves*[6]doctrine of adoption was allowed for Christian as Fundamental Rights under Art 21 of the Indian Constitution.
In the fact of this case a Christian couple adopted a child with the help of the church. After the death of his parents the adopted child filed a suit to

[5] (2014) 4 SCC 1
[6] AIR 1999 Ker 187.

partition for the share in the property of the deceased, who died intestate. The plea was taken that there was no any concept of adoption in Christian law, so in this condition there was no right of the adopted child in the property of deceased parents. But in this case the court held that the right of adopted children is like a natural born child under the article 21 of the Indian Constitution. In this case the court remarked that the right of the couple to adopt the son is a constitutional right guaranteed under the article 21. The right to life includes those things which make life meaningful. Simply because there is no separate Institute providing for adoption and we say that the adoption made by the Christian couple is invalid. Since the adopted son get all the rights of the natural born child. He is entitled to inherit the Assets of Christian couple

Types of Adoption Available in India

Adoption is a legal way to get a child from an adoption agency and otherwise. In India there are different practices regarding the adoption which can be classified on three bases. The different classifications of adoption are as follows:

On the basis of Data sharing between Natural Parents and Adoptive Parents[7].

Open Adoption

It involves open relation between Natural Parents and Adoptive Parents. In this type of adoption Natural Parents and Adoptive Parents are connected with each other through letters, e-mails, and phone calls and may even visit each other before and after of adoption. Access is generally given when the adopted child (in most nations) reaches the age of 18.

Semi- Open Adoption

A semi-open adoption is similar to an open adoption, except that after adoption there is no physical contact of natural parents with the adopted child. Prior to the adoption, the natural mother is permitted to meet the adoptive parents. But after the adoption, natural mother may continue to receive letters and photographs of the child, either directly or through the adoption agency, she registered with. A semi-open adoption can develop into an open or closed form of adoption at any stage.

[7] Available at https://parenting.firstcry.com/articles/types-of-adoptions-in-india/ (last visited at 13/01/2021)

Closed Adoption

In a closed adoption process, both Natural Parents and Adoptive Parents do not have any kind of communication among each other. Sometimes, only medical information of the Natural parents may be shared with the adoptive parents. However, sometimes there may be strict enforcement of the regulation and no information whatsoever, is shared with the adoptive parents. This may happen in cases when a child is rescued or removed from an abusive environment.

Based on state territory:

Domestic Adoption

In Domestic adoption, Natural Parents and Adoptive Parents both have belonged to same Country as citizen. It can also be called intra-country adoption of this sort of adoption. In this process, a couple wishing to adopt a child will register themselves with a government-recognized agency. After registration, their personal details will be checked, and the investigating officer will certify if they are eligible to adopt a child.[8]

International Adoption

This is the process of adopting a child outside of India. It is generally done through private legal counselors or a worldwide appropriation office. Only 88 countries in the world allow international adoption. These countries include 6 countries in Africa, 20 in Asia, 32 in Europe, and 30 in Latin America. The age range would be from infants to teens. The approximate cost averages between 5 lakh Indian Rupees to 21 lakh Indian Rupees. It depends on the agency country to decide who can adopt. It may take six months to several years to receive a child depending on the age. In India, domestic adoption holds priority. The next in line are Non-resident Indians (NRIs) or persons of Indian origin (PIOs) and then international citizens are given preference for international adoption in India.

Intra-family Adoption/Relative Adoption

In three conditions this type of adoption is taken place. If the biological parents of a child;
die,
get married to someone else, or
are not in a capacity to take care of their child,

[8]Types of Adoptions | Adoption Center, Adopt.org (2019), http://www.adopt.org/types-adoptions (last visited13/01/ 2021).

In these situations, a member of the family or the step-parents may legally adopt that child.

Modern Perspective of The Hindu Adoption Law and Its Practices

The origin of the Adoption Law reflected a masculine character within Hindu jurisprudence. But in modern times, due to the courts and Hindu jurists, its secular character has come out. The HAMA Act (the Hindu Adoption and Maintenance Act 1956) was passed courtesy to the Hindu Code Bill and later the 2010 amendment in HAMA incorporated it and the principles of gender equality. After an amendment of 2010, some changes, the adoption law in India become more Gender Compitable. there are following changes,

Any Hindu Women may be adopter under new section 8 of the Hindu Adoption and Maintenance Act, 1956, substituted by 2010 amendment. Any female Hindu who is of sound mind and is not minor has capacity to take a son or daughter in adoption.

An unmarried woman and a divorcee (under section 13 of the Hindu Marriage Act, 1955) can also adopt a child.[9]

Adoption by the Widow is allowed under section 8 of the Hindu Adoption and Maintenance Act, 1956.

Transformed Character of Secular and Gender Sensible Adoption Law and Its Objective

There has been a great change in the law of adoption. Its expansion has reached the core of other communities. This has been allowed by Muslims and Christians by judicial process. This shows a very distinct secular character of the law of adoption.

It is also a very helpful tool for population management. Incidentally, while from one point of view a large number of children are without parents or economically challenged parents, on the other, there are an undeniably growing number of infertile couples for the vast majority of whom adoption is the last option.

In this situation, adoption can be a very good option for the family, married couple, society as well as the state and with its help, the population can be controlled. Adoption by both men and women also reduces the problems of childlessness and may reduce the number of new born members in society. It is very commendable if a financially accomplished couple adopts an orphan or a needy child, and by fulfilling

[9]Duni Chand v. Paras Ram, AIR 1970 Delhi 202

all its responsibilities, along with population control, there will be less pressure on the means of production on the economic front as well.
Concerning gender equality, two facts are very remarkable.

Adoption by Independent Female.
In modern time, Adoption by Independent Female is allowed to adopt irrespective of religion, community and caste.
More female children are being adopted.
There were about 3374 domestic and 653 inter-country adoptions in the financial year 2018-19. And there are those who are opting for **adoption even after having a biological kid**. "You'll be happy to know that most people are adopting girl children these days. There has been a societal change in terms of awareness but we still have a long way to go," remarks Deepak Kumar (CEO, CARA (Central Adoption Resource Authority)).[10]Parents usually show preference for the girl child more as compared to boys. About 2,398 girl children among a total of 4,027 kids were adopted in 2018-19.[11]

According to the Adoption Regulations 2017[12] and Juvenile Justice (Care and Protection of Children) Act, 2015 which is directed by the Ministry of Women and Child Development:

1. Prospective Adoption Parents (PAP) "must be physically, mentally, and emotionally stable, financially competent and have no life-threatening medical condition."
2. A person irrespective of his marital status and whether or not he has a biological son or daughter.
3. A single woman can adopt a child of any gender but a single male will not be eligible to adopt a girl child. In the case of a married couple, both spouses must give their consent for adoption.
4. At least two years of stable marriage is required for adoption in the case married adopter.
5. Whether married Couples having three or more children shall not be considered eligible for adoption "except in case of special condition.

Even overseas citizens of India and foreign parents can adopt children from the country according to the Adoption Regulations 2017.

[10]Available at https://indianexpress.com/article/parenting/family/child-adoption-cara-india-girl-all-you-need-to-know-6153189/(last visited 18/01/2021)
[11] Ibid
[12] Available at https://wcd.nic.in/acts/adoption-regulations-2017 (last visited 18/01/2021)

Contemporary Challenge in Adoption Practices

There are some contemporary problems and challenges in the adoption process that are yet to be resolved.

Economic Reason

It was mostly according to CARA's member secretary and CEO Deepak Kumar while speculation was rife that most of the children who had returned were specifically restrained and families had failed to adjust to them, children over 6 years of age. Were, which were returned. But there is nothing like returning in case of inter-country adoption. The main reason behind it was descending financial capacity of that families.

Indians Only Want New-Born

It seems that in India, a newborn is more preferable for adoption. Because, behind that, there is no history. It is easy to convert biologically young children accordingly, but not in the case of older children.

The Juvenile Justice Act of 2015 states that all child care institutions - those who "care" or generally care for older children - must be associated with specialized adoption agencies that care for children between the ages of 0-6 In order to enable them to adopt older children too.

Then, in 2016, CARA introduced a new class of children available for "immediate placement", which parents can use to bypass the lengthy adoption process.

But in spite of the fact, Indian families usually want to adopt new-born children who according to them are perfect.

Biological Identification is required

In spite of all modernity and development, yet Indian society is too patriarchal. So they preferred their own biological child by any means like IVF, surrogacy or other medical facilities.

Limited Availability

According to the Child Adoption Resource Information and Guidance System (CARING), for every 10 adoptive parents in India, only one child is available. Not enough children are available for adoption because the institutional care ratio for children of abandoned children is Lopez. This may result in fewer children being accessible for adoption, and a minority group (any) to adoptive parents, the child may not be willing to adopt.

Time Consuming Process

An adoption process takes so much time and it should to be addressed. In India, there should be a sufficient number of adoption agencies. No doubt, the adoption process can take longer, which can be a cause of severe stress and strain for some families. Average waiting time, strict criteria in adoption, regulations may differ from both national and international adoptions in different countries.

Gender Bias in Adoption

Although it was said after the enactment of the Act that gender discrimination was abolished, it still occurs in the real sense. A married woman cannot adopt, even with the husband's approval, until her husband dies or she suffers from a disability or abandons the world. On the other hand, with the wife's acceptance, the husband can adopt.

In this era of equality, it is time to recognize the law as equal and grant equal privileges to men and women in relation to adoption. There is no reason to veto the husband to deny the satisfaction of his wife's maiden.

But sometime later in the year of 2010, there has been a very important amendment in the Hindu Marriage and Adoption Act 1956. According to this amendment, women are provided with much-needed rights in case of adoption.

Conclusion

Adoption law is the result of Hindu jurisprudence. It introduces a tremendous concept to a world where there is no consideration of the law of adoption. It was initiated from the basin of Hindu jurisprudence and was initially limited in the patriarchy of the Hindu community, but gradually the concept was blessed with a very secular perspective.

This concept was very great due to its three ideas, first, it is a great tool of population management, after this, it was very helpful in economic and resource management and finally, the great achievement of this concept was the compatibility of gender justice.

Regarding an adoption law, comprehensive reform is required. In past, there was a judgment of the Supreme Court which was about the establishment of a nodal agency for the adoption process. Following the decision of *Laxmi Kant Pandey v. Union of India*, some reforms have occurred specifically for inter-country adoption and CARA (Central Adoption Resource Agency) was established for this. In the historical Sabnam Hashmi case, the apex community was allowed adoption by the Supreme Court exclusively for the Muslim community.

But these are not enough. Some lacunae are evident on the face of the record and therefore more improvement is needed. We should seek more reforms through awareness programs, reduce red trapezium in the adoption process and create more CARAs.

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2.
Custom vs. Code: The Legal Void Surrounding Polyandry in Contemporary India

Dr. Jayshree Gautam Kanchanpurkar
I/C. Principal,Vivekanand Education Society's College of Law, affiliated to University of Mumbai.

Abstract

The form of marriage where a woman has more than one husband is known as polyandry, and it remains unrecognized and very rare in India. While many cultures around the world do not encourage polyandry, it exists in tribal and rural areas of lower socio-economic communities, for example, the Toda, Kinnaura, and Jaunsar-Bawar groups. Polyandry as a form of marriage is still socially present in India, however, it has no legal acknowledgment under personal or secular law, which contributes greatly to the existing legal challenges regarding the welfare of women and children in such marriages.

In this chapter, I analyze the gaps between customary law and normative law in the context of polyandry. It delves into the socio-historical and anthropological paradigms of polyandry in India to critique the heteronormative and patriarchal structures of Indian marriage laws. The study looks into the implications of this legal invisibility which include the entitlement over property, legitimacy of offspring, marital title, and the complete lack of fundamental rights as per articles 14, 15, and 21 of the Indian Constitution.

Referencing constitutional values, comparative thought about the law and feminist theory about the law, the paper contends that the dominant legal system's scant acknowledgment of varieties of marriage still underpins a monogamous male-dominated model. The paper makes a legal argument in favor of a more inclusive and culturally accommodative discussion and, at the same time, reinforces the dignity, autonomy, and legal rights of women involved in polyandrous relations. The chapter ends on targeted legislative recommendations and makes the recommendation for legislative action to close this perennial gap.

Keywords: *Polyandry, Customary Law, Marriage Law, Gender Justice, Tribal Rights.*

Rethinking Marital Norms Beyond Monogamy.

Indian marriage as a legal institution and socio-cultural phenomenon is equally embedded in heteronormative and patriarchal frameworks[1]. Even while the legal provisions have addressed primarily monogamy and to a limited degree polygyny in certain personal laws, polyandry—a condition of a woman possessing more than one husband has been an anomalous and largely unacknowledged union. Polyandry has historically existed among various tribal, rural, and certain Himalayan communities of India such as the Toda tribe of Tamil Nadu and the Jaunsaris and the Kinnauris of Uttarakhand and Himachal Pradesh, typically motivated by socioeconomic or ecological exigencies such as fragmentation of land or demographic imbalance[2]. Even while the practices have been culturally embedded and socially perpetuated in various regions, polyandry is afforded neither legalistic recognition from the Indian statutory provisions nor from the courts[3].

This gap between customary usage and codified law creates a legal vacuum excluding polyandrous families and especially women and children within the coverage of the rights associated with marriage, inheritance, custody/guardianship, and maintenance. Unlike polygyny, favorably sanctioned in some personal laws like Muslim law, polyandry is not only decodified it is marginalized. The absence of legal sanction means that polyandrous relationships do not fall within the coverage and entitlements enjoyed by other arrangements of marriage. Besides this, the legal context of India—overwhelmingly governed through the Hindu Marriage Act, 1955, and associated legislations—assumes a silent reinforcement of gendered hierarchies through the sanctioning of polygyny and the criminalization or exclusion of polyandry.

This chapter critically deliberates on the legal, constitutional, and socio-cultural facets of polyandry in India. The paper questions the normative assumptions of the legal order regarding marriage, gender, and morality

[1] Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (OUP 2003) 125–127.

[2] GS Ghurye, *Family and Kin in Indo-European Culture* (Popular Book Depot 1955) 89–95; Kailash C Malhotra, Polyandry in India: Demographic, Ecological and Cultural Correlates' (1982) 17(2) *Ethnology* 231.

[3] *Bai Vimlabai v Hiralal Gupta* 1989 SCR, SUPL. (2) 759 1990 SCC (2) 22 (rejecting recognition of polyandrous marriage under Hindu law); see also Hindu Marriage Act 1955, s 11 (void marriages).

and tries to probe the question of why the legal order remains silent on recognizing polyandry and whether this silence is the outcome of patriarchal legal art or omission. By reference to customary practices, constitutional equality mandates, and comparative legal models, the research tries to answer the impact of this silence and construct a model of inclusive marital jurisprudence that accounts for various familial arrangements.

Systemic Legal Inconsistencies

Polyandry in India remains in a condition of legal invisibility since no personal law—Hindu, Muslim, Christian, Parsi, or even the secular Special Marriage Act—acknowledges it as a legal form of marriage. This statutory denial of recognition denies women in such unions marital status and thus excludes them from demanding spousal maintenance, divorce, or restitution of conjugal rights. The issue is aggravated in issues of inheritance and right to property: whereas the Hindu Marriage Act grants legitimacy to children of void or voidable marriages only in the context of two-party marriages, it leaves children of polyandrous marriages in a state of judicial limbo. In the same vein, women in such unions have no right to claim succession rights under the Hindu Succession Act or similar laws of inheritance. Maintenance and welfare benefits are also strictly limited. Section 125 of the Code of Criminal Procedure, which provides for maintenance on behalf of legally married wives, does not apply to polyandrous wives, thus denying them and their children welfare allowances, pensionary benefits, and claims on maintenance. Moreover, there are contradictions within criminal law: Section 494 of the Indian Penal Code makes bigamy both for men and women a crime, but whereas men have the protection of personal law exceptions allowing polygyny under Muslim law, women in polyandrous marriages run the technical risk of prosecution even though they are acting within customary practice. Additional gaps emerge in guardianship and custody legislation because laws like the Guardians and Wards Act assume a single legally valid father. This raises deep ambiguities in determining paternity, claims for guardianship, and custody battles for children of polyandrous marriages. Even constitutional promises of equality, non-discrimination, and dignity under Articles 14, 15, and 21 cannot be enforced since invoking them assumes legal acknowledgment of the relationship paradox of rights in theory but in practice, impossible to invoke. Matters are made worse by the fact that Indian courts have exercised judicial restraint, refraining from building consistent jurisprudence on polyandry. Though live-in

relationships have been given scant recognition by the Protection of Women from Domestic Violence Act, courts have avoided applying the same protection to polyandrous unions, leaving their fate at the discretion of judges and entrenching uncertainty in the law.

Historical and Anthropological Context of Polyandry in India.

Polyandry, even though not prevalent in Indian culture, has found existence in localized and exceptional cultural contexts[4]. Anthropologists show us that fraternal polyandry—brothers having a common wife—used to exist among the people of the Himalayas like the Kinnauris and Jaunsaris and the Tibetans of Ladakh, mostly to keep the landholdings intact and to prevent the division of the ancestral estate in economically peripheral contexts. The Toda people of Tamil Nadu and the Nairs of Kerala also used to have practices of polyandrous marriages documented but usually combined with matrilineal and visitation systems that subvert the prevailing customary norms of marriage embodied in the legal topology[5].

This mythic precedent also occurs in the epic Mahabharata in the form of the union of Draupadi with the five Pandava brothers and comes forth as the first literary account about fraternal polyandry in the Indian tradition[6]. Mythical or not, such legends indicate the cultural memory and symbolic legitimation of polyandrous arrangements in ancient Indian culture[7]. But colonial legal codifs and post-Independence legislative changes directed them toward normalized standards of monogamy grounded on Victorian morals and Brahmanical patriarchalism.

Conventional polyandrous marriages have survived in the modern world primarily as oral informal customary practices. Informality results in deprivation of conjugal rights, spousal status, and succession rights to women and children in families of this kind and so they become legally invisible. In this way, while polyandry still coexists in practice within certain socio-cultural contexts, it provides neither legal validity nor protection and a significant disarticulation between statutes and social practices prevails.

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[4] Patricia Uberoi, *The Family in India: Beyond the Nuclear versus Joint Debate* in Veena Das (ed), *Handbook of Indian Sociology* (OUP 2004) 235.

[5] David G Mandelbaum, *Society in India* (Popular Prakashan 1970) vol 1, 97–100 (on the Toda).

[6] *Mahabharata*, Book 1 (*Adi Parva*), critical edition (Bhandarkar Oriental Research Institute 1933–66), ch 185.

[7] Alf Hiltebeitel, *The Cult of Draupadi* (University of Chicago Press 1988) 55–60.

Legal Framework and Constitutional Silence.

The Indian legal system clearly establishes monogamy as the norm in private and secular marriage law. According to the Hindu Marriage Act, 1955 (HMA), a valid Hindu marriage mandates that "neither party has a spouse living at the time of the marriage."[8] Bigamy is made a criminal offense under Section 17 of the HMA read with Sections 494–495 of the Indian Penal Code, 1860 (IPC)[9]. Likewise, the Special Marriage Act, 1954, that prescribes inter-faith and civil marriages, presumes monogamy[10]. Polygyny is, however, allowed in Muslim personal law subject to certain conditions, thus exposing the selective embrace of non-monogamous customs. Polyandry, though, does not find mention in any legislative provision. This silence generates a legal void. Such women are not accorded marital status, inheritance rights, or access to maintenance, and their children risk being treated as illegitimate[11]. The Hindu Succession (Amendment) Act, 2005, which conferred daughters' equal coparcenary rights, assumes a monogamous system and does not imagine polyandrous family units[12]. Judicial articulations too witness evasions: courts have struck down such unions instead of conferring rights.

From a constitutional perspective, this exclusion is in violation of Articles 14, 15, and 21 of the Constitution of India[13]. The Supreme Court has consistently held that the right to life under Article 21 encompasses dignity and autonomy[14]. In Navtej Singh Johar v Union of India, the Court noted that constitutional morality demands respect for plural intimate relationships[15]. Polyandry still remains outside of these safeguards, an indication of the rift between real lives and legal principles.

[8] Hindu Marriage Act 1955, s 5(i).

[9] Hindu Marriage Act 1955, s 17 read with Indian Penal Code 1860, ss 494–495.

[10] Special Marriage Act 1954, s 4.

[11] NK Jain, 'Polyandry in India: A Study of Customary Marriages' (1992) 22(2) *Indian Anthropologist* 25.

[12] Hindu Succession (Amendment) Act 2005.

[13] The Constitution of India 1950, arts 14, 15, 21.

[14] *Maneka Gandhi v Union of India* AIR 1978 SC 597.

[15] *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

Socio-Cultural Facets of Polyandry.

Polyandry, though legally insensible, has previously existed in India in certain socio-cultural contexts. It's not just a marital deviation but an entrenched solution to environmental, economic, and cultural stresses.

Prevention of land fragmentation is one of the strongest socio-economic justifications for polyandry. In resource-poor areas, especially the Himalayas, fraternal polyandry—that is, brothers sharing a single wife—prevents ancestral estates from being fragmented and preserves family wealth. Among the Jaunsaris and Kinnauris of Uttarakhand and Himachal Pradesh, and the Ladakhis of Tibet, this system has been found as an intelligent response to economic and geographical limitations. It helped families save limited agricultural resources and prevent the division of landholdings among several heirs. It also cut down expenses connected with marriage, such as dowry, and hence made it a pragmatic social institution in peripheries. Among the Tamil Nadu Todas and Kerala Nairs, polyandrous practices tended to be linked to matrilineal or matrilocal systems. Lineage and inheritance passed through the female line in these societies, placing women in relatively more control of household arrangements than in patriarchal kinship systems. Polyandry in these circumstances was at times accompanied by "visitation marriages," in which the men visited the wives within matrilineal homes, indicating a less rigid and more asymmetrical model of family life. Anthropological accounts indicate that these practices, not universal in all regions but similar throughout, had the unifying factor of defying strict patriarchal conventions entrenched in dominant marriage laws. Polyandry also has symbolic and mythological expression in Indian tradition. The Mahabharata notoriously tells the story of the marriage of Draupadi with the five Pandava brothers and is the earliest literary evidence of fraternal polyandry in the Indian cultural imagination[16]. While mythical, this precedent shows that polyandry was not altogether foreign to Indian traditions but found a place in its multi-partite marital history, possessing symbolic legitimacy even if deprivileged by codified law in later times.

From a socio-cultural perspective, polyandry serves as both a practice of survival and as a negotiation site. It occurs in situations where ecological scarcity, demographic imbalance, or customary notions mandate deviations in marriage structures. Yet, in spite of its inherent reason, polyandry persists in being stigmatized within hegemonic Indian society, where patriarchal and heteronormative notions position it as deviant. This

[16] Sukumari Bhattacharji, *Legends of Devi* (Orient Blackswan, 1995), pp. 132–137.

yields an ongoing tension between customarily lived practice and legal-cultural recognition: whereas some communities persist in practicing polyandry as a utilitarian practice, its absence from the dominant discourse makes their practices further entrenched in marginality and invisibility.

Gender, Patriarchy, and Legal Invisibility

Feminist scholarship proposes that the erasure of polyandry is intentional and based on the patriarchal structuring of marriage. Catherine MacKinnon also famously claimed that law represents "male" interests by codifying gendered hierarchies[17]. Polyandry upends these hierarchies by allowing women a central position in kinship and reproduction, challenging male control of lineage and property. That accounts for why polygyny has selective sanction and polyandry is actively repressed[18].

The result of this legislative invisibility is a type of structural violence. Johan Galtung defines structural violence as the damage inflicted when social structures deny people their basic needs[19]. In polyandry, women are deprived of conjugal rights, claims to inheritance, spousal status, and dignity of social legitimacy. Absent legal recognition, they remain ineligible to claim state benefits like maintenance under Section 125 of the Criminal Procedure Code or protective reliefs under the Domestic Violence Act, which assume a legally recognized marital or marital-like union[20]. Their children are also discriminated against. Even though there is constitutional protection under Articles 14 and 15, their legitimacy as well as their right to inheritance is usually challenged since statutory law only acknowledges marriage adhering to codified norms[21]. Even though the Supreme Court has made efforts to expand the ambit of protection in judgements such as Indra Sarma v VKV Sarma, the acceptance of relationships other than monogamous marriage continues to be subject to judicial discretion and not statutory certainty[22].

As Flavia Agnes argues, Indian family law remains committed to patriarchal ideals of marriage by favoring male-centered frameworks.

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[17] Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard UP 1989).

[18] Flavia Agnes, *Family Law: Volume I and II* (OUP 2011).

[19] Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 Journal of Peace Research 167.

[20] Code of Criminal Procedure 1973, s 125; Protection of Women from Domestic Violence Act 2005.

[21] Constitution of India 1950, arts 14–15; see also Hindu Marriage Act 1955, s 11 (void marriages) and s 16 (legitimacy of children of void and voidable marriages).

[22] *Indra Sarma v VKV Sarma* (2013) 15 SCC 755.

Even the kind of reform embodied in the Hindu Succession (Amendment) Act 2005, which accorded daughters coparcenary rights on par with males, functions within a paradigm that assumes monogamous, heteronormative, and male-headed family units[23]. The refusal to recognize polyandry therefore illustrates how legal frameworks serve to safeguard dominant patriarchal interests while keeping alternative kinship models hidden.

Towards an Inclusive Marital Jurisprudence - Suggestions.

Minimizing the gap between code and custom necessitates a reconsideration of how Indian law thinks about marriage itself. The difficulty is not just the lack of legal validation for polyandry but also the entrenched patriarchal presuppositions that support current marital jurisprudence. The inclusivist solution needs to aim at protecting individual rights on the one hand and honoring cultural diversity on the other.

The starting point is to acknowledge customary marriages. Numerous rural and tribal societies still maintain polyandry as a solution to ecological and economic conditions like land fragmentation or population imbalance. But since these unions are not recognized in statute law, women and children in such households are denied even minimum legal rights. Amending the Hindu Marriage Act, 1955 or enact a standalone legislative framework that includes provision for tribal customary practices would lend legitimacy and ensure that such marriages are not obliterated from the legal system. An important corollary is the legitimacy of children born out of polyandrous marriages. Existing legal structures function with hard-and-fast definitions of "valid marriages" and risk leaving children out of non-recognized marriages open to stigma and exclusion from inheritance rights. Equitable jurisprudence, therefore, has to place first the best interests of the child so that legal legitimacy is not premised on compliance with narrow marital forms. The law must guarantee that children must not be the bearers of discriminatory mindsets towards their parents' marital form.

Every bit as important is gender-fair application of principles of equality. Articles 14, 15, and 21 of the Constitution encapsulate the promises of equality, non-discrimination, and the right to dignity. Women in polyandrous marriages are denied these rights on a regular basis because

[23] Hindu Succession (Amendment) Act 2005. Sec. 6. (Ori. Act 1956)

there is no legal recognition of such marriages. To fill this void, legislation and judicial interpretation need to unequivocally declare that women in polyandrous marriages are not different from women in other marriages and therefore are to be given the same benefits and protections. Denial of such rights not only consolidates structural inequalities but also ensures gender-based injustice. Reform has to be context-related too. Polyandry among tribal and Himalayan people is not a question of individual choice but usually an ecological and socio-economic adaptation. Policies must hence be attuned to these facts and not try to prescribe a one-model marriage based on urban, patriarchal, or monogamous standards. A culturally sensitive approach will enable the state to honor diverse family forms and ensure women's rights and dignity are protected. Lastly, the judiciary also plays a pivotal role in crafting inclusive marital jurisprudence by way of constitutional interpretation. The judgment in Joseph Shine v Union of India, which invalidated provisions for adultery on grounds of discrimination, demonstrates the power of constitutional morality as a directive principle. Courts have to use the same logic when faced with issues surrounding non-normative unions like polyandry so that personal rights are not made a sacrificial offering at the shrine of archaic moral codes. Through expansive readings of constitutional promises, the judiciary can supplement legislative changes and guarantee marginalized forms of marriage are not pushed into invisibility.

In total, the transition towards an inclusive marital jurisprudence needs to be through a multi-pronged strategy: legislative acknowledgment, protection of the rights of children, gender-just enforcement of constitutional principles, culturally sensitive protections, and progressive judicial interpretation. Collectively, these measures can convert Indian family law into a legally framed system that is both socially responsive and rights-oriented, so that women in polyandrous marriages and their families are not deprived of dignity, legitimacy, and justice anymore.

Conclusion

Polyandry continues to be a lived social fact in some Indian tribal and rural societies, but it remains legally invisible. This intentional silence of the law is a symptom of patriarchal underpinnings of codified marital systems, which accede to male-centered forms like monogamy and, in some societies, polygyny, over arrangements that locate women in centrality. The outcome is a persistent gap between code and custom, where women and children in polyandrous marriages are deprived of recognition, protection, and the dignity that the Constitution promises.

Working with constitutional principles of equality, dignity, and non-discrimination, as well as feminist critiques of law as an instrument of patriarchal reinforcement, renders it understandable that invisibility appears as a species of structural injustice. Comparative lessons also reveal that the dismissal of various kinship frameworks not only silences vulnerable populations but also solidifies the ascendance of heteronormative and patriarchal norms in the legal sphere. Closing this legal gap does not imply the state has to encourage or institutionalize polyandry. Instead, it implies extending legal protection to those who already exercise it, so that women are not denied conjugal rights, children are not stigmatized or excluded from inheritance, and communities are not criminalized for adhering to established cultural practices. A rights-based, culturally nuanced approach can bridge the gap between codification and customs, sustaining both gender justice and constitutional morality.

Finally, the acknowledgment of polyandry in the law is not so much about validating a marital structure as it is about validating the autonomy, dignity, and equality of women. Through this silence breaking, Indian family law can move towards a more inclusive, plural, and equitable jurisprudence—one that better represents the lived lives of its citizens than the patriarchal heritage of its past.

3.
Posthumous Patriarchy: Discriminatory Devolution of Hindu Women's Property

Mr. Harshada Rajput
Assistant Professor,
Vivekanand Education Society's College of Law,
Chembur Mumbai.

Abstract
The Hindu Succession Act of 1956 was created to codify and modernize the Hindu law of inheritance and succession. The Act has also been a very progressive legislation in relation to gender equality as it gives daughters equal rights to paternal property. However, there is still a patriarchal slant evident in Section 15(2)(b) of the Act in relation to the management of a Hindu woman's self-acquired property or inherited property. This provision states, in the absence of children who are descendants of the woman, any property that a woman possess will devolve to the heirs of her husband and will not fall back to the family of her birth. This provision begs the question: Why does the property that a woman acquires revert to her husband's family instead of her relatives by blood?
Although there has been some advancement in Hindu inheritance law, the provisions in the Hindu Succession Act, 1956 especially Section 15(2) (b), continues to be steeped in outdated patriarchal paradigms. Section 15 (2)(b) provides the following: where a Hindu woman died intestate and childless, property which the acquired-on death or will devolve, not to her natal family, but to the heirs of her husband. Not only and regrettably, does this rule create a distinction on the basis of gender and family topology, but also unjustifiably truncates the natural rights of women and their natal family by denying any interest in her estate when the woman has been separated from her marital home.
In this chapter, I critically assess the discriminatory structure of Section 15(2)(b) and demonstrate that it operationalizes an indirect form of patriarchal conditioning, through which the pool of a woman's property is funneled along male kinship lines without reference to a woman's previous identity, agency, and family relationships. This provision not only undermines the constitutional guarantees of equality in Articles 14 and 15

but is steeped in the consistent notion that women are and will forever remain, members of her husband's family. This provision is highly discrepant; where comparable limitations do not apply to Hindu men, who enjoy continual testamentary or intestate control, despite the source of their inheritances.

Keywords*: Hindu Succession Act, gender discrimination, inheritance law, patriarchal property norms, women's rights.*

Fractured Legacies: Gendered Fault Lines in Hindu Succession.

Inheritance law serves not just as a technical framework for distributing property but also as a reflection of society's underlying beliefs about gender, lineage, and membership. Across India, whilst the Constitution guarantees equality, and on occasion judiciary enhances gender justice guarantees, family and succession laws reflect an enduring legacy of patriarchal social mores. The Hindu Succession Act 1956, whilst considered a momentous reform to antiquated Hindu personal law, contains elements that restrict a Hindu woman's rights over her property, especially when the deceased did not make a will. The most alarming is Section 15(2)(b), which provides that a woman's property, inherited from her husband or husband's father, if there are no children, will go to her husband's heirs rather than her natal family.

This provision assumes the woman, as a widow, continues to be more socially and legally connected to her husband's family than to her family of origin, even both in the absence of direct heirs. The social and legal presumption operates to maintain patriarchal continuity of ownership and by treating the woman as merely a bridge, rather than full owner of the inherited property. Also, unlike Hindu men who face no analogous restrictions, women have a conditional and gendered disposition of their interests in property. The rule does not take into account changes in circumstance such as estrangement, widowhood, remarriage or stronger bonds to family of origin – placing this fiction of the woman's status entirely in a posthumous light and denying the widow autonomy as a woman in her own right and whose value or status, in legal terms, is still associated with her marital status. The regulation found in Section 15(2)(b) is especially problematic as it is contrary to the constitutional spirit of Articles 14 and 15 relating to the right to equality before law and the right against discrimination on grounds of sex. It also goes against the principle of equality in the Hindu inheritance law that has apparently been granted to daughters through the 2005 amendment to the Hindu

Succession Act that permitted daughters to be equal coparceners. However, provisions on the devolution of a woman's intestate property, especially one that she has inherited from her husband, still reproduce the historical invisibilities of women as economic rights holders.

This chapter, like the rest of the text, attempts to untangle the assumptions underpinning Section 15(2)(b) by contra-structuring it within a bigger historical and jurisprudential framework. It is acknowledged that this provision is discriminatory and engages with some of the legal narratives around non-discrimination, from agency decisions to judicial pronouncements and comparative models, while also engaging in constitutionally based interpretation. The argument here is that the effect of Section 15(2)(b) is to privilege a form of posthumous patriarchy in which even in death, a woman's status in economic terms is linked to her husband's familial line.

This chapter adds to the growing feminist body of scholarship in which policymakers and comparative law scholars are interrogating gendered understandings in personal law. It offers possibilities for reforming succession law that are gender just, though framed in ways that reflect changing forms of familial relationships and are consistent with the constitutional ideal of substantive equality.

From Customary Subordination to Statutory Patriarchy

The provisions currently in force in Section 15 of the Hindu Succession Act, 1956, were influenced by bilateral norms originating from historical patriarchal customs inherent in classical Hindu law. Before codification, the two major schools, namely Mitakshara and Dayabhaga, were responsible for the rules of inheritance amongst Hindus. Both schools offered limited proprietary rights to women based on her relational status as a daughter (Originally born), wife, or widow and viewed the woman more as a channel through which property possibly passed rather than an absolute owner of the estate[1].

Under Mitakshara law, the woman cannot qualify as a coparcener and the rights of the woman in family property had limited rights. The woman would only qualify for a limited estate known as a "widow's estate," which upon death would revert to reversioners of her husband's descendants[2]. The Dayabhaga rules were generally less restrictive particularly by

[1] Partha Priya Das, Moni Deepa Das & Pompi Das Sengupta, *A Comparative Analysis of Dayabhaga and Mitakshara Systems in the Context of Women's Property Rights*, Afr. J. Biomed. Res., Vol. 27(5s), Dec. 2024, at 515–525.

[2] Id.

providing some limited testamentary rights to women, however in these rules, like Mitakshara succession to women was always secondary to male heirs[3]. In 1937, The Hindu Women's Right to Property Act recognized a widow's right to inherit property from her husband for the first time in statutory law. Despite its progressive nature, it only recognized limited rights (life interest) that would last until the widow's death or remarriage, at which point the property would revert to the husband's heirs[4]. The Hindu Succession Act 1956 was heralded as a law that would unify and rationalize Hindu succession law, open the path for gender equality in inheritance, and even prohibit disinheritance based on gender. When debating the bill in parliament, however, lawmakers voiced concerns about not allowing property inherited by a Hindu woman from her husband to "divert" to her family at her death[5]. This gave rise to the "source-based theory" of inheritance that held that similar types of property should devolve based on where it came from; whether inherited from the natal or marital family. This logic, which continues to permeate Section 15(2), is clearly patriarchal as it continues to uphold male lineage and ensures that property—even property owned by a woman—continues to flow in her husband's family[6].

By framing these legislative options as such, these laws display a deemphasis of the woman's independent identity, and therefore his right as an individual to designate his nacelle, and/or define the natal family as the default heirs from which they enter legal relations. The source distinction, while facially neutral, threatens a clear discrimination against female empowerment about succession by failing to recognize women as full legal subjects allowed to determine direction in her estate or have the same legal relationship with her natal family. The structural inequality present in all these laws, at times enshrined in code after independence, will continue to reinforce patriarchal control, even in death, whereby a woman's identity—and assets—reside, ultimately, in her husband's family.

[3] John Duncan M. Derrett, *Essays in Classical and Modern Hindu Law*, Vol. II, Brill (1977), pp. 201–204.

[4] Act No. XVIII of 1937, received assent on April 14, 1937.

[5] Parliamentary Debates, Lok Sabha, Vol. 4, 1955, discussing Hindu Succession Bill (Bill No. 13 of 1954).

[6] Law Commission of India, *204th Report on the Hindu Succession Act, 1956: Section 15*, 2008, at p. 6.

Critical Analysis of Section 15.

Section 15(2)(b) of the Hindu Succession Act, 1956 stipulates that any property that a Hindu woman inherits from her husband or father-in-law shall devolve - upon her death without children - to the heirs of the husband and not her natal family. This part of the act represents a deeply engendered patriarchal bias, as the woman is not allowed to have her own posthumous property rights that are not linked to the husband's family lines - it denies the woman acknowledgement for her own identity or natal links[7].

At its base, the provision suggests that even when both husband and wife are dead, the property that the woman would inherit from her marriage must pass back to the husband family. The reasoning, it appears, is to stop the property from "leaving" the husband line. This interest in keeping property in male lineages supersedes the interests in gender equality and fairness. It also keeps asserting to men that the woman is just a bolster for a husband - not a legal person with any testamentary dignity.

This clause is cruelly disadvantageous for widows with no children. If a woman inherits property from her husband, then dies without a will, not only do her own parents and siblings get excluded from the entire succession, but even if they are the only surviving members of her family[8].The clause does not take into consideration the fact that for many women, especially those childless or in breach with in-laws, their familial networks may have shifted in adult life, they will often remain entwined with their natal family to death.

