Lesser than equal? A feminist analysis of Hindu family law in India

Saumya Uma[i]

SHORT BIO

[i]Dr. Saumya Uma is a Professor and Director – Centre for Women's Rights, Jindal Global Law School (JGLS), O.P. Jindal Global University, India. She works at the intersections of gender, human rights and the law.

INSTITUTIONAL AFFILIATION
Centre for Women's Rights,
Jindal Global Law School (JGLS),
O.P. Jindal Global University, India
saumyauma@gmail.com / saumya@jgu.edu.in

ORCID
https://orcid.org/0000-0002-5867-9111

ABSTRACT

In India, Hindu family law is often touted as a progressive and gender-just law that ought to be emulated and extended to minority religious communities through a common civil code. Against this backdrop, the present article examines the question of whether Hindu family law in India adequately protects women's rights and, if law reform is required, what should be the factors guiding it. The article further analyses the status of women within Hindu family law in India from the time of the country's independence and the law reform measures that have led to advancement in women's equality rights in recent decades as well as discriminatory provisions that continue to persist through a historical, legal and feminist lens. It argues that further reforms to Hindu family law must be undertaken to realize women's equality rights, albeit within the larger framework of constitutional norms and international human rights standards, rather than an interpretation/re-interpretation of Hindu religious texts based on dubious claims of a "glorious past." This includes recognition of trans* and queer relationships within the folds of Hindu law. Moreover, the article argues in favor of applying feminist discourses on formal and substantive equality to the Uniform Civil Code debate to ensure plural family laws are gender-just.

KEYWORDS
Hindu law, India, women's rights, gender discrimination, patriarchy

Introduction

India is a country with multiple family or personal status laws. The law governing rights within marriage, upon divorce, and for issues arising from a marital relationship, including succession and inheritance of property, are different for each religious community. Secular laws that govern matrimonial rights (The Special Marriage Act, 1954) and property rights within the family (Indian Succession Act, 1925) coexist with specific family laws for each religious community. In the contemporary context**,** the term 'Hindu law' connotes a range of statutory legislations such as The Hindu Marriage Act of 1955, The Hindu Maintenance and Adoption Act of 1956, The Hindu Succession Act of 1956, and The Hindu Minority and Guardianship Act of 1956. These are drawn from Hindu religious texts and combined with customary practices and a large body of jurisprudence created through legislations and judgments over the past two centuries.

Since Hindu law is applicable to a vast population in India to govern family relationships, rights, and responsibilities, the issue of the status of women in Hindu legal thought becomes pertinent. The central question that this article seeks to address is whether Hindu family law in India adequately protects women's rights and, if not, what more is required. This is undertaken through a feminist, legal, and historical analysis of modern sources of Hindu law. The first part of this article critically analyses the socio-legal status of women in Hindu law in the post-independence period and the contemporary era. The second maps the recent initiatives for law reform that have been proposed and undertaken thus far. Finally, the article presents a roadmap for the future.

1. Hindu Family Law in India: 1947-2000

1.1 Hindu Code Bill & the Discourse on Hindu Women's Equality Rights

The independence of India from British colonial rule was coupled with its partition from Pakistan on religious grounds. After independence, the Hindu Law Committee, spearheaded by the initiative of Dr. B. R. Ambedkar, presented the Hindu Code Bill in the legislature on 11 April 1947.[1] The Bill sought to codify family law applicable to Hindus and "modernize" it by eliminating discriminatory provisions and practices. However, the introduction, as Parashar notes, happened in the context of the "partition of the country into Pakistan and India and the ensuing disturbances" wherein "religious identities of the respective communities were heightened".[2] Communities that were unhappy with the creation of Pakistan viewed the introduction of this Bill as interfering with their religious identity. The task of reimagining the Hindu law was made even more difficult as various diverging positions existed within the Indian National Congress party itself. For instance, at one stage, Dr. Rajendra Prasad, the erstwhile President of India, declared that he would refuse Presidential Assent to such a Bill.[3] In his letter to Pandit Jawaharlal Nehru, the erstwhile Prime Minister of India, he wrote, "new concepts and new ideas which are not only foreign to Hindu law but may cause disruption in every family".[4]

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1 Archana Parashar, *Women and Family Law Reform in India*, (New Delhi: Sage Publications, 1992), 80.