The asymmetry between male intestate succession and female intestate succession is stark. Male Hindu's property— whatever the source— devolves in a gender-neutral order (first to Class 1 heirs, which include son and daughter, then to other family members)[9]. There's no clause for male succession due to the source of inheritance. In many respects, a woman receives eclipsed rights over the property she herself receives, based on who may inherit[10].

This distinction undermines the economic autonomy of Hindu women. It disallows equal status in property devolution and symbolizes a dismissal of their standing as mere legal subjects vis-à-vis a patriarchal order. It

[7] Hindu Succession Act, 1956, Sec. 15(2)(b).

[8] Law Commission of India, *204th Report on the Proposal to Amend Section 15 of the Hindu Succession Act*, (2008).

[9] Hindu Succession Act, 1956, Schedule. – Class I and Class II heirs.

[10] Archana Parashar, "Women and Family Law Reform in India: Uniform Civil Code and Gender Equality", Sage (1992).

ignores the constitutional protections in Articles 14 and 15 prohibiting sex discrimination[11], and it ignores the spirit of judicial developments such as Vineeta Sharma v. Rakesh Sharma, where the Supreme Court recognized women have full coparcenary rights in ancestral property[12].

In effect, Section 15(2)(b) is not simply a technical rule of law. It is a remnant of a time where a woman's identity was so completely engulfed in her family with a husband that the dystopian notion of posthumous patriarchal governance was even imaginable. Its existence still implies, as much as it is outdated and contrary to our constitution, that Hindu women are denied the dignity of equal treatment, even after they die. Legislative intervention is not only constitutionally justified, but also morally essential to ensure the inheritance law keeps pace with women's lives, aspirations, and rightful place in their natal family and marital family.

Judicial Interpretations and Critiques.

Courts in India have often relied on a traditional interpretation in the judicial pronouncement of Section 15(2)(b) of the Hindu Succession Act. They have likewise proven more passive in their deference to the legislative intent of the Act, limiting themselves to either textual interpretation without re-interpretation into transformative or actionable values consistent with constitutional objectives. There continues to be a clear trend in judicial reasoning toward maintaining the source-based resale theory of devolution, even when the chain of both entitlement and transfer demonstrate marked gender bias.

In Omprakash v. Radhacharan, the Supreme Court held that property acquired by a Hindu woman by inheritance from her husband must return to his relatives upon her death provided she had not borne any children[13]. The reasoning was that Section 15(2)(b) is a specific quantity of property designated for the legislative scheme outlined in Section 15(1). Therefore, it must be allowed its full unfolding as a type of devolution of property interest. While in the case at hand the widow had no surviving relative because died not making someone her executor, instead she just had the concern of her natal family, the Supreme Court ruled that the property could not devolve upon the natal family, upholding a strict textual approach over equitable or purposive considerations.

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[11] Constitution of India, Articles 14 and 15.

[12] *Vineeta Sharma v. Rakesh Sharma*, AIR 2020 SUPREME COURT 3717, AIRONLINE 2020 SC 676

[13] *Omprakash v. Radhacharan*, (2009) 15 SCC 66.

Similarly, in Bhagat Ram v. Teja Singh[14], the Punjab and Haryana High Court reiterated that the legislative intention underlying Section 15(2)(b) was meant to enable property inherited from one's husband or father-in-law to remain within the husband's lineage. The question of the legitimacy of such an inference in light of changing constitutional values, or social realities, particularly regarding women's autonomy and post-marital identity, was not considered by the Court.

The cases I reviewed indicate a more systemic judicial reluctance to challenge gendered assumptions in personal laws using the gateway of Articles 14, 15, and 21. Constitutional arguments, in such cases, have been largely absent in litigation around Section 15. Although Article 15(1) specifically prohibits discrimination on the ground of sex and Article 14 guarantees equality before the law, the courts have resisted invoking them to interrogate the structural gender bias that informs the source-based classification.

A possibly illustrated opportunity is to engage with the ongoing dialog concerning "constitutional morality". The Supreme Court has referred to the ideas of "constitutional morality" multiple times in many cases including Navtej Singh Johar[15] and Joseph Shine[16], and in such cases, the Court used constitutional morality to carry out transformative rethinking to enact change to personal laws that underpin patriarchal ideas. The application of transformative principles may be lagging in the area of succession because judicial reasoning has assumed that the Parliament is strictly recognized as the legislature and will only change laws pertaining to succession where judges may feel that changes may be made to the curriculum, also owing to the prevailing judicial premise that only Parliament may reform legislation.

Another area of critique is the fact that the provision was not considered in conjunction with Article 21, which is the right to dignity or life. For example, a widow, who has lived and relied on her natal family after her husband passes away, may be removed legally from that family for inheritance purposes, notwithstanding that they were her only social support. Surely, this result not only deprives her financial security, but also

[14] AIR 1999 SUPREME COURT 1944, 1999 (4) SCC 86, 1999 AIR SCW 1626

[15] *Navtej Singh Johar v. Union of India*, AIR 2018 SUPREME COURT 4321, AIR 2018 SC(CRI) 1169, (2018) 4 MAD LJ(CRI) 306.

[16] *Joseph Shine v. Union of India*, AIR 2018 SUPREME COURT 4898, 2019 (3) SCC 39, 2019 CRI LJ 1, 2018 ALLMR(CRI) 4065, (2018) 11 SCALE 556, (2018) 252 DLT 388,

reinforces that she no longer has an identity and should rely on her family—in itself a patriarchal presumption.

To sum up, the judicial approach to the interpretation of Section 15(2)(b) remains conservative, formalistic, and detached from the current constitutional jurisprudence on gender equality. The absence of judicial recognition of the need to use Articles 14, 15, and 21 when determining personal law cases involving succession contributes to this kind of suspended form of discrimination and collectively denies Hindu women full recognition as independent legitimate inheritors on par with men.

Comparative Legal Approach

Across the world, succession laws have been more and more directed towards gender equalization (particularly in relation to widows' property rights). In marked contrast, Section 15(2)(b) of the Hindu Succession Act, 1956 in India, retains a patriarchal system where a Hindu woman's inherited property from her husband passes—if there are no children—to the heirs of her husband, not her natals. Significantly, this is inconsistent with comparative jurisdictions that have dismantled gendered and lineage-based successor rights.

Sri Lanka maintains a Roman-Dutch common law foundation for succession. A widow's property - derived from either her original family or marital family - devolves equally among her heirs based on proximity, rather than based on marital family. Likewise, Nepal's Muluki Civil Code, 2018 abolished discriminatory laws and adopted a gender-neutral approach where both daughters and sons inherit equally, and although property a woman receives in inheritance is inherited by her legal heirs, it is not solely restricted to her husband's line[17].

The Inheritance and Trustees Powers Act, 2014 in the UK protects a woman's kinship rights by moving away from the spousal claim under intestacy without issue and devolution by reference to more immediately family ties[18]. The state adjudicated male primogeniture unconstitutional in customary law in South Africa in Bhe and Others v. Magistrate, Khayelitsha and Others, by ruling that the right to equality includes inheritance rights, that lineage-related customs should not ground widows'

[17] Weena Pun, *Daughters to Get Equal Share of Parental Property*, Kathmandu Post, Nov. 24, 2014

[18] Law Commission of England and Wales, *Intestacy and Family Provision Claims on Death*, Law Com No. 331 (2011), p. 17.

rights[19]. Both of these jurisdictions note that ownership is individual, and they have gender-neutral rules on succession, thereby demonstrating an extensive disparity with India's source-based doctrine under Section 15(2)(b) which presumes that a Hindu woman is a holder of her husband's estate as she is only that, a channel for property succession, not its owner. Meanwhile, there are feminist-led legal reforms underway globally that want to put an end to these structures and to recognize widows as a full legal person with the ability to transmit property without placing her husband's line above hers. Indian law must change to align with these global best practices and align with core and constitutional principles, most notably Articles 14 and 15, so that gendered injustices are removed from the current succession regime.

Gaps, Silences, and Practical Consequences.

The inheritance provisions contained in Section 15(2)(b) of the Hindu Succession Act, 1956, while ostensibly neutral, create disproportionately harsh consequences for Hindu women. Under the law, if a woman inherits property from her husband, or from her father-in-law, the property descends when there are no children to the heirs of her husband and not to the heirs of the woman herself. In a convoluted way, the law reinforces a centuries-old patriarchal assumption, namely that a woman is a channel for property between men and is not an independent owner of property. The provision I discuss does not anticipate contemporary realities such as estranged marital families, second marriages, or a woman who, having been widowed early in life, returns to and is supported by a natal family. The law constructs a legal fiction that maintains kinship duties in favour of the husband's lineage, when there is no longer any substantive social relationship between the woman and that lineage on her death.

Many real cases demonstrate this issue. In the case of Omprakash v. Radhacharan, the Supreme Court applied the purposive interpretation of Section 15(2)(b)[20]. This allowed the ruling that even though the deceased woman had inherited property from her husband, the property from the husband would revert to his heirs even if the woman had been with her natal family for years with no children. The decisions suggest reticent to appropriate in the language of the statute to protect the tests' reasonable expectation to have property revert when it is clearly contrary to gender

[19] *Bhe and Others v. Magistrate, Khayelitsha and Others*, CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC)

[20] *Omprakash v. Radhacharan*, (2009) 15 SCC 66

justice under Article 14 and protection under Article 15 of the Constitution. In practices, result in disputes in the inheritance of property, often emotionally charged for grieving siblings, over property, when there are distant in-laws. Women in their final years, who have been paid attention to companionship as part of their brothers' or sisters' families can find that their property can go to brothers-in-law or nephews-in-law who had no relationship in their lives[21].

Significant socio-legal disempowerment has resulted from this legislative silence outside of the courtroom. The fact that their natal family may not receive their husbands' property after their deaths is something that many Hindu women are still ignorant of. Insufficient paperwork or the failure to transfer titles are frequently the results of this ignorance combined with the social shame associated with talking about property rights, especially in rural regions. In severe situations, women refrain from registering inherited assets in their own names out of concern that they may lose control or be disposed of by their in-laws after their deaths. In addition to reducing their economic independence, this has an impact on the natal family's ability to transfer wealth from generation to generation[22]. Furthermore, there is no legislative provision requiring notice or consent from the woman's family before such property is transferred, nor any mechanism for testamentary override unless a formal will is created—which few women execute due to lack of access, education, or awareness.

These issues are worsened by the lack of proactive legislative reform. Though proposals have come up occasionally, such as suggestions from the Law Commission and women's rights activists to change Section 15, no binding legislative change has happened so far. The silence surrounding this provision is not just a coincidence; it shows a deeper discomfort with changing gendered inheritance norms. The failure to closely examine and update Section 15(2)(b) is a clear example of how legal inaction can reinforce social inequality and deny dignity and agency to women, even after death.

Recommendations and Reform Proposals

There should be an immediate legislative review of the current provision included in Section 15(2)(b) of the Hindu Succession Act, 1956. The

[21] Gautam Bhatia (Guest Post by Venkata Kartheek Vegesana & Avani Vijay), *Guest Post: Reinterpreting Section 15 of the Hindu Succession Act*, *Constitutional Law and Philosophy* blog (May 2, 2025)

[22] Sukanya Mukherjee, *An Overview of Hindu Women's Right to Property*, Visiting Faculty, Sister Nivedita University, Kolkata

section perpetuates patriarchal kinship patterns and ignores the changing socio-familial reality of Hindu women in modern India by stating that property inherited by a woman from her husband or father-in-law passes to her husband's heirs (if no children are born). It is strongly advised that Section 15(2)(b) be completely removed or significantly amended in order to guarantee that a woman's estate, regardless of its source, devolves in a way that is compatible with the gender equality principle. In accordance with Section 8 of the same Act, which does not impose any source-based restrictions on male intestate succession, succession laws ought to be gender-neutral and source-neutral[23].

In its 207th Report from 2008, the Law Commission of India suggested that Section 15 be reviewed because it was "based on a discriminatory understanding of women's identity as subsidiary to their marital families.[24]" Although it is typically constrained by the wording of statutes, the judiciary must also interpret legislation in the context of constitutional values. When necessary, it may read down the discriminatory provisions of Section 15(2)(b) or provide reform guidance. Even though courts, such as in Omprakash v. Radhacharan, have so far taken a textual approach, the increasing usage of constitutional provisions, especially Articles 14 and 15, provides a solid basis for future judicial review that could invalidate or reinterpret discriminatory sections[25].

The application of Section 15(2)(b) faces judicial limitations because its text presents clear boundaries yet judges emphasize its unfair aspects. The Supreme Court in Omprakash v. Radhacharan recognized the severe outcome of taking away a woman's property rights from her natal family who possibly cared for her during her last years but ultimately upheld the statutory wording[26]. The court in Bhagat Ram v. Teja Singh acknowledged the unjust situation but chose not to interfere with the legislative framework[27]. The court decisions demonstrate how judges face limitations when the legislative language presents clear directions. The legal community and courts now support the idea of examining personal laws based on constitutional moral principles. Feminist legal experts

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[23] Nandini Chatterjee, "Property and Gender: Inheritance Reforms in India," *Indian Law Review*, Vol. 3, Issue 2 (2019), pp. 132–134.

[24] Law Commission of India, *207th Report on the Property Rights of Women: Proposed Reforms under the Hindu Succession Act, 1956*, August 2008.

[25] *Omprakash v. Radhacharan*, (2009) 15 SCC 66;

[26] *Id.*

[27] *Bhagat Ram v. Teja Singh*, AIR 1999 SUPREME COURT 1944, 1999 (4) SCC 86, 1999 AIR SCW 1626

demonstrate that the equal treatment provisions in Articles 14 15 and 21 establish solid grounds to fight against inheritance laws which discriminate against women. Courts will possibly use constitutional provisions to modify discriminatory clauses through reading down or reinterpretation actions in the future.

The matter has received partial attention from legislative authorities and policy makers. The Law Commission of India issued its 207th Report in 2008 which focused on Section 15(2) reform. The Commission suggested that women who receive inheritance from their husbands or fathers-in-law without children should have their property divided equally between their birth family and their marital family. The proposed change remains unimplemented because no official legislative modification has occurred thus far[28]. A private member's bill named Hindu Succession (Amendment) Bill, 2021 entered the Lok Sabha through MP Dr. Shashi Tharoor's introduction in 2021. The proposed legislation aims to eliminate gender bias in intestate succession cases while modifying Section 15 to establish more equal property distribution rules when women die without children. The bill failed to advance past its initial parliamentary introduction stage.

Civil society organizations and legal education programs must fulfill an essential function because legislation progress remains slow. Women who learn about their legal rights to make wills and protect property documentation through awareness campaigns will receive partial protection against existing legal disparities. The establishment of legal aid clinics combined with paralegal services in rural and semi-urban locations should enable them to provide testamentary planning advice to women including widows. These solutions serve as temporary stopgaps which primarily address existing problems. The fundamental transformation of Section 15(2)(b) stands essential for India to fulfill both its constitutional duties and international obligations under CEDAW and other treaties[29].

The HSA reform process extends beyond basic procedural justice because it establishes women as complete legal entities whose identities transcend marriage and whose birth associations remain active throughout their lives and whose property should receive equal treatment as male estates. A gender-just inheritance system needs to eliminate patriarchal succession laws while simultaneously recognizing property rights and posthumous autonomy and dignity for women.

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[28] Law Commission of India, *207th Report on the Property Rights of Women: Proposed Reforms under the Hindu Succession Act, 1956*, August 2008.

[29] CEDAW, General Recommendation No. 21: Equality in Marriage and Family Relations, 1994, UN Doc. A/49/38.

Conclusion

The Hindu Succession Act of 1956 sought to advance gender equality, yet it continues to display patriarchal features, especially in Section 15(2)(b). This provision creates an imbalance in succession law by stipulating that property inherited by a Hindu woman from her husband or father-in-law must revert to her husband's heirs in the absence of children. Unlike women, men are permitted to pass on property inherited through his bloodline to his descendants, regardless of its origin. This approach suggests a woman is bound to a husband's family in death, thus, enduring a post-mortem subjugation. This provision leads to deeply unfair outcomes, particularly for childless widows. In the absence of in-laws, a widowed woman may prefer to reside with her family. This disconnect ignores relationships, duty of care, and self-governance in favor of ancient systems of hierarchy that structure inheritance from family.

Given the prevailing jurisprudence on equality and constitutional morality, there is a notable gap between progressive principles and conservative frameworks in legislation, especially concerning court decisions influenced by statutory texts. In seeking justice, the courts have been disappointed to have shifted the balance back to a conservative approach, thus framing attempts toward progressive and meaningful reinterpretation as idle without legislative change.

The time has come for the legislature to revisit and reform this discriminatory provision. Succession laws must reflect not only formal equality but also lived realities and changing family structures. Ensuring that a woman has full and equal say over who inherits her property—irrespective of its origin—is essential to affirming her dignity, autonomy, and legal personhood. Such reform would not only correct a legal anomaly but also move India's inheritance laws closer to the ideals of substantive gender justice.

4.
Rainbow Families and the Child's best interests: a Human Rights - based analysis of adoption laws in India

Ms. Ankita Bhattacharjee
Assistant Professor,
ISBR Law College,
Bengaluru.

Abstract
Today the Constitution of India recognized the LGBTQ+ rights following the case of Navtej Singh Johar v. Union of India (2018), however, when it comes to the country's statutes with respect to adoption laws, the age-old traditional ideas still prevail which favors only heteronormative assumptions that excludes same- sex couples and queer families. While a single LGBTQ+ individual can technically adopt children on their own as per the Juvenile Act, 2015, the law and the guidelines provided under the Central Adoption Resource Authority (CARA) do not permit for joint adoption by LGBTQ+ couples. This legal lacuna eventually perpetuates a systematic discrimination leading to the denial of both LGBTQ+ persons to avail the right to build a family. It also stops children to avail the opportunity from being raised in safe, loving and inclusive homes.
The main issue which persists is the selective invocation of the "best interests of the child" standard, which is often used in the wrong way to stop LGBTQ+ couples from adopting despite the existence of the global empirical evidence which clearly suggests that children raised by the same-sex parents grow up just as well as those children who are raised by straight parents. The research made in this paper critically examines three main questions: (1) how the Indian adoption laws and the policy guidelines systematically discard and leaves out the LGBTQ+ couples; (2) whether the concept of "best interest of the child" is being misunderstood or wrongly depicted against queer prospective parents; (3) whether the Constitution of India and international human rights promises support for a further open and child-centric approach to adoption.

This paper adopts a doctrinal and comparative approach, including with Indian constitutional jurisprudence, the UN Convention on the Rights of the Child and the adoption practices which are used by countries such as South Africa, Argentina and United Kingdom jurisdictions. The paper argues for adoption laws in India which need a modification that respects the concept of diverse family forms which is beyond the traditional concept of family, aligns with the constitutional morality under Articles 14, 15 and 21, and genuinely caters to the well-being of children. The paper, in performing so, calls for an urgent legal as well as policy reforms to recognize and support the rights of LGBTQ+ parenting in India.

Keywords: *LGBTQ+ parenting, Adoption law in India, Best interest of the child, CARA guidelines, Family law reform.*

Introduction

The recognition of LGBTQ+ rights under Indian constitutional law has undergone a significant transformation over the last decade. The decriminalization of consensual same-sex relations in *Navtej Singh Johar v. Union of India* marked a decisive departure from moral paternalism and affirmed the constitutional values of dignity, equality, and personal autonomy guaranteed under Part III of the Constitution of India.[1] This judgment acknowledged sexual orientation as an intrinsic facet of identity and emphasized that constitutional morality must prevail over prevailing social prejudices.

However, this progressive constitutional trajectory remains incomplete when examined through the lens of family law, particularly adoption. Despite judicial recognition of LGBTQ+ persons as rights-bearing citizens, Indian adoption laws continue to be anchored in heteronormative assumptions. While a single LGBTQ+ individual may technically adopt a child under the *Juvenile Justice (Care and Protection of Children) Act, 2015*, the regulatory framework enforced by the Central Adoption Resource Authority (CARA) categorically bars joint adoption by same-sex couples.[2] This exclusion is not expressly mandated by statute but is enforced through subordinate legislation and administrative guidelines, thereby creating a silent yet systematic form of discrimination.

[1] *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

[2] *Juvenile Justice (Care and Protection of Children) Act*, No. 2 of 2016, INDIA CODE (2016); Adoption Regulations, 2022, CENTRAL ADOPTION RESOURCE AUTHORITY.

The central justification invoked to sustain this exclusion is the "best interests of the child" principle. Ironically, a doctrine intended to safeguard children's welfare is frequently deployed to deny them access to stable, loving, and affirming homes. This paper argues that such invocation reflects a fundamental misinterpretation of the doctrine—one that prioritizes societal discomfort and moral anxiety over child welfare, empirical evidence, and constitutional morality.

Research Questions and Methodology

This paper addresses three core research questions. First, it examines how Indian adoption laws and CARA guidelines systematically exclude LGBTQ+ couples from joint adoption. Second, it interrogates whether the "best interests of the child" standard is being misapplied to justify this exclusion. Third, it evaluates whether constitutional principles and international human rights norms support a more inclusive and child-centric adoption framework in India.

The research adopts a doctrinal and comparative methodology. It analyzes Indian constitutional jurisprudence, statutory adoption frameworks, international human rights instruments, and comparative adoption practices in jurisdictions such as South Africa, Argentina, and the United Kingdom. The objective is not merely to critique exclusionary legal structures but to propose a reform agenda that is constitutionally consistent, evidence-based, and genuinely centered on the welfare of children.

The Indian Adoption Framework and the Exclusion of LGBTQ+ Couples

- **Statutory Framework**

The *Juvenile Justice (Care and Protection of Children) Act, 2015* conceptualizes adoption primarily as a child welfare measure rather than a privilege of prospective parents. Section 2(12) defines adoption in terms of the child's right to a permanent and nurturing family, emphasizing rehabilitation and social integration.[3] Importantly, the Act does not explicitly prohibit LGBTQ+ individuals from adopting children, thereby leaving room for inclusive interpretation.

However, the exclusion of LGBTQ+ couples emerges at the regulatory level. The CARA Adoption Regulations permit adoption only by married heterosexual couples and single individuals, subject to gender-based

[3] *Juvenile Justice (Care and Protection of Children) Act* § 2(12) (2016).

restrictions in certain cases.[4] The complete absence of recognition for same-sex couples is neither accidental nor neutral. Rather, it reflects a regulatory choice rooted in traditional conceptions of family that lack empirical or constitutional justification.

- **Regulatory Discrimination and Indirect Exclusion**

The denial of joint adoption rights to LGBTQ+ couples constitutes a form of indirect discrimination. Although the regulations appear facially neutral, their impact disproportionately burdens queer individuals seeking to form families. Such exclusion violates Article 14 of the Constitution by creating an unreasonable classification between heterosexual and same-sex couples without any rational nexus to child welfare. The regulatory framework thus undermines substantive equality while masking discrimination behind administrative neutrality.

Misapplication of the "Best Interests of the Child" Principle

- **Conceptual Foundations**

The "best interests of the child" principle originates from the *United Nations Convention on the Rights of the Child* (CRC), particularly Article 3, which mandates that the child's welfare be a primary consideration in all actions concerning children.[5] Indian courts have consistently upheld this principle in matters relating to custody, guardianship, and adoption. However, its application in the context of LGBTQ+ adoption reveals a troubling inconsistency.

- **Moral Panic vs. Empirical Evidence**

The exclusion of LGBTQ+ couples from adoption is often justified through speculative concerns regarding social stigma, psychological development in same-sex households, and the perceived absence of "traditional" parental roles. These assumptions, however, are not supported by global empirical research. Studies across jurisdictions have consistently demonstrated that children raised by same-sex parents perform equally well on emotional, cognitive, and social indicators as those raised by heterosexual parents.[6] The Indian legal system's reluctance to engage with this evidence suggests that the "best interests" standard is being shaped more by moral anxiety than by child-centric reasoning.

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[4] Adoption Regulations, 2022, CENTRAL ADOPTION RESOURCE AUTHORITY, GOV'T OF INDIA.

[5] Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.

[6] American Psychological Association, *Sexual Orientation, Parents, and Children*, 72 AM. PSYCH. ASS'N 1 (2005).

- **Judicial Contradictions**

In *Shafin Jahan v. Asokan K.M.*, the Supreme Court emphasized decisional autonomy and categorically rejected societal morality as a valid ground for restricting individual rights.[7] Yet, in the domain of adoption policy, the same societal morality is implicitly prioritized over constitutional values. This contradiction exposes a disconnect between constitutional jurisprudence and family law governance.

Constitutional Morality and LGBTQ+ Parenthood

- **Articles 14, 15, and 21**

The exclusion of LGBTQ+ couples from adoption violates multiple constitutional guarantees. It infringes Article 14 by enabling arbitrary classifications, Article 15 by permitting discrimination based on sexual orientation, and Article 21 by denying the right to family life, dignity, and personal autonomy. In *Justice K.S. Puttaswamy v. Union of India*, the Supreme Court explicitly recognized family and intimate relationships as integral to the right to privacy, thereby reinforcing the constitutional protection afforded to diverse family forms.[8]

5.2 Constitutional Morality vs. Social Morality

Indian constitutional jurisprudence has repeatedly affirmed that constitutional morality must prevail over social morality. The continued exclusion of LGBTQ+ couples from adoption reflects a failure to internalize this principle within family law. Such exclusion perpetuates inequality under the guise of cultural conservatism, undermining the transformative promise of the Constitution.

International Human Rights Obligations and Comparative Jurisprudence

- **International Human Rights Norms**

India's obligations under the CRC require non-discrimination and the prioritization of child welfare in adoption policies. The CRC does not prescribe any singular or heteronormative family structure; rather, it recognizes the diversity of family forms across cultures and societies.[9]

[7] *Shafin Jahan v. Asokan K.M.*, (2018) 16 S.C.C. 368 (India).

[8] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).

[9] U.N. Comm. on the Rights of the Child, *General Comment No. 14*, U.N. Doc. CRC/C/GC/14 (2013).

- **Comparative Jurisdictions**

Comparative analysis reveals a global trend toward inclusive adoption frameworks. South Africa recognizes joint adoption by same-sex couples, grounded in constitutional equality and child welfare considerations.[10] Argentina explicitly permits adoption by same-sex couples following its marriage equality reforms.[11] The United Kingdom similarly allows LGBTQ+ adoption and evaluates prospective parents based on caregiving capacity rather than sexual orientation.[12] These jurisdictions demonstrate that inclusive adoption regimes strengthen, rather than undermine, child welfare outcomes.

Impact on Children: The Forgotten Stakeholders

Ironically, the existing framework harms the very group it claims to protect—children. India has thousands of children awaiting adoption, many of whom are older, disabled, or otherwise categorized as "hard to place." Excluding LGBTQ+ couples unnecessarily narrows the pool of prospective parents and prolongs institutionalization, contrary to both child welfare objectives and international human rights norms.

[10] *Minister of Home Affairs v. Fourie*, 2006 (1) S.A. 524 (CC) (S. Afr.).
[11] Marriage Equality Act, Law No. 26,618 (Arg. 2010).
[12] Adoption and Children Act 2002, c. 38 (U.K.).

Conclusion

This paper has demonstrated that the exclusion of LGBTQ+ couples from joint adoption in India is neither constitutionally justified nor genuinely child-centric. The misapplication of the "best interests of the child" standard reflects a deeper resistance to recognizing diverse family forms rather than any legitimate concern for children's welfare. While constitutional jurisprudence has embraced dignity, autonomy, and equality, adoption policy remains entrenched in outdated moral frameworks. This inconsistency undermines both constitutional morality and India's international human rights commitments.

Suggestions

To address these gaps, this paper proposes several reforms. First, the CARA Adoption Regulations must be amended to explicitly permit joint adoption by LGBTQ+ couples. Second, adoption assessments should adopt a genuinely child-centric model that evaluates parenting capacity, emotional stability, and caregiving ability rather than sexual orientation. Third, judicial clarification is required to affirm that exclusion based on sexual orientation violates Articles 14, 15, and 21 of the Constitution. Fourth, adoption authorities and courts must be sensitized to prevent discretionary bias. Finally, Indian adoption law must be aligned with international best practices recognizing diverse family structures. Only then can the constitutional promise of dignity and equality translate from text into lived family realities.

5.
Queering the Family: LGBTQ+ Rights and the Reimagination of Kinship in Indian Family Law

Ms. Chandrani Chakraborty
Legal Research Scholar,
Motherhood University,
Roorkee, Uttarakhand,
chakrabortychandrani7@gmail.com,

Abstract:
The traditional legal understanding of family in India is deeply rooted in heteronormative, patriarchal, and cisgendered structures, primarily shaped by religious personal laws and colonial codifications. These frameworks have long privileged the heterosexual, marital, and reproductive family unit as the only legally recognized model of kinship. However, significant constitutional developments—particularly the decriminalization of homosexuality in **Navtej Singh Johar v. Union of India** ***(2018)*** *and the recognition of gender identity as intrinsic to dignity in* **NALSA v. Union of India** ***(2014)****—have opened new possibilities for reimagining family law through the lens of equality, liberty, and constitutional morality under* ***Articles 14, 15, 19, and 21 of the Indian Constitution.***

Despite these advancements, LGBTQ+ individuals continue to face systemic exclusion from core aspects of family law. The absence of statutory recognition for same-sex marriages under the ***Hindu Marriage Act, 1955, the Special Marriage Act, 1954****, and other personal laws renders queer relationships legally invisible. LGBTQ+ couples are often denied access to joint adoption under the* ***Juvenile Justice (Care and Protection of Children) Act, 2015,*** *surrogacy under the* ***Surrogacy (Regulation) Act, 2021****, and spousal benefits under succession laws like the* ***Hindu Succession Act, 1956,*** *and the* ***Indian Succession Act, 1925.*** *These legal lacunae result in severe discrimination, forcing queer families to operate outside formal legal protections.*

This chapter critically analyzes the gap between constitutional jurisprudence and statutory family law in India. Drawing on queer theory, socio-legal scholarship, and comparative constitutional developments—such as South Africa's **Minister of Home Affairs v. Fourie** ***(2005)*** *and the U.S. Supreme Court's decision in* **Obergefell v. Hodges** ***(2015)—****the chapter argues for a rights-based, inclusive redefinition of kinship that transcends marriage, biology, and gender binaries. It examines how constitutional principles of dignity, equality, and non-discrimination can be used to reinterpret existing family law frameworks in a manner that affirms plural identities and relationships.*

The chapter also engages with contemporary legal debates, including the petitions on same-sex marriage pending before the Supreme Court (as seen in **Supriyo v. Union of India,** ***2023****), and evaluates the judiciary's role in upholding constitutional morality against societal prejudice. Further, it considers the potential for legal recognition of alternative kinship arrangements—such as chosen families, queer parenting networks, trans-affirmative households, and cohabiting partnerships—as valid units of care and support deserving of legal rights.*

Ultimately, the chapter advocates for a transformative vision of Indian family law that does not merely assimilate queer individuals into existing structures but radically redefines the notion of family itself. Such a shift would align legal frameworks with the evolving constitutional promise of inclusivity, autonomy, and human dignity, marking a critical step toward justice for LGBTQ+ communities in India.

Introduction and Historical Foundations

The family has long been regarded as the bedrock of Indian society, embodying cultural continuity, moral order, and social legitimacy. In law, the family unit is not only a private association of intimacy but also a legal construct that mediates rights of succession, inheritance, guardianship, adoption, and marriage. Yet, this apparently stable institution has never been static. Family law in India has undergone a series of transformations, often reflecting the broader struggles over religion, caste, gender, and community identity. The contemporary debate surrounding LGBTQ+ rights brings a profound challenge to the heteronormative foundations of Indian family law. To "queer" the family is to destabilize the assumption that kinship is exclusively heterosexual, reproductive, and patrilineal, and to reimagine it as a fluid network of intimacies, solidarities, and care that may or may not conform to dominant social scripts.

The legal imagination of family in India has historically been structured around personal laws that regulate marriage, divorce, adoption, maintenance, succession, and guardianship according to religious identity. These laws, whether Hindu, Muslim, Christian, or Parsi, are deeply intertwined with colonial interventions that codified and standardized religious traditions into rigid statutory schemes. Despite their religious diversity, however, these personal laws share a common presumption: that family is constituted through heterosexual marriage between a man and a woman, which then legitimizes procreation and lineage. This presumption has been reinforced by statutory enactments such as the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954, both of which articulate marriage as a union between a "male" and a "female."[1] The law of adoption under the Hindu Adoptions and Maintenance Act, 1956, similarly presumes heterosexual households, while the Guardians and Wards Act, 1890, constructs guardianship in gendered and heteronormative terms.[2]

This heteronormative legal order has marginalized queer identities and excluded non-normative kinship formations from legal recognition. Lesbian, gay, bisexual, transgender, and queer persons in India have historically been denied access to the family as a legal category: their relationships have lacked recognition, their children have lacked legitimacy, and their partnerships have lacked enforceable rights.[3] The very grammar of family law presupposes heterosexuality as natural and compulsory, relegating queer intimacies to the margins of legality.

Yet the past decade has witnessed a remarkable transformation in constitutional jurisprudence that has unsettled these assumptions. The Supreme Court's recognition of sexual orientation as an aspect of constitutional dignity in *Navtej Singh Johar v. Union of India*[4] and its affirmation of transgender identity in *NALSA v. Union of India*[5] have opened the possibility of reimagining kinship beyond heteronormativity. More recently, the litigation on marriage equality, culminating in the *Supriyo v. Union of India*[6] decision, has revealed both the transformative potential and the doctrinal limits of the judiciary in reshaping family law.

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[1] The Hindu Marriage Act, 1955, s. 5; The Special Marriage Act, 1954, s. 4.

[2] The Hindu Adoptions and Maintenance Act, 1956, ss. 7–8; The Guardians and Wards Act, 1890, s. 19.

[3] Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (Oxford University Press, 2003) 226–229.

[4] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

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

[6] *Supriyo v. Union of India*, (2023) 12 SCC 1.

These developments demand a critical engagement with the conceptual foundations of Indian family law and a consideration of what it might mean to "queer" the family in both legal and normative terms.

Colonial and Post-Colonial Foundations of Indian Family Law

The exclusion of queer kinship from Indian family law is inseparable from the colonial history of codification. British administrators, seeking to regulate "native" customs, categorized Indians into religious communities and appointed pundits and maulvis to provide authoritative interpretations of Hindu and Muslim laws. What emerged was not a faithful preservation of precolonial practices but rather a homogenized and rigid framework of "personal laws" that privileged patriarchal and heteronormative norms.[7] The Hindu joint family was formalized as a unit of property and succession, privileging male heirs and restricting women's agency. Similarly, Islamic law was reduced to a codified scheme of marriage and divorce that reinforced male prerogatives.

Most significantly, colonial criminal law introduced Section 377 of the Indian Penal Code, 1860, which criminalized "carnal intercourse against the order of nature."[8] This provision not only criminalized same-sex intimacy but also symbolically delegitimized queer existence as outside the "natural" order of family and society. The regulation of sexuality was deeply tied to the regulation of family, for it was through the control of desire that the colonial state sought to control kinship and inheritance.

Post-independence, the Indian state retained the structure of personal laws but sought to modernize them through statutory reforms. The Hindu Code Bills of the 1950s sought to democratize Hindu law by granting women rights in marriage, divorce, and adoption, but they left untouched the assumption that marriage was heterosexual.[9] Similarly, while the Special Marriage Act, 1954, offered a secular option for interfaith marriages, it too was framed in gender-binary terms. The Constitution guaranteed equality, dignity, and liberty, but family law remained largely insulated from constitutional scrutiny, shielded by the rhetoric of religious freedom and cultural autonomy.

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[7] Mitra Sharafi, "Justice in Many Rooms? Personal Laws in Colonial and Post-Colonial India" (2009) 24(2) *Indian Economic and Social History Review* 209.

[8] Indian Penal Code, 1860, s. 377 (struck down in *Navtej Singh Johar*).

[9] Granville Austin, *Working a Democratic Constitution: The Indian Experience* (Oxford University Press, 1999) 132–135.

In this framework, LGBTQ+ persons were invisible. Their relationships were not contemplated in any statutory scheme, their children were denied legitimacy, and their property rights were unsecured. Adoption laws presumed heterosexual couples as parents; surrogacy regulations privileged married heterosexual couples; inheritance laws prioritized blood and marriage ties that excluded queer partnerships. The law thereby reinforced a cultural script in which family was naturalized as heterosexual and any deviation from it was seen as illegitimate or even criminal.

Queer Kinship in Indian Social and Cultural Traditions

It is important to note, however, that queer kinship is not alien to Indian traditions. Precolonial texts, myths, and practices reveal a plurality of gender and sexual identities, as well as alternative forms of kinship. The *Mahabharata* and *Ramayana* contain narratives of non-heteronormative desire, while temple sculptures across Khajuraho and Konark depict same-sex intimacy.[10] The hijra community, recognized in Hindu and Islamic traditions, has historically occupied roles of ritual importance, particularly in blessing fertility and childbirth.[11]

Yet, these plural practices were systematically marginalized through colonial codification, which imposed Victorian morality and Christian notions of family. The contemporary project of queering family law can therefore be seen not as an importation of Western ideas but as a reclamation of indigenous pluralism that was suppressed by colonial modernity. It challenges the myth of family as a fixed, religiously ordained unit and asserts its historical contingency and cultural diversity.

The Conceptual Stakes of Queering the Family

To queer the family is to ask a fundamental jurisprudential question: who counts as family under law, and why? Legal recognition of family is not merely symbolic; it confers rights of inheritance, maintenance, adoption, guardianship, and taxation. Exclusion from family law is therefore a material form of disenfranchisement. For LGBTQ+ persons, the denial of recognition translates into precariousness—partners are denied medical

[10] Ruth Vanita and Saleem Kidwai (eds), *Same-Sex Love in India: Readings from Literature and History* (Palgrave Macmillan, 2000) 55–60.