2 Parashar, *Women and Family Law Reform in India*, 80.

3 Christophe Jaffrelot, "Nehru And The Hindu Code Bill", *Outlook*, August 8, 2003.

4 Valmiki Choudhary, *Dr. Rajendra Prasad: Correspondence and Select Documents,* (New Delhi: Allied Publishers, 1987), 266.

Within this process, the discussions and the eventual conclusion on the question of equal access to property for women is the most revealing. The Select Committee of the Constituent Assembly, with Dr. B. R. Ambedkar as the Law Minister, was the first to suggest that both should be on "par with regard to the quantum of their share of inheritance".[5] It observed that "there is no reason why a female heir generally should be treated differently from a male heir".[6] However, while members debated various provisions of Hindu Law, the progressive aspects of the Bill were met with vehement opposition.[7] For instance, Baba Baijnath Bajoria argued that, "[the] Hindu women being nurtured by society to fulfil the role of ideal wives and mothers, were not in a suitable position to manage property".[8] Ganpat Rai stated, "I object to the granting of an absolute estate to women" since "their character will suffer, if they are given an absolute estate".[9] These statements, and particularly the numerous references to the woman's "role" whereby the woman was expected to fulfil the ideal of wives and mothers, indicate the anxiety of conservatives in according women equal right to property.

Eventually the Bill was divided into four statutes and passed by the Indian Parliament: The Hindu Marriage Act (1955), The Hindu Adoption and Maintenance Act (1956), The Hindu Succession Act (1956), and The Hindu Minority and Guardianship Act (1956). Despite the proclaimed commitment to gender equality, the legislations carry remnants of patriarchy, some of which are discussed below.

1.2 Age of Marriage and Agency in Marriage

Section 5(iii) of the Hindu Marriage Act enacted in 1955 prescribes the valid age of marriage to be eighteen and twenty-one for women and men, respectively. However, the non-fulfilment of the said condition does not make the marriage either void (invalid) or voidable (valid unless the validity is challenged by a party to the marriage). Contravention of the same is punishable by imprisonment of two years, a fine of one lakh Indian Rupees

5 Parashar, *Women and Family Law Reform in India*, 124.
6 Parashar, *Women and Family Law Reform in India*, 124.
7 Parashar, *Women and Family Law Reform in India*, 124.
8 Chitra Sinha, "Images of Motherhood: The Hindu Code Bill Discourse", *Economic and Political Weekly*, 42 (2007), 49-57.
9 Sinha, *Images of Motherhood*, 49. See also Government of India, *Oral Evidence Tendered to the Hindu Law Committee*, (Madras: Government of India, 1945), 194.

(INR1,00,000), or both, under section 18 of the Act. The validity of child marriages has been maintained, with the primary intention of protecting young girls whose only security in such a situation lies within the framework of marriage itself and the nullification of which may lead to disastrous social consequences.

In contrast, as per the Prohibition of Child Marriage Act (PCMA) of 2006, a criminal law, under-aged marriage would remain valid but voidable. If the minor party to the marriage choose to remain in the marriage, the marriage would remain valid. However, the legislation also provides for the minor party to repudiate the marriage (to have the marriage nullified) up to two years after reaching majority. This provision of repudiation of marriage that recognizes the agency of the minor party (usually the girl) upon reaching majority, is conspicuously absent in the Hindu Marriage Act.

In those cases where under-aged girls elope with boys, either due to a difference in caste or religion (and, hence, opposed by the families), the girl's family typically turns to criminal law to file charges of kidnapping, abduction, rape, and other such offences against the boy to "restore" custody of the girl onto themselves.[10]

The caste system in India is hierarchical in nature, with no scope for upward mobility. Although the Hindu Marriage Act does not prohibit inter-caste or inter-class marriages, due to the rigidity of the caste system within the Hindu community, with its notions of superiority and inferiority, purity, and pollution, the reality is that inter-caste marriages are often unacceptable to the families, resulting in honour crimes.[11] In the words of Dr. B. R. Ambedkar, the foremost leader of the anti-caste movement in India, the blame for the caste system, with its rigidity and dehumanization, lies with Hindu religious texts that advocate for it and not with the followers of the religion. [12]

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[10] For more details, see Uma Chakravarti, "From Fathers to Husbands: Of Love, Death and Marriage in North India", in *Honour: Crimes, Paradigms and Violence Against Women*, eds. Lynn Welchman and Sarah Hossain (London: Zed Books, 2005), 309.

[11] This is discussed in detail in Ilangovan Rajasekaran, "In the Name of Honour", *Frontline*, March 13, 2020; see also Aniruddha Mahajan, "In the Name of Honour: Comprehending Honour Killings in India", *Critical Edge*, September 26, 2020.

[12] B. R. Ambedkar, *Dr. Ambedkar Writing and Speeches*, Vol. 1, Part 2, (Education Department, Govt. of Maharashtra, 1992), 37-124

1.3 Restitution of Conjugal Rights

Restitution of conjugal rights is an archaic legal remedy under English law in which an unwilling wife could be forced by the might of the state to cohabit with her husband due to his right to marital conjugality and consortium. This remedy came to be imposed upon Hindu women by British colonialists through the *Rukhmabai* judgment when traditional Hindu law had no such provision.[13] Ironically, when Hindu law was codified in 1955, the remedy found its way into the statute and remains in force to date even though the British abolished the remedy in 1970.[14]

The Hindu Marriage Act of 1955 carries an explicit provision (section 9) that allows either party in the marriage to apply for the remedy.[15] Although couched in gender neutral terms, the ramifications of this remedy are disparate for husbands and wives. The Andhra Pradesh High Court observed this and opined that, in the woman's case, should the remedy be granted to her husband it would lead the to court sanction "humiliating sexual molestation" that could potentially result in a "pregnancy that is foisted on her by the state and against her will".[16] On this ground, the High Court found that the law violates the right to privacy and the dignity guaranteed by the Indian Constitution.

However, this progressive judgment that recognized the bodily integrity and sexual autonomy of women in Hindu marriages was overruled by the Supreme Court which held that the intention of the legal remedy is to bring

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13 *Dadaji Bhikaji vs. Rukmabai* (1885) ILR 9 Bom 529. For a detailed discussion, see Sudhir Chandra, "Rukhmabai: Debate Over Woman's Right to her Person", *Economic & Political Weekly*, (1996): 2937-2947.

14 The remedy of restitution of conjugal rights was repealed by S. 20 of The Matrimonial Proceedings and Property Act, 1970 in the United Kingdom.

15 S. 9 of the Hindu Marriage Act, 1955 states as follows: When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for restitution of conjugal rights and the Court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

16 *T. Sareetha vs. T. Venkata Subbaiah AIR 1986 AP 356*, para 29

about cohabitation between estranged parties so that they can live together.[17]

1.4 Guardianship

The Hindu Minority and Guardianship Act (1956) governs the rights and responsibilities of guardians for Hindus in India. It was the first and only attempt at codifying the law to keep pace with changing social needs. However, patriarchal beliefs underlie the provisions in the 1956 Act. Section 6(a) provides that the natural guardian for a "boy or an unmarried girl" would be that father "and after him, the mother", implying that it is only after the lifetime of the father that the mother can claim to be the natural guardian to the child. In *Gita Hariharan v Reserve Bank of India*, this provision was challenged on the grounds of violating articles 14 and 15 of the Indian Constitution, which guarantees women equality rights. [18]

However, the Supreme Court of India did not strike down this provision as unconstitutional but, instead, opined that the word "after" must be read as "in the absence of" and clarified that in the absence of the father's physical or mental ability during his lifetime (and not necessarily only after his death) the mother can become the natural guardian of her child under Hindu law. While the court's interpretation has broadened the grounds for mothers' right to guardianship of their wards, the court fell short of discharging its constitutional mandate to ensure women's equal rights by failing to treat mothers on equal footing as fathers to be considered natural guardians.