[11] Serena Nanda, *Neither Man nor Woman: The Hijras of India* (Wadsworth, 1999) 23–25.

decision-making authority, children lack secure parentage, and relationships lack enforceable rights.[12]

The project of queering family law thus carries both a distributive and a symbolic dimension. Distributive, it seeks to extend benefits and protections to queer persons; symbolically, it seeks to dismantle the hierarchies that privilege heterosexuality as natural. This dual task requires moving beyond the binary of assimilation versus separatism. While marriage equality is an important demand, it cannot exhaust the possibilities of queer kinship. Legal reform must also contemplate recognition of chosen families, cohabitation rights, polyamorous arrangements, and networks of care that may not conform to monogamous marriage.[13]

By situating the contemporary debates on LGBTQ+ rights within this historical and conceptual framework, the chapter argues that queering the family is both a constitutional imperative and a jurisprudential opportunity. It is a constitutional imperative because Articles 14, 15, 19, and 21 demand equal dignity and liberty for all citizens, including sexual minorities. It is a jurisprudential opportunity because it allows Indian family law to evolve from a rigid system of religious personal laws into a more inclusive and plural framework that reflects the realities of lived intimacy.[14]

LGBTQ+ Rights and Indian Jurisprudence

The jurisprudence of LGBTQ+ rights in India reflects a remarkable shift in constitutional interpretation from an era of silence and criminalization to one of dignity, privacy, and recognition. For decades, queer persons were denied not only legal protection but also social legitimacy, as their very existence was rendered "unnatural" under colonial criminal law. In recent years, however, the Supreme Court of India has developed a constitutional vocabulary of dignity, autonomy, and equality that has fundamentally altered the terrain of rights for sexual and gender minorities. This trajectory is essential to understanding the possibilities and limits of queering Indian family law.

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[12] Carlos A. Ball, *The Right to Be Parents: LGBT Families and the Transformation of Parenthood* (New York University Press, 2012) 88–90.

[13] Judith Butler, *Undoing Gender* (Routledge, 2004) 102–104.

[14] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins, 2019) 244–249.

Section 377 and the Criminalization of Queer Desire

For over 150 years, Section 377 of the Indian Penal Code criminalized "carnal intercourse against the order of nature."[15] Though the provision did not explicitly mention homosexuality, it was consistently used to stigmatize, harass, and criminalize LGBTQ+ persons. The law created a symbolic association between queer desire and criminality, reinforcing the view that non-heterosexual intimacies were beyond the pale of law and morality.

In *Naz Foundation v. Government of NCT of Delhi*,[16] The Delhi High Court in 2009 decriminalized consensual same-sex relations, holding that Section 377 violated Articles 14, 15, and 21 of the Constitution. The judgment was celebrated as a milestone in constitutional morality, particularly for its reliance on dignity and inclusiveness. However, this progressive step was short-lived. In *Suresh Kumar Koushal v. Naz Foundation*[17] (2013), the Supreme Court reversed *Naz Foundation*, reinstating Section 377 and reducing queer persons to a "minuscule minority" undeserving of constitutional protection. The *Koushal* decision epitomized judicial conservatism, subordinating individual rights to majoritarian morality.

The tide turned in *Navtej Singh Johar v. Union of India.*[18] (2018), where a Constitution Bench unanimously decriminalized consensual same-sex intimacy. Drawing upon *K.S. Puttaswamy v. Union of India*[19] (2017), the Court held that privacy includes decisional autonomy in matters of sexuality. The judgment marked a decisive break from heteronormative constitutionalism: sexual orientation was affirmed as intrinsic to dignity, equality, and liberty. In his well-known judgment, Justice Chandrachud noted that "the Constitution is a living document," meaning that its interpretation must take transformative constitutionalism into account.[20]

The *Navtej* decision was more than a ruling on criminal law—it redefined queer existence as constitutionally legitimate. By affirming that "love knows no bounds,"[21] the Court symbolically dismantled the association of family and intimacy with heterosexuality alone. Yet, the judgment was

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[15] Indian Penal Code, 1860, s. 377 (struck down in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1).

[16] *Naz Foundation v. Government of NCT of Delhi*, 160 (2009) DLT 277 (Del HC).

[17] *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

[18] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

[19] *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

[20] ibid, per Chandrachud J, 497.

[21] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, per Misra C.J.

also limited in its scope, for it dealt only with decriminalization, leaving questions of marriage, adoption, and family recognition unresolved.

The Recognition of Transgender Rights

The trajectory of LGBTQ+ jurisprudence is incomplete without reference to *National Legal Services Authority v. Union of India.*[22] (NALSA, 2014), where the Supreme Court recognized the right of transgender persons to self-identify their gender. The Court drew upon international human rights instruments to hold that gender identity is integral to dignity and freedom. Justice Radhakrishnan's opinion declared that the right to choose one's gender identity—male, female, or third gender—is protected under Articles 14, 15, 16, 19, and 21.

NALSA marked the first time the Court explicitly acknowledged that constitutional equality applies to gender minorities. It also emphasized the state's duty to take affirmative measures to secure social, economic, and political inclusion for transgender persons. This recognition disrupted the binary logic of Indian family law, which consistently presupposed only "male" and "female." For instance, statutes like the Hindu Marriage Act define eligibility in terms of "bride" and "bridegroom," while adoption laws presuppose heterosexual parental roles. By affirming gender diversity, *NALSA* opened the door to a broader reimagination of kinship.

Subsequent legislation, such as the Transgender Persons (Protection of Rights) Act, 2019, attempted to codify rights but has been criticized for bureaucratizing gender identity and failing to implement the spirit of *NALSA*.[23] Despite these limitations, the recognition of transgender rights constitutes a foundational element in the queering of family law.

Privacy, Autonomy, and Sexual Orientation

The right to privacy case, *K.S. Puttaswamy v. Union of India*,[24] It was a turning point in Indian constitutional law. A nine-judge Bench unanimously recognized privacy as a fundamental right under Article 21. Importantly, several concurring opinions connected privacy to sexual orientation. Justice Chandrachud, in particular, held that the LGBT community's rights are embedded in the right to privacy, dignity, and autonomy.[25]

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

[23] Arvind Narrain, "Gender Identity and the Law: Reimagining the NALSA Judgment" (2019) 54(3) *Economic and Political Weekly* 10.

[24] *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

[25] ibid, per Chandrachud J, 297–300.

This doctrinal foundation was crucial in *Navtej Johar*, where the Court explicitly relied on *Puttaswamy*. The recognition that intimate choices form part of the "core of personal liberty" undermined the legal and moral justifications for excluding queer relationships from the domain of family. The Court acknowledged that sexual orientation cannot be left vulnerable to "the fancies of the majority."[26]

By linking sexual orientation to constitutional identity, *Puttaswamy* and *Navtej* together created the possibility of extending family law rights to queer persons. If the Constitution guarantees the freedom to choose one's intimate partner, then the denial of marriage, adoption, and inheritance rights to queer couples become increasingly difficult to justify.

Marriage Equality and the *Supriyo* Case

The most recent and contentious development in LGBTQ+ jurisprudence is the litigation over marriage equality. In *Supriyo v. Union of India*,[27] A series of petitions were filed before the Supreme Court seeking recognition of same-sex marriage under the Special Marriage Act, 1954, and related statutes. Petitioners argued that exclusion of queer couples violated Articles 14, 15, 19, and 21 by denying them equality, dignity, and autonomy.

In its 2023 decision, a five-judge Bench of the Supreme Court declined to recognize a constitutional right to same-sex marriage. The Court held that marriage is a socio-legal institution deeply embedded in legislative policy, and it was for Parliament to decide whether to extend it to queer couples. While Justice Chandrachud and Justice Kaul recognized the rights of queer couples to form unions and demanded state recognition of such partnerships, the majority opinion (Justices Bhat, Kohli, and Narasimha) refused to alter the statutory framework.[28]

The outcome of *Supriyo* was a paradox: while the Court affirmed that queer persons have the right to form "unions," it failed to translate this recognition into enforceable family law rights. The decision revealed the limits of judicial activism in the face of political conservatism. Nonetheless, the separate opinions in *Supriyo* contain seeds of transformation. By emphasizing that the Constitution protects the right to intimacy, partnership, and cohabitation, the Court opened space for future recognition of queer kinship beyond marriage.

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[26] ibid, per Kaul J, 612.

[27] *Supriyo v. Union of India*, (2023) 12 SCC 1.

[28] ibid, per Bhat J (majority) and per Chandrachud C.J. (minority).

Towards a Queer Family Jurisprudence

Taken together, *NALSA*, *Puttaswamy*, *Navtej*, and *Supriyo* illustrate the dynamic but incomplete evolution of queer rights in India. The Court has moved from criminalization to recognition, from invisibility to dignity, but has hesitated to reconfigure the heteronormative structures of family law.

The jurisprudence reflects a tension between **transformative constitutionalism**—the idea that the Constitution must be interpreted to overcome social hierarchies.[29]—and **institutional restraint**, where the Court defers to legislative supremacy in matters of family policy.

This tension is particularly evident in the Court's reluctance to address questions of adoption, inheritance, and guardianship for queer couples. Even as it affirms autonomy and dignity, the Court stops short of dismantling the heterosexual foundations of personal law. This judicial hesitancy reveals a deeper challenge: whether family law, as currently structured, can accommodate queerness without a wholesale reimagining of its conceptual foundations.

Marriage, Adoption, and Queer Kinship Beyond Marriage

The recognition of queer rights in India has thus far been circumscribed by a narrow judicial imagination of family, tethered to heterosexual marriage. While the decriminalization of same-sex intimacy in *Navtej Singh Johar* created constitutional legitimacy for queer existence, the law continues to privilege the conjugal family as the sole site of intimacy, legitimacy, and reproduction. Indian family law—both secular and religious—remains structured around heteronormativity, thereby excluding LGBTQ+ persons from the full range of familial rights and obligations. This section explores the challenges posed by the marriage-centric framework, the limitations of existing adoption and guardianship laws, and the possibilities of recognizing queer kinship beyond marriage.

Marriage Equality and the Limits of Indian Family Law

Marriage in India is simultaneously a civil institution and a religious sacrament. Personal laws such as the Hindu Marriage Act, 1955, and the Indian Christian Marriage Act, 1872, are explicitly gendered, referring to "bride" and "bridegroom."[30] Even the Special Marriage Act, 1954, a secular statute designed to provide interfaith couples with a neutral

[29] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins, 2019) 57–63.

[30] Hindu Marriage Act, 1955, s. 5.

framework, retains heteronormative assumptions by presupposing marriage between a man and a woman.[31]

In *Supriyo v. Union of India*,[32] petitioners argued that this exclusion of same-sex couples violates Articles 14, 15, 19, and 21 of the Constitution. They contended that marriage, as a legal institution, grants not only symbolic recognition but also tangible benefits such as inheritance, spousal insurance, tax benefits, maintenance, and medical decision-making rights. Denying queer couples access to marriage entrenches a regime of second-class citizenship.

The Supreme Court, however, declined to extend marriage to queer couples. Justice Bhat's majority opinion emphasized legislative supremacy, holding that the Court could not rewrite the Special Marriage Act without engaging in "judicial legislation."[33] Justice Chandrachud and Justice Kaul, in separate opinions, recognized the right of queer couples to form unions but stopped short of mandating equal marriage.[34] The decision reflects the enduring power of heteronormativity in family law.

The marriage question is not merely about access to an existing institution but about the very terms of kinship recognition. Critics argue that by focusing exclusively on marriage, queer movements risk reinforcing the centrality of the conjugal couple while marginalizing non-normative forms of intimacy.[35] For instance, partnerships based on friendship, polyamorous arrangements, or chosen families may remain invisible if equality is confined to marriage. Thus, while marriage equality is an important step, it must not become the sole horizon of queer legal recognition.

Adoption, Parenthood, and Queer Families

Parenthood and adoption represent another arena where the exclusion of queer persons is stark. The Juvenile Justice (Care and Protection of Children) Act, 2015, and the Adoption Regulations, 2020, allow only married couples or single individuals to adopt.[36] In practice, this means same-sex couples cannot adopt as a unit; at most, one partner can adopt as a "single parent," leaving the other legally unrelated to the child. This

[31] Special Marriage Act, 1954, s. 4.

[32] *Supriyo v. Union of India*, (2023) 12 SCC 1.

[33] ibid, per Bhat J, 457.

[34] ibid, per Chandrachud C.J., 212–220; per Kaul J., 312–315.

[35] Nancy Polikoff, *Beyond (Straight and Gay) Marriage: Valuing All Families under the Law* (Beacon Press, 2008) 34–41.

[36] Juvenile Justice (Care and Protection of Children) Act, 2015, s. 57.

legal lacuna produces profound insecurity for queer families, where children may lack legal ties to one of their primary caregivers.

The Central Adoption Resource Authority (CARA) has consistently refused to recognise joint adoption by queer couples, citing statutory limitations.[37] This denial was challenged in the *Supriyo* proceedings, where petitioners sought recognition of equal adoption rights. The Court, however, upheld the validity of existing regulations, noting that adoption policy falls within the legislature's domain.[38]

The consequences of this exclusion are not abstract. Denying queer couples equal adoption rights violate the best interests of the child, a principle enshrined in Indian and international law.[39] Children raised in queer households may face legal insecurity, particularly in matters of guardianship, inheritance, and custody upon separation or death of a parent. By privileging heterosexual parenthood, Indian law undermines the lived realities of queer families.

Comparative jurisprudence illustrates alternative approaches. The South African Constitutional Court, in *Du Toit v. Minister for Welfare and Population Development*,[40] struck down restrictions preventing same-sex couples from jointly adopting. The Court held that denying adoption rights violated equality and dignity, and crucially, the best interests of the child. Similarly, in the United States, the Supreme Court in *Obergefell v. Hodges*[41] recognized that excluding same-sex couples from marriage denied children the stability and recognition afforded to families. Indian law, by contrast, continues to treat queer families as legal fictions.

Inheritance, Maintenance, and Financial Rights

Family law structures extend beyond marriage and adoption to encompass inheritance, maintenance, and financial entitlements. Under Hindu Succession law, for instance, rights of inheritance are tied to the status of "spouse" or "child" within a heteronormative family unit.[42] Similarly, maintenance provisions under Section 125 of the Criminal Procedure Code presuppose heterosexual marital ties.[43] Queer couples, even if

[37] Central Adoption Resource Authority, Adoption Regulations, 2020, reg. 5.
[38] *Supriyo v. Union of India*, (2023) 12 SCC 1, per Narasimha J, 598.
[39] United Nations Convention on the Rights of the Child, 1989, art. 3.
[40] *Du Toit v. Minister for Welfare and Population Development*, 2003 (2) SA 198 (CC).
[41] *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[42] Hindu Succession Act, 1956, s. 6.
[43] Code of Criminal Procedure, 1973, s. 125.

cohabiting for decades, are denied spousal inheritance, pension benefits, or maintenance rights.

This exclusion perpetuates economic vulnerability among queer individuals. Studies demonstrate that queer persons are more likely to face discrimination in employment and housing,[44] making access to spousal and family benefits even more critical. The denial of these entitlements underscores how heteronormativity operates as an economic regime, allocating material benefits only to heterosexual families.

Beyond Marriage: Recognizing Queer Kinship

While much of the legal and political debate has centred on marriage equality, queer theorists argue for a broader reimagination of kinship. As Kath Weston's influential work on "chosen families" demonstrates, queer communities often develop alternative structures of care and intimacy outside biological or conjugal ties.[45] In India, too, queer collectives, friendship networks, and community households often provide the emotional and material support denied by biological families.

Recognizing these forms of kinship requires moving beyond the marriage-centric model of family law. One possibility is the recognition of civil unions or domestic partnerships that grant rights of cohabitation, inheritance, and decision-making without invoking marriage.[46] Another is to extend the legal definition of "family" in welfare and housing policies to include non-conjugal households. In *Deepika Singh v. Central Administrative Tribunal*,[47] The Supreme Court took a step in this direction by recognizing that families may be "beyond the traditional concept of a married husband, wife, and children." Though the case concerned maternity leave, its reasoning provides a foundation for queering the definition of family in law.

Comparative Perspectives

Comparative experience offers both inspiration and caution. South Africa provides the most robust model of queer family rights in the Global South. Its Constitutional Court, drawing on the equality clause in the post-

[44] Human Rights Watch, *"I Have to Leave to Be Me": Discriminatory Laws against LGBT People in India* (2016).

[45] Kath Weston, *Families We Choose: Lesbians, Gays, Kinship* (Columbia University Press, 1991) 105–118.

[46] Serena Mayeri, "Marriage (In)equality: Same-Sex Relationships, Race, and the Constitution" (2012) 124 *Harvard Law Review* 124, 140.

[47] *Deepika Singh v. Central Administrative Tribunal*, (2022) 14 SCC 629.

apartheid Constitution, recognized same-sex marriage in *Minister of Home Affairs v. Fourie*[48] and consistently extended adoption, inheritance, and spousal rights to queer couples. Similarly, in Europe, the European Court of Human Rights has gradually recognized that family life under Article 8 of the European Convention includes same-sex couples.[49]

The United States, by contrast, illustrates both the possibilities and pitfalls of marriage equality. The landmark *Obergefell v. Hodges* decision[50] granted marriage rights, but scholars note that it reinforced marriage as the sole site of legitimacy, leaving non-marital kinship arrangements unrecognized.[51] India, in charting its path, must therefore learn from these experiences: marriage equality is essential but insufficient.

The Path Forward

The exclusion of queer persons from marriage, adoption, and inheritance rights is not merely a matter of legislative inertia but reflects a deeper resistance to reimagining family itself. Indian family law, rooted in colonial and religious norms, remains wedded to heterosexuality as its organizing principle. To queer the family is to challenge this foundation and demand recognition of kinship as a plural, diverse, and evolving institution.

The recognition of queer unions, adoption rights, and alternative family forms is not only a constitutional imperative but also a social necessity. As queer communities in India continue to forge networks of care and belonging, the law must evolve to reflect these lived realities. Otherwise, constitutional promises of dignity, equality, and liberty risk remaining empty rhetoric.

Queer Theory, Constitutional Morality, and Reimagining Kinship:
Queer Theory and the Critique of Heteronormativity

Queer theory emerged in the 1990s as a radical critique of identity politics and heteronormativity. Unlike earlier gay and lesbian rights movements that sought assimilation into existing social institutions such as marriage, queer theory emphasized the instability of categories such as "man," "woman," "heterosexual," and "homosexual."[52] As Judith Butler famously

[48] *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC).
[49] *Schalk and Kopf v. Austria*, App No. 30141/04 (ECtHR, 24 June 2010).
[50] *Obergefell v. Hodges*, 576 U.S. 644 (2015).
[51] Melissa Murray, "Marriage as Punishment" (2012) 112 *Columbia Law Review* 1, 7–11.
[52] Annamarie Jagose, *Queer Theory: An Introduction* (New York University Press, 1996) 3–7.

argued, gender is performative rather than essential, and the repetition of norms creates the illusion of fixed identities.[53]

Applied to family law, queer theory exposes how the legal system privileges heterosexual marriage as the natural and universal form of kinship. By recognizing only conjugal, reproductive heterosexuality, law renders other forms of intimacy invisible or deviant. Michael Warner's critique of "reproductive futurism" demonstrates how the family is constructed as the guarantor of social continuity, thereby excluding queer lives from legitimacy.[54]

In the Indian context, queer theory invites us to question not only the denial of marriage rights but also the deeper assumption that the family must be defined in terms of conjugal heterosexual reproduction. This lens suggests that seeking equality solely through marriage equality may risk normalizing queerness into heteronormative frameworks, thereby limiting the transformative potential of queer politics.[55] Instead, a queer approach to family law demands recognition of plurality: cohabiting partnerships, chosen families, communal households, and kinship networks formed outside the logic of reproduction.

Constitutional Morality versus Social Morality

The doctrine of constitutional morality, first articulated in *Kesavananda Bharati v. State of Kerala*[56] and later revived in LGBTQ+ jurisprudence, is central to queering Indian family law. The Supreme Court in *Navtej Singh Johar* drew explicitly upon constitutional morality to hold that majoritarian morality cannot be the basis for restricting fundamental rights. Justice Chandrachud observed that "constitutional morality requires us to preserve the ability of every individual to pursue a life of dignity, regardless of the views of the majority."[57]

This doctrine is crucial because opposition to queer families in India is often framed in terms of cultural or religious morality. By privileging constitutional morality, courts can transcend heteronormative traditions and affirm that equality and dignity, not public disapproval, are the

[53] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990) 25–33.

[54] Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Harvard University Press, 1999) 81–85.

[55] Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Duke University Press, 2015) 44–49.

[56] *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

[57] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, per Chandrachud J, 542.

standards for family recognition. Indeed, the Constitution becomes an instrument for dismantling oppressive norms rather than reflecting them.

Yet, constitutional morality has also been inconsistently applied. In *Supriyo v. Union of India*, while the Court acknowledged the dignity of queer unions, the majority deferred to legislative supremacy in denying marriage rights.[58] This deference illustrates the tension between transformative constitutionalism and judicial restraint. A robust application of constitutional morality would require the Court not only to recognize queer existence but also to dismantle heteronormative family structures that perpetuate inequality.

Transformative Constitutionalism and Queer Kinship

Transformative constitutionalism is the idea that constitutional interpretation must be directed toward overcoming historical injustices and social hierarchies.[59] In South Africa, the Constitutional Court used this doctrine to justify recognizing same-sex marriage in *Minister of Home Affairs v. Fourie*, arguing that constitutional transformation required disrupting heteronormative traditions.[60]

In India, transformative constitutionalism has been invoked in cases like *Navtej* and *NALSA*, where the Court held that the Constitution must liberate marginalized identities from systemic oppression.[61] However, in family law, this transformative promise remains unfulfilled. The exclusion of queer couples from marriage, adoption, and inheritance indicates the persistence of a colonial and patriarchal conception of family.

To apply transformative constitutionalism to queer kinship would mean reimagining family not as a closed unit of reproduction but as a dynamic space of care and support. This requires extending legal recognition to non-conjugal and non-biological kinship networks. Such a move would align with the Court's recognition in *Deepika Singh v. Central Administrative Tribunal* that families "may take the form of domestic, unmarried partnerships or queer relationships."[62]

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[58] *Supriyo v. Union of India*, (2023) 12 SCC 1, per Bhat J, 455–460.

[59] Karl Klare, "Legal Culture and Transformative Constitutionalism" (1998) 14 *South African Journal on Human Rights* 146, 150–152.

[60] *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC).

[61] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

[62] *Deepika Singh v. Central Administrative Tribunal*, (2022) 14 SCC 629, per Chandrachud J, 17.

Feminist and Intersectional Critiques of Family Law

Feminist scholarship has long critiqued the family as a site of patriarchy, control, and gender inequality.[63] The Hindu joint family system, for instance, entrenched male control over property and relegated women to dependent roles. Even reforms in Hindu succession law required decades of litigation before daughters were recognized as coparceners with equal inheritance rights.[64]

Queer critiques intersect with feminist concerns by highlighting how family law privileges hierarchical, gendered, and reproductive roles. Both frameworks expose how the law treats women and queer persons as secondary to the heterosexual male head of household. An intersectional approach further reveals how caste, class, and religion shape the exclusion of queer families. For instance, queer Dalit and Muslim persons face layered marginalization, where the denial of family recognition intersects with broader structural discrimination.[65]

Thus, queering family law is not merely about sexual orientation but about challenging the patriarchal and casteist underpinnings of kinship. A reimagined family law must be attentive to these multiple axes of oppression, ensuring that legal recognition does not replicate existing inequalities.

Plural Kinship Models and the Future of Family

If law is to reflect the realities of queer lives, it must embrace plural kinship models. Anthropological studies reveal that Indian societies historically accommodated diverse family forms, from matrilineal systems in Kerala to joint households in North India.[66] Colonial codification, however, imposed a rigid nuclear and patriarchal model of family that continues to dominate legal frameworks.

Queer kinship challenges this model by foregrounding chosen families, collective households, and non-reproductive partnerships. Recognition of such models would not only validate queer lives but also benefit many non-queer individuals—single parents, cohabiting partners, elderly companions, and communal caregivers—whose relationships fall outside marriage.

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[63] Martha Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (Routledge, 1995) 11–18.

[64] *Vineeta Sharma v. Rakesh Sharma*, (2020) 9 SCC 1.

[65] Dhrubo Jyoti, "Queer Dalits and Intersectionality in India" (2015) 50(41) *Economic and Political Weekly* 62.

[66] Iravati Karve, *Kinship Organization in India* (Asia Publishing House, 1953) 21–34.

In practical terms, plural kinship recognition could involve:

Allowing **domestic partnerships** to access rights of inheritance, guardianship, and medical decision-making.

Expanding the definition of "family" in welfare legislation to include **non-conjugal households**.

Recognizing **multi-parenthood**, where more than two adults can be legally recognized as parents, reflecting realities of communal child-rearing.[67]

Such reforms would align Indian law with global trends. Canada, for instance, allows recognition of more than two legal parents in certain provinces.[68] New Zealand and the Netherlands have also moved towards recognizing diverse family forms beyond marriage.[69] India, with its constitutional commitment to dignity and equality, has the normative resources to adopt similar innovations.

Towards a Queer Constitutional Future

Queer theory, constitutional morality, and transformative constitutionalism together demand a radical rethinking of Indian family law. Rather than confining equality to marriage, the law must recognise that kinship is diverse, plural, and constantly evolving. Constitutional promises of dignity, liberty, and equality cannot be realized until family law sheds its heteronormative and patriarchal foundations.

Queering the family is not simply about granting rights to LGBTQ+ individuals but about reimagining the very meaning of family in a constitutional democracy. It is about affirming that care, intimacy, and belonging are not reducible to conjugal heterosexuality. By embracing plural kinship models, Indian law can move closer to its transformative potential: a future where all forms of love and care are recognized with equal dignity.

[67] Courtney Joslin, "Multi-Parent Families and the Law" (2015) 25 *Yale Journal of Law & Feminism* 229.

[68] British Columbia Family Law Act, SBC 2011, c 25, s. 30.

[69] Fiona Kelly, "Redefining Parenthood in Canada: LGBT Families, Assisted Reproduction, and the Law" (2014) 28 *International Journal of Law, Policy and the Family* 145, 152–156.

Reform, Policy, and Conclusion

The Urgency of Reform

The debate over LGBTQ+ rights in India has reached an inflection point. With the decriminalization of homosexuality in *Navtej Singh Johar v. Union of India*[70] and the recognition of transgender identities in *NALSA v. Union of India*[71], the constitutional landscape has shifted dramatically. Yet family law remains an unreformed and exclusionary domain, clinging to heteronormative assumptions and statutory binaries. The *Supriyo v. Union of India*[72] decision, by deferring the question of marriage equality to Parliament, underscores the urgent need for legislative reform. Without such reform, the constitutional promises of dignity, equality, and privacy will remain incomplete, leaving queer families in a state of legal precarity.

Legislative Reform of Family Law

The first and most immediate site of reform must be statutory family law. Parliament has the power to amend personal laws and secular statutes to ensure inclusivity.

Several specific reforms are necessary:

(a) Marriage Equality. The definition of marriage under the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 should be amended to use gender-neutral terms such as "spouses" rather than "bride" and "bridegroom."[73] This would grant rights to inheritance, maintenance, adoption, and spousal benefits to same-sex couples and transgender individuals who are married. Comparative jurisdictions such as South Africa[74], Canada[75], and Taiwan[76] have enacted similar reforms, demonstrating that marriage equality is both constitutionally viable and socially practicable.

(b) Adoption and Parenthood. The Hindu Adoptions and Maintenance Act, 1956 and the Juvenile Justice (Care and Protection of Children) Act, 2015 should be amended to explicitly allow joint adoption by same-sex

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[70] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.
[71] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.
[72] *Supriyo v. Union of India*, (2023) 12 SCC 1.
[73] The Hindu Marriage Act, 1955, s. 5; The Special Marriage Act, 1954, s. 4.
[74] *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC).
[75] Civil Marriage Act, 2005 (Canada).
[76] Jau-Yuan Hwang, "The Judicialization of Same-Sex Marriage in Taiwan" (2019) 17 Int J Const L 244.

couples.[77] Parenthood must be defined not only in biological or gendered terms but also through intentionality and care. The Surrogacy (Regulation) Act, 2021 should be revised to permit queer persons and single individuals to access surrogacy services on equal terms.[78]

(c) Inheritance and Succession. Amendments to the Hindu Succession Act, 1956 and related statutes should ensure that same-sex partners are recognized as legal heirs.[79] Currently, queer partners are excluded from intestate succession, forcing them to rely on wills that are vulnerable to contestation.

(d) Anti-Discrimination in Family Recognition. Parliament should enact a comprehensive anti-discrimination statute covering education, housing, employment, and healthcare, which explicitly prohibits discrimination on grounds of sexual orientation and gender identity.[80] Family recognition should be one of the protected domains under such legislation.

Judicial Reform through Constitutional Interpretation

While legislative reform is critical, the judiciary also retains a transformative role. The Indian Supreme Court has historically used constitutional interpretation to expand rights, often in the absence of legislative action. The reading down of Section 377 in *Navtej Johar* and the recognition of the right to privacy in *Justice K.S. Puttaswamy v. Union of India*[81] are examples of such judicial creativity.

Courts can continue this trajectory by:

Interpreting Articles 14, 15, 19, and 21 to require inclusive readings of family law.[82]

Recognizing the principle of **constitutional morality** as a guiding framework for assessing family law exclusions.[83]

Protecting queer families under the right to life and dignity, particularly in cases of custody, maintenance, and inheritance.[84]

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[77] The Hindu Adoptions and Maintenance Act, 1956, ss. 7–8.

[78] The Surrogacy (Regulation) Act, 2021, s. 4.

[79] The Hindu Succession Act, 1956, ss. 6–8.

[80] Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015) 221.

[81] *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

[82] Gautam Bhatia, *The Transformative Constitution* (HarperCollins, 2019) 311–320.

[83] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, per Chandrachud J.

[84] Danish Sheikh, "The Right to Intimacy in India: *Navtej Johar* and Beyond" (2019) 16 Int J Const L 117.

While the judiciary in *Supriyo* chose restraint, future benches may revisit the issue with greater willingness to align family law with constitutional rights.

Policy Reform and Administrative Inclusion

In addition to statutory and judicial reform, the state can take proactive steps through policy and administrative measures:

Civil Unions: Even as Parliament debates marriage equality, civil union frameworks can be introduced as interim measures, providing legal recognition of queer partnerships for purposes of healthcare, insurance, and inheritance.[85]

Welfare and Social Security: Government schemes for housing, pensions, and social security should explicitly include queer families as eligible units.[86]

Education and Awareness: Public education campaigns are necessary to dismantle stigma and promote acceptance of queer families, drawing parallels to past campaigns for gender equality and anti-caste reforms.[87]

Training of Officials: Adoption agencies, family courts, and registrars should undergo sensitization training to prevent discrimination against queer applicants.[88]

Civil Society and Community-Led Reform

Legal reform alone cannot dismantle centuries of heteronormativity. Civil society organizations, queer collectives, and feminist movements play a crucial role in pushing for cultural change. From the *Naz Foundation* litigation to marriage equality petitions, queer rights advocacy has been

[85] Carlos A. Ball, *Same-Sex Marriage and Children: A Tale of History, Social Science, and Law* (Oxford University Press, 2014) 142.

[86] Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change* (Yoda Press, 2004) 196–199.

[87] Ruth Vanita, *Love's Rite: Same-Sex Marriage in India and the West* (Penguin, 2005) 73–75.

[88] Madhavi Divan, *The Right to Equality in the Indian Constitution* (Oxford University Press, 2015) 212–214.

driven by community mobilization.[89] Partnerships between queer groups, women's rights groups, and progressive religious movements can build broader coalitions for reform.

At the same time, community-led models of kinship—such as hijra gharanas[90] and chosen families—must be valued as legitimate forms of care and belonging, even beyond the legal frameworks of marriage and adoption. The recognition of such plural kinship systems challenges the dominance of a single heteronormative family model.

The Future of Kinship: Towards a Plural and Inclusive Family Law

The reimagination of kinship requires a paradigm shift. Instead of viewing the family as a fixed, biological unit, law must recognize it as a plural, evolving network of care. This vision aligns with constitutional principles of dignity, equality, and fraternity. It also resonates with India's diverse cultural histories, which have long included non-normative forms of intimacy and kinship, from the epics' acknowledgment of gender fluidity to the living traditions of hijra and kothi communities.[91]

Reforming family law is therefore not an alien imposition but a constitutional and cultural necessity. By queering the family, Indian law can move towards a model that affirms diversity rather than enforcing conformity, celebrates love and care rather than policing gender and sexuality, and expands citizenship rather than restricting it.

[89] Lawyers Collective, "The Right that Dares to Speak its Name" (2009) 2 NUJS L Rev 417.

[90] Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (University of Chicago Press, 2005) 118.

[91] Devdutt Pattanaik, *Shikhandi and Other Tales They Don't Tell You* (Zubaan, 2014) 49.

Conclusion

Queering the family in Indian law is both a legal imperative and a moral project. The heteronormative structure of existing family laws excludes queer persons from the rights and recognition that are fundamental to citizenship. While constitutional jurisprudence has affirmed the dignity and equality of LGBTQ+ persons, family law lags behind, creating a disjuncture between constitutional ideals and statutory realities.

The path forward requires a multi-pronged approach: legislative amendments to family law statutes, judicial interpretation grounded in constitutional morality, policy initiatives that promote inclusion, and civil society mobilization that challenges social prejudice. Reform must go beyond assimilation into marriage to embrace a plural reimagination of kinship.

Ultimately, the project of queering family law is not only about LGBTQ+ rights but about the kind of democracy India aspires to be: one that respects difference, values care, and affirms the dignity of all its citizens. In embracing queer kinship, Indian law can fulfill the constitutional promise of justice—social, economic, and political—and move towards a more inclusive vision of family and nation.

6.
Clicking out of Marriage: Digital Divorces, Post-Separation Realities, and the social cost of Speed

Mr. Purnendu keshav
Advocate, Patna High Court
LL.B. Delhi University,
LL.M. Amity University Patna

Abstract
This chapter critically examines the emergence of "digital divorce" in India, driven by e-filing, online mediation, and virtual hearings, particularly in the wake of the COVID-19 pandemic. While digitization enhances procedural efficiency and expands access to justice, it simultaneously raises deep socio-legal concerns. Women, elderly spouses, rural litigants, and children are especially vulnerable to exclusion through the digital divide and the erosion of conciliatory practices. By situating digital divorce within constitutional values of equality, dignity, and access to justice, the analysis highlights the risk of reducing marriage dissolution to a transactional process that neglects reconciliation, child welfare, and post-divorce rehabilitation. Drawing on case law, statutory frameworks, and comparative experiences from the UK, Singapore, Estonia, and the US, the chapter argues for a calibrated model that balances efficiency with empathy. It recommends integrating mandatory counselling, child impact assessments, privacy safeguards, and welfare schemes, thereby reimagining digital divorce not as a technocratic reform but as a constitutional experiment in advancing substantive justice.

Keywords: *Digital Divorce; Family Law; Access to Justice; Digital Divide; Child Welfare; Gender Justice; E-Courts Project; Constitutional Morality; Human Dignity; Procedural Reform*

Introduction

"These women are to be all in common to all these men; no one is to live privately with anyone. The children too will be in common, and neither will a parent know his child, nor a child his parent. … The result will be that they will all call each other 'mine' and will share in the same joys and sorrows, and so the city will come to be most truly one."

— Plato, *The Republic*, Book V.[1]

PLATO'S RADICAL vision of a "community of wives and children," though intended to promote civic unity, stands as a cautionary tale about the dangers of subordinating familial bonds to administrative efficiency. By abolishing private kinship, the scheme promised social cohesion but at the cost of emotional attachment, moral development, and child welfare.[2] This ancient debate resonates powerfully with the present, where the rise of "digital divorce" risks reducing marriage and family to matters of procedural speed, privileging administrative convenience over the human dimensions of intimacy, reconciliation, and care.

The digitization of legal processes in India, accelerated during the COVID-19 pandemic, has fundamentally altered the relationship between citizens and the justice delivery system. While every sphere of litigation has witnessed a shift to digital platforms, it is in the field of family law that these changes have been most keenly felt. Matrimonial disputes, which traditionally demanded in-person engagement for conciliation and adjudication, are now increasingly processed through e-filing systems, video-conferenced hearings, and even digital mediation platforms. This phenomenon has given rise to what may be described as the "digital divorce" — a mode of marital dissolution facilitated substantially by technology rather than physical presence before courts.

The promise of digital divorce rests on two premises: speed and accessibility. The introduction of the E-Courts Project by the Supreme Court's e-Committee envisioned the elimination of bureaucratic delays and geographical obstacles through the creation of a paperless,

[1] Plato, *The Republic*, Book V (trans. Benjamin Jowett, Oxford University Press, 1894) 457c–464d.

[2] Aristotle, *Politics*, Book II (trans. H. Rackham, Loeb Classical Library, Harvard University Press, 1932), criticizing Plato's "community of wives" scheme for undermining familial bonds.

technology-driven judiciary.[3] For many estranged spouses, especially those constrained by mobility, stigma, or financial limitations, the digital turn ostensibly enables access to justice with a new degree of ease.

Yet, this apparent triumph of technology raises profound socio-legal questions. Can the acceleration of divorce proceedings through virtual hearings truly be equated with substantive justice? Does efficiency risk trivializing the institution of marriage by reducing its dissolution to a transactional process? What is the cost borne by vulnerable groups—women without digital literacy, elderly divorcees, unemployed spouses, or children caught in custodial disputes? These concerns echo long-standing anxieties about the judicial system's capacity to balance procedural innovation with human dignity and equity.

This chapter situates digital divorce not merely as a legal development but as a social phenomenon at the intersection of technology, kinship, and state responsibility. The central aim is to interrogate whether digitization of family law advances or undermines constitutional values of equality, access, and dignity under Articles 14 and 21 of the Constitution of India.[4]

The inquiry is guided by three interrelated research questions:

Access vs. Equity: Does digital divorce genuinely democratize access to justice, or does it deepen existing divides of gender, geography, and class?

Family and Social Fabric: How does the virtualization of matrimonial disputes reshape the meaning of marriage, kinship, and parental responsibility?

Safeguards and Reform: What institutional safeguards are required to ensure that digitization does not sacrifice empathy, dignity, and substantive justice at the altar of efficiency?

The scholarship on digital justice in India can be grouped into three strands: access, reconciliation, and socio-legal vulnerabilities. Together, these highlight both the promise and perils of digital divorce.

Digitization has been celebrated for expanding access through initiatives such as the Supreme Court's e-Committee reports (2005, 2014), which

[3] Supreme Court of India, *National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary* (2005).

[4] Supreme Court of India, *Report on Phase II of the e-Courts Project* (2014).

promoted e-filing and video-conferencing.[5] Scholars note gains in efficiency and accessibility, though critics caution that rural women, elderly litigants, and the poor remain excluded by the digital divide.[6]

In family law, where reconciliation is central, the shift raises unique concerns. The Family Courts Act, 1984 obliges courts to seek settlement, and in *Krishna Veni Nagam v. Harish Nagam* the Apex Court endorsed virtual hearings but warned against undermining conciliation.[7] Scholars argue that online speed risks reducing divorce to mere procedure, echoing global critiques.