1.5 Succession and Inheritance

Succession and inheritance rights of Hindus are addressed through the Hindu Succession Act (1956). While trying to understand the various hurdles that have been placed upon access to equal rights for woman, it is not surprising that the earliest legislative attempts to rectify this historical injustice were centered around what benefits a man can accrue and were not framed as part of the "woman's question".[19] As scholars suggest, the case for advocating for women rights was provided in cases where "men would no longer devise extralegal methods of supporting their wives and

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17 *Saroj Rani vs. Sudarshan Kumar Chadha* AIR 1984 SC 1562

18 *Ms. Githa Hariharan & Anr vs Reserve Bank of India & Anr.* (1999) 2 SCC 228.

19 Mytheli Sreenivas, "Conjugality and Capital: Gender, Families, and Property under Colonial Law in India", *The Journal of Asian Studies*, 63, (2004), 937-960.

daughters" as currently 'men had to make these through the investment of large sums in female ornaments' that resulted in a decrease in the potential advancements of the economy.[20]

While the frames of such inquiry started changing in the decades prior to 1947, the concessions obtained were, nevertheless, severely limited. For instance, the changes sought under the Hindu Women's Rights to Property Act (1937) were restricted to widows who could claim the property of their deceased husbands if he died intestate. The concept of the Hindu joint family was broader and included male and female members of the family. The property owned by such a family, referred to as the coparcenary property, could only be held by male members of the joint family. Female members were only allowed the rights of maintenance, residence in the property, and marriage expenses, where relevant. This unequal legal system that existed in pre-independence India continued in the post-independent enactment of Hindu law, the Hindu Succession Act, s to assuage the sentiments of traditionalists who neither wanted to abolish the unequal system of Hindu coparcenary nor wished to extend equal inheritance rights to Hindu women. However, daughters, widows, and mothers were included as legal heirs in intestate succession of the separate property of a Hindu man.

As Malavika Rajkotia opines, even this change could be seen as a "consolation prize" for women, as the "fathers began excluding daughters from inheritance by using the device of a will to say that daughters were 'settled' and had generally received 'dowry' and thus needed nothing more".[21] In the Law Commission of India, this unfettered right is a "weapon in the hands of a man" to deprive female members, especially daughters and widows, of property rights,.[22]

The subsequent reform of Hindu law has taken place through a combination of legislative amendments and judgments of the higher judiciary. The state

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20 A statement of Collector of Tirunelveli district, as quoted in Mytheli Sreenivas, *Wives, Widows and Concubines: The Conjugal Family Ideal in Colonial India* (Bloomington: Indiana University Press, 2008), 57.

21 Malavika Rajkotia, *Intimacy Undone: Marriage, Divorce and Family Law in India*, (New Delhi: Speaking Tiger Books, 2017), 148.

22 The Law Commission of India, 174th report, *Property Rights of Women: Proposed Reforms under the Hindu Law*, (Ministry of Home Affairs: Government of India, 2000), para 2.12.

of Kerala abolished its joint family system through the Kerala Joint Hindu Family System (Abolition) Act of 1975. The state amendments by Andhra Pradesh (1986), Tamil Nadu (1989), Maharashtra (1994), and Karnataka (1994) were followed by a central amendment to the Hindu Succession Act in 2005 that allowed for daughter's right to coparcenary property. This is discussed further in 2.1 below.

2. Recent Initiatives in Hindu Law Reform (2000 Onwards)

The recent initiatives in law reform have mainly been proposed by the Law Commission of India, an official and statutory body entrusted with a mandate of undertaking law research, reviewing existing laws and making recommendations for law reform. Since 2000, at least four reports by the Commission have recommended reforms to aspects of Hindu law, often by soliciting feedback and suggestions from members of the civil society.[23] Some relevant aspects are discussed below.

2.1 Daughter's Inheritance Rights in Ancestral Property - 174th Law Commission Report (2000)

The 174th Law Commission report focused on pervasive gender discrimination (against women) in provisions of the Hindu Succession Act of 1956. The report addressed the discrimination in section 6, which deals with the daughter's inheritance rights to ancestral property. The report observed that, "the patrilineal assumptions of a dominant male ideology are clearly reflected in the laws governing a Hindu female who dies intestate. The law in her case is markedly different from those governing Hindu males" and subsequently, "legislation that on the face of it discriminates between a male and a female must be made gender neutral".[24] The report led to amendments to the Hindu Succession Act in 2005 that accorded daughters with equal rights to coparcenary property.

The 2005 amendment extends the coparcenary right to property to daughters from birth with the same rights and liabilities as that of a son,

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[23] The Law Commission of India's 174th report (2000), 204th report (2008), 207th report (2008) and 208th report (2008), 217th report (2009), 252nd report (2015), 257th report (2015) address aspects of Hindu law reform. The reports are available at www.lawcommissionofindia.nic.in (last accessed 8 March 2021).

[24] The Law Commission of India, 174th report, *Property Rights of Women,* para 2.5.

thereby, removing the disability that daughters faced. In March 2013, the Supreme Court held that the 2005 amendment is also applicable also to daughters born before the Hindu Succession Act (1956) came into force.[25]

Arguably, after the 2005 amendment, the socio-economic position of women has changed. For instance, one study that was undertaken in five states highlights that the reform has positively impacted women's education, their labor force participation, and their daughter's education.[26] Another study also claims that the 2005 Amendment led to greater access "to women-owned physical and human capital assets, and that it has enhanced the probability of daughters inheriting land".[27] However, any such reform remains hollow until a substantial reworking of the gender-biased framework is undertaken.

It is pertinent to note that while the uncodified Hindu law extended coparcenary rights to all male members of the Hindu Joint Family within three generations of the last holder of property, the 2005 amendment extended this right only to the daughters as opposed to all women (such as mothers and widows) in the family. To that extent, the discrimination persists for all categories of women within the Hindu Joint Family, excluding daughters. However, Hindu men and women have an unfettered right to will away their property to anyone, including their sons, thereby, denying inheritance to their daughters.[28]

2.2 Scheme of Succession for Hindu Female Intestate - 207th Law Commission Report (2008)

In this report, the Law Commission revisited the scheme of intestate succession for Hindu women and recommended equal right to parents' heirs and husband's heirs to inherit a female intestate's self-acquired property in the absence of her husband, children, and children of predeceased children.

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25 *Danamma Suman Surpur & Another vs. Amar & Others* AIR 2018 SC 721.

26 Rahul Sapkal, "From Mother to Daughter: Do Equal Inheritance Property Laws Reform Improve Female Labour Supply, Educational Attainments in India?", *Asian Journal of Law and Economics,* Vol. 8(1), (December 2014), 1-36.

27 Klaus Deininger, Aparajita Goyal and Hari Nagarajan, "Inheritance Law Reform and Women's Access to Capital: Evidence from India's Hindu Succession Act" *The World Bank: Policy Research Working Paper No. 5338* (2010).

28 Provided for in section 30 of the Hindu Succession Act, 1956.

It concludes that, while the natal family might be in proximity, "her relations with her husband's family are not separated and uprooted in entirety". The recommendation was influenced by the consideration that "the social ethos and the mores of our patriarchal system demand that the existing system should not be totally reversed". Traditionally, Hindu religious and cultural practices treat a married woman as only a member of the marital family. Hence, in the general scheme of inheritance for a Hindu female intestate, her husband's heirs are considered higher priority than her own parents and siblings. This is not the case for male intestates. In this report, the Law Commission did not comment on this anomaly and blatantly discriminatory provision, leading to its continued presence in the statute.[29]

Three provisions that blatantly discriminate against women continue to plague the Hindu Succession Act. First, the Act creates two schemes of succession for male and female intestates. For female intestates, the scheme is further bifurcated by the source of the female intestate's property (whether inherited from parents or husband/father-in-law) and the presence or absence of children. Where the property was inherited from the woman's parents, it would revert to her father's heirs (even if she had inherited it from her mother). Property inherited from her husband or father-in-law would revert to her husband's heirs. These criteria are not specified for male intestates, indicating that the legislators perceived women as temporary and transitory possessors of property and, hence, did not recognize their absolute ownership in law. Second, agnates are preferred over cognates, even if the agnates are more remote than cognates.[30] This violates the fundamental rule of proximity of relation as the basis for inheritance rights. Third, while full blood relations are preferred over half-blood relations, relationships by uterine blood are completely ignored.[31]

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29 Damle, Devendra et al, "Gender discrimination in devolution of property under Hindu Succession Act, 1956", National Institute of Public Finance and Policy (NIPFP) Working Paper Series, No. 305, May 25, 2020, 22-23.