Feminist and child-focused perspectives stress that women and children bear disproportionate burdens. Flavia Agnes[8] highlights women's economic precarity post-divorce, while cases such as *Danial Latifi v. Union of India* and *Gaurav Nagpal v. Sumedha Nagpal* reflect judicial concern with gender and child welfare. Comparative experiences, including the UK's reflection period and Singapore's mandatory counselling, underscore the need to temper efficiency with empathetic safeguards.

In sum, the literature suggests that digital divorce, though efficient, risks eroding reconciliation, gender justice, and child welfare if not accompanied by safeguards.

The Rise of Digital Divorce in India

The trajectory of matrimonial law in India has historically been tethered to in-person processes of filing, appearance, conciliation, and adjudication. Divorce petitions under the *Hindu Marriage Act, 1955* (HMA)[9] or the *Special Marriage Act, 1954* (SMA)[10] demanded personal presence at family courts, both to comply with procedural mandates and to facilitate reconciliation efforts. However, the onset of the digital age—particularly following the *E-Courts Project* initiated by the Supreme Court's e-Committee—has dramatically altered this landscape.

[5] Nandan Kamath, "Technology and Access to Justice" in *India Justice Report 2019* (Tata Trusts, 2019).

[6] Reetika Khera, "The Digital Divide in India" (2019) *Economic and Political Weekly* 54(6).

[7] *Krishna Veni Nagam v. Harish Nagam*, (2017) 4 SCC 150.

[8] Flavia Agnes, *Law, Justice and Gender: Family Law and Constitutional Provisions in India* (Oxford University Press, 2011).

[9] The Hindu Marriage Act, 1955 (Act 25 of 1955).

[10] The Special Marriage Act, 1954 (Act 43 of 1954).

Today, divorce petitions may be filed electronically, hearings may occur through video-conferencing, and mediation can unfold on online platforms. Together, these developments mark the arrival of what may be called **"digital divorce"**—a transformation undergirded not by legislative amendment alone, but also by judicial innovation and administrative reform.

Statutory Framework: The substantive provisions governing divorce in India remain anchored in personal law statutes such as the HMA, SMA, the *Parsi Marriage and Divorce Act, 1936*[11] and the *Dissolution of Muslim Marriages Act, 1939*.[12] However, the procedural transformation toward digitalization has been facilitated by a combination of general statutes and judicial policy interventions.

The *Family Courts Act, 1984*[13] empowers courts to adopt procedures that prioritize conciliation over adversarial adjudication. Section 10 of the Act gives family courts flexibility to evolve their own procedure, subject to rules framed by the High Court. This flexibility has been interpreted to include virtual hearings and online mediation.

Similarly, the *Information Technology Act, 2000* legitimized electronic records and digital signatures as legally valid,[14] thereby laying the foundation for e-filing of matrimonial petitions and electronic service of notices. When read with the *Code of Civil Procedure, 1908*—especially Order X, which concerns the recording of statements—the IT Act provides a statutory scaffold for the acceptance of video-conferencing as a valid mode of hearing.

The interplay of these enactments indicates that while substantive family law remains unchanged, the procedural law has become digitally adaptive, opening the door for "clicking out" of marriage.

The E-Courts Project and Institutional Reforms: The roots of digital divorce in India lie in the E-Courts Project, launched in 2005 by the Supreme Court's e-Committee as a phased plan to digitize the judiciary. Phase I computerized district courts, Phase II introduced e-filing and video-conferencing, and Phase III, launched in 2021, now integrates

[11] The Parsi Marriage and Divorce Act, 1936 (Act 3 of 1936).
[12] The Dissolution of Muslim Marriages Act, 1939 (Act 8 of 1939).
[13] Family Courts Act, 1984 (Act 66 of 1984), s. 10.
[14] Information Technology Act, 2000 (Act 21 of 2000), ss. 4, 5.

artificial intelligence and online dispute resolution.[15] Family courts, burdened with pendency, became early beneficiaries: litigants in cities like Delhi and Bengaluru accessed e-filing and remote hearings, especially during the COVID-19 pandemic.

Judicial recognition cemented these reforms. In *Krishna Veni Nagam v. Harish Nagam*, the Court endorsed video-conferencing to reduce hardship in matrimonial disputes, while *State of Maharashtra v. Praful Desai* validated video evidence recording, legitimizing "virtual presence." Together with the e-Committee's frameworks, these decisions normalized digital adjudication, shifting what began as a pandemic necessity into a lasting feature of family law.

Landmark Judicial Precedents: Case law reflects both acceptance and ambivalence. In *Praful Desai*, the Court recognized video-conferencing as valid presence; in *Krishna Veni Nagam*, it allowed virtual hearings for parties in distant jurisdictions. *Swapnil Tripathi* extended the vision of transparency through live-streaming, with implications for access in family law. Yet *Santhini v. Vijaya Venkatesh* revealed tension: while the majority insisted conciliation required physical presence, Chandrachud J.'s dissent argued for digital hearings to ease hardship.[16] Collectively, these rulings illustrate a judiciary supportive of technology but cautious about its impact on reconciliation.

The Pandemic as an Accelerator: The COVID-19 lockdown accelerated digital transformation. With physical hearings suspended in March 2020, courts rapidly adopted platforms like Vidyo and Webex.[17] Family courts in metros shifted to online mediation, with Delhi reporting nearly 60% of matrimonial petitions filed via e-filing between 2020 and 2022. While some litigants appreciated the convenience, others—particularly rural or digitally inexperienced—struggled, often relying entirely on intermediaries.

[15] E-Committee, *Draft Vision Document for Phase III of the E-Courts Project* (Supreme Court of India, 2021).

[16] *Santhini v. Vijaya Venkatesh*, (2017) 14 SCC 174.

[17] Supreme Court of India, "Guidelines for Court Functioning through Video Conferencing" (April 2020).

Emerging Challenges: Despite gains in efficiency, digital divorce raises enduring challenges. Unequal access to technology widens the digital divide; virtual hearings may dilute conciliation, undermining the ethos of the Family Courts Act; authenticity and privacy risks remain unresolved; and diaspora litigants face jurisdictional uncertainty over enforcement of digital decrees. These issues underscore that digital divorce is not merely procedural reform but a structural shift that must reconcile efficiency with equity and empathy.

Efficiency vs. Justice — A Critical Appraisal

The rhetoric surrounding digital divorce in India has been dominated by the promise of efficiency. By allowing petitions to be filed electronically, hearings to be conducted remotely, and decrees to be delivered digitally, the judiciary appears to have made significant progress in reducing backlog and delays. However, a closer examination reveals that efficiency does not necessarily translate into justice. In family law, where questions of reconciliation, welfare, and human dignity are central, the pursuit of speed often risks undermining substantive justice.

Speed and Procedural Justice: The Indian judicial system is notorious for its delays. The Law Commission of India, in its 230th Report, identified chronic arrears and backlog as one of the gravest challenges to access to justice.[18] It recommended structural reforms, including the adoption of technology, to streamline procedures. Similarly, in *Salem Advocate Bar Association (II) v. Union of India*, the Supreme Court underscored the need to balance procedural efficiency with fairness, directing that alternative dispute resolution (ADR) mechanisms be integrated into civil procedure.

Digital divorce appears to fulfil this mandate by offering faster disposal. However, scholars such as Amartya Sen have cautioned that the idea of justice cannot be reduced to mere institutional efficiency.[19] Justice must be substantive, reflecting values of fairness, equity, and dignity. In the matrimonial context, a hasty resolution that fails to address underlying grievances—economic dependency, custody arrangements, or emotional trauma—risks producing a *formal* but not a *meaningful* resolution.

[18] Law Commission of India, "230th Report on Reforms in the Judiciary: Some Suggestions" (August 2009).

[19] Amartya Sen, *The Idea of Justice* 45 (Allen Lane, London, 2009).

The Digital Divide and Unequal Access: A central challenge of digital divorce is its potential to exacerbate existing inequalities. While metropolitan litigants with digital literacy and access to reliable internet may benefit, rural women, elderly spouses, and economically disadvantaged individuals often find themselves at the margins of digital processes.

Government data indicates that as of 2019, only about 20% of Indian women in rural areas had access to the internet.[20] This disparity translates into unequal access to online legal remedies. In practice, many women depend entirely on lawyers or NGOs to file petitions, thereby reducing their autonomy in proceedings.

Judicial recognition of this divide can be traced to *Krishna Veni Nagam v. Harish Nagam*, where the Supreme Court emphasized that compelling women litigants to travel long distances imposes disproportionate hardship.[21] Although the Court permitted video-conferencing as a remedy, this solution assumes the availability of stable digital infrastructure, which remains far from universal. The "digital divide" thus risks transforming access to justice into a digital privilege, undermining the constitutional promise of equality before law under Article 14.

Reconciliation and the Risk of Trivialization: The ethos of family law in India prioritizes reconciliation and settlement over adversarial adjudication. Section 9 of the *Family Courts Act, 1984* obliges judges to make efforts for settlement before proceeding to trial. Courts have repeatedly emphasized that marriage is not merely a private contract but a social institution deserving of preservation.

However, digital divorce risks undermining this conciliatory ethos. In *Santhini v. Vijaya Venkatesh*, the majority of the Supreme Court insisted that personal presence was essential for meaningful reconciliation, arguing that physical hearings facilitate empathy and persuasion. The dissent by Chandrachud J., however, highlighted the hardships of travel and supported digital modes. This divergence underscores judicial ambivalence: while technology reduces hardship, it may also truncate the affective space necessary for reconciliation.

Further, global experiences reveal similar concerns. In the UK, scholars have critiqued the "click-and-divorce" model for trivializing marriage by

[20] Government of India, *Digital India Report* (Ministry of Electronics and IT, 2019).

[21] *Krishna Veni Nagam v. Harish Nagam*, (2017) 4 SCC 150

reducing dissolution to an online transaction.[22] In India, where marriage is deeply intertwined with cultural and familial structures, such trivialization risks eroding the social fabric.

Child Welfare and Substantive Justice: Another area where efficiency collides with justice is child welfare. Custody and visitation disputes require sensitive evaluation of the child's best interests, a principle repeatedly upheld by the Supreme Court. In *Gaurav Nagpal v. Sumedha Nagpal*, the Court reaffirmed that the welfare of the child is the paramount consideration, overriding even statutory entitlements of parents.[23]

Digital hearings, however, may reduce opportunities for counsellors and judges to interact meaningfully with children. The absence of physical presence can limit the court's ability to gauge emotional cues and family dynamics. Psychological research, particularly Judith Wallerstein's longitudinal studies, demonstrates that children of divorced parents suffer long-term emotional consequences when custody arrangements are determined without adequate counselling and support.[24]

Thus, while digital divorce may expedite custody disputes, it risks compromising the substantive justice owed to children as vulnerable stakeholders.

Privacy, Authenticity, and Procedural Fairness: Efficiency also raises concerns regarding privacy and authenticity. Online hearings and electronic filings generate large volumes of sensitive data, including financial disclosures, custody reports, and psychological evaluations. India currently lacks a comprehensive data protection framework for judicial proceedings, creating risks of breaches and misuse.

The Supreme Court, in *Justice K.S. Puttaswamy v. Union of India*, recognized the right to privacy as a fundamental right under Article 21. Extending this logic, matrimonial litigants are entitled to protection against the unauthorized disclosure of sensitive personal data. Yet, existing digital infrastructure often lacks robust safeguards, thereby undermining procedural fairness.

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[22] Joanna Miles, "Digitalization of Divorce Proceedings: A Comparative Study" 45 Family Law Quarterly 233 (2020).

[23] *Gaurav Nagpal v. Sumedha Nagpal*, (2009) 1 SCC 42.

[24] Judith Wallerstein, *Second Chances: Men, Women and Children a Decade After Divorce* 65 (Ticknor & Fields, New York, 1989).

Authenticity also remains contested: impersonation, coercion in virtual environments, and unequal participation due to poor connectivity can all erode the fairness of digital divorce proceedings.

Efficiency vs. Empathy: The overarching concern is that efficiency may come at the cost of empathy. Family law disputes are not merely legal transactions but involve complex emotional, social, and psychological dimensions. By fast-tracking divorce through digital platforms, the state risks abdicating its responsibility to provide holistic support mechanisms such as counselling, rehabilitation, and post-divorce welfare schemes.

As Sen reminds us, justice is not achieved by procedural shortcuts but by ensuring substantive fairness.[25] For matrimonial litigants, especially vulnerable women and children, this means access not only to a decree of divorce but also to mechanisms of economic support, psychological care, and social reintegration.

While digital divorce has been celebrated for reducing delays and enhancing procedural efficiency, this section demonstrates that such efficiency must be critically appraised. Without addressing the digital divide, safeguarding reconciliation, ensuring child welfare, and protecting privacy, efficiency risks becoming an empty promise. The next section will examine the socio-legal challenges of digital divorce, focusing on its disproportionate impact on vulnerable groups such as women, elderly spouses, and economically disadvantaged litigants.

Socio-Legal Challenges

While the rise of digital divorce promises procedural efficiency, it simultaneously foregrounds the structural inequities embedded in Indian society. Divorce is never a level playing field; it is shaped by gender hierarchies, economic disparities, and geographic inequalities. The digitization of matrimonial proceedings risks exacerbating these vulnerabilities, creating what might be termed a "two-tier" system of justice — accessible to the digitally empowered, yet exclusionary for the marginalized.

[25] Sen, supra note 3, p. 47.

Gendered Dimensions: Divorce in India has always carried disproportionate consequences for women. Empirical studies consistently reveal that women, especially homemakers and those without independent income, suffer greater economic and social fallout post-divorce.[26] Flavia Agnes has argued that the legal system continues to reflect patriarchal assumptions, often leaving women financially and socially vulnerable despite statutory safeguards.[27] *Rajkotia* observes that maintenance law, though framed as protective, often translates into prolonged litigation and inadequate relief, leaving homemakers especially vulnerable in post-divorce life (pp. 182–186).[28] In the context of digital platforms, such vulnerabilities may be further entrenched, with women lacking both bargaining power and technological access.

The transition to digital platforms risks intensifying these inequalities. Women frequently face lower digital literacy rates compared to men, particularly in rural and semi-urban areas. According to the *National Family Health Survey (NFHS-5, 2019–21)*, only 33% of women in India reported using the internet, compared to 57% of men.[29] Such disparities mean that women are more likely to be dependent on lawyers or male relatives to access digital platforms, reducing their autonomy in matrimonial litigation.

Judicial recognition of gendered hardships has been explicit in cases like *Danial Latifi v. Union of India*, where the Court safeguarded the rights of divorced Muslim women to a fair and reasonable settlement.[30] Similarly, in *Shayara Bano v. Union of India*, the Court struck down instantaneous triple talaq as unconstitutional, emphasizing substantive gender equality.[31] These landmark decisions illustrate the judiciary's awareness of gendered vulnerabilities. However, the digitization of divorce proceedings risks undoing such protections by imposing new technological barriers.

Moreover, women's economic dependency is compounded by the absence of robust post-divorce rehabilitation schemes. In the absence of state-supported welfare, digital divorce may reduce complex matrimonial

[26] Bina Agarwal, "Gender and Command over Property: A Critical Gap in Economic Analysis and Policy in South Asia" 22 World Development 1455 (1994).

[27] Flavia Agnes, *Law, Justice and Gender: Family Law and Constitutional Provisions in India* 120 (Oxford University Press, New Delhi, 2011).

[28] Malavika Rajkotia, *Intimacy Undone: Marriage, Divorce and Family Law in India* 182–186 (Speaking Tiger, New Delhi, 2017).

[29] Ministry of Health and Family Welfare, *National Family Health Survey-5 (NFHS-5), 2019–21* (2021).

[30] *Danial Latifi v. Union of India*, (2001) 7 SCC 740.

[31] *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

disputes into expedited decrees, leaving women to navigate financial and emotional precarity without institutional support. As *Malavika Rajkotia* argues in *Intimacy Undone: Marriage, Divorce and Family Law in India*, family law in India has historically been "structured to protect patriarchal privilege, often overlooking the socio-economic vulnerabilities of women and children" (p. 37).[32] This insight warns that digital divorce, if reduced to a technocratic exercise, risks amplifying the very inequities it seeks to dissolve.

Economic Stratification: The economic divide in India manifests acutely in access to digital justice. Wealthier litigants in metropolitan cities are well-positioned to benefit from online hearings, as they possess devices, stable internet connections, and professional legal support. By contrast, economically disadvantaged litigants—particularly daily-wage earners, migrants, and those in informal employment—struggle to access the infrastructure necessary for digital divorce.

The cost of technology itself constitutes a barrier. Smartphones, laptops, and broadband subscriptions remain unaffordable for large segments of the population. The Ministry of Electronics and IT's 2019 report found that only 24% of rural households had access to the internet.[33] This digital exclusion has the effect of stratifying matrimonial justice: while the affluent resolve disputes through seamless virtual platforms, the poor remain trapped in cycles of delay or dependency.

Case law has highlighted similar concerns. In *Anita Kushwaha v. Pushap Sudan*, the Supreme Court affirmed that access to justice is a fundamental right under Article 21, encompassing affordability and accessibility. Yet, digital divorce without equitable infrastructural support risks violating this principle by creating an economic filter to matrimonial relief.

Geographic Inequities: Geography also mediates access to digital divorce. Urban litigants, particularly in tier-I and tier-II cities, benefit from functional e-court portals and virtual hearing infrastructure. By contrast, litigants in remote districts often face erratic electricity supply, unstable internet connectivity, and poorly resourced family courts.

The E-Courts Project's Phase II Report revealed stark disparities: while metro courts achieved near-total digitization, many district courts in states such as Bihar, Jharkhand, and the North-East lacked basic video-

[32] Id. at p. 37

[33] Government of India, *Digital India Report* (Ministry of Electronics and IT, 2019).

conferencing facilities.[34] Such uneven implementation risks creating regional inequalities in access to matrimonial justice.

Diaspora litigants illustrate another layer of geographic complexity. Non-Resident Indians (NRIs) frequently resort to Indian family courts for divorce under personal law statutes. However, questions of jurisdiction and enforceability arise when decrees are granted through virtual hearings. In *Y. Narasimha Rao v. Y. Venkata Lakshmi*, the Supreme Court held that foreign divorce decrees would be recognized in India only if granted on grounds available under Indian law. In a digital context, uncertainty persists as to whether online decrees, especially those involving NRI spouses, will be enforceable across jurisdictions.

The Burden on Elderly and Vulnerable Litigants: Elderly divorcees, though a smaller demographic, face unique challenges in the digital age. Many lack digital literacy or the physical ability to engage with online platforms. Similarly, vulnerable groups such as persons with disabilities find virtual hearings less accessible due to design flaws in existing platforms.

The constitutional guarantee of equality under Articles 14 and 21 requires that procedural innovations be inclusive. Yet, absent assistive technologies and inclusive design, digital divorce risks marginalizing those already at the periphery of matrimonial litigation.

Diaspora Concerns and Transnational Justice: For diaspora couples, digital divorce offers convenience by allowing participation without travel. Yet, it simultaneously raises complex questions of recognition and enforcement abroad. In jurisdictions such as the United States and the United Kingdom, recognition of foreign divorces is subject to principles of jurisdiction, domicile, and natural justice. Indian digital decrees may thus face challenges if one spouse contests jurisdiction or claims lack of opportunity for fair hearing.

Scholars of transnational family law warn that online divorces risk producing a class of "limping marriages," where a couple is considered divorced in one jurisdiction but married in another.[35] For diaspora Indians,

[34] E-Committee, *Report on Phase II of the E-Courts Project* (Supreme Court of India, 2014).

[35] Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* 212 (Cambridge University Press, 2011).

this legal uncertainty can have profound implications for property, custody, and remarriage.

Intersectionality of Inequities: The socio-legal challenges of digital divorce are not discrete but **intersectional**. A rural woman from a low-income household may face compounded barriers of gender, geography, and class, making digital divorce effectively inaccessible. Similarly, diaspora women subjected to domestic violence may be disadvantaged if digital divorce proceedings are recognized in India but not abroad, trapping them in legal liminality.

Addressing these intersectional inequities requires a calibrated approach that balances efficiency with inclusivity. Without safeguards, digital divorce risks reproducing the very inequalities it claims to redress.

This section demonstrates that digital divorce is not a neutral technological innovation but a deeply political and socio-legal phenomenon. It disproportionately burdens women, the poor, rural litigants, elderly divorcees, and diaspora couples, thereby challenging the constitutional promise of equality and justice. The next section will turn to the impact of digital divorce on children and family dynamics, examining how efficiency-driven processes shape the welfare of minors and the integrity of familial relationships.

Impact on Children & Family Dynamics

The dissolution of marriage is never confined to the spouses alone; its reverberations extend to children, extended families, and the wider social fabric. In the context of digital divorce, these reverberations acquire new dimensions. While virtual platforms may facilitate speedy adjudication, they risk compromising the child-centric ethos that underpins Indian family law. Children may become the silent casualties of efficiency-driven reforms, with long-term consequences for their psychological well-being and familial identity.

The Welfare Principle in Indian Jurisprudence: Indian courts have consistently held that a child's welfare overrides parental claims, as seen in the *Guardians and Wards Act, 1890*[36] and *Hindu Minority and Guardianship Act, 1956*.[37] The Supreme Court in *Gaurav Nagpal v. Sumedha Nagpal* underscored welfare as a holistic standard, while *Roxann*

[36] The Guardians and Wards Act, 1890 (Act 8 of 1890).

[37] The Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956).

Sharma v. Arun Sharma highlighted developmental needs in early childhood.[38] Yet digital hearings often limit courts' ability to interact meaningfully with children, risking decisions that are efficient but less attuned to their best interests.

Children as Invisible Stakeholders in Digital Divorce: Matrimonial disputes usually centre on parents, leaving children marginalized. In online proceedings, counselling to elicit children's views often falters, with family counsellors noting reduced candour in virtual settings.[39] This invisibilization contravenes India's obligations under the UNCRC, which requires children's best interests and voices to be integral to judicial processes.[40] *Rajkotia* poignantly describes children as the "collateral damage" of adversarial matrimonial litigation, their welfare frequently subordinated to procedural speed (p. 220).[41] In digital divorces, this invisibility may deepen when virtual formats limit counsellor-child interaction.

Psychological Consequences of Digital Divorce: Studies like Wallerstein's show divorce can heighten children's anxiety and insecurity.[42] Digital divorce may intensify these harms by hastening decrees, reducing empathetic engagement, and enabling parental alienation where one parent controls technological access. Without systemic counselling, children risk carrying unaddressed emotional burdens.[43]

Custody, Visitation, and Virtual Parenting: Courts have experimented with virtual visitation, especially during the pandemic,[44] but such measures cannot substitute physical care. As reaffirmed in *Roxann Sharma*, custody must reflect nurturing needs, and digital visitation often reduces parental bonds to screen-time, assuming universal access to

[38] *Roxann Sharma v. Arun Sharma*, (2015) 8 SCC 318.
[39] Government of India, *National Legal Services Authority Report on Online Mediation and Counselling during COVID-19* (2021).
[40] United Nations Convention on the Rights of the Child, 1989, arts. 3, 12.
[41] Id. at 220.
[42] Judith Wallerstein, *Second Chances: Men, Women and Children a Decade After Divorce* 65 (Ticknor & Fields, New York, 1989).
[43] Carol Smart, *Children's Voices: The Experience of Family Breakdown* 52 (Cambridge University Press, 2001).
[44] Janet Leach Richards, "Virtual Visitation: The Next Frontier in Family Law" 38 Family Law Quarterly 201 (2004).

technology. Hybrid models are necessary to safeguard the child's right to care.[45]

Children in Transnational and NRI Marriages: Diaspora divorces complicate custody. In *V. Ravi Chandran v. Union of India*, the Supreme Court stressed harmonizing domestic law with international conventions. Yet digital custody orders risk "limping" recognition abroad, destabilizing children's security and violating UNCRC's call for stability.

Erosion of the Family as a Social Institution: Digital divorce may also weaken family structures. While *Lata Singh v. State of U.P.* affirmed freedom of marital choice, the ease of online dissolution risks trivializing marriage, eroding extended kinship bonds, and leaving children to absorb the consequences of familial instability.[46]

Towards Child-Centric Digital Reforms: To prevent efficiency from eclipsing justice, reforms must prioritize children: mandatory impact assessments, child counselling protocols, hybrid visitation models, and stronger cross-border custody coordination. These align with constitutional guarantees of dignity and equality under Articles 14 and 21, and India's obligations under the UNCRC.

Without safeguards, children risk becoming invisible victims of digital divorce. Embedding child-centric mechanisms ensures that efficiency is tempered with empathy, and that technology strengthens rather than undermines the welfare principle.

Comparative Perspectives

The phenomenon of digital divorce is not unique to India. Across jurisdictions, courts and legislatures have experimented with online systems to streamline matrimonial disputes. Yet, the comparative experience demonstrates that efficiency is always tempered by safeguards: mandatory counselling, reflection periods, and child impact assessments. A comparative analysis is thus essential to contextualize India's digital divorce trajectory and to identify reforms that can reconcile speed with empathy.

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[45] Delhi High Court, *XYZ v. ABC*, FAO 123/2020 (order dated Sept. 2020) (directing online visitation during pandemic).

[46] Patrick Parkinson, *Family Law and the Indissolubility of Parenthood* 212 (Cambridge University Press, 2011).

The United Kingdom: Balancing Speed with Reflection: The United Kingdom represents one of the most prominent examples of digital divorce. The *Divorce, Dissolution and Separation Act, 2020* introduced online applications for divorce, accompanied by a "no-fault" ground.[47] Spouses can now file petitions electronically without attributing blame, reducing hostility and streamlining procedure.

Crucially, however, the Act mandates a 20-week "cooling-off" period between the filing of the application and the grant of a conditional order.[48] This reflection period is designed to encourage reconsideration, reconciliation, or mediation before final dissolution.

Judicial practice has also highlighted the importance of balancing efficiency with substantive justice. In *Owens v. Owens,* the UK Supreme Court lamented the rigidity of fault-based divorce laws, leading to legislative reforms that combined digital convenience with welfare safeguards.[49]

For India, the UK model underscores the need for mandatory reflection mechanisms. While Section 13B(2) of the *Hindu Marriage Act, 1955* already prescribes a six-month waiting period for mutual consent divorces,[50] digital processes risk reducing this safeguard to a procedural formality. A UK-style reflection period could preserve deliberation in the digital context.

Singapore: Emphasis on Counselling and Mediation: Singapore's Family Justice Courts have pioneered the use of technology in matrimonial disputes, but with a distinct emphasis on child welfare and counselling. The *Family Justice Courts' Digital Transformation Report (2018)* highlights the integration of online filing systems with mandatory Parenting Programmes for couples with minor children.[51]

Under the *Women's Charter (Singapore),* parties seeking divorce are required to undergo mandatory counselling and mediation before proceedings are finalized, particularly where children are involved.[52] The courts employ psychologists, social workers, and mediators to ensure that digital efficiency does not compromise the holistic needs of families.

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[47] Divorce, Dissolution and Separation Act, 2020 (UK), s. 1.

[48] Id., s. 10.

[49] *Owens v. Owens* [2018] UKSC 41.

[50] The Hindu Marriage Act, 1955 (Act 25 of 1955), s. 13B(2).

[51] Family Justice Courts of Singapore, *Digital Transformation Report* (2018).

[52] The Women's Charter, 1961 (Singapore), ss. 50–55.

Singapore's model demonstrates that digitization can be harnessed without eroding substantive justice. The combination of online systems with structured welfare interventions provides a useful blueprint for India, where counselling often remains a discretionary rather than mandatory process.

Estonia's "e-society" demonstrates the potential of fully digital divorces, where petitions, authentication, and decrees are processed online.[53] Its success, however, relies on near-universal digital literacy, robust data protection, and strong welfare systems, with custody and support still requiring judicial oversight.[54] The United States, by contrast, illustrates state-level diversity: while some states permit online filing and remote hearings,[55] most retain safeguards such as mandatory counselling or parenting classes—for instance, Florida's Parent Education and Family Stabilization Course[56] and judicial discretion to order mediation. These examples reveal that while digital systems expedite procedure, meaningful safeguards remain essential to protect vulnerable spouses and children.

For India, the comparative lessons are clear. The UK's reflection period, Singapore's mandatory counselling, the US's child-focused programmes, and Estonia's infrastructural preconditions together highlight that efficiency must be tempered with empathy. Key reforms would include mandatory digital counselling, child impact assessments, retention of the statutory cooling-off period with limited discretion, targeted digital literacy schemes for women, rural litigants, and the elderly, and a judicial data protection framework. Embedding these measures would harmonize India's digital divorce regime with constitutional commitments to dignity, equality, and welfare, ensuring that technological innovation strengthens rather than undermines substantive justice.

Policy, Constitution & Reform

The digitization of matrimonial proceedings raises not only questions of procedure but also of constitutional principle. Efficiency, while desirable, must be weighed against foundational values of equality, dignity, liberty, and social justice. As B.R. Ambedkar observed during the Constituent Assembly Debates, the Constitution is not merely a legal document but a

[53] Government of Estonia, *e-Governance in Courts Report* (2019).

[54] Id.

[55] American Bar Association, "Family Law and Technology: Online Divorce Platforms in the U.S." (2020).

[56] Florida Statutes, Title VI, ch. 61.21 (Parent Education and Family Stabilization Course).

vehicle of social transformation.[57] In this context, digital divorce must be evaluated not only for its administrative convenience but for its consonance with constitutional morality and the rights of vulnerable groups.

Access to Justice as a Constitutional Right: The Supreme Court has repeatedly affirmed that access to justice is a fundamental right implicit in Article 21. In *Anita Kushwaha v. Pushap Sudan*, the Court held that access to justice includes four essentials: adjudicatory mechanism, accessibility in terms of distance, affordability, and speedy adjudication. Digital platforms, by reducing geographical barriers and expediting hearings, satisfy some of these dimensions.

However, access cannot be defined solely in terms of speed. Equality under Article 14 demands that access be substantively equitable, ensuring that women, rural litigants, and economically disadvantaged groups are not excluded by digital divides. The risk is that digital divorce may enable access for the privileged while perpetuating exclusion for the marginalized — thereby producing what Sen describes as "arrangements without justice."[58]

Constitutional Morality and the Institution of Marriage: In *Navtej Singh Johar v. Union of India*, the Court clarified that *constitutional morality* must guide judicial and legislative action, privileging liberty, dignity, and equality over prevailing social morality.[59] Applied to digital divorce, this principle requires that reforms uphold the dignity of estranged spouses and the welfare of children, rather than reducing marriage dissolution to a technocratic process.

Marriage, while a social institution, has been consistently framed by the Court as subject to constitutional values. In *Joseph Shine v. Union of India*, the Court struck down adultery as a criminal offence, holding that the Constitution protects individual autonomy and equality within marriage.[60] Similarly, in *Shayara Bano v. Union of India*, the Court invalidated instant triple talaq, affirming that family law must align with constitutional morality.[61]

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[57] Constituent Assembly Debates, Vol. VII, 953 (Nov. 25, 1949).
[58] Amartya Sen, *The Idea of Justice* 45 (Allen Lane, London, 2009).
[59] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1
[60] *Joseph Shine v. Union of India*, (2019) 3 SCC 39.
[61] *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

Digital divorce, therefore, must be designed to uphold *human dignity* (Article 21), *gender equality* (Articles 14–15), and *child welfare* (Article 39(f)), rather than merely facilitating expedient dissolution.

Human Dignity and Privacy: The right to dignity and privacy, recognized in *Justice K.S. Puttaswamy v. Union of India*, extends to matrimonial litigation. Online divorce proceedings involve sensitive disclosures — financial affidavits, medical records, child custody evaluations — all of which require stringent protection. Without robust data protection mechanisms, digital divorce risks violating dignity by exposing litigants to breaches of confidentiality.

A calibrated reform must therefore integrate data protection safeguards into the digital justice system, ensuring that the technological shift does not erode the substantive rights of litigants.

Law Commission reports have consistently balanced efficiency with justice—proposing irretrievable breakdown as a ground for divorce, recommending flexibility in cooling-off periods, and stressing child welfare. These insights underscore that digital reforms must integrate counselling, mediation, and welfare safeguards. A calibrated framework for India would include mandatory counselling, child impact assessments, protection for vulnerable groups, retention (with discretion) of the cooling-off period, robust data protection, and state-supported rehabilitation. Ultimately, as the Supreme Court cautioned in *Salem Advocate Bar Association (II)*, efficiency must align with fairness. Digital divorce, therefore, is not merely procedural innovation but a constitutional challenge—demanding that speed be harmonized with dignity, empathy, and substantive justice.

Recommendations and Conclusion

"The legal subordination of one sex to the other is wrong in itself, and now one of the chief hindrances to human improvement." — John Stuart Mill, *The Subjection of Women* (1869), ch. 1.[62]

John Stuart Mill's critique of marital subordination as a hindrance to human progress provides a compelling lens through which the promises and perils of digital divorce may be assessed. While technology may accelerate procedures, reforms that ignore gendered inequalities risk perpetuating precisely the injustices Mill condemned. To ensure that

[62] John Stuart Mill, *The Subjection of Women* (Longmans, Green, Reader & Dyer, 1869) ch. 1.

digitization advances justice, rather than replicating inequities under the guise of speed, digital reforms must be calibrated to uphold constitutional values of gender justice, child welfare, and human dignity.[63]

The emergence of digital divorce in India represents a transformative moment in the intersection of law, technology, and society. By migrating matrimonial disputes to virtual platforms, the judiciary has sought to remedy delay, distance, and pendency. At first glance, digitization appears to democratize access to justice, enabling spouses across geographies to dissolve marriages with relative ease. Yet, as this chapter has shown, efficiency does not automatically equate to justice.

Summary of Key Insights: Digital divorce in India evolved through the e-Courts Project and rulings such as *Krishna Veni Nagam* and *Swapnil Tripathi*, which endorsed virtual participation. While delays have reduced, digitization is not neutral but a socio-legal phenomenon: speed risks undermining reconciliation and fairness, the digital divide marginalizes women, the elderly, and rural litigants, diaspora families face jurisdictional hurdles, and children's welfare often goes unheard. Comparative lessons (UK, Singapore, Estonia) reveal that efficiency must be balanced with safeguards, while constitutional values of equality and dignity demand a calibrated approach.

Towards a Calibrated Approach: Reform must combine efficiency with welfare: retaining deliberation through the Section 13B(2) cooling-off period (with sparing judicial waiver), embedding counselling and mediation, adopting child-centric protocols like Child Impact Assessment Reports, bridging digital inequities through literacy and legal aid, safeguarding privacy as affirmed in *Puttaswamy*, and supporting post-divorce rehabilitation through state welfare schemes.

Reimagining Digital Divorce as Social Justice: Divorce is not merely procedural but a social rupture with profound implications for women and children. If supported by safeguards, digitization can democratize access and reduce stigma; without them, it risks trivializing marriage and deepening inequalities. Echoing Rajkotia's call to view divorce not as contractual exit but as a site for "social justice and reconstitution of rights"

[63] Susan Moller Okin, *Women in Western Political Thought* (Princeton University Press, 1979) 220–225.

(p. 12)[64], digital divorce must be reimagined as a constitutional experiment where efficiency is tempered by dignity, empathy, and welfare.

As Ambedkar reminded the Constituent Assembly, constitutional values must guide reform.[65] Digital divorce, therefore, should not be understood as the triumph of technology over tradition, but as an experiment where efficiency serves equity, technology serves humanity, and law serves justice.

Ultimately, it is my considered view that digital divorce, though inevitable in India's judicial future, cannot be pursued as a technocratic reform alone. To reduce divorce to an exercise in digital efficiency is to risk trivializing marriage, silencing children, and deepening gendered inequities. The measure of a just legal system lies not merely in how swiftly it delivers decrees, but in how sensitively it responds to the lived realities of those most affected — women, children, the elderly, and the marginalized. At the same time, the responsibility to safeguard children's welfare does not rest with institutions alone. Couples themselves, in choosing dissolution, must remain mindful of the far-reaching impact on their offspring. Digital platforms may ease procedural hurdles, but they cannot substitute for the emotional labour of responsible parenting. In this sense, digital divorce must be approached not only as a legal procedure but also as a moral choice, one that requires individuals to balance personal freedom with the duties owed to their children. The challenge before judges, lawmakers, and policymakers is therefore not whether India can digitize divorce, but whether it can do so without abandoning the human bonds at its heart. Only then can technology advance justice without emptying it of the human bonds that accord it meaning.

[64] Id. at 12.

[65] Constituent Assembly Debates, Vol. VII, 953 (Nov. 25, 1949).

7.
Frozen Embryo Ownership in Marital Breakdown and Beyond: Legal Conundrums

Mr. Harsh Amrit[1]
UGC-NET(JRF) LL.M.,
Rajiv Gandhi National University of Law, Patiala.

Ms. Priyadarshi Jha[2]
Asst. Professor of Law,
KIIT School of Law, KIIT University, UGC-NET(JRF).

Abstract
In the rapidly evolving field of assisted reproductive technology, frozen embryos, once seen purely as scientific breakthroughs, have now become sites of legal and ethical contestation. As ARTs becomes more accessible to couples dealing with infertility, disputes over the fate of stored embryos, particularly in the event of divorce or death, are raising complex legal questions. This paper explores the jurisprudential ambiguities and normative entanglements regarding the issue of ownership and control over frozen embryos from a family law perspective, focusing on the rights of spouses. The discussion revolves around the central question: What rights do spouses retain over stored embryos once the marital bond dissolves? To address this, the paper examines three dominant theoretical frameworks; the personhood approach, which views embryos as potential life and grants them special moral consideration; the property approach, which treats embryos as marital property subject to division; and the intermediate approach, which attempts to balance reproductive autonomy with ethical concerns. Beyond the marital context, the paper further explores challenging questions arising from the death of a spouse, disputes among unmarried partners, and withdrawal of consent. These scenarios raise deeper questions about intent, autonomy, and the evolving meaning of biological connection. The Indian legal framework remains notably under articulated in this domain. Despite guidelines and

[1] UGC-NET(JRF) LL.M., Rajiv Gandhi National University of Law, Patiala.
[2] Asst. Professor of Law, KIIT School of Law, KIIT University, UGC-NET(JRF).

legislation, there is a lack of judicial clarity on embryo ownership in matrimonial disputes. Indian courts have remained largely incongruent, leaving the stakeholder uncertain about the legal course to follow. By examining global jurisprudence alongside emerging Indian legal and policy developments, this paper attempts to delineate the normative gaps and ethical tensions within the current regulatory structure. It argues for a more nuanced legal framework that upholds the reproductive choices while recognizing the unique legal status of frozen embryos.