30 Agnates are those claimants to the property who are related to the intestate by blood or adoption, wholly through male lineage, defined in S. 3(1)(a) of the Hindu Succession Act, 1956. Cognates are persons who are related to the intestate by blood or adoption, not wholly through the male line, defined in S. 3(1)(c) of the Hindu Succession Act, 1956.

31 Section 3(e) of the Hindu Succession Act defines a relationship by 'full blood' as one when they have descended by a common male ancestor by the same wife, 'half blood' when they have descended from a common male ancestor with different wives, and

2.3 Reforms in the Law of Guardianship – 257th Law Commission Report (2015)

The discriminatory provision in section 6 of the Hindu Minority and Guardianship Act (1956) has been discussed above in 1.4. In the 257th report, the Law Commission recommended that section 6(a) of the latter Act be struck down and substituted by a provision that does not explicitly place the father in a superior position.[32] It states that the "superiority of one parent over the other should be removed, and that both the mother and the father should be regarded, simultaneously, as the natural guardians of a minor".[33] The report's recommendations are in tandem with social justice considerations. However, the recommendation is yet to be legislated. In 2016, the Delhi High Court affirmed that the Regional Passport Office should not insist on the name of the father as the natural guardian in cases of single women applying for their children.[34] In 2019, a public interest litigation (class action suit) was filed in the Supreme Court of India, challenging the constitutionality of section 6 of the Hindu Minority and Guardianship Act.[35] The petition remains pending in court at the time of writing this article.

2.4 Consultation Paper on Family Law Reforms (2018)

The Government of India referred a study to the Law Commission that examined issues arising from the Uniform Civil Code in 2016. The Uniform Civil Code (UCC) asserts that one family law is applicable to all religious communities. The Indian Constitution, through Article 44, provides for the state to endeavor to enact a UCC. Given the religious, cultural, and social diversities prevalent in India, recent trends towards a Hindu majoritarian rule and the consequential insecurities among minority religious communities, the issue of the UCC is a highly contentious one. While opposing the call for a UCC, feminist academic, Nivedita Menon, observed that "talk of [UCC] has

'uterine blood' as one where two persons are related as descendants of their mother, through different husbands.

32 The Law Commission of India, 257th Report, *Reforms in Guardianship and Custody Laws in India*, New Delhi: Ministry of Home Affairs, Government of India, 2015.

33 The Law Commission of India, 257th Report, para 6.3.

34 *Shalu Nigam & Another vs. Regional Passport Office & Another* 2016 SCC OnLine Del 3023

35 *Sakshi Bhattacharya vs. Union of India* WP (Civil) No. 1290 of 2019.

nothing to do with gender justice. It has entirely to do with a nationalist Hindu agenda and is right up there with the beef ban and the temple in Ayodhya".[36]

Various judgments from the higher judiciary directed the parliament to enact a UCC.[37] Despite this, the Law Commission's paper recognized that the UCC is "neither necessary nor desirable at this stage", especially since "most countries are now moving towards recognition of difference", a process which can be undertaken without abolition of difference itself.[38] Instead, it sought to suggest reforms in family laws that apply to each religious community to make family laws gender-just and egalitarian.

The paper emphasized the need for deleting the matrimonial remedy of the |Restitution of Conjugal Rights" from the Hindu Marriage Act as it was an obsolete remedy.[39] On the issue of guardianship, the paper recommended an amendment to section 6 of the Hindu Minority and Guardianship Act to make both father and mother natural guardians on equal footing.[40] In the context of rights to a Hindu coparcenary property, the paper suggested the abolition of rights to the property by birth.[41]

2.5 Initiative to Increase the Age of Marriage for Girls

In 2020, a move by the central government of India to increase the legally marriable age of girls from 18 years to 21 years added further complication to the legal landscape. While the initiative claims to empower women, activists working at the ground level on adolescents' concerns fear that the age increase 21 years would mean that girls would be unable to exercise their agency until the age of 21 and parents would force their daughters to marry a person of their choice (and caste).[42] Organizations that studied data

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36 Nivedita Menon, "It isn't about women", *The Hindu*, 15 July 2016.

37 See for example, *Mohd. Ahmed Khan vs. Shah Bano Begum* AIR 1985 SC 945; *Jordan Diengdeh vs. S.S. Chopra* AIR 1985 SC 935 and *Sarla Mudgal vs. Union of India* AIR 1995 SC 1531.

38 The Law Commission of India, *Consultation Paper on Reform of Family Law*. New Delhi: Ministry of Home Affairs: Government of India, 2018, para 2.35.

39 The Law Commission of India, *Consultation Paper*, para 2.62.

40 The Law Commission of India, *Consultation Paper*, para 3.31.

41 The Law Commission of India, *Consultation Paper*, para 5.26.

42 Jagriti Chandra, "Should the Age of Marriage for Women be Raised to 21?", *The Hindu*, 4 September 2020. Madhu Mehra, 'Empowering Women or Curbing Rights?', *Economic and Political Review*, Vol. 57, Issue No. 2, January 8, 2022, 8.

related to the Prohibition of Child Marriages Act overwhelmingly found that the law was used by parents as a tool for control to stop their daughters from eloping and as a tool to punish the boys they chose as their husbands.[43]

The Supreme Court of India and the High Courts have, time and time again, delivered judgments against honor crimes and reiterated that the right to choose a partner is a fundamental right of all persons, including women, though the gap between law and reality remains large.[44]

2.6 Recognition of Sexual Orientation and Gender Identities in Hindu Family Law

Sexual intercourse between persons of the same sex, even if between consenting adults in private spaces, was criminalized under section 377 of the Indian Penal Code (IPC). In September 2018, the Supreme Court of India struck down the provision as unconstitutional as it violated the constitutionally-guaranteed fundamental rights of bodily integrity, sexual autonomy, liberty, and privacy of the concerned persons.[45] Subsequent to the decriminalization, queer communities have demanded the legal recognition of same sex marriages within the framework of Hindu law as well as the secular Special Marriage Act. Meanwhile, a judgment from the Madras High Court legally recognized the marriage of a trans-person and a cis-person within the framework of Hindu Marriage Act by interpreting the term “bride” in section 5 of the Act to include transwomen.[46] The judgement states that term “bride” should not only include cis-women but also anyone who identifies themselves as a woman.[47] In its reasoning, the court drew upon right to marry a person of one’s own choice, affirmed as a fundamental right by the Supreme Court of India.[48]

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43 Ibid.

44 *Lata Singh vs. State of U.P.* (2006) 5 SCC 475; *Arumugam Servai vs. State of Tamil Nadu* (2011) 6 SCC 405.

45 *Navtej Singh Johar vs. Union of India* (2018) 10 SCC 1

46 *Arun Kumar vs. Inspector General of Registration* 2019, Madurai Bench of Madras High Court in W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019, judgment delivered on April 22, 2019.

47 *Arun Kumar*.

48 *Shafin Jahan vs. Asokan K.M.* AIR 2018 SC 357

Notably, scholars such as Ruth Vanita and Saleem Kidwai, in their work on same sex love in India, demonstrate that the Hindu religion has historically celebrated diverse forms of sexual orientation and gender identities.[49] Indeed, it was British colonial rule that not only introduced section 377 of the IPC but also the hetero-normative, patriarchal form of marriage and a narrow, Victorian perspective on sexual orientations and gender identities.

In recent years, two petitions were filed in the Delhi High Court for a legal recognition of same-sex marriages within the framework of the Hindu Marriage Act, the Special Marriage Act, and the Foreign Marriage Act. The Solicitor General of India, representing the central government with a Hindu majoritarian ideology, reportedly stated in court that a marriage between same-sex couples was "not permissible" in India as it is not recognized by "our laws, legal system, society and our values'.[50] The statement juxtaposes and contrasts Indian (read Hindu) culture on same-sex marriages. At the time of writing this article, the petitions for legalizing same-sex marriage, including under Hindu law, remain pending in the Delhi High Court. However, a similar remedy sought by a lesbian couple from the Allahabad High Court was rejected in April 2022.[51] At present, it is clear that the queer community is driving the litigations for family law reform following the *Navtej Johar* judgment and its aftermath have challenged and complicated our understanding and the law's treatment of heterosexual intimacies.