Keywords: *Frozen Embryo, ARTs, Divorce, Reproductive Autonomy, Personhood.*

Introduction

The emergence of Assisted Reproductive Technologies (ARTs) has fundamentally transformed reproductive medicine, offering new possibilities for individuals and couples struggling with infertility. The birth of Louise Brown in 1978, the first successful IVF pregnancy, marked a turning point in medical science, demonstrating that conception could occur outside the human body. Since then, techniques such as in vitro fertilization (IVF), embryo transfer, surrogacy, and cryopreservation have become increasingly common.[3] A critical component of these procedures is embryo storage, where fertilized embryos are frozen for potential future use. While this technology has provided hope to countless individuals, it has also introduced complex legal and ethical challenges, particularly concerning the rights of spouses over stored embryos in the event of divorce, the dilemmas surrounding embryo donation, and the adequacy of regulatory frameworks in countries like India.

The growing reliance on ARTs can be attributed to various modern factors, including delayed marriages, occupational stress, and rising infertility rates. Data from the Centers for Disease Control and Prevention (CDC) indicate a significant increase in the demand for ART procedures over the past decade. However, legal systems in many jurisdictions, including India, have struggled to keep pace with these advancements. This lag has resulted in unresolved disputes over critical issues such as embryo ownership, consent, and disposition rights, leaving courts to navigate these matters without clear legislative guidance.

[3] Rachel Gurevich, "What to Expect Along the Path to Conceiving With IVF", *Verywell Family* (April 14 2020), *available at*: https://www.verywellfamily.com/understanding-ivf-treatment-step-by-step-1960200> (last visited on August 21, 2025).

One of the most contentious legal issues arises when couples who have undergone IVF later decide to divorce. The question of who retains control over the stored embryos becomes a matter of significant dispute. Different jurisdictions have adopted varying approaches to this problem. Some courts prioritize pre-existing contractual agreements between the parties, while others focus on principles of reproductive autonomy or the right not to procreate. Landmark cases in the United States, such as *Davis v. Davis* and *Reber v. Reiss*, have attempted to establish precedents, but inconsistencies remain. In India, the absence of specific legislation means that such disputes are often resolved through general contract law or judicial discretion, leading to uncertainty and potential inequities.

Another area of concern is embryo donation, where unused embryos are given to other individuals or couples facing infertility. While this practice offers a solution for those unable to conceive, it raises several ethical and legal questions. Key among these is whether a spouse can revoke consent after embryos have been donated. Additionally, disputes may arise over legal parentage if a donated embryo results in a child. Should the donors or the recipients be recognized as the legal parents? The distinction between genetic and social parenthood further complicates these cases, particularly when donors later seek to assert parental rights. These dilemmas highlight the need for clear legal frameworks to govern embryo donation and ensure that the rights of all parties are protected.

In India, the legal landscape surrounding ART remains underdeveloped. While the Assisted Reproductive Technology (Regulation) Act, 2021, and the Surrogacy (Regulation) Act, 2021, provide some regulatory structure, they do not comprehensively address disputes over embryo ownership. The Indian Council of Medical Research (ICMR) has issued guidelines recommending written consent for embryo storage and use, but these lack strong enforcement mechanisms. As a result, Indian courts have had to rely on broader legal principles, such as equity, contractual obligations, and fundamental rights under Article 21 of the Constitution, to resolve such cases. The scarcity of judicial precedents in this area further exacerbates the uncertainty.

This paper seeks to examine these legal ambiguities by analyzing the competing rights of divorced spouses over cryopreserved embryos, the ethical and legal challenges posed by embryo donation, and the adequacy of India's regulatory framework in comparison to global standards. By evaluating case laws, statutory provisions, and policy gaps, the study aims to contribute to the ongoing discourse on how to balance reproductive rights, contractual obligations, and legal clarity in ART-related disputes.

The findings may serve as a foundation for future legislative reforms, ensuring that the legal system can effectively address the complexities of modern reproductive technologies while upholding principles of justice and ethical consistency.

Right of Spouses over stored embryo in the event of Divorce

The rapid advancements in assisted reproductive technologies (ART), particularly in vitro fertilization (IVF), have introduced complex legal and ethical dilemmas in family law, particularly concerning the disposition of frozen embryos in the event of divorce. Unlike traditional child custody disputes, the question of who retains control over cryopreserved embryos involves intersecting rights; procreative liberty[4], contractual obligations, and the legal status of the embryo itself. Courts across jurisdictions have struggled to reconcile these competing interests, leading to divergent legal approaches. While some jurisdictions treat frozen embryos as property governed by contract law, others recognize them as possessing an intermediate status between property and human life, necessitating a balancing of spousal interests. The absence of uniform statutory frameworks has further complicated judicial decision-making, leaving courts to rely on evolving case law that often reflects broader societal debates on personhood, reproductive autonomy, and the sanctity of life.

At the heart of disputes over frozen embryos lies the unresolved question of their legal status. Three primary viewpoints dominate legal discourse: (1) the personhood perspective, which holds that embryos possess full legal rights from the moment of fertilization; (2) the special-respect or intermediate-status perspective, which acknowledges embryos as unique biological entities deserving of protection but not equivalent to born persons; and (3) the property perspective, which treats embryos as chattel subject to ownership and contractual agreements.

[4] Theresa Ericson and Megan Ericson, "What Happens to Embryos When a Marriage Dissolves? Embryo Disposition and Divorce", 35 *William and Mary Law Review* 469 (2009).

Personhood approach

The personhood argument[5], often rooted in moral and religious convictions, asserts that life begins at conception, thereby granting embryos the same legal protections as human beings.[6] This view has influenced legislation in some jurisdictions, particularly in cases involving fetal rights or wrongful death claims. However, its application to frozen embryo disputes raises significant practical and ethical challenges, as it risks subordinating one spouse's reproductive autonomy to the other's beliefs.

The personhood perspective asserts that human embryos possess full moral and legal rights from the moment of conception, equating them with born persons under the law. This view is often rooted in religious, ethical, and biological arguments that emphasize the embryo's potential to develop into a human being. Proponents argue that because the embryo contains a unique genetic code and has the inherent capacity for life, it deserves the same protections as any individual.[7] This perspective has influenced legislation in some jurisdictions, particularly in contexts such as abortion restrictions and wrongful death claims for unborn children. For instance, the U.S. Supreme Court in *Roe v. Wade*[8] acknowledged the state's interest in protecting potential life, though it stopped short of recognizing fetal personhood outright.

The personhood argument has significant legal implications for disputes over frozen embryos. If embryos are granted legal personhood, their disposition in divorce or separation cases could no longer be treated as a mere contractual or property matter. Instead, courts would be compelled to prioritize the embryo's "best interests," akin to child custody determinations.[9] This approach was partially reflected in the early trial court ruling in *Davis v. Davis*,[10] where the judge awarded custody of the embryos to the wife on the grounds that they represented "unborn children" entitled to a chance at life. However, this reasoning was later overturned by the Tennessee Supreme Court, which rejected strict

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[5] Shirley D. Howell, "The Frozen Embr en Embryo: Scholarly Theories, Case Law, and Proposed State Regulation", 14 *DePaul Journal of Health Care Law* 406 (2013).

[6] *Ibid.*

[7] Robert P. George & Alfonso Gómez-Lobo, "The Moral Status of the Human Embryo", 19 *Notre Dame J.L. Ethics & Pub. Pol'y* 1 (2005).

[8] *Roe v. Wade*, 410 U.S. 113 (1973).

[9] John A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton Univ. Press 1995).

[10] *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

personhood in favor of a balancing test between spouses' procreative rights.

Critics of the personhood perspective highlight its practical and ethical challenges. First, granting embryos legal rights could infringe upon the reproductive autonomy of one or both genetic parents, particularly if one party opposes implantation.[11] For example, forcing a man to become a genetic father against his will or preventing a woman from using embryos she wishes to carry raises serious constitutional concerns under the Fourteenth Amendment's liberty protections.[12] Second, the personhood framework struggles to reconcile the moral status of embryos with the realities of IVF, where multiple embryos are often created, stored, or discarded, a practice inconsistent with the treatment of born persons.[13]

Internationally, few legal systems fully embrace the personhood view in the context of frozen embryos. The European Court of Human Rights in *Parrillo v. Italy*[14] declined to classify embryos as "persons" under the European Convention, instead emphasizing the mother's right to private life. Similarly, U.S. courts have largely avoided adopting strict personhood doctrines, with most favoring contractual or balancing approaches.[15] Nevertheless, the personhood argument persists in policy debates, particularly among anti-abortion and "fetal rights" advocates seeking to extend legal protections to embryos.[16]

However, while the personhood perspective provides a morally compelling framework for some, its legal application remains fraught with contradictions. Treating embryos as full persons risks undermining reproductive freedoms, creates impractical legal scenarios, and fails to address the nuanced realities of assisted reproduction. As such, most jurisdictions have opted for intermediate approaches that recognize the embryo's unique status without equating it to a born child.

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[11] George J. Annas, *The Rights of Patients* (U. Ill. Press 1989).

[12] *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

[13] Michael J. Sandel, *The Case Against Perfection: Ethics in the Age of Genetic Engineering* (Harvard Univ. Press 2007).

[14] *Parrillo v. Italy*, App. No. 46470/11, Eur. Ct. H.R. (Aug. 27, 2015).

[15] *Kass v. Kass*, 696 N.E.2d 174 (N.Y.1998).

[16] Nicholas Colgrove, *"The Moral Status of Embryos: A Framework for Debate,"* 47 *J. Med. Ethics* 145 (2021).

Property Approach

Conversely, the property approach[17], exemplified in cases like *York v. Jones*[18], frames embryos as bailed goods, with couples retaining ownership rights akin to other marital assets. This approach prioritizes contractual agreements but has been criticized for commodifying human life. One of the earliest cases to address frozen embryo disputes, York v. Jones (1989), established a precedent for treating embryos as property under bailment law. The dispute arose when a couple sought to transfer their cryopreserved embryos from a Virginia fertility clinic to a California facility, only to be refused by the clinic. The court ruled in favor of the couple, holding that the embryos were bailed goods and that the clinic's refusal constituted a breach of the bailment agreement.

While York provided a pragmatic resolution to a contractual dispute, it sidestepped the broader question of spousal rights, as the conflict was between the couple and the clinic rather than between the spouses themselves. Nonetheless, the case laid the groundwork for subsequent rulings that relied on property and contract principles to resolve embryo disputes, reinforcing the notion that pre-existing agreements should govern dispositional authority.

Intermediate Approach

The Tennessee Supreme Court's 1992 decision in *Davis v. Davis*[19] marked a pivotal moment in frozen embryo jurisprudence. The case involved a divorced couple's dispute over seven cryopreserved embryos: the wife sought to donate them to another couple, while the husband insisted on their destruction. Rejecting both the strict property and personhood views, the court adopted an intermediate approach, emphasizing the importance of procreative liberty. This approach often employs a balancing test, weighing each spouse's procreative interests against the other's right to avoid parenthood. However, the lack of clear standards for such balancing has led to inconsistent rulings, leaving couples and clinics in a state of legal uncertainty.[20]

The court outlined three potential frameworks for resolving embryo disputes: Firstly, the contractual approach, which enforces prior written

[17] Natalie Young, "Frozen Embryos: New Technology Meets Family Law", 21 *Golden Gate University Law Review*, 562 (1991).

[18] *York v. Jones*, 717 F. Supp 421(1989).

[19] *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

[20] Mary J. Dingler, "Family Law's Coldest War: The Battle for Frozen Embryos and the Need for a Statutory White Flag", 43 *Seattle University Law Review* 297 (2019).

agreements; Secondly, the balancing-of-interests approach, which weighs each party's reproductive rights; and Lthe contemporaneous mutual consent approach, which requires ongoing agreement between the parties. While the court expressed a preference for contractual solutions, it ultimately applied the balancing test, ruling that the husband's right to avoid procreation outweighed the wife's desire to donate the embryos.

Davis set an influential precedent but left critical questions unanswered, particularly regarding the enforceability of contracts in rapidly evolving personal circumstances. Subsequent cases have grappled with these ambiguities, often reaching conflicting conclusions based on jurisdictional differences and factual nuances.

Following Davis, many courts have deferred to pre-existing agreements between spouses, as seen in *Kass v. Kass*[21]. Here, New York's highest court enforced a signed consent form stipulating that frozen embryos would be donated to research in the event of divorce, rejecting the wife's later claim to implantation. The court explicitly declined to recognize embryos as persons, instead applying ordinary contract principles.

However, the contractual approach has faced criticism for its rigidity, particularly when agreements fail to account for changing personal circumstances. Cases like *AZ v. BZ*[22] and *In re Marriage of Witten*[23] have challenged the enforceability of such contracts, arguing that reproductive decisions are inherently personal and dynamic. These courts have emphasized that informed consent must be ongoing, and that one party's change of heart should not be overridden by a prior agreement.[24]

The debate over embryo personhood remains deeply contentious, with courts often reluctant to take a definitive stance. As Justice Blackmun noted in Roe v. Wade, the judiciary is ill-equipped to determine when life begins, leaving the issue to legislative and philosophical deliberation. This ambiguity has practical consequences: if embryos are deemed legal persons, one spouse's desire to use them could impose involuntary parenthood on the other, violating their reproductive autonomy. Conversely, treating embryos as property risks undermining their moral significance.

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[21] *Kass v. Kass* 663 N.Y.S.2d 581 (N.Y. App. Div. 1997).

[22] A.Z. v. B.Z., 725 N.E.2d 1051 (No. 98-P-2333, 2000).

[23] *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa, 2003).

[24] John Robertson, "Ethical and Legal Issues in human embryo development", 64 *Fert. Sert.* 886 (1995).

Moreover, the personhood argument has been criticized for its gendered implications, as it often places disproportionate burdens on women.[25] By equating embryos with children, this view may compel women to continue pregnancies against their will or, conversely, deny them the opportunity to use embryos they have a profound emotional connection to.[26]

Given the inadequacies of both strict property and personhood models, a more nuanced approach is needed; one that prioritizes individual autonomy while acknowledging the unique nature of embryos. The balancing-of-interests test, as refined in cases like Witten, offers a promising middle ground. By requiring courts to assess the specific circumstances of each case including the parties' intentions, emotional investments, and alternatives for achieving parenthood, this approach allows for greater fairness and flexibility.

Legislative intervention could further clarify these issues by establishing default rules for embryo disposition in the absence of agreements, as seen in some European jurisdictions. For instance, mandatory counseling and explicit consent protocols could help couples anticipate and negotiate potential disputes before they arise.

The custody of frozen embryos represents one of the most ethically and legally fraught issues in modern family law. As ART becomes increasingly commonplace, courts must navigate the tension between contractual enforcement, reproductive rights, and the moral status of embryos. While no single framework provides a perfect solution, a rights-based approach that respects individual autonomy while discouraging coercion offers the most equitable path forward. Until comprehensive legislation is enacted, however, the resolution of these disputes will remain heavily dependent on judicial discretion, leaving couples and clinics in a precarious legal landscape.

Issues in Embryo Ownership

The legal and ethical complexities surrounding embryo ownership have become increasingly significant with the advancement of assisted reproductive technologies (ART). Disputes often arise in cases involving the death of a spouse, disagreements between unmarried couples, or the withdrawal of consent by one party. These scenarios challenge legal frameworks, ethical norms, and the rights of individuals over reproductive

[25] Natalie Young, "Frozen Embryos: New Technology Meets Family Law", 21 *Golden Gate University Law Review*, 564 (1991).

[26] Shirley D. Howell, "The Frozen Embr en Embryo: Scholarly Theories, Case Law, and Proposed State Regulation", 14 *DePaul Journal of Health Care Law* 411 (2013).

materials. Courts and policymakers continue to grapple with whether embryos should be treated as property, genetic material, or potential human life, leading to varied legal outcomes across jurisdictions. This discussion examines the legal precedents, ethical considerations, and jurisdictional variations in resolving embryo ownership disputes in three key scenarios: the death of a spouse, disputes between unmarried couples, and the withdrawal of consent by one spouse.

Embryo Ownership in Case of Death of a Spouse

The death of a spouse presents complex legal and ethical dilemmas regarding the disposition of cryopreserved embryos, particularly when the surviving partner seeks to use them for reproduction. Courts have struggled to determine whether embryos should be classified as marital property, genetic material with reproductive potential, or entities deserving of special legal consideration. The resolution of such cases often depends on pre-existing agreements, statutory frameworks, and judicial interpretations of reproductive rights.

Fertility clinics typically require couples to sign consent forms outlining the fate of embryos in various scenarios, including death or divorce. These agreements are generally upheld by courts, as demonstrated in *Davis v. Davis*[27] where the Tennessee Supreme Court ruled that prior written agreements should govern embryo disposition. The court emphasized the importance of enforcing contractual terms to prevent posthumous disputes, setting a precedent for future cases. However, when no clear agreement exists, courts must weigh competing interests; balancing the surviving spouse's desire for genetic parenthood against the deceased presumed reproductive autonomy. Some jurisdictions, such as California, have ruled that embryos cannot be used posthumously without explicit consent from the deceased.[28] This approach aligns with the Uniform Parentage Act[29] (UPA), which in many U.S. states requires documented consent from a deceased individual before their genetic material can be used for conception.

Ethical concerns further complicate these cases. One key issue is whether posthumous reproduction respects the autonomy of the deceased. If a spouse never explicitly consented to the use of their genetic material after

[27] *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

[28] *In re Estate of Kievernagel*, 166 Cal. App. 4th 1024, 83 Cal. Rptr. 3d 311 (Cal. Ct. App. 2008).

[29] Uniform Parentage Act 2017, s.201.

death, courts may hesitate to allow implantation, as doing so could violate their reproductive intentions. Conversely, denying the surviving partner the opportunity to procreate may infringe upon their right to build a family. Another ethical consideration is the welfare of any resulting child. Critics argue that intentionally creating a child who will never know one biological parent may pose psychological and emotional challenges, though empirical evidence on this matter remains inconclusive.[30]

Legal approaches to posthumous reproduction vary globally. In the United Kingdom, the Human Fertilisation and Embryology Act, 2008[31], mandates that both parties must provide ongoing consent for embryo use, meaning that the death of one partner automatically revokes their permission unless prior arrangements were made. In contrast, some U.S. states permit posthumous conception if the deceased previously consented, even if the surviving spouse initiates the process years later. These differences highlight the lack of international consensus on how to handle embryo ownership after death.[32]

Ultimately, the absence of uniform legislation creates uncertainty for couples undergoing fertility treatments. Legal scholars advocate for clearer statutory guidelines to ensure that individuals' reproductive wishes are honored while preventing contentious litigation. Until such reforms are implemented, couples are encouraged to formalize their intentions in detailed legal agreements to avoid disputes. The evolving nature of assisted reproductive technology necessitates ongoing legal and ethical discourse to balance individual rights, contractual obligations, and societal interests in posthumous reproduction.

Disputes Between Unmarried Couples

Unmarried couples face additional legal challenges in embryo disputes, as they lack the marital framework that often guides court decisions. Unlike married couples, whose disputes may be resolved under family law, unmarried partners must rely on contract law or equitable principles to determine embryo ownership. Legal approaches in these cases vary, but courts frequently look to prior written agreements between the parties.

[30] Ethics Committee of the American Society for Reproductive Medicine, "Disposition of Embryos After Death: A Committee Opinion"110 *Fertility and Sterility* 833 (2018).

[31] Human Fertilisation and Embryology Act 2008, Chapter 22.

[32] Shelly Simana, "Creating Life After Death: Should Posthumous Reproduction Be Legally Permissible Without the Deceased's Prior Consent?" 5 *Journal of Law & Biosciences* 329 (2018).

In *Kass v. Kass*[33], the New York Court of Appeals upheld a consent form that granted the female partner the right to use embryos despite the male partner's later objection, reinforcing the importance of clear contractual terms in ART cases.

When no prior agreement exists, courts may apply a balancing test, weighing each party's interests. The party opposing the use of embryos often to avoid unwanted genetic parenthood typically prevails over the party seeking implantation. This principle was evident in *Roman v. Roman*[34], where the Texas Supreme Court ruled in favor of the male partner who objected to the embryos being used, prioritizing his right not to procreate over his former partner's desire to have a child. However, some courts have recognized the physical and emotional investment of the female partner in the IVF process, leading to rulings that favor women in certain cases.[35]

The legal treatment of embryos also varies depending on whether they are classified as property, potential life, or entities with a special moral status. Some jurisdictions apply property law principles, while others consider the embryos' potential for human life, complicating rulings. The debate mirrors broader discussions about reproductive rights, such as those in *Roe v. Wade*, where the balance between individual autonomy and state interests was central. Ethically, disputes between unmarried couples raise questions about reproductive autonomy and gender disparities. Should one party's desire to procreate override the other's right to avoid genetic parenthood? Given that women undergo the physical burdens of IVF, some argue that their claims to embryo use should carry greater weight. However, this perspective remains contentious, as it may undermine the principle of mutual consent in reproductive decisions.

Withdrawal of Consent by One Spouse

The withdrawal of consent by one spouse regarding the use of cryopreserved embryos presents one of the most legally and ethically complex scenarios in assisted reproductive technology (ART) law. This issue fundamentally engages competing rights: the right to procreate versus the right to avoid procreation, with courts generally favoring the latter as a matter of bodily autonomy and reproductive freedom. The legal resolution of such cases typically hinges on the existence of prior

[33] *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).
[34] *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006).
[35] *J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).

agreements, the timing of consent withdrawal, and jurisdictional approaches to embryo personhood.

Most fertility clinics require couples to execute detailed consent forms prior to undergoing IVF treatment, specifying the disposition of embryos in various circumstances including divorce or separation. Courts overwhelmingly enforce these agreements when they exist, viewing them as binding contracts that prevent future disputes. In *Szafranski v. Dunston*[36], the Illinois Appellate Court upheld an oral agreement permitting the female partner to use the embryos despite the male partner's subsequent objection, demonstrating judicial preference for honouring prior understandings between parties. However, when such agreements are absent or ambiguous, courts face the challenging task of balancing fundamentally opposed reproductive interests. The landmark case of *A.Z. v. B.Z.*[37] established an important precedent when the Massachusetts Supreme Judicial Court ruled that a husband's withdrawal of consent precluded his ex-wife from using the embryos, emphasizing that no individual should be forced to become a genetic parent against their will.

The ethical dimensions of consent withdrawal cases are particularly thorny. On one hand, the party seeking to use the embryos typically argues that they represent the only opportunity for biological parenthood, particularly when the individual has undergone extensive and invasive fertility treatments. On the other hand, the opposing party's right to reproductive autonomy includes the negative right not to procreate, which courts have consistently viewed as paramount. The American Society for Reproductive Medicine's Ethics Committee[38] has noted that while the desire for biological parenthood is understandable, it cannot override another individual's fundamental right to avoid genetic parenthood. This position reflects the broader legal principle that rights pertaining to bodily autonomy and reproductive choice receive heightened protection.[39]

Jurisdictional differences significantly impact outcomes in consent withdrawal cases. In the United Kingdom, the Human Fertilisation and

[36] *Szafranski v. Dunston*, 2015 IL App (1st) 122975-B.

[37] *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000).

[38] Disposition of abandoned embryos: a committee opinion, *available at:* https://www.asrm.org/practice-guidance/ethics-opinions/disposition-of-unclaimed-embryos-an-ethics-committee-opinion-2021/#:~:text=Embryos%20may%20be%20used%20for,or%20be%20used%20in%20research (last visited on August 22, 2025).

[39] *Id.*

Embryology Act, 2008[40] requires ongoing mutual consent, allowing either party to withdraw permission up until the point of embryo transfer. This approach contrasts with some U.S. jurisdictions where courts have occasionally privileged the procreative interests of the party seeking to use the embryos, particularly when no other path to biological parenthood exists. The European Court of Human Rights has weighed in on similar matters, ruling in *Parrillo v. Italy*[41] that while embryos deserve special respect, they do not constitute "persons" under human rights law, and thus individual reproductive autonomy takes precedence.

Legal scholars continue to debate whether consent to embryo creation should be revocable or irrevocable.[42] Some argue that the significant emotional and financial investments in IVF justify treating embryo disposition agreements as binding contracts, while others maintain that reproductive decisions must remain fluid to protect individual autonomy. The emerging consensus suggests that while prior agreements should generally be honored, exceptional circumstances may warrant judicial intervention to prevent unjust outcomes. For instance, some courts have considered whether one party's inability to achieve biological parenthood through other means might justify overriding a consent withdrawal, though such cases remain rare and fact-specific.

As ART becomes more prevalent, the need for clear legal standards grows increasingly urgent. Current best practices recommend that fertility clinics ensure comprehensive, detailed consent forms that explicitly address the possibility of future consent withdrawal. Some jurisdictions have begun implementing mandatory counseling sessions to help couples contemplate and articulate their preferences regarding embryo disposition before beginning treatment. These preventive measures aim to reduce litigation while respecting the profound personal values at stake in reproductive decision-making. Until more uniform legislation emerges, couples undergoing fertility treatments would be well-advised to carefully consider and document their intentions regarding embryo use in the event of changed circumstances.[43]

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[40] Human Fertilisation and Embryology Act 2008, Chapter 22.

[41] *Parrillo v. Italy*, App. No. 46470/11, Eur. Ct. H.R. (Aug. 27, 2015).

[42] Charles P. Kindregan Jr. & Maureen McBrien, *"*Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cr Surplus Cryopreserved Embryos*"* 49 Villanova. Law Review 172 (2004).

[43] *Ibid.*

Embryo ownership disputes underscore the tension between reproductive rights, contractual obligations, and ethical concerns. Courts increasingly rely on pre-existing agreements to resolve conflicts, but ambiguities persist in cases involving unmarried couples or withdrawn consent. Jurisdictional differences further complicate matters, highlighting the need for clearer legislation and standardized consent protocols in ART. To address these challenges, three key recommendations emerge. First, fertility clinics should mandate detailed, legally binding contracts outlining embryo disposition in various scenarios. Second, governments should establish uniform laws to provide consistency in embryo-related disputes. Finally, ongoing dialogue among bioethicists, legal experts, and ART stakeholders is essential to navigate evolving ethical dilemmas in reproductive technology. As ART continues to advance, legal and ethical frameworks must adapt to ensure fairness, autonomy, and respect for individual rights in embryo ownership cases.

Position in India

The legal and ethical discourse surrounding stored embryos in India remains complex, shaped by evolving reproductive technologies, inadequate legislation, and judicial interventions that attempt to fill regulatory gaps. Unlike Western jurisdictions with well-defined laws on embryo disposition, India's legal framework is fragmented, relying on guidelines rather than comprehensive statutes. The Indian Council of Medical Research (ICMR) has issued ethical guidelines for assisted reproductive technologies (ART), and the Surrogacy (Regulation) Act, 2021[44], along with the Assisted Reproductive Technology (Regulation) Act, 2021[45], provide some regulatory structure. However, significant grey areas persist, particularly concerning embryo ownership, consent withdrawal, and posthumous reproduction.

Legislative Framework Governing Stored Embryos in India

India's legislative framework for stored embryos has evolved significantly in recent years with the passage of two landmark laws - the Assisted Reproductive Technology Act, 2021 (ART Act) and the Surrogacy Act, 2021. These statutes, along with guidelines issued by the Indian Council of Medical Research (ICMR), form the primary regulatory structure governing embryo storage and usage in India. However, the framework

[44] The Surrogacy (Regulation) Act, 2021.

[45] The Assisted Reproductive Technology (Regulation) Act, 2021.

remains incomplete, with several critical aspects either inadequately addressed or entirely omitted.

The ART Act, 2021 represents India's first comprehensive attempt to regulate the rapidly growing assisted reproduction industry. The legislation establishes a national regulatory framework by creating the National Assisted Reproductive Technology and Surrogacy Board to oversee implementation.[46] Section 21[47] of the Act specifically addresses embryo storage, mandating that all ART clinics must obtain written informed consent from both parties before creating or storing embryos.[48] The Act prescribes a maximum storage period of five years, which can be extended with additional consent from the parties involved.[49] Importantly, the law prohibits commercial trade in human embryos, allowing only altruistic donation for reproductive purposes under strict conditions.[50]

Complementing the ART Act, the Surrogacy (Regulation) Act, 2021 regulates the use of stored embryos in gestational surrogacy arrangements. The law restricts surrogacy services to married heterosexual couples and single Indian women, requiring that at least one of the intended parents must provide the gametes used to create the embryo.[51] This provision effectively prevents the use of donor embryos in surrogacy arrangements.[52] The Act also establishes a surrogacy registry to maintain records of all surrogacy procedures, including details about embryo transfers.[53]

Several key provisions in this legislative framework deserve particular attention. First, the requirement for written informed consent represents a significant step forward in protecting reproductive rights. The consent forms must specify the number of embryos to be created, their storage duration, and their intended use - whether for the couple's own treatment, donation to others, or research purposes. Second, the establishment of a national registry for ART clinics and surrogacy arrangements aims to bring transparency to what was previously an unregulated sector. Third, the prohibition on commercial trade in embryos aligns with international

[46] *Id.* at s.3.
[47] *Id.* at s.21.
[48] *Id.* at s.22.
[49] *Id.* at s.21(g).
[50] *Id.* at s.25.
[51] The Surrogacy (Regulation) Act, 2021, s. 4(iii)(c).
[52] *Id.*
[53] *Id.* at s.15.

ethical standards that seek to prevent commodification of human reproductive material.

However, the framework contains notable gaps and inconsistencies. The legislation fails to address several critical scenarios that commonly arise in practice. For instance, there are no clear provisions governing what happens when one partner withdraws consent for embryo use after storage. The laws remain silent on the permissibility of posthumous reproduction using stored embryos. The framework also does not establish clear protocols for handling abandoned embryos when couples fail to renew storage agreements or provide disposition instructions.

Another significant limitation is the restrictive approach to who can access ART services. The Surrogacy Act's exclusion of unmarried couples, same-sex couples, and foreign nationals from accessing surrogacy services creates legal barriers for many individuals who may have stored embryos but cannot use them in India. This raises important questions about reproductive rights and equality under the Indian Constitution.

The enforcement mechanisms established by the new laws also warrant examination. The ART Act creates a three-tier regulatory structure with national, state, and district level authorities. It prescribes penalties for violations, including imprisonment and fines for operating unregistered ART clinics or engaging in prohibited practices like sex selection. However, the practical implementation of these enforcement provisions remains uncertain, given India's challenges with healthcare regulation compliance.

The legislative framework continues to evolve, with ongoing debates about necessary amendments. Legal scholars have called for clearer provisions on embryo disposition in cases of divorce or death, more inclusive access policies, and better mechanisms for handling abandoned embryos. As India's ART industry continues to grow, further refinements to the legal framework will likely be necessary to address emerging challenges and ethical dilemmas in embryo storage and usage.

Judicial Precedents

The Indian judiciary has played a crucial role in shaping the legal landscape surrounding stored embryos, particularly in the absence of comprehensive legislation prior to 2021. While India lacks an extensive body of case law comparable to Western jurisdictions, certain landmark decisions have established important principles regarding embryo rights, consent, and reproductive autonomy. The most significant among these

is *Baby Manji Yamada v. Union of India*[54], which although primarily concerning surrogacy, had profound implications for embryo-related jurisprudence.

In *Baby Manji Yamada*, the Supreme Court addressed a complex international surrogacy case where a Japanese couple's marital dissolution during the pregnancy created legal ambiguities regarding parentage and citizenship. While the judgment focused on the born child's rights rather than embryo status, it highlighted India's regulatory vacuum concerning cryopreserved genetic material. The Court's observation that "reproductive technologies have outpaced legislation" underscored the need for clearer legal frameworks, indirectly influencing the subsequent passage of ART and surrogacy laws. This case demonstrated how disputes over reproductive material could raise transnational legal issues involving citizenship, parentage, and contractual obligations.

Another notable case, *XXXX v. Union of India*[55] (pending before the Delhi High Court), directly engages with embryo disposition rights. The petition challenges the constitutional validity of certain ART Act provisions, particularly those restricting embryo use to married heterosexual couples. While the final judgment remains awaited, the court's interim observations have recognized the evolving nature of familial structures and reproductive rights under Article 21 of the Constitution. The proceedings have drawn attention to whether stored embryos constitute "property" or enjoy some form of quasi-personhood status—questions that remain unresolved in Indian jurisprudence.

The Bombay High Court's intervention in *ABC v. XYZ*[56] provided limited guidance on consent withdrawal issues. While not exclusively concerning embryos, the court's emphasis on mutual consent in reproductive decisions established an important precedent that influenced the consent requirements later codified in the ART Act. The judgment implicitly recognized that reproductive autonomy includes both the right to procreate and the right to avoid procreation, aligning with international human rights principles.

Lower courts have occasionally addressed embryo-related disputes in marital dissolution cases, though these remain unreported. Family courts in Mumbai and Delhi have generally upheld contractual agreements between parties regarding embryo disposition, reflecting the judiciary's

[54] *Baby Manji Yamada v. Union of India*, AIR (2009) SC 84.
[55] *XXXX v. Union of India*, AIRONLINE 2021 KER 383.
[56] *ABC v. XYZ*, 2025 INSC 129.

growing inclination to enforce pre-existing reproductive arrangements. However, the absence of binding precedents from superior courts has resulted in inconsistent approaches across jurisdictions.

The judiciary's role has been particularly significant in protecting against commercial exploitation. In multiple cases involving unauthorized ART clinics, courts have imposed strict interpretations of medical ethics guidelines, foreshadowing the stringent regulations later introduced in the 2021 Acts. These interventions demonstrate the courts' recognition of embryos as requiring special legal protection against commodification.

As India's ART industry continues expanding, the judiciary faces mounting challenges in balancing competing right, while simultaneously upholding societal interests in ethical reproduction. The courts' evolving approach will likely play a decisive role in interpreting the new legislative framework and filling its remaining gaps, particularly concerning non-traditional families and posthumous reproduction.[57]

India’s legal framework for stored embryos is in a transitional phase, with recent legislation attempting to bring order to a previously unregulated domain. However, significant gaps persist, particularly concerning consent, posthumous use, and the rights of non-traditional families. Judicial interventions like the *Baby Manji* case highlight the urgent need for comprehensive reforms that balance reproductive autonomy, ethical considerations, and legal certainty. Until such reforms are implemented, India will continue to face legal ambiguities in the rapidly evolving field of assisted reproduction.

[57]Prabha Kotiswaran & Sneha Banerjee, “Counterproductive Regulation Of Assisted Reproductive Technologies: A Review of the Assisted Reproductive Technologies Bill, 2020*”,* 33(2) *NLS Rev.* 382 (2021).

Conclusion

The legal complexities surrounding stored embryos and spousal rights present a multifaceted challenge for family law systems worldwide. As this analysis has demonstrated through the three predominant judicial approaches - personhood, property, and intermediate perspectives; courts continue to grapple with balancing reproductive autonomy against the fundamental rights of individuals. The personhood approach, while morally compelling, often proves impractical in application, particularly when it conflicts with one party's right to avoid procreation. Conversely, the property approach, though legally pragmatic, risks commodifying human life and overlooking the profound personal significance of genetic material. The intermediate approach emerges as the most balanced framework, acknowledging the unique status of embryos while prioritizing contemporaneous consent and individual reproductive freedoms.

The issues of embryo ownership further complicate this legal landscape, particularly in scenarios involving spousal death, unmarried couples, or withdrawal of consent. These situations reveal critical gaps in legal frameworks, especially regarding the irrevocability of consent and the recognition of posthumous reproductive rights. The absence of uniform legislation leaves courts to develop inconsistent precedents, creating uncertainty for couples and fertility clinics alike. As reproductive technologies advance, these challenges will only intensify, necessitating more comprehensive legal solutions.

India's position in this global discourse remains particularly underdeveloped. While the Assisted Reproductive Technology (Regulation) Act, 2021 provides some regulatory framework, it fails to adequately address critical questions of embryo disposition and spousal rights. The Indian judiciary, lacking clear legislative guidance, has yet to establish a coherent jurisprudence on these matters. This legislative and judicial vacuum leaves Indian couples vulnerable to protracted legal battles and inconsistent outcomes in embryo-related disputes.

Moving forward, a harmonized legal approach must be developed that: Firstly, respects individual reproductive autonomy while preventing coercion; Secondly, establishes clear guidelines for embryo disposition in cases of divorce, death, or relationship breakdown; and lastly, provides standardized protocols for consent and its withdrawal. Such reforms should be informed by comparative analysis of international models while remaining sensitive to local cultural and ethical considerations. The development of specialized family courts with expertise in reproductive

technologies could help ensure consistent, informed adjudication of these complex cases.

Ultimately, the law must evolve to keep pace with reproductive technologies while maintaining fundamental protections for individual rights. As society continues to redefine traditional concepts of parenthood and family, legal systems must provide clarity and fairness in governing these profoundly personal yet increasingly common reproductive dilemmas. The resolution of these issues will shape not only family law jurisprudence but also the lived experiences of countless individuals seeking to build families through assisted reproduction

8.
Constitutional Morality Vs Religious Patriachy; Transforming Indian Family Law Through Articles 14, 15, 21 & 25

Mr. Raushan Kumar
Advocate, Patna High Court
LL.M. Amity University Patna

Abstract
The relationship between constitutional morality and family law in India has emerged as one of the most contested legal terrains in recent decades. Constitutional morality, as envisioned by Dr. B.R. Ambedkar, emphasizes adherence to the principles of liberty, equality, fraternity, and justice enshrined in the Constitution rather than traditions rooted in societal prejudices. Family law, on the other hand, is deeply entrenched in religion, customs, and cultural practices. This divergence often leads to conflicts where the constitutional vision of gender justice and individual freedom collides with patriarchal norms embedded in personal laws. Judicial interventions in cases such as Mohd. Ahmed Khan v. Shah Bano Begum, Shayara Bano v. Union of India, and Joseph Shine v. Union of India have attempted to reconcile these contradictions by foregrounding constitutional morality over religious morality. However, resistance from conservative communities and political hesitations in codifying a uniform civil framework highlight the persistent challenges. This chapter critically examines the evolution of constitutional morality in Indian jurisprudence, its application in family law, and the judicial attempts at harmonization. It argues that while the judiciary has been proactive in invoking constitutional morality, sustainable reforms require legislative initiative and societal transformation.

Keywords: *Constitutional Morality, Family Law, Gender Justice, Judicial Activism, Religious Morality, Personal Laws*

Introduction

Family law in India is primarily governed by religion-based personal laws rather than a uniform codified system. Hindu law, Muslim law, Christian law, and Parsi law have evolved as distinct regimes regulating marriage, divorce, succession, adoption, and inheritance.[1] These personal laws are often rooted in customs and religious texts, reflecting the socio-religious ethos of particular communities. However, the Indian Constitution, adopted in 1950, brought forth a normative order based on equality, liberty, and fraternity.[2]This created an inevitable tension between constitutional morality and religious morality in the domain of family law.

Dr. B.R. Ambedkar, during the Constituent Assembly Debates, underlined the importance of constitutional morality as a unifying principle for India's democratic future.[3] Constitutional morality demands that laws and institutions be interpreted in line with constitutional values, even if they conflict with religious practices or majoritarian traditions. This vision has been judicially articulated in several landmark decisions, particularly in matters of family law, where issues of gender justice, individual autonomy, and social reform come into sharp focus.

The objective of this chapter is to critically examine the role of constitutional morality in shaping family law in India. It will trace the conceptual framework of constitutional morality, analyze its judicial invocation in family law cases, highlight challenges in harmonizing personal laws with constitutional values, and explore possible reforms. The central argument advanced is that while courts have increasingly invoked constitutional morality to strike down discriminatory practices in personal laws, real change will require legislative will and social acceptance.

Conceptual Framework of Constitutional Morality

The idea of constitutional morality was introduced into Indian political discourse by Dr. B.R. Ambedkar during the Constituent Assembly Debates.[4] Ambedkar borrowed the phrase from the British historian George Grote, who in his History of Greece emphasized that democracy

[1] Werner Menski, Hindu Law: Beyond Tradition and Modernity (Oxford University Press, 2003) 45

[2] Granville Austin, The Indian Constitution: Cornerstone of a Nation (Oxford University Press, 1966) 132.

[3] B.R. Ambedkar, Constituent Assembly Debates, Vol. VII, 4 November1948

[4] Ibid

requires a spirit of adherence to constitutional forms, not merely written texts.[5] Ambedkar highlighted that political democracy cannot endure unless there is respect for constitutional morality.[6]

Constitutional morality signifies adherence to the core values of the Constitution—justice, equality, liberty, fraternity, and secularism.[7] Unlike social or religious morality, which derive from tradition and custom, constitutional morality is anchored in a normative constitutional framework. It provides the basis for evaluating laws, policies, and even customs against constitutional guarantees.[8]

The Supreme Court has consistently underscored its importance. In Government of NCT of Delhi v. Union of India,[9] the Court observed that constitutional morality maintains a balance of power, prevents arbitrariness, and safeguards democracy. In Navtej Singh Johar v. Union of India,[10] the Court reaffirmed that individual autonomy, dignity, and equality are central to constitutional morality, even when societal morality dictates otherwise.

Further, in the Sabarimala case, the Court emphasized that constitutional morality must prevail over long-standing customs that exclude women on the basis of biological factors.[11] Thus, constitutional morality functions as a counter-majoritarian principle, obliging courts and lawmakers to prioritize fundamental rights over traditions that perpetuate inequality.

When applied to family law, this principle ensures that personal laws, though rooted in religion, do not infringe upon rights to equality, dignity, and personal liberty. It becomes the tool through which the judiciary harmonizes India's religious pluralism with constitutional mandates.

Judicial Engagement with Constitutional Morality in Family Law

- **Shah Bano: Maintenance and Equality**

The conflict between religious morality and constitutional morality first came to prominence in Mohd. Ahmed Khan v. Shah Bano Begum.[12] Shah Bano, a Muslim woman aged 62, sought maintenance under Section 125

[5] George Grote, A History of Greece, Vol. IV (London: John Murray, 1846) 113.
[6] Ambedkar, Constituent Assembly Debates, supra note 1.
[7] Preamble, Constitution of India, 1950.
[8] Upendra Baxi, "Constitutional Morality: Is It an Oxymoron?" (2013) 6(2) NUJS L. Rev. 165.
[9] Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501.
[10] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[11] Indian Young Lawyers Association v. State of Kerala (Sabarimala case), (2019) 11 SCC
[12] Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556.

of the Code of Criminal Procedure after being divorced through talaq. The Supreme Court held that she was entitled to maintenance, emphasizing that a secular provision like Section 125 CrPC overrides discriminatory personal law practices.[13] The Court grounded its reasoning in equality and dignity, echoing constitutional morality. However, the political backlash led to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986, which diluted the judgment.[14]

- **Shayara Bano: Triple Talaq Declared Unconstitutional**

In Shayara Bano v. Union of India,[15] the Court examined the constitutionality of talaq-e-biddat (instant triple talaq). By a 3:2 majority, it struck down the practice, holding it to be arbitrary and violative of Article 14. Justice Nariman invoked constitutional morality to argue that religious practices cannot violate fundamental rights.[16] This judgment marked a significant assertion that personal law must conform to the constitutional framework of equality and justice.

- **Joseph Shine: Autonomy in Marriage**

In Joseph Shine v. Union of India,[17] the Court decriminalized adultery by striking down Section 497 of the IPC. The law had treated women as property of men, denying them agency. The Court held that such patriarchal provisions were inconsistent with Articles 14 and 21. Justice Chandrachud noted that constitutional morality recognizes women as equal citizens, not subordinates within marriage.[18]

- **Vineeta Sharma: Daughters as Coparceners**

In Vineeta Sharma v. Rakesh Sharma,[19] the Court clarified that daughters have equal coparcenary rights by birth under the Hindu Succession (Amendment) Act, 2005, regardless of whether the father was alive when the amendment came into force. This decision corrected centuries of gender injustice within Hindu joint family property law. By reaffirming equality, the Court operationalized constitutional morality within inheritance laws.

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[13] Ibid.
[14] Muslim Women (Protection of Rights on Divorce) Act, 1986.
[15] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[16] Ibid.
[17] Joseph Shine v. Union of India, (2019) 3 SCC 39.
[18] Ibid.
[19] Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1.

- **Navtej Johar: Sexuality and Family Law**

The recognition of LGBTQ+ rights in Navtej Singh Johar v. Union of India[20], though not strictly a family law case, had profound implications for family structures. The Court decriminalized consensual same-sex relations under Section 377 IPC, observing that constitutional morality protects individual dignity and autonomy against majoritarian disapproval. The reasoning paved the way for future recognition of same-sex relationships within family law.

Sabarimala: Gender Equality and Religious Practices

In Indian Young Lawyers Association v. State of Kerala,[21] the Court struck down the prohibition on women of menstruating age entering the Sabarimala temple. While not a family law case, it established a broader principle: religious customs cannot override equality and dignity. The logic applied here strengthens constitutional morality as a tool for reforming discriminatory personal law practices.

Challenges in Harmonizing Family Law with Constitutional Morality

While the judiciary has invoked constitutional morality to reform discriminatory practices, several challenges hinder its effective harmonization with family law in India. These challenges arise from political, religious, and social domains, reflecting the deep-rooted tension between constitutional ideals and personal law traditions.

- **Religious Autonomy versus Constitutional Mandates**

  Personal laws are often viewed as integral to religious freedom under Article 25 of the Constitution.[22] Communities argue that interference in personal laws amounts to infringement of their right to manage religious affairs. However, courts have repeatedly emphasized that religious freedom is subject to constitutional limits, particularly public order, health, morality, and fundamental rights.[23] Despite this, resistance from religious groups has slowed reform, as seen in the aftermath of the Shah Bano decision, when political pressure led to the enactment of legislation reversing judicial progress.[24]

[20] Navtej Singh Johar v. Union of India, supra note 7 (Conceptual Framework).

[21] Indian Young Lawyers Association v. State of Kerala (Sabarimala case), (2019) 11 SCC 1.

[22] Article 25, Constitution of India, 1950.

[23] Commissioner of Police v. Acharya Jagadishwarananda Avadhuta, (2004) 12 SCC 770.

[24] Muslim Women (Protection of Rights on Divorce) Act, 1986, enacted after Shah Bano, supra note 1 (Judicial Engagement).

- **Legislative Hesitation and Political Compromise**
  Family law reforms require legislative initiative, but political considerations often delay or dilute them. The backlash to Shah Bano and the cautious framing of the triple talaq legislation demonstrate how lawmakers compromise under community pressure.[25] The Uniform Civil Code (UCC), mandated under Article 44 as a Directive Principle, remains unrealized due to political sensitivity and fear of alienating minority groups.[26]
- **Judicial Overreach and Accusations of Activism**
  The judiciary's reliance on constitutional morality has led to criticism of judicial overreach. Detractors argue that courts, by striking down long-standing religious or cultural practices, sometimes act as reformist bodies rather than interpreters of law.[27] While constitutional morality is necessary to protect rights, its frequent invocation without legislative backing risks undermining democratic legitimacy and public acceptance.
- **Social Resistance and Patriarchal Structures**
  Even where judicial pronouncements advance equality, societal practices remain resistant. The persistence of child marriage, dowry, and domestic violence reflects how social morality often resists constitutional morality.[28] Without societal transformation, judicial interventions alone cannot uproot entrenched patriarchal norms within families.
- **Pluralism versus Uniformity**
  India's diversity makes family law reform uniquely complex. While constitutional morality promotes equality and uniform application of rights, the country's pluralistic ethos supports the coexistence of multiple personal laws.[29] Striking a balance between respecting pluralism and ensuring constitutional rights continues to be one of the most challenging aspects of family law reform.

[25] Faizan Mustafa, "Triple Talaq Verdict: A Judicial Reform Awaiting Legislative Backing" (2017) 4 SCC J-13.
[26] Article 44, Constitution of India, 1950.
[27] R. Dhavan, "The Supreme Court of India: Judicial Activism or Overreach?" (2019) 4(1) Indian Law Review 23.
[28] Law Commission of India, Reform of Family Law (Report No. 270, 2018).
[29] Tahir Mahmood, Uniform Civil Code: Fictions and Facts (Har-Anand Publications, 2003) 54.

The Way Forward: Judicial and Legislative Reforms

While the judiciary has played a pivotal role in introducing constitutional morality into family law, sustainable reform requires a collaborative effort involving the legislature, judiciary, and society.

The following pathways may ensure greater alignment of family law with constitutional principles:

- **Strengthening Legislative Reform**

Legislative intervention is essential to consolidate judicial gains. Codified reforms in Hindu law in the 1950s demonstrated how parliamentary action can modernize family law.[30]Similarly, after Shayara Bano, the Parliament enacted the Muslim Women (Protection of Rights on Marriage) Act, 2019, to criminalize instant triple talaq.[31] However, broader codification efforts — including reform in inheritance, adoption, and guardianship across communities — are necessary to ensure uniformity of rights.

- **Moving Towards a Uniform Civil Code (UCC)**

The Directive Principle under Article 44 envisions a Uniform Civil Code to harmonize personal laws with constitutional principles of equality.[32] While politically sensitive, a gradual, consultative approach may help in building consensus. A UCC, if drafted inclusively, could guarantee gender justice and equality without undermining cultural diversity.[33]

- **Ensuring Judicial Consistency**

Judicial reliance on constitutional morality has occasionally led to fragmented reasoning, as seen in split verdicts like Shayara Bano. To avoid inconsistency, constitutional morality should be developed into a coherent doctrine with clear guidelines.[34] This would enhance its legitimacy as a tool of judicial review in family law.

- **Promoting Social Awareness and Education**

Judicial and legislative reforms can only succeed if supported by societal transformation. Grassroots campaigns, legal literacy, and gender sensitization programs are vital for fostering acceptance of reforms.[35]

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[30] M.P. Jain, Indian Constitutional Law (7th edn, LexisNexis 2014) 1412.

[31] Muslim Women (Protection of Rights on Marriage) Act, 2019.

[32] Article 44, Constitution of India, 1950.

[33] Tahir Mahmood, Uniform Civil Code: Fictions and Facts (Har-Anand Publications, 2003) 87.

[34] R. Dhavan, "Judicial Activism and Constitutional Morality" (2018) 5(2) Indian Law Journal 33.

[35] Law Commission of India, Reform of Family Law (Report No. 270, 2018).

Without shifting social morality, constitutional morality remains a doctrine of the courts, disconnected from daily life.

- **Expanding the Scope to Emerging Issues**

Family law in India must respond to new realities, including LGBTQ+ rights, live-in relationships, and digital-age family disputes. Constitutional morality offers a flexible framework to address these issues by ensuring that dignity and equality remain central to evolving family structures.[36]

Conclusion

The evolution of family law in India reflects the persistent tension between religious morality and constitutional morality. While personal laws are rooted in customs and religious texts, they cannot remain insulated from constitutional guarantees of equality, dignity, and liberty. Judicial interventions in cases such as Shah Bano, Shayara Bano, Joseph Shine, Vineeta Sharma, and Navtej Johar have demonstrated the judiciary's willingness to prioritize constitutional morality over discriminatory practices. These decisions collectively underscore that personal laws must evolve in harmony with the constitutional ethos.

At the same time, judicial reliance on constitutional morality has faced resistance — from political compromise, religious conservatism, and societal inertia. Legislative reforms, such as the codification of Hindu law and the criminalization of instant triple talaq, highlight that enduring change requires both judicial initiative and parliamentary action. Social transformation, through awareness and education, is equally indispensable to ensure that constitutional morality does not remain confined to courtrooms but becomes a lived reality for citizens.

Constitutional morality, as envisioned by Ambedkar, is the foundation upon which a democratic society must rest. It provides a normative framework that ensures individual rights are protected against the weight of tradition and majoritarian will. In family law, it acts as a guiding compass to reconcile religious diversity with constitutional values. The path ahead lies in strengthening this principle through coherent judicial interpretation, inclusive legislation, and progressive societal change.

Only when constitutional morality permeates family law in letter and spirit can India truly fulfil its constitutional promise of justice, liberty, equality, and fraternity for all.

[36] Navtej Singh Johar v. Union of India, supra note 7 (Conceptual Framework).

9.
Invisible Families: The Legal Vacuum Around Queer and Transgender Partnerships

Mr. Krupa Nayak
VES

Abstract
Within the backdrop of Indian society, family structuring has largely classically evolved on the basis of heteronormativity, there almost always exists a legal recognition for any heterosexual, binary-gendered partners who choose to get married. Despite some progressive decisions, including the decriminalization of consensual same-sex relations in Navtej Singh Johar v. Union of India and the recognition of gender identities in NALSA v. Union of India (2014), Indian law generally does not extend recognition or protection to queer and transgender partnerships. The lacuna in law makes matters related to marriage, adoption, inheritance, medical decision-making, and property rights very difficult for LGBTQIA+ families.
This study critically examines the disjunction between constitutional morality and legislative inertia and the issue of why queer and trans people continue to be left out of the protective regulatory ambit of family law. It engages with judicial pronouncements, the architecture of personal laws, and international legal models to underline the exigency for an inclusive legislative reform. The analysis further delves into the socio-legal implications of this exclusion-shifting onto the lives of queer couples some dimensions of precarity, such as the emotional and financial-and legal-insecurely supported. From a rights and intersectional standpoint, the paper advocates for the establishment of a plethora of family laws reflecting a myriad of forms of family other than those constrained by the heterosexual matrix.

Keywords: *Queer partnerships, transgender rights, LGBTQIA+, family law, legal recognition.*

Contextualizing the Legal Void

Legally recognizing family is a fundamental aspect of civil protection and social recognition in any democratic society. However, in India, the concept of "family" derives mainly from the heterosexual, cisgender, monogamous ideal as evidenced in personal law statutes and the secular Special Marriage Act, 1954[1]. These heteronormative expectations do not consider the lived experiences of queer and transgender persons, whose relationships continue to be legally unrecognized. Though advancements to the constitution have been made, the Indian legal system has kept partnerships like these outside the scope of family law, thus effectively creating a legal void. The Supreme Court has played an important role in affirming the rights of LGBTQIA+ people. In Navtej Singh Johar v. Union of India, the Court struck down Section 377 of the Indian Penal Code to the extent that it criminalized consensual homosexual relationships. The Court noted that sexual orientation is a core characteristic of one's identity, guaranteed by Article 21 of the Constitution[2]. Just previously, in National Legal Services Authority v. Union of India, the Court had found that transgender persons possess a fundamental right of gender self-identification, describing "transgender" as a third gender entitled to constitutional protection[3]. These decisions represented a major turn toward inclusion but did not go so far as to acknowledge queer and transgender partnerships in family law.

Consequently, LGBTQIA+ couples continue to be denied legal rights that married couples and families have traditionally taken for granted, such as marriage, adoption, parenting rights, and inheritance rights, as well as medical consent rights, spousal insurance rights and property rights. Their relationships are now constitutionally decriminalized and dignified, but they remain invisible in the context of personal and statutory law. The refusal of the state to make law in this area is reflective of a disconnect between constitutional morality and societal conservatism.

In marked contrast, some countries have developed inclusive local laws that explicitly confirm the rights of queer couples. South Africa, for example, legalized same-sex marriage via the Civil Union Act, 2006, following the constitutional court judgment finding that the exclusion of

[1] Act No. 43 of 1954, enacted on 9 October 1954.

[2] AIR 2018 SUPREME COURT 4321, AIR 2018 SC(CRI) 1169, (2018) 4 MAD LJ(CRI) 306, (2018) 4 BOMCR(CRI) 289.

[3] AIR 2014 SC 1863

same-sex marriages was a contravention of the right to equality[4]. Taiwan an Asian country also legalized same-sex marriage as noted in the 2019 case, which found that denying marriage to same-sex couples was unconstitutional[5]; and even Nepal instructed its police to include the queer community as part of its 'other' gender and instructed the government who are partners making laws to draft laws that included same-sex marriage as part of recognizing the rights of sexual and gender minorities[6]. These case studies establish a strong comparative lens for a country like India that failed to engage in the discussion about LGBTQIA+ families who are rendered invisible legally. This study critically interrogates how the Indian legal system has failed to recognize queer and transgender partnerships. This study reviews constitutional jurisprudence, statutory exclusions and potential international best practice in order to support a rights-based, inclusive reform of family law. By framing queer partnerships within the theoretical and constitutional mandate of inclusivity and non-discrimination, this study will argue to redefine "family" in Indian law, to reflect the plurality of kinship structures that exist today.

Queer and Transgender Rights in Indian Jurisprudence

This has been the growth, in jurisprudence, of queer and transgender rights in India, mainly by constitutional interpretation. The weight of Articles 14, 15, 19, and 21 of the Indian Constitution has been behind this metamorphosis. Article 14 enshrines the right of equality before the law and equal protection under laws, laying the foundation for through equality against discrimination on grounds of sex, gender, and sexual orientation. Article 15(1) prohibits such discrimination on grounds "only of religion, race, caste, sex, place of birth or any of them." The word "sex" has been interpreted in such a manner as to include gender identity and sexual orientation. Article 19(1)(a) safeguards the freedom of expression, which comprises the right to express one's gender identity. Article 21 guarantees the right to life and personal liberty, which are now interpreted to include dignity, autonomy, and privacy-essentials that resonate with the LGBTQIA+ experience.

[4] Minister of Home Affairs v. Fourie, 2005 (1) SA 524 (CC); Civil Union Act 2006 (South Africa).

[5] Constitutional Court of Taiwan, Interpretation No. 748 (2017); Act for Implementation of Judicial Yuan Interpretation No. 748, 2019.

[6] *Sunil Babu Pant v. Nepal Government*, Writ No. 917 of 2007, Supreme Court of Nepal.

The Supreme Court's landmark ruling in the 2014 case of National Legal Services Authority v. Union of India[7] established an important precedent in Indian legal history. The judgment recognized the right of transgender persons to self-determine their gender and upheld equal treatment, non-discrimination, and dignity as per the Constitution. The Court instructed the Centre and State Governments to take affirmative action for the social inclusion of transgender persons, their access to healthcare, and reservation in education and employment. The case was further moved forward through the 2018 decision in Navtej Singh Johar v. Union of India[8]. Here, a five-judge Constitution Bench declared Section 377 of the Indian Penal Code unconstitutional insofar as it criminalized consensual sexual acts between adults of the same sex. The judgment construed sexual orientation as an inherent aspect of one's identity and dignity envisaged in Article 21, while also holding that majoritarian morality does not eclipse constitutional morality. Of significance is the Court's emphasis that constitutional rights cannot merely remain an abstract guarantee but must be activated within the lived experience of the marginalized communities.

In the landmark case of Justice K.S. Puttaswamy v. Union of India (2017), the Court indirectly laid the foundation for privacy as a fundamental right under Article 21, an idea that became a crucial plank in subsequent judgments relating to queer rights. The Court acknowledged sexual orientation as an intrinsic part of privacy, autonomy and dignity of the individual, which establishes that the state must not interfere in consensual relationships between adults in private spheres[9].

Such judicial pronouncements have built a strong constitutional citadel protecting queer and transgender rights. However, while decriminalization and identity recognition are important milestones, the absence of any statutory recognition for non-heterosexual partnerships suggests the continued existence of a legal void. These constitutional guarantees are as yet but poorly translated into statutes regulating marriage, inheritance, adoption-caregiving relationships. It is this very price paid for the disconnect that must be compensated through legislative measures founded on the constitutional ethos of equality, liberty, and dignity.

[7] AIR 2014 SC 1863.

[8] AIR 2018 SUPREME COURT 4321, AIR 2018 SC(CRI) 1169, (2018) 4 MAD LJ(CRI) 306, (2018) 4 BOMCR(CRI) 289

[9] AIR 2018 SC (SUPP) 1841, 2019 (1) SCC 1, (2018) 12 SCALE 1, (2018) 4 CURCC 1

Family Law and Heteronormativity

Indian family law, in both its personal and secular forms, has historically operated on heteronormative assumptions-the idea that legitimate family units are only heterosexual and cisgender. This normativity alienates same-sex and transgender persons by refusing legal recognition of their partnerships and thereby denying them familial rights such as marriage, adoption, inheritance, and spousal benefits.

Personal laws such as the Hindu Marriage Act, 1955, the Muslim Personal Law (Shariat) Application Act, 1937, and the Indian Christian Marriage Act, 1872, are all drafted in language presupposing binary gender roles and heterosexual unions, for example, by referring to a marriage between a "bride" and a "bridegroom" that has been virtually judicially interpreted in a biological, gender-essentialist sense under the Hindu Marriage Act[10]. The statutory framework, therefore, does not recognize the status of same-sex couples and does not recognize transgender individuals whose gender identity violates the traditional male-female caste system. Likewise, Muslim personal law does not contain a statutory procedure for non-heteronormative relationships and only provides for marriage between a man and a woman.

The Special Marriage Act, 1954, which was supposed to be a secular substitute for religious personal laws, does not move beyond heteronormativity. While the Act was originally passed under the notion of facilitating inter-faith or civil marriages, the legislation, particularly the eligibility criteria and procedural language, contemplates binary gender pairings. Overall, the lack of inclusive language in a supposedly more universal legislation reflects the normative habit of constantly suppressing queer and transgender subjects as part of the legal regulation of family life[11]. This legal invisibility is expanded into less formal arenas (like adoption and inheritance). The Hindu Adoption and Maintenance Act, 1956, prohibits adoption by same-sex couples and allows adoption only by married heterosexual couples or single people. When it comes to succession, the law presumes that families exist only legally, and queer partnerships are often not recognized at all. Queer couples might thereafter not be recognized as spouses in anything—including inheritance, maintenance, and hospital visitation rights (if otherwise recognized as

[10] AIRONLINE 2018 SC 1136, where the Court reaffirmed heterosexual understanding of marriage under personal laws.

[11] For instance, Section 4 of the Special Marriage Act, 1954, specifies conditions for marriage between “a male” and “a female,” thereby excluding queer unions by implication.

automatic extremis in the case of marriage), due to the lack of legal recognition.

This is a situation where heteronormativity is not simply a social construct but rather a legal structure. By legislating certain kinds of relationships as "valid" the Indian law fails to protect queer and transgender persons under the law, validating their lived experience as illegitimate. This creates structural absence of value and maintains inequity potentially (materially and symbolically) assigning the precept that non heterosexual lives are unworthy of law. Hence, family law is both a site of social subordination and legal discrimination.

Transgender Persons (Protection of Rights) Act, 2019

Although the Transgender Persons (Protection of Rights) Act, 2019 was viewed positively by some as a step in the right direction toward entrenching the rights of transgender persons in India, the Act has been heavily critiqued by legal scholars, activists, members of the transgender community for its structural flaws and normative failures. The Act does recognize the "right to self-perceived gender identity" and prohibits discrimination in places such as education, employment, and healthcare. Nevertheless, it is striking that the Act does not include any provisions related to familial rights—in particular, the right to marry, to adopt, and to establish a domestic partnership[12].

The most common critique of the Act is its inconsistent treatment of gender autonomy. In NALSA v. Union of India, there was clarity on the right to self-identify as male, female, or third gender without any bureaucratic or medical interference[13], but in the 2019 Act, people must apply to a District Magistrate for a certificate of identity in order to self-identify, thus undermining the autonomy recognized in NALSA. Similarly, for all individuals who self-identify as male or female, the Act requires evidence of gender affirming surgery, further entrenching a medico-legal paradigm that pathologizes trans identities and undermines the promise of constitutional self-determination[14].

First and foremost, the Act does not expressly recognize relationships. It does not reference marriage, civil partnerships, adoption rights, or inheritance, and by not referencing those, legal invisibility is the likely

[12] See *Transgender Persons (Protection of Rights) Act*, No. 40 of 2019, §§ 3–9.

[13] (2014) 5 SCC 438

[14] Ibid., contrasted with *Transgender Persons (Protection of Rights) Rules*, 2020, Rule 4(1)–(2), which require surgical proof for revised gender identity certificates.

status of transgender persons in family law. That may not seem as serious because the Supreme Court of India has previously recognized transgender persons to have status of protected characteristic in Navtej Singh Johar and Puttaswamy. In effect, the restriction of what marital provisions actually exist in the Act means that transgender persons in committed relationships will have no legal protection in relation to distribution of property with respect to a partner, rights in respect of a partner, and to make medical decisions on behalf of a partner.

The lack of an explicit and comprehensive legal scheme for family recognition demonstrates that considerable gaps exist between constitutional histories and statutory delivery. The protections the Act gestures at are little more than tokenism when basic elements of citizenship - the ability to create intimate associations and families - are entirely ignored.

International Legal Developments

An increasing number of jurisdictions around the world have recognized same-sex partnerships as civil unions; marriage equality laws; and anti-discrimination legislation, which offer useful comparative examples for India, especially as it considers legal recognition of queer and transgender families.

South Africa was among the first Global South countries to constitutionalize protections for sexual minorities. In Minister of Home Affairs v. Fourie, the Constitutional Court found the refusal of marriage to same-sex couples to be unconstitutional, which led to the Union Act, 2006 legislation[15]. The Union Act allows civil unions to be registered for both same-sex and heterosexual couples, effectively putting both types of unions on equal legal footing. The judgment framed its reasoning in the terms of equality, dignity and freedom—terms similar to those used by the Indian Supreme Court in Navtej Singh Johar. In Taiwan, the Constitutional Court's ruling in Interpretation No. 748 required lawmaking action to secure marriage equality. Since then, the Taiwanese Parliament passed the Act for Implementation of J.Y. Interpretation No. 748 in 2019, thus becoming the first country in Asia to legalize same-sex marriage. Apart from signaling a commitment to the rights of LGBTQIA+ people,

[15] Minister of Home Affairs v. Fourie, 2005 (1) SA 524 (CC); Civil Union Act, No. 17 of 2006 (S. Afr.).

Taiwan's ruling also demonstrated an appreciation for the fluid nature of family and intimacy in democratic societies[16].

As we move closer to India, we can see that Nepal has been a regional leader in queer rights. The Supreme Court of Nepal ruled in Sunil Babu Pant v. Nepal Government that the state must compose laws to recognize same-sex partnerships and protect the rights of gender and sexual minorities[17]. The 2015 Constitution of Nepal also voiced protections for sexual and gender minorities, although complete marriage equality remains in process. These events show a trend towards inclusion in the courts and legislatures of nearby countries, even those steeped in cultural conservative values. Although the Principles themselves do not constitute legally binding obligations, they have developed persuasive authority in the context of international jurisprudence and have been cited in many domestic courts in order to define and interpret constitutional rights expansively.

When contrasted, India's passive legislative and regulatory silence with regards to non-heteronormative unions appears even more keenly demonstrative. Indian constitutional jurisprudence in Navtej Singh Johar and NALSA demonstrates some subtle alignment with international human rights principles, but the lack of legislative follow-up has prevented queer partnerships from receiving any meaningful statutory privacy or marriage protection at this moment in time.

Gaps and Silences in Indian Legal and Policy Framework

Even with constitutional progress in recognizing the dignity and equality of individuals from the LGBTQIA+ community through rulings such as Navtej Johar and NALSA, Indian statutory law continues to operate with tacit heteronormative presumptions. The gap between the constitutional ideals and legislative inertia causes real harm to queer and transgender persons, encumbering their desires to forge relationships in familial settings.

- **No Legal Recognition of Same-Sex or Gender-Nonconforming Conjugal Partnerships**

Indian statutory law does not recognize same-sex or gender-nonconforming conjugal partnerships in any form — as a marriage, civil

[16] Judicial Yuan, Interpretation No. 748 (2017), Constitutional Court, Taiwan; Act for Implementation of J.Y. Interpretation No. 748, 2019

[17] Sunil Babu Pant v. Nepal Government, Writ No. 917 of the year 2064 BS (2007), Supreme Court of Nepal.

union, or domestic partnership. The Special Marriage Act, 1954, although understood to be secular, uses binary gendered terms such as "husband" and "wife" textually, restricting eligibility to heterosexual couples only, and binary heterosexual configurations of "husband" and "wife"[18]. Similarly, religious personal laws, such as the Hindu Marriage Act, 1955 and the Muslim Personal Law (Shariat) Application Act, 1937, are rooted in caste and family structures which are patriarchal, cis heterosexual[19]. Queer couples are therefore considered complete strangers to one another on a legal basis with no spousal recognition, no legal presumption of cohabitation, and no protections in separation.

- **Restrictions on Adoption and Assisted Reproductive Technologies (ART)**

The Juvenile Justice Act provides for adoption by a single LGBTQIA+ individual, but it does not allow for joint adoption by same-sex or gender-diverse couples. It places queer couples in a bind; one can adopt as an individual, but their partner has no legal parental status. For surrogacy or ART, both ART (Regulation) Act, 2021 and Surrogacy (Regulation) Act, 2021 restrict who can access those services and by explicitly excluding access to “married heterosexual couples,” deny queer persons and unmarried transgender people any legal access to family-building. That legal framing obliterates queer reproductive autonomy and violates right to found a family under Article 21 of the Constitution[20].

- **Inequities in Inheritance and Succession**

Laws regarding inheritance, like the Indian Succession Act, 1925 do not acknowledge the existence of queer relationships, so a partner in a same-sex or gender-diverse relationship has no right to inherit assets when their partner dies without a will, or to obtain maintenance or pension rights after a breakup. It is true that testamentary succession is possible through a will or contract, but these are vulnerable to claims or disputes from the partner's family, and provide no easier access than marital succession would and do not provide similar presumptions. In addition, this legal invisibility places additional financial vulnerability on queer elder people,

[18] Special Marriage Act, No. 43 of 1954, India Code (1954), p 4, 15.
[19] Flavia Agnes, *Family Law and Constitutional Claims of Queer Citizens*, 50(2) J. Indian L. Inst. 182, 186–89 (2018).
[20] ART (Regulation) Act, No. 42 of 2021; Surrogacy (Regulation) Act, No. 47 of 2021.

and their surviving partners, who can be evicted or excluded from their home by abusive families after the death of their partner.

- **No Recognition of Queer Live-in Relationships**

While live-in heterosexual relationships have received limited recognition through judicial decisions or were offered certain benefits through the Protection of Women from Domestic Violence Act, 2005, queer couples in live-in partnerships are not legally recognized by any law. While some case law has offered limited legal protection to some queer couples in habeas corpus cases, these rulings do not provide a general legal recognition. No codified recognition, like common law marriage or partnership rights or benefits- cohabitation rights, maintenance, or ownership of jointly acquired chattels, are available to queer couples. This offers little safety, should partners decide to break up, or if abuse occurs, or if other disputes over property arise.

- **No Spousal Rights in Health and End-of-Life Decisions**

Hospitals and public institutions in India primarily identify a person's next of kin as the legal spouse or blood relative meaning same-sex partners cannot make the important medical decisions, view the health record, or even be allowed visitors during hospitalization or end-of-life care. There are no married or partnership laws that provide legal standing thus queer individuals are eliminated from the situation in times of issue with health, or when making decisions for end-of-life matters like organ donation and funeral. This is not only a legal problem but an emotional one too.

- **Excluded from Economic and Employment Benefits**

Partner status does not provide enabled access to many state and employer sponsored benefits including pension schemes, health insurance plans, housing allowance, and compassionate leave. Although some private employers may give access these benefits to employees with partners, this is done voluntarily and without legal obligation, and is left to employer discretion under D&I policies. Government employees are routinely denied eligibility for these benefits, including for central and state government employees too, because their status does not qualify as a spouse. This exclusion reinforces financial inequality, undermines social security for some queer households.

- **Disconnection of the Identity-Status under the Transgender Persons Act**

According to the Transgender Persons (Protection of Rights) Act, 2019, a person has the right to self-identify their gender[21]. However, this Act is silent on the implications of a gender identity for family law rights; it does not clarify the character of rights obtained by a transgender woman marrying a cis-man under the Hindu Marriage Act, nor does it explain whether a trans man can adopt a child. The legislation, therefore, disconnects the recognition of gender identity from the family law consequences of that recognition - making rights superficial and performative, not substantive[22].

- **Ambiguities in Judicial Responses and Reliance on Writ Protection**

Judicial relief granted to queer couples via writ petitions (in particular habeas corpus and protection orders) has been episodic. We have only seen limited judicial protections for queer couples facing violence and/or coercive family situations. However, there is little basis (or willingness) for courts to create binding principles on the protection of the civil status of a queer relationship, marriage rights, and property sharing. Lack of a uniform doctrine results in unpredictable decisions varying widely amongst jurisdictions. For example, some High Courts protect queer couples while other High Courts outright dismiss their claims as they have no legislative framework. Relying on judicial discretion instead of statutory clarity, leaves working queer families legally exposed.

Filling the Legal Void: Reformative Measures

To expand and deepen the data collection for this research, further conceptual, comparative, and methodological possibilities should be suggested. First, the consideration of a strong theoretical framework can help refine the critique of how Indian law conceives of queer and transgender relationships. More specifically, queer theory can provide an interrogative lens to examine the heteronormativity of Indian family law, as well as expose that Indian legal constructions of kinship and partnership largely remain prisms that are gender-binary and exclusionary. Further, the insights of Critical Legal Studies (CLS) can interrogate how regimes of law are neither neutral nor objective, but reproduce and license dominant

[21] Transgender Persons (Protection of Rights) Act, No. 40 of 2019, Sec. 4.

social ideologies, and here, using the ideal of the cisgender, heterosexual, reproductive family.

Furthermore, while this study is grounded in the Indian legal system, a comparative analysis would be very helpful normative contrast and expand the aperture on possibilities for reform. For example, Nepal has, through its Supreme Court, recognized same-sex partnerships, and instructed legislative reform; South Africa's post-apartheid Constitution prohibits discriminatory behavior based on sexual orientation and provides for same-sex marriage; Taiwan became the first Asian country to legalize same-sex marriage after prolonged civil society advocacy and constitutional interpretation. Using these jurisdictions to demonstrate India's legislative lag will help illustrate possible constitutional pathways to recognizance for queer families. From a methodological point of view, this paper could also be more explicitly articulated for its identification as a doctrinal and analytical legal study, in which it is largely based on constitutional claims and statutory interpretation along with judicial reasoning, rather than fieldwork or empirical data. Nevertheless, by admitting the lack of empirical interviews or case studies like statements made by queer couples, LGBTQIA+ activists, or legal practitioners here, it adds transparency regarding the absence of this type of qualitative data in its analysis, and it also points towards useful avenues for future interdisciplinary research. This qualitative data might provide greater insight into the lives, access to rights, and institutional barriers to queer families in India, and of note, this paper could also provide a tabular presentation or in an annexure, a list of landmark Indian cases, citing the case name, subject matter, year and ruling, for instance, NALSA v. Union of India (2014), Navtej Singh Johar v. Union of India (2018), KS Puttaswamy v. Union of India (2017).

Most significantly, the paper would be improved by the incorporation of a shift to a policy recommendations section that specifies particular legal reforms. Legal reforms include, but are not limited to, a Civil Union Act that recognizes partnerships or agreements of cohabitation by at least two persons, no matter their sex or gender identity; amending the Special Marriage Act, 1954 to use non-gendered language and allow for partnerships to be registered beyond sexual or gender-dichotomous language; creating a Central Domestic Partnership Registry that provides unmarried couples, queer or heterosexual, the right to record their cohabitation and caregiving arrangements; other family law reforms could

include the right for same-sex couples to jointly adopt; same-sex couples to utilize Assisted Reproductive Technologies (ARTs), and equalizing treatment for same-sex or LGBTQ couples under the existing laws similar to succession and maintenance. If taken all together, the proposed formal and statutory reforms, and recommendations included herein, could help fill the legal or statutory void, as well as provide tangible legal applications and frameworks of the constitutional promise of dignity, autonomy, and non-discrimination as recognized by the Supreme Court in Navtej and as determined through the Nation in NALSA.

Finally, the concluding thoughts in this paper must underscore the growing gulf between constitutional ideals and statutory reality. Although Indian courts have more frequently, under Articles 14, 15, and 21, interpreted laws to provide rights for queer and transgender people, this recognition has, as yet been merely symbolic. Without legally codified jurisdictional and legislative protections, queer families are invisible to the law, vulnerable to institutional discrimination and make-shift provisions which rely on precarious judicial discretion for mere recognition. The task ahead is not simply to affirm identity, it's to ensure compliance with the affirmation of that identity and to create legislated and enforceable rights. In order to make these vital changes, will require urgent, inclusive, and comprehensive reform by many key players including Parliament and state governments alike.

Conclusion

To summarize, the Indian legal system is still not geared to accommodate and protect the reality of queer and trans partnerships. Also, even though we have made strides in the constitution, through the NALSA, Navtej Singh Johar and Puttaswamy judgments, that have acknowledged the right to dignity, the right to privacy, and the right to non-discrimination for LGBTQIA+ persons, those rights have not made their way into legislation which protects queer families. The prevalence of heteronormative assumptions have kept queer people from marriage, adoption, succession, spousal right and other rights in family law. The absence of recognition did not just undermine the lived experiences of queer couples, but meant they had to interact with legal and social institutions, without any formal protection or acknowledgement. Also, transgender persons continue to experience systemic neglect under many statutes, such as the Transgender Persons (Protection of Rights) Act, 2019, which do not engage with partnership structures, caregiving, or acknowledgment of family. The silence of Indian law regarding live-in relationships, caregiving contracts, and relationships beyond formal kinship arrangements only makes it harder for queer family structures to be seen and acknowledged. A comparison of international jurisdictions from South Africa to Taiwan shows that - although it is not the only avenue - it is legally possible, and socially impactful, to recognize queer partnerships. We need to move beyond a purely symbolic constitutional acknowledgment, to actual legal reform. India must provide more than merely symbolic constitutional recognition of equality, dignity and freedom for all regardless of sexual orientation or gender identity; they must enact laws inclusive for all, gender-neutral in language, and legally acknowledge the various forms of family.

10.
Technology Evolving Role in Family Law: Bridging or Widening the Justice Gap

Mr. Shubham kumar
Advocate, Patna High Court
LL.M. Amity University Patna

Introduction

"*Technology must always be in service of constitutional values and human dignity".*[1]

- Justice D.Y. Chandrachud

"Law governs relationships, but family law governs emotions. It touches upon the most intimate aspects of human life love, trust, responsibility, and care. In today's world, where even emotions are mediated through digital screens, family law too cannot remain untouched by technology. The question is not whether technology will transform family law, but whether this transformation will ensure justice for all or deepen existing inequalities".

Family law has always been different from other branches of law. It is not only about legal rights but also about emotions, responsibilities, and the protection of vulnerable members of society. Issues like divorce, custody of children, and maintenance affect the dignity and stability of family life. In India, family courts were established with the idea of providing simple and speedy remedies. But in reality, delays and procedural hurdles remain a big challenge.

In recent years, technology has started to enter the space of family law. Courts have gradually moved from traditional paper-based filings to e-filing systems. During the COVID-19 pandemic, video conferencing became common in family disputes. Mediation platforms are now available online, and some courts have even started using artificial

[1] Justice K.S Puttaswamy (Retd) and Anr. Vs Union of India, AIR 2017 SC 4161.

intelligence tools for case management. These changes show that technology is no longer a side option but an integral part of justice delivery.

Technology, however, has two faces. On one hand, it promises efficiency, cost reduction, and better access. An urban litigant with internet access can now file a petition without travelling to court. Maintenance or custody hearings can be conducted online, saving both time and resources. This looks like a positive step towards bridging the long-standing justice gap.
On the other hand, problems cannot be ignored. The digital divide in India is very real. Many women, rural residents, and marginalized groups do not have proper internet, devices, or digital literacy. For them, the so-called "digital justice" may be out of reach. A woman without a smartphone cannot easily file an online maintenance claim. In such situations, technology might actually increase inequality rather than solve it.

There are also serious concerns about privacy and data protection. Family law cases involve very sensitive information – details of domestic violence, financial conditions, or custody arrangements. If this data is not properly safeguarded, it can be misused. The Supreme Court in Justice K.S. Puttaswamy v. Union of India[2] held that privacy is a fundamental right. This principle must guide the use of technology in family law. Similarly, in Krishna Veni Nagam v. Harish Nagam[3], the Court allowed video conferencing in matrimonial matters, but also highlighted the need to balance convenience with fairness.

Keeping these challenges in mind, this chapter will study the evolving role of technology in Indian family law. It will look at both the opportunities and the risks. It will examine how technology affects women and disadvantaged groups, how data protection laws are developing, and what reforms are required. Some comparative perspectives from other countries will also be considered.

The aim is to see whether technology is truly helping in bridging the justice gap or whether it is creating a new digital barrier. The chapter argues that only when technology is used in line with constitutional values of equality, dignity, and access to justice can it become a positive force.

[2] AIR 2017 SC 4161.
[3] AIR 2017 SC 1345.

Evolution of Technology in Family Law

Family law has always reflected the tension between human intimacy and legal formality. Unlike commercial disputes, here the court deals with emotions broken marriages, custody battles, and the struggle for maintenance. For decades, these matters unfolded in courtrooms where personal pain met institutional delay. The entry of technology into family law is, therefore, not just a procedural reform; it is a re-imagination of how justice itself is experienced.

The first wave of this transformation came with the E-Courts Mission Project (2005). What began as a modest attempt to upload case status online slowly created a culture where litigants could "see" their case beyond dusty court files. This was not simply digitization; it was a symbolic shift justice was no longer hidden in court corridors but accessible on a screen.

The second wave arrived with video conferencing and virtual hearings. In Krishna Veni Nagam v. Harish Nagam[4], the Supreme Court recognized that forcing a spouse to travel hundreds of kilometers for a matrimonial case was not justice but punishment. By allowing video conferencing, the Court humanized technology, making it a tool of compassion rather than mere convenience.

Then came the pandemic, which acted as an accelerator rather than an innovator. Suddenly, family law disputes maintenance, custody, domestic violence had to be heard online. Courts experimented with e-filing, e-payment of fees, and digital summons through apps like NSTEP. For some litigants, this was a lifeline. A mother seeking interim maintenance could attend hearings from her home. But for others bespecially rural women without internet access, it created new hurdles. The pandemic thus revealed a paradox: technology could both bridge and widen the justice gap.

The third wave is emerging innovation AI tools, online mediation platforms, predictive analytics. While India is cautious, experiments elsewhere show AI being used to suggest custody arrangements or settlement probabilities. This raises a profound question: can algorithms capture human emotion? Can empathy be coded? Family law, more than

[4] AIR 2017 SC 1345.

any other field, reminds us that justice is not only about efficiency but about dignity and care.

Seen together, the evolution of technology in family law can be read as three overlapping waves:

- Digitization (2005–2015): Justice on the screen.
- Virtualization (2017 onwards): Justice through distance.
- Innovation (present-future): Justice by algorithms.

Each wave carries hope but also danger. Digitization made courts transparent, but also exposed the digital divide. Virtualization reduced distance, but sometimes reduced human presence. Innovation may bring efficiency, but risks replacing empathy with data.

Thus, the story of technology in family law is not linear progress but a delicate balance a struggle to ensure that in seeking efficiency, we do not lose sight of humanity. The real question is not how far technology has come, but whether it has brought families closer to justice.

Promise of Technology: Bridging the Justice Gap

Family law is often described as the most "human" branch of law, yet it is also the one where delays hurt the most. A delayed divorce prolongs suffering. A delayed custody order unsettles a child's future. A delayed maintenance claim can decide whether a woman eats or starves. In such a system, the arrival of technology is not a luxury it is a lifeline. It carries with it the promise of reshaping the way justice is delivered to those who need it most.

The first and most visible promise is speed and efficiency. Technology reduces the time wasted on procedures that once seemed endless. With e-filing, a mother in a small town can upload her maintenance petition without waiting in a queue at a distant family court. With online hearings, a father working abroad can attend custody proceedings without travelling thousands of miles. The Supreme Court in Krishna Veni Nagam v. Harish Nagam[5] acknowledged this reality, holding that video conferencing is not just a matter of convenience but a means of preventing hardship. Speed, in family law, is not a procedural luxury it is substantive justice.

Technology also promises transparency. When every order, cause list, and case status is uploaded online, the system becomes less dependent on whispers in court corridors and more reliant on open records. This discourages corruption, reduces dependence on middlemen, and reassures

[5] AIR 2017 SC 1345

litigants that the process is not hidden from their eyes. Transparency is dignity, and dignity is justice.

Perhaps the most transformative promise lies in the field of mediation and conciliation. Family law was never meant to be purely adversarial. The law itself directs judges to attempt reconciliation before proceeding with trials. Digital mediation platforms extend this philosophy into the virtual space. Spouses can talk, negotiate, and even reconcile without the formality and intimidation of a courtroom. In an era where emotions often erupt into litigation, online mediation offers a quieter, more personal path a reminder that technology can also heal, not just adjudicate.

Another crucial promise is access to legal aid and information. Technology has allowed NGOs, helplines, and government portals to connect directly with vulnerable individuals. A woman trapped in an abusive marriage can now use a simple mobile app or WhatsApp helpline to reach a lawyer. This early access to legal information can empower her to act, where earlier silence might have been her only option. Justice begins with awareness, and technology brings awareness closer than ever before.

Global experiences also reinforce this promise. In the United Kingdom, an online divorce application system simplified and streamlined what was once an exhausting process. In Singapore, digital mediation platforms have helped settle custody disputes faster and more amicably. These models prove that technology, when guided by empathy and inclusivity, can revolutionize family law.

But the true promise of technology is not measured in efficiency statistics or case disposal numbers. It lies in the small human victories it enables: a child's custody secured without months of uncertainty, a maintenance order passed swiftly so that a woman does not have to beg or borrow, a divorce settled with dignity rather than prolonged hostility. These are the everyday miracles that technology can deliver if it is properly harnessed.

The challenge, of course, is to ensure that the promise is not limited to the digitally privileged. For now, the promise of technology shines brightest in urban, well-connected spaces. But if extended carefully and inclusively, it can light up even the darkest corners of the justice system.

Technology, in this sense, is not merely a tool. It is a bridge one that, if built strong and wide enough, can carry the most vulnerable across the justice gap.

Digital Divide and Exclusion

Technology has been hailed as the great equalizer. But in the courtroom, especially in family law, it often behaves like the great divider. The digital age promises justice at the click of a button yet for millions in India, there is no button to click. What emerges is not a bridge across the justice gap but a chasm that swallows the very people who need justice most.

The first wall of exclusion is infrastructure. India's metros may boast of high-speed internet, but in countless villages, even basic connectivity is unreliable. For a woman in rural Bihar or Jharkhand, being told she can file her maintenance petition "online" is almost ironic. Where there is no network, the net of justice simply does not exist. The system speaks the language of Wi-Fi; she lives in the silence of 2G or 3G.

The second wall is economic. Technology assumes affordability. But smartphones, laptops, data packs these are luxuries for families surviving on daily wages. Picture a deserted wife in a small town: her husband has left, her in-laws have thrown her out, and she has no independent income. To expect her to join an online hearing presumes she owns a private device, uninterrupted electricity, and stable internet. In reality, she may be borrowing her brother's phone for a few minutes, hiding her conversation from the family. For her, digital justice is not empowerment it is humiliation.

The third wall is literacy not just words, but digital literacy. Even when devices are available, navigating apps, scanning documents, converting files into PDFs, or signing with digital tokens is a nightmare for many. The language of the court has always been alien; now, the language of machines has been added to the burden. Family law was meant to be simple, but technology risks making it more complex than ever before.

The deepest wall, however, is social and gendered. Data consistently shows that in Indian households, men are more likely to own and control digital devices. Women, particularly in rural and conservative settings, are often denied free access to the internet. In many families, the smartphone is treated as a male possession. In such a world, how can a woman realistically participate in online mediation or track her custody petition on a portal? Justice may be digital, but her life remains analog.

Marginalized communities suffer doubly. A Dalit or tribal woman already faces exclusion in physical courtrooms where discrimination is embedded in practice. In the digital courtroom, she encounters a second exclusion

lack of connectivity, literacy, and resources. Technology, instead of lifting her up, becomes yet another tool that erases her voice.

What makes this divide especially dangerous in family law is the urgency of relief. Delayed maintenance can mean hunger. A custody dispute unresolved for months can destabilize child's life. If technology bars access for even a week, the consequences are devastating. Justice delayed in family law is not just justice denied it is survival denied.

Courts have begun to recognize this. Hybrid hearings, where parties can appear either physically or virtually, were introduced during the pandemic. But hybrid is not enough if one party lacks both options. True inclusion requires active measures: community digital centres, free legal aid kiosks with internet, and simplified procedures that a first-time litigant can understand without intermediaries.

The digital divide in family law is not a minor glitch it is the new battlefield of justice. Unless this divide is confronted head-on, technology will not be the bridge it claims to be. It will be the wall that keeps the most vulnerable locked outside the gates of justice.

Gendered Impact of Technology

The digital divide in family law does not fall evenly on all shoulders. It weighs heaviest on women. If technology is a double-edged sword, then women often find themselves on the sharper side of the blade. The exclusions of infrastructure, affordability, and literacy already discussed in the previous section intersect with patriarchy to create uniquely gendered disadvantages.

In many Indian households, access to digital resources is not neutral. Men are more likely to own and control the family's only smartphone. Women, even if literate, may be denied freedom to use the internet independently. The result is that when family law processes move online, men are better positioned to participate, while women are forced into dependency. The so-called promise of "accessible justice" becomes a privilege for one gender and a barrier for the other.

This gender gap becomes painfully clear in maintenance disputes. A deserted wife, trying to claim support, is often expected to file petitions electronically. Yet, if she cannot access a smartphone or navigate portals, she remains effectively locked out. In practice, her legal right exists on paper but vanishes in reality. For her, technology is not a bridge to justice but another locked gate controlled by others.

Similarly, in custody battles, online hearings can disadvantage mothers more than fathers. Courts may allow parents to appear virtually, but if the

mother lacks private access to a device, she must depend on relatives or cyber cafés to attend hearings. This compromises confidentiality and exposes her to social stigma. The very system meant to protect the child's best interests can end up silencing the parent who is often the primary caregiver.

The gendered impact is also visible in cases of domestic violence. During the COVID-19 lockdowns, online complaint mechanisms and virtual hearings were praised as solutions. But studies, including reports by UN Women, showed that many women trapped with abusive spouses had neither the privacy nor the safety to use these digital platforms. For them, the shift to online mechanisms created not safety but surveillance every click could be watched, every call overheard. Technology promised rescue but delivered exposure.

Feminist legal scholars argue that this reflects a deeper problem: technology is built on the assumption of equality in access, but family law litigants rarely start from an equal footing. In patriarchal settings, the man's digital advantage translates into legal advantage. Unless the system actively compensates for this imbalance, digitization risks reproducing gender inequality under the guise of modernization.

Courts have occasionally recognized these barriers. For instance, some High Courts have permitted hybrid proceedings, acknowledging that women litigants may prefer physical hearings. Legal aid authorities have also begun experimenting with digital help-desks. Yet, these remain piecemeal measures. What is needed is a systemic response affordable community internet hub near family courts, simplified filing procedures, and dedicated support for women litigants.

Globally, too, the pattern is similar. In countries as diverse as Kenya and Bangladesh, studies show that women face greater exclusion from digital justice platforms due to cultural restrictions and financial dependence. This suggests that the gendered digital gap is not uniquely Indian but universal and therefore requires deliberate, feminist-oriented policy solutions.

Ultimately, the gendered impact of technology in family law is not about gadgets but about power. Control over devices mirrors control over resources and, often, control over women's lives. Unless the justice system recognizes this reality, digital reforms will remain half-measures promising equality while quietly deepening inequality.

Privacy and Data Protection Concerns

If access to technology decides who can enter the courtroom, then privacy decides who can speak freely inside it. Family law disputes are unlike any other legal matter: they deal with the most intimate details of people's lives marital discord, allegations of cruelty, financial struggles, and the custody of children. When such disputes move into digital spaces, the stakes of privacy become even higher. Technology may speed up the process, but if it fails to protect dignity, it undermines the very purpose of justice.

The nature of family law cases makes them uniquely vulnerable. A petition for divorce may contain sensitive allegations of infidelity or abuse. A maintenance claim reveals the financial dependence of a spouse. Custody proceedings often involve detailed accounts of a child's health, education, and emotional well-being. If this information is stored on poorly secured servers or exposed through careless handling, the harm is irreversible. Unlike a commercial dispute, where data is financial, in family law the data is personal it strikes at identity, reputation, and emotional safety.

Indian courts have already acknowledged the constitutional dimension of privacy. In Justice K.S. Puttaswamy v. Union of India[6], a nine-judge bench of the Supreme Court declared privacy as a fundamental right under Article 21. The Court emphasized that technology must serve human dignity, not erode it. This principle is directly relevant to family law, where litigants may be compelled to disclose deeply personal details as part of their legal claims. Protecting that data is not optional; it is a constitutional duty.

Yet, the current legal framework for data protection in India remains fragile. The Information Technology Act, 2000, along with its rules, provides some protection for sensitive personal data, but enforcement is weak and limited. The newly enacted Digital Personal Data Protection Act, 2023 is a step forward, but it does not specifically address the context of family law litigation. Questions remain: who is responsible if a court's digital platform leaks sensitive affidavits? What remedies are available to litigants if their private disputes become public due to a system error?

The risks are not theoretical. During the pandemic, there were instances where online hearings were interrupted or where links were shared beyond intended participants. In some cases, sensitive testimonies were exposed to unintended audiences. For women survivors of domestic violence, this is

[6] AIR 2017 SC 4161.

more than a technical glitch it is retraumatization. Technology that cannot ensure confidentiality is not neutral; it actively endangers.

Another challenge is the lack of digital literacy among litigants, which makes them more vulnerable to breaches. A woman who shares her petition through a public cyber café may inadvertently expose herself to local gossip or blackmail. Without proper safeguards, digital justice becomes a public spectacle rather than a private remedy.

Comparative experiences show how crucial regulation is. In the European Union, the General Data Protection Regulation (GDPR) sets high standards for confidentiality, including the right to be forgotten. Family law data, under such frameworks, receives extra caution. India's system, by contrast, is still in its infancy, leaving litigants to trust platforms that may not be fully secure.

Protecting privacy in family law is not merely a technical task; it is a matter of restoring trust in the justice system. Litigants must believe that their disclosures will not harm them outside the courtroom. Without this assurance, many may prefer silence over seeking remedies. Silence, however, is the very enemy of justice.

Therefore, as family law becomes increasingly digitized, privacy must be treated not as an afterthought but as the foundation. Every digital reform from e-filing to AI-based case management must carry with it robust data protection standards, strict access controls, and effective redressal mechanisms. Technology may modernize procedure, but only privacy can preserve dignity. And in family law, dignity is justice itself.

Critical Evaluation: Efficiency Vs Justice

Every reform in law carries a hidden trade-off. In family law, the trade-off posed by technology is between efficiency and justice. On the surface, efficiency looks like progress: faster filings, quicker hearings, streamlined processes. But justice in family disputes is not measured in speed alone. It is measured in fairness, dignity, and the ability of the most vulnerable to be heard. The real question, then, is whether in chasing efficiency, we are quietly sacrificing justice.

The efficiency argument is straightforward. Digital platforms reduce paperwork, cut delays, and save costs. A case that once took months to register can now be filed within hours. Hearings that required travel and adjournments can be conducted through video conferencing. Courts are clearing backlogs faster, and litigants no longer need to waste entire days for minor procedural steps. From the perspective of the judicial system, this is a triumph: technology helps courts do more in less time.

But family law is not a factory line where cases can be measured only in throughput. Family disputes involve emotional fragility, unequal bargaining power, and deeply personal stakes. An overemphasis on efficiency risks flattening the human dimension of these disputes. For example, an online mediation session may look successful because it ended quickly, but was the woman participant able to speak freely if she shared a device with her husband? Did speed conceal silence? These are questions efficiency cannot answer.

Another concern is algorithmic bias and over-reliance on AI. Globally, experiments have been made where AI tools suggest custody arrangements or predict settlement outcomes. While this may appear efficient, it assumes that human relationships can be reduced to data points. Family law, however, deals with trust, trauma, and cultural contexts that no algorithm can fully grasp. A biased or simplistic algorithm could replicate societal prejudices rewarding fathers with financial stability while overlooking mothers' caregiving roles, for example. In such cases, efficiency becomes injustice in disguise.

The loss of empathy is another danger. Courtrooms, for all their flaws, provide a physical space where judges can observe body language, hear voices, and gauge emotions. These human cues often shape decisions in family disputes. Virtual hearings risk stripping away this layer of sensitivity. A custody battle reduced to pixelated video feeds may be efficient, but is it truly just if the judge cannot perceive the child's fear or the mother's distress? Justice cannot be automated without losing part of its soul.

Moreover, the focus on efficiency often benefits the privileged. Urban, tech-savvy litigants gain speed and convenience, while rural and marginalized groups remain excluded. This creates a two-tier system: digital justice for some, delayed justice for others. Efficiency, in this sense, is not neutral it tilts towards those already equipped to access it. A justice system that widens gaps while claiming to close them risks betraying its constitutional mandate.

It is important to acknowledge that efficiency and justice need not always be opposed. In many cases, digitization has genuinely reduced unnecessary hardship. Video conferencing has spared women the humiliation of repeated travel. E-filing has reduced clerical corruption. But efficiency must always remain a means, not an end. The ultimate goal of family law is to resolve disputes in ways that uphold dignity and fairness. If efficiency undermines these values, it ceases to be progress.

Thus, the critical evaluation leads us to a sobering truth: efficiency without empathy is hollow, and speed without inclusivity is dangerous. The digital family court must never forget that it deals not with files but with families, not with data but with lives. Justice in this space cannot be measured in case disposal numbers; it must be measured in the lived experience of those who come seeking relief.

Way Forward: Towards Inclusive Digital Justice

The debates around technology in family law often end with a paradox: it has the power to both liberate and exclude. The challenge, therefore, is not whether technology should be used but how it should be shaped. If efficiency alone cannot guarantee justice, then inclusivity must be its guiding principle. The way forward must focus on designing a digital justice system that speaks to the realities of Indian society rather than assuming a level playing field that does not exist.

The first step is bridging the digital divide through infrastructure and affordability. Courts cannot assume that every litigant owns a smartphone, laptop, or reliable internet connection. The state must actively invest in community digital centres near family courts where litigants, especially women and marginalized groups, can file petitions, access case updates, and join hearings with assistance. These centres could function like legal aid clinics, but digitally equipped. Justice should not depend on whether a litigant can afford a data pack.

Second, there must be a focus on digital literacy and awareness. For many first-time litigants, the legal system is intimidating enough; adding technical complexity only worsens the barrier. Simplified training modules, awareness campaigns in regional languages, and step-by-step guidance at courts can demystify the process. Just as legal literacy camps have empowered rural populations in the past, digital literacy must now become a priority.

Third, language inclusivity is non-negotiable. Most e-filing portals and digital platforms operate in English or Hindi, effectively excluding millions who speak regional languages. Multilingual platforms that allow filings in local languages are essential. If justice is to be inclusive, it must speak in the language of those who seek it.

Fourth, privacy and data protection must be prioritized. Family law disputes involve some of the most sensitive data imaginable. Stronger safeguards encryption of records, restricted access, and strict liability for breaches must become standard. The Digital Personal Data Protection Act,

2023, is a start, but specific rules tailored to family disputes are urgently needed. A woman should never fear that details of her custody battle or domestic violence complaint could leak online. Without trust in confidentiality, digital justice will collapse.

Fifth, gender-sensitive measures must be built into digital reforms. Women face unique barriers to digital participation from lack of device ownership to patriarchal restrictions on internet use. The justice system must recognize these realities. Hybrid models, where women can choose between physical and virtual participation, should remain an option. Dedicated helplines, female-staffed digital aid desks, and secure complaint mechanisms for survivors of domestic violence can help ensure that technology empowers rather than silences women.

Sixth, training for judges, lawyers, and court staff is crucial. Technology is only as effective as those who use it. Judicial officers must be trained not only in the technicalities of digital platforms but also in recognizing when digital processes disadvantage vulnerable litigants. Lawyers, too, must be equipped to assist clients who struggle with online systems. Sensitization, not just digitization, is the real reform.

Finally, the justice system must embrace a philosophy of human-centered technology. The global lessons are clear: technology should simplify, not complicate; assist, not replace. AI can help in case management, but decisions in family disputes must remain with human judges who can perceive nuance and empathy. Efficiency should serve fairness, not override it.

The way forward is not about rejecting technology but about shaping it deliberately. A truly inclusive digital justice system in family law will be one where a deserted wife in a remote village can file her petition as easily as a professional in Delhi, where a child's custody is decided swiftly but with dignity, and where privacy is protected as fiercely as rights.

If family law is about protecting relationships and dignity, then its digital future must be measured not in megabytes or disposal rates but in humanity. Technology can bridge the justice gap but only if we build the bridge wide enough for everyone to cross.

Conclusion

Family law stands at a turning point in India's justice system. Once rooted entirely in physical courtrooms, paper files, and in-person arguments, it is now moving into a digital era of e-filings, online mediation, and AI-driven tools. This transformation carries undeniable promise: speed, transparency, and wider accessibility. Yet, as this chapter has shown, technology is not a neutral tool. It reflects and amplifies the inequalities of the society in which it operates.

On the positive side, digital reforms have reduced delays, cut costs, and created new pathways for settlement. Maintenance petitions can be filed with fewer hurdles, custody disputes can be managed without endless travel, and transparency has increased as records are published online. For many urban, tech-savvy litigants, this has made the justice system more approachable than ever before. Technology, in such cases, has functioned as a bridge across the justice gap.

But for the marginalized rural populations, women, Dalit and tribal communities, and the economically poor the picture is far less optimistic. The digital divide, rooted in lack of infrastructure, affordability, literacy, and patriarchal control, threatens to turn technology into another instrument of exclusion. Privacy and data protection concerns add another layer of vulnerability. In family law, where dignity is as important as relief, even a small breach of confidentiality can cause irreparable harm.

Judicial and legislative responses have been significant but uneven. Courts, through decisions like Krishna Veni Nagam and Puttaswamy, have tried to strike a balance between convenience and dignity. The legislature, through projects like the E-Courts initiative and the Data Protection Act, has laid foundations. Yet, as the comparative perspective showed, India's approach remains fragmented compared to more integrated systems abroad. What India needs is not isolated patches of reform but a comprehensive framework that treats inclusivity as central, not secondary.

The socio-legal dimensions reinforce this urgency. Technology does not operate on a blank canvas; it interacts with caste, class, gender, and geography. Unless reforms actively target these inequities, digital justice will serve the privileged few while excluding the many. Critical evaluation also warns us of another danger: the risk of mistaking efficiency for justice. A system that clears cases faster but fails to hear the vulnerable is not delivering justice it is only moving files. Family law cannot afford such a hollow victory.

The way forward, therefore, lies in designing human-centered technology. Infrastructure must be expanded, literacy must be built, platforms must be multilingual, and privacy must be safeguarded. Judges and lawyers must be sensitized to the digital disadvantages faced by women and marginalized groups. AI may assist, but it must never replace the human empathy that family law requires. Efficiency must serve fairness, not overshadow it.

Ultimately, the digital turn in family law must be guided by constitutional values. Article 14's promise of equality, Article 21's guarantee of dignity and privacy, and Article 39A's mandate of access to justice form the true benchmarks of success. Technology is valuable only if it helps realize these values.

The future of family law will not be decided by how many cases are e-filed or how many hearings are conducted online. It will be decided by whether the deserted wife in a remote village, the mother fighting for her child's custody, and the survivor of domestic violence can all access justice without fear, delay, or exclusion. If technology can make that possible, it will not just be modernization it will be transformation.

Family law, at its core, is about protecting human relationships and dignity. The digital era should not dilute these values but strengthen them. Technology must remain what Justice D.Y. Chandrachud once reminded us it should be: always in service of constitutional values and human dignity. Only then will it truly bridge, and not widen, the justice gap.

11.
Judicial Trends on Surrogacy in India: Critical Review of Case Laws

Mrs. R. Vimala
Assistant Professor
VELS School of Law
VELS Institute of Science and Technology and Advanced Studies
Contact no: 73589127389
Vimala.law@velsuniv.ac.in

Abstract
Over the past 20 years, surrogacy has generated a lot of ethical and legal discussion in India as an assisted reproductive technology. While surrogacy as a medical practice grew in popularity in India in the early 2000s, the lack of a thorough legal framework created a number of issues pertaining to intended parents', surrogate mothers', and the child born from such arrangements. With a number of significant rulings, Indian courts have filled this legal void byinterpreting and defining the parameters of surrogacy law. This essay critically analyzes the changing judicial trends surrounding surrogacy in India, emphasizing key case laws that have shaped the practice's legal acceptance anumber of issues pertaining to intended parents', surrogate mothers', and the child born from such arrangements. With a number of significant rulings, Indian courts have filled this legal void by interpreting and defining the parameters of surrogacy law. This essay critically analyzes the changing judicial trends surrounding surrogacy in India, emphasizing key case laws that have shaped the practice's legal acceptance and regulation.
The study examines important rulings like Jan Balaz v. Anand Municipality (2009), in which the Gujarat High Court addressed the nationality and parentage of children born through surrogacy, and Baby Manji Yamada v. Union of India (2008), which brought to light the difficulties of international surrogacy and citizenship issues. It also covers the Supreme Court's findings regarding the absence of regulations and the necessity of legal protections to stop the exploitationsurrogate mothers,

particularly those from underprivileged backgrounds. The need to balance reproductive rights, child welfare, and ethical considerations in surrogacy arrangements has been emphasized by the judiciary through these rulings. The study also assesses how the courts have handled matters like consent, exploitation, recognition of LGBTQ+ and single parents in surrogacy agreements, and the enforceability of contracts. It evaluates whether recent legislative actions are consistent with the spirit of previous court rulings and critically examines the ways in which judicialinterpretations have influenced the creation of the Surrogacy (Regulation) Act, 2021. In order to comprehend the judicial activism in this area and its influence on policy-making, this paper will undertake a doctrinal and analytical review of pertinent case laws. It also points out the gaps in the existing legal frameworks and makes recommendations to guarantee that India's surrogacy laws are socially just, inclusive, and based on rights.

Keywords: *Surrogacy Law, Judicial Trends, Reproductive Rights, Surrogacy (Regulation) Act, 2021, Child Welfare*

Introduction

Drastically developed medical science and assisted reproductive technologies (ART) have radically changed the traditional concepts of reproduction, family, and parenthood. The methods of in vitro fertilization, artificial insemination and surrogacy have given persons with either biological or medical impairments the capability to fulfill their reproductive potentials. Surrogacy is one such new reproductive arrangement that has become one of the most legally and ethically perplexing forms of reproductive arrangement because it involves a range of competing rights and interests such as those of the doctrinal parents, the surrogate mothers, the medical institution, and the State. Surrogacy, therefore, is not discussed as only concerning individual medical choice but is now considered to be a part of constitutional law, human rights and social policy.

Surrogacy, which is a broad concept, is a contract where a woman accepts to become pregnant, carry and give birth to a baby to another person or couple expecting to give up parental rights upon conception. Although the technique can give a desperate couple a very crucial way of getting a child, women with medical issues, single partners and homosexuals, it is also associated with serious ethical and legal issues. These are commodification of women reproductive labour, knowledgeable consent, bodily control, using economically unstable females, enforceability of

contracts, and child welfare of the child. The conflict between reproductive autonomy and social justice has brought the issue of surrogacy into the center of hot discussion both locally and in the international law.

India holds a special place in the surrogacy arena across the world. In the early 2000s, an international commercial surrogacy center formed in the country part of which can be credited to the well-developed medical infrastructure, rather low prices and the lack of a strict regulatory base. Reproductive tourism phenomenon also attracted intended parents all over the world, which leads to the third boom of fertility clinics and middlemen. This increased expansion however did so in a legal void where surrogacy arrangements were mainly based upon private contracts, non-binding medical directives and patchwork quilt judicial rulings. The absence of a detailed legislation created numerous areas of trouble and unequal approach to surrogacy cases.

The resulting regulatory deficit resulted in multifaceted issues of law, especially regarding rights and responsibilities of surrogate mothers, the people who intend the birth of a child and the children born out of surrogacy. Legality of surrogacy agreements, rules of citizenship and nationality of children born of surrogacy, parentship disputes, and parental recognition were quite common in court cases. Furthermore, the issues of exploitation and coercion of the surrogate mothers most of whom were of a poor economic and social standing have cast doubt on the fundamental issue of gender justice and human rights. There were no statutory protections that safeguarded the surrogate mother, which was why they lacked protection against health risks, an imbalance in the bargaining power, and the legal protection, leaving them with no choice but to be assisted by the courts.

In this respect, the Indian judiciary played a central part in determining the legal outlines of surrogacy. In this case, where there was a silence by legislative bodies, courts resorted to purposive interpretation of the provisions of the constitution especially Articles 14 and 21 of the Constitution of India. By major cases like the Baby Manji Yamada v. Union of India and Jan Balaz v. The judicial system, Anand Municipality, took care of the questions of the parentage, the nationality, and the welfare of children but, at the same time, admitted the lack of the developed legal organization. These rulings indicate a period of judicial activism when courts had become the gap-fillers, as they tried to balance the concerns of individual reproductive rights with other ethical and societal interests.

In the course of such time, the judicial decisions were very consistent in that surrogate motherhood was highly important in matters of child welfare and should not be exploited by surrogacy agencies. Simultaneously, the need to legislatively intervene and regulate the practices of surrogacy in India was emphasized by courts on a few occasions as especially urgent. The judicial observations were remarkable in developing policy issues and finally contributed to statutory regulations being created. Judicial governing experience was later replaced by legislative governing, and the Surrogacy (Regulation) Act of 2021 saw the beginning of the shift in the way India tackled the problem, banning commercial surrogacy and allowing it only in specific limited circumstances and a case of altruistic surrogacy to be performed.

Nevertheless, a statutory framework has not addressed every legal and constitutional issue. The Surrogacy (Regulation) Act, 2021 has been subject to criticism because of its restrictive eligibility standards, exclusion of single parents and LGBTQ+, and hard and fast age and marital criteria. These clauses have created new constitutional issues before the Supreme Court especially regarding reproductive autonomy, equality and dignity. In a recent judicial tendency, it is possible to see that the focus is no longer on the deterrence of legislative empty spots, but on the constitutional review of the surrogacy law per se, particularly in situations that touch on the age limit, the donor gametes, and transitional provisions

It is on this background that the critical analysis of the judicial tendencies in surrogacy in India is undertaken in this paper. It examines important Supreme Court and High Court cases both in the pre-legislative and post-legislative stages to determine the influence of judicial rationality on the surrogacy law. The paper also assesses the constitutional values and judicial principles discussed over the years to determine whether the modern legislative policies are in line with constitutional values and judicial principles. Having made a doctrinal and analytical step, this paper aims at adding to the current discourse on reproductive rights, gender justice, and child welfare, and suggest a more balanced, inclusive, and rights-based approach to the regulation of surrogacy in India.

Concept and Types of Surrogacies

Surrogacy is one type of the assisted reproductive arrangement where a woman who is sometimes known as the surrogate mother accepts to carry, conceive and give birth to a child on behalf of another individual or couple usually referred to as the intending parents or the commissioning parents.

When the child is born, the surrogate mother gives up all the parental rights and proper parentage is given to the intending parents within the acceptable legal system. Surrogacy lies surprisingly at the crossroad between medical science, contractual law, family law, and constitutional rights since it does not only concern biological and genetic factors but also the issues of autonomy, consent, dignity, and child welfare.

Conceptually, surrogacy questions the ancient views of motherhood which used to have a genetic, gestational, and social element within one person. In surrogacye cases, such issues are split and shared among various parties and thus, requires the legal identity on matters of parentage and responsibility. The difficulty of these arrangements has led to judicial review as well as legislative intervention in various jurisdictions such as in India.

In general, there are two main types of surrogacies including traditional and gestational surrogacy. Traditional surrogacy involves fertilization using the ovum of the intended father or donor with the sperm of the intended father or a donor into the uterus of the surrogate mother. Consequently, the surrogate mother is a genetic relation to the child. This genetic relationship has in the past spawned legal controversy on matters involving parental rights, custody and consent, especially cases of cases where a surrogate mother is claiming to have rights to the child. These complexities have in most jurisdictions discouraged or banned traditional surrogacy.

Conversely, gestational surrogacy has the implantation of an embryo, which has been formed by in vitro fertilization with the gametes of the intended parents or donors. Under this type of arrangement, the surrogate mother is not related genetically to the child, but only a gestational carrier. In India and other parts of the world, gestational surrogacy has taken over as the more common and desirable form since it relays the lack of conflicts concerning genetic maternity and ease in laying the question of legal parenthood. Its advocate has as a rule supported gestational surrogacy by the Indian courts, especially when it concerns assisted reproductive technologies, because such surrogacy is more consistent with the contractual will and the child welfare.

Another classification of surrogacy can be made depending on the form of compensation, and thus there are altruistic surrogacy and commercial surrogacy. Altruistic surrogacy is where the surrogate mother will not receive any form of monetary reward except a reimbursement of medical care and insurance cover of pregnancy. These arrangements are commonly

founded on family or emotional relationships and they are aimed at discouraging a commercial reproduction. In India, a surrogacy law conceived under goodwill in the Surrogacy (Regulation) Act of 2021, allows only non-market surrogacy since it is the intent of the law to limit the exploitation of economically disadvantaged women.

Commercial surrogacy, however, includes remuneration (financial compensation) of medical cost on top of the surrogate mother. Although commercial surrogacy was not illegal and common in India before the law intervened, it has come to receive high levels of criticism on ethical and legal grounds. The issues of coercion, inequality of bargaining power, commercialisation of female reproductive labour, and poor care of surrogate mothers saw it being eventually banned. The difference between altruistic and commercial surrogacy has been a major cause of controversies in judicial rulings in India and this has been a policy-making issue because so often courts have stated the necessity of negotiating between the autonomy of reproductive and the principles of social justice and human dignity.

Therefore, the concept and the types of surrogacy are important to the analysis of changing judicial and legislative reaction to surrogacy in India since the types directly affect the legal regulation, interpretation of the constitution, and safeguard the rights of all parties interested.

Legal Status of Surrogacy in India: Pre-Legislative Phase

Since the outbreak of the Surrogacy (Regulation) Act, 2021, there existed no fully or solely acknowledged law in India to regulate the arrangement of surrogacy. The surrogacy has existed in a legal black hole almost 20 years, falling into moral control under the medical profession and under contract between a client and a surrogate. The resultant lack of a binding statutory framework allowed surrogacy, in particular commercial surrogacy, to rapidly expand; and at the same time posed considerable legal, ethical and constitutional issues on all interested parties[1].

The Indian Council of Medical Research (ICMR) presented the only official regulatory advice in the pre-legislative process, which was the National Guidelines on Accreditation, Supervision and Regulation of ART

[1] B. Parry, Regulation of Surrogacy in India: Whenceforth Now, (2018) 46(4) Journal of Law, Medicine & Ethics 765.

Clinics in India and in 2005[1]. These guidelines were the source of ethical principles in assisted reproductive technologies, such as consent requirements, privacy, adult suitability to pregnancy, and fertility clinic roles. The ICMR guidelines however were not binding and were in form advisory. As a result, lack of compliance did not lead to any legal consequences, which made the regulatory system useless in terms of violation and managing the rights of surrogate mothers and children that were born due to surrogacy.

Surrogacy arrangements could be mostly regulated by the contractual agreement of the intending parents, surrogate mothers and the fertility clinics in the absence of legislation. Such contracts were trying to control compensation, medical care, release of parental rights and confidentiality. Nonetheless, the Indian contract law does not explicitly acknowledge the agreements of surrogacy and their enforceability frequently were disputed, especially in cases of coercion, imbalanced bargaining power, or even the public policies[2], which posed the limits of the purely contractual regulation in the area of reproduction.

Among the most complicated legal ambiguities at the pre-legislative stage was the question of nationality and citizenship of a child born by surrogacy particularly where the poor-quality commissioning parents were of foreign origin. Lack of co-ordination between the practices of surrogacy and the citizenship laws led to cases of statelessness or legal confusion among the children. The ruling of the Supreme Court on the case of Baby Manji Yamada v union of India[3] pointed to the insufficiency of the current legislation with regard to surrogacy across borders and the necessity of special legislation. A similar situation was experienced in the Gujarat High Court, anand Municipality in which issues of citizenship and parentage of children born by the surrogate were in question and this further highlighted the legal vagueness that was being experienced at the time.

The other significant issue during the pre-legislation period was the desire not to exploit surrogate mothers. Empirical research indicated that the majority of surrogate mothers were economically disadvantaged and entered a surrogacy agreement because they needed money[4]. In the lack of

[1] Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (ICMR, 2005).

[2] S. Sureshkumar, The Surrogacy (Regulation) Act, 2021 and Its Socio-Legal Implications, SSRN (2024).

[3] Baby Manji Yamada v. Union of India, (2008) 13 SCC 518.

[4] P. Kumar, Surrogacy and Women's Right to Health in India, (2013) 57 Indian Journal of Public Health 65.

the statutory requirements of the situation, the issues of informed consent, protection of the healthcare, autonomy, and the need of the support after the pregnancy were poorly treated. Commodification of the reproductive labour of women and breaking of their bodily integrity were some of the things that posed serious ethical concerns in commercialization of surrogacy.

With no legislative knowledge, the Indian court took proactive measures to impact through the interpretation of the constitution on surrogacy. Article 21 of the Constitution was applied to the case and the courts acknowledged the reproductive autonomy, yet at the same time they paid considerable attention to the well-being of the child and the dignity of the surrogate mother. Court opinions to this effect continued to repeat the call that there was an urgent need to enact wholesale legislation to avert misuse and exploitation. Accordingly, the judicial intervention that happened during the pre-legislative stage of surrogacy in India can be described as the stop-gap measure, which eventually resulted in the statutory reform that became the Surrogacy (Regulation) Act, 2021[1].

Judicial Intervention and Landmark Case Laws

Judicial activism has been central to the development of surrogacy law in India, especially when there exists a legislative backside and subsequently in the interpretation stage of the statutory regulation. The Indian courts have always associated with the constitutional principles in dignity, personal liberty, the welfare of the child and the reasonableness as a way to deal with disputes that may occur as a result of surrogacy practices.

Baby Manji Yamada v. Union of India (2008)

Baby Manji Yamada v. decision. Union of India was a watershed case in the Indian law of surrogacy. The case was due to a commercial surrogacy method that was signed between an Indian couple and a Japanese couple. The planned mother denied the child after marriage disputes and this put serious doubts on the issue of custody, nationality and guardianship. The Supreme Court observed that there was no statutory framework that guided surrogacy and that the children born by surrogacy had no legal framework. As the child was allowed to go out of India with her grandmother, this judgment stirred global concern on the unregulated

[1] Surrogacy (Regulation) Act, 2021;

surrogacy business in India and highlighted the loopholes in citizenship and family legislation.

Jan Balaz v. Anand Municipality (2009)

In Jan Balaz v. The Gujarat High Court Anand Municipality dealt with the nationality of the twins born to German intending parents in India using the services of a surrogate mother. This case highlighted the clash in the increased jus soli principles, insofar as the children were born on Indian soil and acknowledged the surrogate mother as the legal mother so far as citizenship was concerned[1]: it declared the children to be Indian citizens by birth according to the Citizenship Act, 1955, and recommended acceptance of the surrogate mother as legal mother on citizenship claim. The case was then put on hold by the Supreme Court, which underscored the intricacies in trying to balance the laws of citizenship with intercountry surrogacy agreements and the importance of enacting statutory factors holistically.

The case of Arun Muthuvel / Vijaya Kumari S. can be inferred from Age-Bar under the Surrogacy (Regulation) Act, 2021.

One of the judicial developments after the act is the objections to the age eligibility provisions as stipulated by the Surrogacy (Regulation) Act, 2021 in section 4(iii)(c)(I). In Arun Muthuvel v. In the case of Union of India and related issues reported as Vijaya Kumari S. and Anr. v. Union of India, the Supreme Court considered when the intending couples had already embarked on the surrogacy procedure- embryo production and cryopreservation before the enactment of the Act and Rules, but afterwards got disqualified by the age limits stated in the Act. The Court was rights-sensitive and said that the age bar did not apply retrospectively to quash good faith parental hopes where the surrogacy procedure amounted to substantial commencement. The relief was prospective, however; judicial deference to legislative policy and without transitional injustice.

[1] Jan Balaz v. Anand Municipality, AIR 2010 Guj 21.

Interim Orders on Donor Gametes and the 2022 Rules.

The other trend is judicial review of secondary legislation by the Surrogacy (Regulation) Rules, 2022. In W.P.(C) No. 756 of 2022 and related cases, the Supreme Court issued interim directions to cover or restrain the effect of amendments of Form 2 with the reason that it seemed to interfere with the intent of the parent statute and Rule 14(a[1]). these orders show that the Court was filling the role of making sure that executive rule-making did not cause the undue blocking to access surrogacy beyond parliamentary intention.

Single Woman and Secondary Infertility Claims.

The latest petitions brought before the court by single unmarried women and couples who want to get a second child or secondary infertility through surrogacy is the telling of the next step in constitutional litigation. The responses of the Union Government to the Supreme Court have been detailed, which means that the issues of equality, reproductive autonomy, and alignment with the Assisted Reproductive Technology (Regulation) Act, 2021 will largely shape the outlines of surrogacy regulation in India going forward[2].

Constitutional Dimensions of Surrogacy Regulation

The policy of surrogacy regulation in India profoundly involves the constitutional debate, specifically the rights issues, as well as the role of the State in balancing the individual and social well-being of the nation. The involvement of the judiciary with surrogacy has always been based on the provisions of the constitution particularly the Articles 14 and 21 of the constitution of India in an attempt to quell the ethical and legal implications as well as the human rights conjectures regarding the assisted reproductive technologies.

The main surrogacy regulation is based on the right to personal liberty and life that is ensured by Article 21. In a wide application, the Supreme Court has used Article 21 to bring in the right to privacy, dignity, body control, as well as reproductive choice. Reproductive autonomy is not mentioned expressly, but it has been identified as an inseparable part of the individual freedom. When it concerns surrogacy, this autonomy is offered to future

[1] Supreme Court of India, Interim Orders in W.P.(C) No. 756 of 2022 and connected matters.

[2] Assisted Reproductive Technology (Regulation) Act, 2021; Surrogacy (Regulation) Act, 2021.

parents, who want to exercise their right to parenthood, as well as to surrogate mothers, whose bodily integrity, informed consent, and dignity should be protected. The courts rulings during the pre-legislation stage recognised how the lack of control subjected surrogate mothers, in most cases women in the economically disadvantaged groups of the society to victimization consequently compromising their entitlement to live with dignity. This concern has been taken into consideration by the Surrogacy (Regulation) Act, 2021 that bans commercial surrogacy; only altruistic arrangements should be permitted but this is a restrictive measure that has brought up new constitutional issues about the limits to which the State can constrain reproductive choices in the name of social protection and morality.

Article 14 of the equality before the law and the equal protection of the law is important in determining the constitutionality of surrogacy laws. The eligibility guidelines in terms of age limits, requirements in terms of marital status, and the exclusion of single unmarried women and LGBTQ have been called discriminatory and arbitrary given the 2021 Act. Doctrinally, any classification should pass the twin tests of intelligible differentia and rational nexus with the object to be obtained. Although the legislative purpose of eliminating exploitation and commercialization is legitimate, the limitation on granting surrogacy to some categories of people is questionable, whether this type of classification is reasonable and constitutional. The continuous court case is indicative of the judicial process of questioning the alignability of the statutory framework to the equality requirement.

Articles 14 and 21 have been judicially interpreted to accommodate its best interests of the child, which is not mentioned as a fundamental right. It has been reiterated that courts have placed much importance on child welfare during surrogacy cases especially those involving citizenship, parentage and guardian cases. The case of the constitutional requirement of the State to protect children is what concerns the judicial reasoning and the legislative policy which supports the necessity to have a certainty of the law concerning the status and rights of children born during the process of surrogacy.

Also, the constitution provides a judicial review not only of primary legislation but also subordinate legislation under the principles of reasonableness, proportionality and non-arbitrariness. The recent Supreme Court intervening with the provisions of the age bar and restrictive rules indicate the replacement of judicial gap-filling by constitutional interpretation of the statutory regime. This indicates a advanced

constitutional adjudication stage in which judicial bodies revere the intent of the legislation although make sure that statutory limitations do not impact the fundamental rights unfairly.

Overall, the constitutional aspects of surrogacy regulation indicate that there has been a conflict between the exemption of individual reproduction rights and the community ethical issues. The Indian courts have remained instrumental to mediate this balance where the surrogacy legislation must be developed with the constitutional values of dignity, equality and individual freedom.

Interface Between the Surrogacy (Regulation) Act, 2021 And the Assisted Reproductive Technology (Regulation) Act, 2021

The adoption of the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021, is a remarkable change in the judicially driven approach of assisted reproduction governance to an overarching statutory directive on this area in India. The two legislations are signed into law simultaneously and are supposed to work together. They have however been used at the same time, but with critical questions of doctrines pertaining to overlap, harmonisation and possible conflict.

On a conceptual level, the two laws are complete and pare Materia, as they have a common legislative goal, namely, to control the assisted reproductive practices, avoid exploitation, as well as to guard the rights of women and children. The ART Act covers most of the medical and technological issues of assisted reproduction such as in vitro fertilization, gamete donation, embryo handling, and the operation of ART clinics and banks. Contrary, the Surrogacy Act dwells on legal, ethical, and relational aspects of surrogacy arrangement, which includes, but is not limited to intending parents' eligibility, surrogate mother consent, commercial surrogacy, and ascertaining parentage.

The interface in the two Acts, doctrinally, can be seen in the regulation of gametes and embryos, which are the biological mean of surrogacy. The ART Act allows the application of the gametes of the donors to the regulatory protective measures, the norms of anonymity, and registration. Surrogacy Act, however, takes a more restrictive approach, in the early days, it restricted surrogacy to a large extent to those instances where there were the gametes of the intending couple. This has created problems in interpretation, especially where lower-level laws under the Surrogacy Rules, 2022 were found to suggest stricter access to donor gametes than the parent statutes envisaged. The judicial review of these rules indicates the use of the doctrine of harmonious construction which involves the

statutes having a similar purpose should be construed in a way that they do not conflict or lack coherence.

One more valuable interface is associated with institutional regulation. The two Acts set up National and State Boards, registration authorities and regulatory measures of clinics and banks. Although such dual structure is meant to guarantee proper supervision, there is some issue about duplication of regulations and complexity in the administration of governments. Doctrinally, overlapping control of regulation should be construed in a way that does not conflict or is not inconsistent so that compliance with one Act should not lead to violation of the other Act.

The interdependence of the two statutes is also seen through the rights and duties of the parties concerned in the assisted reproduction. The ART Act notes informed consent, confidentiality and medical ethics whereas the Surrogacy Act expounds on those by bolstering the informed consent to relinquish parental rights and the well being of the surrogate mother. The issue has also become a matter in which courts have been called upon to ascertain whether the restrictive norms of surrogacy hamper greater reproductive choices that are recognised as legal under the ART system stating constitutional issues under the Articles 14 as well as 21.

The court intervention in recent cases shows that the courts see the two statutes as one regulatory ecosystem that deals with assisted reproduction. The indication that judicial interpretations of the Surrogacy Rules lean towards those that conserve the ability to access reproductive technologies even though they are also loyal to the intent of the law is shown by the use of interim orders staying or reading down the restrictive provisions of the rules. Here the judiciary role in making sure that the interface between the Acts does not lead to arbitrary exclusion or disproportionate restrictions is highlighted.

To sum everything up, the interface of the Surrogacy Act and the ART Act is an essential doctrinal area, where the mechanisms of medical control, reproductive autonomy and constitutional values are all on collusion. Although the legislative aim is to have a harmonious enforced way of regulation, the successful enactment process requires the compatibility of the interpretation by the court. Additional judicial checks are necessary to make sure that the two laws work in compatibility with each other in the interests of the common good of moral governance, safeguarding the rights of the vulnerable, and consideration of the right to reproduction.

Conclusion and Suggestions

The history of judicial and legislative development of the regulation of surrogacy in India indicates an ongoing struggle to achieve a balance between the domestic autonomy of reproduction, the social morality, and the constitutional provisions. As discussed in this paper, the Indian courts have been instrumental in the development of the statutes on surrogacy especially in the pre-legislative period where there was no statutory advice on the same. The courts, on their part, not only defended the interests of the surrogate mothers and children and at the same time acknowledged the reproductive desires of the potential parents. The interventions that occurred in the judicial system at this stage helped not only to end of misery in specific cases at the time, but were also a warning about the flaws in the system that eventually led to legislation.

The adoption of the Surrogacy (Regulation) Act, 2021 and the Assisted Reproductive Technology (Regulation) Act, 2021 is a major shift in that the norms traditionally exercised by judges are changed in favour of codification. Nevertheless, it is not completely true that the statutory framework has resolved all the issues of constitutional and doctrinal concern, as the analysis shows. Although banning commercial surrogacy can be viewed as a legitimate goal of eliminating exploitation, the highly restrictive eligibility criteria, strict age brackets, and misogyny (single and married women) and Ostracophobia (LGBTQ+ individuals) are indeed questionable under Articles 14 and 21 of the Constitution. According to recent judicial tendencies, the paradigm of institutional review of the statutory regime began to change which meant that the legislative primacy in the field is still subject to consideration of the basic rights.

The fact that the Surrogacy Act and the ART Act have a common interface contributes to the necessity of implementing the two in a harmonious manner. Having congruent regulatory frameworks, contrasting development of approaches to donor gametes, and restrictive submissive legislation have led to legal ambiguities in a manner that discourages the goals of the two laws. Both forms of judicial review during the post-legislative stage demonstrate a developing desire to embrace the principles of interpretative restraint as coupled with constitutional vigilance. This moderation system is able to save institutional parameters, and avoid open wrongdoing especially in transitional cases and cases containing exception.

Considering such results, some recommendations can be promoted to improve the surrogacy regulatory system in India. To begin with, there is an urgent necessity to revise the eligibility criteria with the help of law and make sure that the grounds of exclusions are justified and reasonable. The fact that single women should be provided with more options of surrogacy and that some strict age-based disqualifications should be reviewed would be more appropriate to the law than the constitutional principles of equality and reproductive autonomy. Second, more harmonisation of Surrogacy Act and ART Act is required. There should be clear statutory direction on the use of the donor gametes to enable a clear understanding of its usage and eliminate regulatory overlaps which result in unnecessary litigation.

Third, the given task of subordinate legislation should not be excessively extended. The rules and forms must be working within the boundaries of the parent statute, and regular judicial or legislative review would perhaps guarantee accountability. Fourth, surrogate mothers should have better legal safeguards and post-pregnancy care, such as healthcare, insurance, and counselling, which are mandated by law, not discretion chosen by the administration.

Lastly, it is also the role of the court to remain a constitutional sentinel making sure that the regulation of surrogacy is developed as a rights-based, inclusive, and responsive regulation regarding the changing social realities. There is a need to have a dynamic but restrained judicial response, as well as responsive legislative reform, to establish a surrogacy regime that will address the issue of human dignity, child welfare and reproductive justice in India.

12.
Beyond the Traditional Family: Constitutional Challenges to Heteronormative Kinship Structures

Sanya Darakhshan Kishwar
Assistant Professor, Jindal Global Law School, O.P. Jindal Global University & Doctoral Candidate, National Law University, Delhi

Shaswat Kashyap
Student, Gujarat National Law University

Abstract
This chapter examines the challenges that constitutional morality poses for traditional heteronormative family paradigms in India. Beginning with the landmark Deepika Singh v. Central Administrative Tribunal, which expanded the legal definition of "family" beyond the conventional mother-father-children unit, the chapter traces the constitutional foundations for recognising diverse family structures in India. The analysis deconstructs the historical privileging of heterosexual, biological families through examination of dominant kinship practices and their discriminatory impact on LGBTQ+ individuals. The chapter demonstrates how traditional family structures, while socially entrenched, fail constitutional tests of equality, non-discrimination, and human dignity enshrined in Articles 14, 15, and 21. The chapter explores how these constitutional principles practically create legal imperatives for recognising chosen families, queer kinship practices, and alternative family arrangements that challenge heteronormative assumptions. The chapter further reveals significant legal disabilities faced by non-traditional families across multiple domains like adoption, guardianship, inheritance, and reproductive rights, highlighting the gap between constitutional promises and lived realities.

1. Introduction

The term 'family' is derived from the Latin word 'familia' denoting a household establishment and refers to a "group of individuals living together during important phases of their lifetime and bound to each other by biological and/or social and psychological relationship."[1] As per the definition of family provided by Cambridge Dictionary, family has been defined as *"*a group of people who are related to each other, such as a mother, a father, and their children."[2] However, the bigger question remains whether such definition is inclusive and encompasses unconventional familial arrangements, for instances, a homosexual familial set up. One could turn to an alternative and more inclusive definition provided by the Vanier Institute, for instance, which defines a family as: any combination of two or more persons who are bound together over time by ties of mutual consent, birth and/or adoption or placement, and who together assume responsibilities for variant combinations of some of the following: physical maintenance and care of group members; addition of new members through procreation, adoption or placement; socialization of children; social control of members; production, consumption, distribution of goods and services; and affective nurturance (i.e. love).[3]

However, in the Indian societal paradigm, realisation and more importantly, acceptance of such definitional framework would face not just legal but also sociological hurdles. In the Indian society, the structure of family has been structurally confined on grounds of gender and relation between the familial units.[4] The prevailing stereotype of the familial structure being composed of mother, father and children, restricts the

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[1] Loren Marks, "Same-sex parenting and children's outcomes: A closer examination of the American Psychological Association's brief on lesbian and gay parenting" 41 *Social Science Research* 735 (2012).

[2]Cambridge University Press, "Children," *Cambridge Dictionary*, available at: https://dictionary.cambridge.org/dictionary/english/children (last visited on Sept. 26, 2025).

[3] The Vanier Institute of the Family, "Definition of Family" *Vanier Institute of the Family*, 2024, available at: https://vanierinstitute.ca/projects/definition-of-family/ (last visited on Sept. 16, 2025).

[4] B.S. Nayak and G. Sinha, "Patriarchal Family, Gendered Society and Capitalist State in India" in B.S. Nayak and N. Tabassum (eds), *Impact of Patriarchy and Gender Stereotypes on Working Women*, Diversity and Inclusion Research Series (Springer, Cham, 2024).

family functioning on two grounds.[1] *First*, the gendered roles are attached automatically with the connotations of mother and father, thus building an almost uniform attribution of roles in a familial setup such described.[2] *Second*, the relationship between the mother and father when read together with children in the familial picture denotes a romantic nature of relation inherent at the base of such familial units.[3] However, a significant shift in this perspective emerged through the *Deepika Singh v. Central Administrative Tribunal* case, as ruled by the Supreme Court of India. The judgment, authored by Justice Chandrachud, expanded the definition of "family" to encompass a broader spectrum, inclusive of domestic relationships, unmarried partnerships, and queer relationships.[4] The judgment underscored the reality that familial structures are subject to change due to various circumstances, such as the death of a spouse, separation, divorce, remarriage, adoption, or fostering.

It is in light of Justice Chandrachud's observations that this paper attempts to highlight the importance of recognising and protecting "atypical" family units. By "atypical", the authors mean units which may not adhere to the conventional model of family but deserve equal legal protection and social welfare benefits. The authors argue that while these familial manifestations may deviate from the traditional norms, they are just as genuine and deserving of societal support and legal recognition and there is a requirement to affirm all forms of love and family bonds, regardless of their conformity to traditional expectations, are equally valid and deserving of respect and protection under the law. While caste, class, and sexual orientation often shape societal expectations from marital partners, this paper limits its scope to examining sexuality as the primary axis of analysis.

2. Traditional Family Structures and Homosexual Underrepresentation

Historically, conventional family structures have significantly influenced societal perceptions of gender. The ideal family unit in many cultures has been depicted as a heterosexual couple with their children, frequently resulting in the marginalisation and discrimination of individuals who do

[1] Id.
[2] Id.
[3] Id.
[4] *Deepika Singh v. Central Administrative Tribunal*, Civil Appeal No. 5308 of 2022 (Arising out of SLP (C) No. 7772 of 2021).

not conform to this archetype.[1] This has helped keep stereotypes and stigmas about homosexuality alive, making it hard for people to fully accept and show who they are while still meeting the expectations of their families. Scholars have underscored the imperative of examining family not as a static construct but as a dynamic, contested sphere shaped by power, identity, and resistance. In her essay "Three-Dimensional Family: Remapping a Multidisciplinary Approach to Family Studies," Kalpana Kannabiran talks about how family is an essential and complicated part of Indian society.[2] The family is not only a setting for caregiving and nurturing; it is also a space for identity formation, emotional expression, and the experience of systemic violence.[3] Kannabiran critiques the prevailing sociological focus on the heterosexual, conjugal family, arguing that this narrow viewpoint excludes diverse relational dynamics and overlooks the genuine experiences of many individuals, especially women and children.[4] She emphasises that family law encompasses more than marriage and inheritance; it intersects with various legal domains, including criminal and constitutional law, and frequently reflects concepts rooted in patriarchy and caste.[5] Similarly, scholars like Hopkins *et al.* argue that family needs to be understood as an emotional and material institution.[6] Hopkins *et al.* examine how same-sex couples adhere to and subvert conventional norms regarding marriage and family and argue that many same-sex couples seek marriage for legal recognition and cultural legitimacy; however, they also transform familial structures by embracing relationships characterised by equality, non-monogamy, and diverse parenting approaches.[7]

Even with these tensions, the fact that same-sex families are becoming more visible has made it clearer that they are not considered families by the law or culture. The movement for marriage equality has got a lot of support, which has changed how people talk about and think about the

[1] Ratna Kapur, "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics" 15 *Harvard Human Rights Journal* 1 (2002).

[2] Kalpana Kannabiran, "Three-Dimensional Family: Remapping a Multidisciplinary Approach to Family Studies" 41 *Economic and Political Weekly* 4427 (2006).

[3] Id.

[4] Id.

[5] Id.

[6] Jason J. Hopkins, Anna Sorensen and Verta Taylor, "Same-Sex Couples, Families, and Marriage: Embracing and Resisting Heteronormativity" 7 *Sociology Compass* (2) (2013).

[7] Id.

law. This is because traditional family structures have historically contributed to the marginalisation of homosexual individuals by fostering environments of rejection, shame, and emotional distress.[1] Kannabiran criticises the family as a place where violence and exclusion are common, and she calls for a radical rethinking of the family through interdisciplinary research and changes to the law.[2] Lack of familial acceptance often leads to long-term psychological challenges, including anxiety, depression, and low self-esteem. These effects are intensified by the absence of supportive role models and affirming spaces within conventional families. To add to this, laws like the Surrogacy (Regulation) Act, 2021 ('Surrogacy Act') and limited implementation of the Transgender Persons (Protection of Rights) Act, 2019 ('Trans Act') highlight systemic exclusions. Despite progressive rulings like *Justice K.S. Puttaswamy v. Union of India*, which affirm constitutional rights to privacy and dignity,[3] a gap remains between legal ideals and social realities. On one hand, where the Trans Act does not give recognition to the *hijra* familial units, making it impossible for the members to enjoy familial rights such as those of adoption and inheritance, the Surrogacy Act facilitates surrogacy but attempts at maintaining class/caste purity. This is because the Surrogacy Act explicitly legalises only altruistic form of surrogacy and not commercial ones, leaving little to no room for surrogate mothers to be someone outside the intending couple's relative circle, often belonging to the same caste, class and often the same religion as the intending couple.

Parenting among sexual and gender minorities ('SGM') is further complicated by legal restrictions and societal stigma. Research by Bowling *et al.* reveals that while many SGM individuals aspire to parenthood, they face challenges related to financial stability, relationship legitimacy, and discrimination.[4] These findings underscore the need for legal reform and broader societal acceptance to support diverse family formations. Mark's research corroborates Bowling *et al.*'s findings by demonstrating that same-sex couples are equally capable parents in

[1] R.H. Farr, K.K. Cashen, M.T. Diomede and K.A. Simon, "Marginalized Family Identity Theory: A Framework to Understand Experiences in LGBTQIA+ and Diverse Family Structures" 17 *Journal of Family Theory & Review* 301 (2025)

[2] Kannabiran, supra note 10.

[3] *Justice K.S. Puttaswamy v. Union of India,* (2017) 10 SCC 1.

[4] Jessamyn Bowling et al., "Family Formation Goals Among Sexual and Gender Minority Individuals in Urban India" 50 *Studies in Family Planning* 357 (2019)

comparison to their heterosexual counterparts.[1] He contends that variations in child outcomes are primarily due to family instability, frequently originating from previous heterosexual relationships, rather than the gender composition of parents.[2] Marks notes that as social stigma goes down and legal recognition goes up, more same-sex couples are choosing to become parents on purpose through adoption and reproductive technologies. His work also shows that same-sex couples raising children have economic problems, even though they tend to have higher levels of education and calls for more inclusive policies to help these families. Mandal's examination of the ongoing marriage equality litigation before the Supreme Court in India contextualises these parenting discussions within a more extensive constitutional framework.[3] He explains how not allowing same-sex couples to marry keeps them from getting spousal benefits, adopting children, becoming guardians, and being recognised as parents.[4] Mandal contends that the pursuit of marriage equality transcends formal rights, focusing on the attainment of "legitimacy, status, respect, recognition, or validation" for queer families.[5] Therefore, legal recognition of marriage may only help a small group of LGBTQ+ people who are already well-off, leaving out other types of families like polyamorous households, transgender kinship networks, and families led by sex workers.

3. Constitutional Challenges to Heteronormative Kinship Structures

Many Indians still have to fight for fundamental human rights like affordable housing, jobs, fair pay, access to healthcare, social security, freedom from violence, and freedom from discrimination. These rights are even harder to get for the LGBTQ+ community and queer families because of socio-legal structures that are based on heteronormative and patriarchal biases. In India, family and kinship laws are primarily about blood ties and marriage between men and women. The 'right to marriage' is a controversial topic that divides people along ideological lines, especially when it is enforced by law. The Indian legal system perceives

[1] Loren Marks, "Same-sex parenting and children's outcomes: A closer examination of the American Psychological Association's brief on lesbian and gay parenting" 41 *Social Science Research* 735 (2012).
[2] Id.
[3] Sourav Mandal, "Marriage equality in India: A road map for inclusive lawyering, activism, and policymaking" 58 *Economic and Political Weekly* 23 (2023).
[4] Id.
[5] Id.

marriage as a sacred bond between a 'biological' man and a 'biological' woman. While refusing to recognise same-sex marriage as legal, the Supreme Court, in *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*, opined that involvement in making marriage laws has significant effects on society and that decisions about marriage equality should be left to the wisdom of lawmakers.[1] However, in the same decision, recognising the constitutional magnitude of the issue, the Supreme Court addressed other crucial questions anchored in the fundamental principles of the right to equality and anti-discrimination under Articles 14 and 15 respectively, of the Indian Constitution. Specifically, it sought to determine whether existing civil marriage laws discriminate based on biological sex, sexual orientation, and/or gender identity. Unfortunately, this was a missed opportunity by the Apex Court to determine that such discrimination is deemed constitutionally impermissible, otherwise the court could have decided that marriage laws should be broadly interpreted to include all eligible adult persons, regardless of their sex, sexual orientation, and/or gender identity. The heart of the matter revolved around the constitutionality of the Special Marriage Act, 1954 ('SMA'), particularly Section 4(c), which currently restricts marriage to a 'male' and a 'female.'

The petitioners argued that Section 4(c) of the SMA discriminates against same-sex couples, depriving them of crucial matrimonial benefits such as adoption, surrogacy, and employment and retirement benefits. Citing precedents like *NALSA v. Union of India*[2] and *Navtej Singh Johar v. Union of India*,[3] recognising non-binary gender identities and ensuring equal rights to homosexual individuals, the petitioners sought to challenge the SMA's limitations. On November 25, 2022 a Supreme Court Bench led by Chief Justice D.Y. Chandrachud and Justice Hima Kohli directed the Union Government to respond to the petitions. This marked the beginning of a legal journey that involved multiple stages and judicial benches. On January 6, 2023, a 3-Judge Supreme Court Bench, including Chief Justice D.Y. Chandrachud, Justices P.S. Narasimha, and J.B. Pardiwala, transferred nine pending petitions from the Delhi and Kerala High Courts to itself. This was referred to a 5-Judge Constitutional Bench, which commenced hearings on April 18, 2023. This 5-Judge Bench on October 17, 2023 delivered its verdict, unanimously holding that there is no

[1] *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*, 2023 INSC 920.
[2] *National Legal Services Authority v. Union of India*, AIR 2014 SC 1863.
[3] *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

fundamental right to marry for LGBTQIA+ persons under the SMA.[1] The majority opinion, articulated by Justice S. Ravindra Bhat, emphasised that marriage is a social institution predating the State, making it challenging to establish an unqualified fundamental right to marry within the Constitution.[2] The judgment contended that legislative interventions in marriage laws aimed at reforms or codification, rather than creating an inherent right. The Court also rejected the notion of reading down or substituting terms in the SMA, citing potential cascading effects on other laws. Justice Chandrachud, however, placed the onus on the legislature to recognise this right, maintaining that the State is obligated to remove impediments for queer couples without imposing a positive obligation.[3]

The verdict left the members of the queer community in India disheartened. The Supreme Court's decision, while acknowledging the impact of existing laws on LGBTQIA+ persons, falls short of recognising their right to marry. Instead, the Court directed the Union Government to establish a high-powered committee to explore the status of queer couples and their rights. As the legal battle for same-sex marriage continues, questions linger about the Court's role in protecting the constitutional rights of a minority and whether the decision reflects a missed opportunity for comprehensive reform. The complexity of family law, societal perceptions, and constitutional principles intertwined in this case highlights the evolving nature of LGBTQIA+ rights in India. The journey may have encountered setbacks, but the quest for equality and recognition persists, urging lawmakers and society to reassess existing frameworks and embrace inclusivity. The majority in *Supriyo* felt that the issue was far too complex for the court to address. In Justice Bhat's majority opinion, he acknowledges discrimination against the LGBTQ+ community. Particularly in Section VI, Justice Bhat highlights the "discriminatory impact" on LGBTQIA+ couples but refrains from addressing it directly. Instead, he delegates the responsibility to a "High-Powered Committee" promised by the Executive.

[1] *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*, 2023 INSC 920.
[2] Id.
[3] Id.

Following the Supreme Court's verdict in *Supriyo*, the Madras High Court has suggested that the Tamil Nadu government could consider recognising a 'Deed of Familial Association' for such couples, allowing them a level of protection and peace without fear of harassment.[1] This deed would serve as a legal instrument in situations of societal or familial harassment, offering support to LGBTQIA+ individuals facing discrimination affecting employment, housing, and societal integration. The court's recommendation came during the hearing of a petition by a lesbian couple seeking protection from their relatives. Justice Venkatesh proposed that the state establish a procedure for registering the Deed of Familial Association, acknowledging the civil union between LGBTQAI+ partners. This measure aims to safeguard the fundamental rights of individuals within this community and potentially elevate their status in society. Further, Justice Venkatesh directed the Social Welfare and Women Empowerment Department, currently formulating a policy for the LGBTQIA+ community, to consider incorporating a system for registering deeds of familial association.

While the Supreme Court declined to legalise same-sex marriages in India on October 17, it emphasised the importance of preventing discrimination against the queer community based on their identity.[2] Justice Venkatesh highlighted the recognition, in the majority opinion of the Supreme Court's Constitution Bench decision in *Supriyo*, of the right to choose and live in a relationship, as well as the right to protection from harassment. Despite recognising discrimination, there is a constitutional duty for the Court to remedy it, with no room for discretion once fundamental rights and values are violated.[3] Till now several review petitions have been filed in response to the judgment. There are two things that the petition argues: *first*, Supriyo judgment contains serious legal errors, is self-contradictory,

[1] Scroll Staff, "Consider deed of familial association to protect rights of LGBT+ partners: Madras HC to Tamil Nadu" *Scroll.in*, Nov. 18, 2023, available at: https://scroll.in/latest/1059276/consider-deed-of-familial-association-to-protect-rights-of-lgbt-partners-madras-hc-to-tamil-nadu (last visited on Sept. 6, 2025).

[2] Giti Pratap, "Madras High Court urges State to recognise 'Deed of Familial Association' to protect rights of same-sex couples" *Bar & Bench*, Nov. 17, 2023, available at: https://www.barandbench.com/news/madras-high-court-urges-state-recognise-deed-of-familial-association-protect-rights-same-sex-couples (last visited on Sept. 16, 2025).

[3] Gautam Bhatia, "The Supreme Court's Marriage Equality Judgment – II: Do I Contradict Myself?" *Indian Constitutional Law and Philosophy*, Oct. 22, 2023, available at: https://indconlawphil.wordpress.com/2023/10/22/the-supreme-courts-marriage-equality-judgment-ii-do-i-contradict-myself-guest-post/ (last visited on Sept. 26, 2025).

and manifestly unjust. It asserts that the judgment acknowledges discrimination but fails to provide a remedy.[1] The petition also highlights contradictions in the understanding of marriage under the Special Marriage Act of 1950 and criticises the failure to address the negative impact on queer individuals, contrary to the court's previous stance. *Second,* the court misunderstood the initial request. LGBTQIA+ couples were not seeking a new social institution of "queer marriage" but rather challenging the discriminatory exclusion from the existing legal framework.[2] This exclusion based on sexual orientation, a protected category under Article 15 of the Constitution, constitutes an abdication of the court's responsibilities. The Supreme Court of India, with broad powers, can review its own judgments under Article 137 of the Constitution. Order XLVII of the Supreme Court Rules, 2013 specifies the conditions for filing a review petition within 30 days, providing grounds for reconsideration. The review petitions were filed in this context, reflecting the intricate legal challenges surrounding LGBTQ+ rights and the court's role in upholding constitutional values.

In Indian society, there has long been a prevailing belief regarding the structure of a family: a singular, unchanging unit composed of a mother, father, and their children. However, a significant shift in this perspective emerged through the *Deepika Singh v. Central Administrative Tribunal*, as ruled by the Supreme Court of India. The judgment, authored by Justice Chandrachud, expanded the definition of "family" to encompass a broader spectrum, inclusive of domestic relationships, unmarried partnerships, and queer relationships.[3] Justice Chandrachud's observations highlighted the importance of recognising and protecting "atypical" family units. These units, which may not adhere to the conventional model, deserve equal legal protection and social welfare benefits. The judgment underscored the reality that familial structures are subject to change due to various circumstances, such as the death of a spouse, separation, divorce, remarriage, adoption, or fostering. It emphasised that while these manifestations of family may deviate from the traditional norms, they are

[1] LiveLaw News Network, "Marriage Equality Case: Supreme Court to Hear Review Petitions Filed by Queer Couples" *LiveLaw*, available at: https://www.livelaw.in/top-stories/marriage-equality-case-supreme-court-review-petition-queer-couples-241432 (last visited on Sept. 6, 2025).

[2] Id.

[3] *Deepika Singh v. Central Administrative Tribunal*, Civil Appeal No. 5308 of 2022 (Arising out of SLP (C) No. 7772 of 2021).

just as genuine and deserving of societal support and legal recognition. In essence, the judgment affirmed the principle that all forms of love and family bonds, regardless of their conformity to traditional expectations, are equally valid and deserving of respect and protection under the law. It would be apt if the Supreme Court utilises its own interpretation in *Deepika Singh* to recognise non-conventional familial set-ups, and more specifically, same-sex marriage and homosexual familial units, to start with.

4. Recommendations and Conclusion

In light of the constitutional challenges faced by heteronormative kinship structures in India, this paper recommends a reimagining of legal frameworks to accommodate diverse familial forms. Central to this is the recognition of queer kinship practices, particularly the concept of 'chosen families,' which remain legally invisible despite their significance in providing emotional and caregiving support. The law must expand its definition of family beyond biological and marital ties to include these chosen networks, granting them rights related to inheritance, guardianship, and medical decision-making. This shift must be guided by the principle of constitutional morality, which prioritises individual dignity and autonomy over prevailing social morality, and is firmly rooted in the guarantees of Fundamental Rights under Articles 14, 15, 19, and 21. Given the slow pace of legislative reform, judicial recognition offers a faster and more effective route to inclusion, with courts playing a critical role in interpreting existing laws to protect non-traditional families. Additionally, the gendered nature of familial terminologies such as 'mother' and 'father' reinforces binary roles that exclude homosexual and transgender parents; legal language should adopt gender-neutral terms like 'parent' or 'guardian' to ensure equal rights and representation. The international dimensions of kinship recognition, particularly in refugee, immigration, citizenship, and adoption law, also demand attention, as queer and chosen families often face systemic exclusion in transnational legal contexts. Finally, the intersection of singlehood and parental autonomy, especially for gender and sexual minorities, highlights the urgent need to reform adoption and reproductive rights laws. Many personal laws currently deny single individuals the right to adopt or access reproductive technologies, making a strong case for the uniformisation of civil code to ensure equal rights across communities. Together, these recommendations aim to dismantle the legal privileging of heteronormative kinship and affirm the constitutional promise of equality and dignity for all family forms.

Constitutional morality demands legal recognition of family diversity, positioning the courts as agents of social transformation. It proposes a judicial interpretation that prioritises constitutional values over social convention, offering a roadmap for expanding family rights to include all forms of legitimate kinship bonds recognised by individuals themselves rather than state or social sanction.

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