In April 2022, Supriya Sule, a parliamentarian of the National Congress Party, introduced a private member's bill to legalize same-sex marriages and provide the same rights to LGBTQIA+ couples as that of heterosexual couples.[52] Interestingly, the bill seeks amendments to the secular law (Special Marriage Act) and not the Hindu law. In August 2022, the Supreme Court expanded the traditional definition of family and reportedly observed that the family,

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49 Ruth Vanita and Saleem Kidwai (ed.), *Same Sex Love in India: Readings from Literature and History*, (Gurugram: Penguin Random House India, 2008) (revised edition).

50 India Today Web Desk, "Not our values: Centre opposes plea in HC for recognition of same-sex marriages," India Today, September 14, 2020.

51 The Wire Staff, 'HC Rejects Lesbian Couple's Plea for Recognition of Marriage, UP Govt Cites 'Hindu Culture',' *The Wire*, April 15, 2022

52 Alka Dhupkar, Why this MP Wants to Legalise Same Sex Marriage in India, *The Times of India*, April 19, 2022.

> may take the form of domestic, unmarried partnerships or queer relationships … such atypical manifestations of the family unit are equally deserving not only of protection under law but also of the benefits available under social welfare legislation.[53]

Though this is an *obiter dicta* (opinion of the court) and, hence, not binding for future judgements, it is, nevertheless, significant in indicating the potential of the Indian judiciary to recognize new forms of family that include relationships beyond a heterosexual model.

The queer community in India is a historically oppressed community that has been denied a legitimate demand of equal legal recognition of and rights within marriage equal to others. However, advancing the institution of marriage as an embodiment of love, companionship, and sexual desire excludes unmarried, non-monogamous, non-binary, and gender fluid persons.[54] Madhavi Menon argues that while marriage is presented across the political spectrum as the flagbearer of sexual equality, marriage also brings along institutionalized sexual inequality.[55] This is more so the case in Hindu law that has patriarchal and gender discriminatory provisions entrenched in it, as discussed above.

2.7 Testing Family Laws Against the Yardstick of Constitutional Principles

The post-colonial era witnessed the euphoria of Indian independence in 1947 and the creation of the Constitution that was adopted in 1950. However, the relationship between the State and religion remained ambiguous. Articles 25 and 26 of the Indian Constitution guarantees freedom of religion, on one hand, while Articles 14–16 that guarantees gender equality, non-discrimination, and equal opportunity to women were firmly embedded as fundamental rights, enforceable against the Indian state. The existence of multiple family laws was justified through an extension of

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53 *Deepika Singh vs. Central Administrative Tribunal* 2022 LiveLaw (SC) 718

54 For details, see Madhavi Menon, *The Case Against Marriage*, 7 November 2020, https://www.article-14.com/post/the-case-against-marriage

55 Menon, The Case Against Marriage.

the freedom of religion.[56] These family laws, including Hindu law, contained and continue to contain provisions that discriminate against women.

However, for decades, courts were reluctant to measure family laws by the yardstick of the constitutionally guaranteed fundamental rights and strike down gender discriminatory provisions as unconstitutional. This was through a perverse logic that family laws did not amount to "law" under Article 13 of the Indian Constitution and, hence, fundamental rights (including women's equal rights) did not apply to them.[57] Indeed, judgments in the 1980s compared the introduction of constitutional law into the home to introducing a bull into a china shop, claiming it was most inappropriate as it would destroy the institutions of marriage and family.[58] However, other judgments stated that no personal law can be held above the Constitution of India and, as such, discriminatory provisions in matrimonial statutes could be voided if violative of constitutional provisions.[59]

Recent jurisprudence indicates the courts' willingness to apply constitutional principles to, at least some, aspects of Hindu law.[60] In 2008, the Madras High Court passed a landmark judgment that a female claimant for the position of a priest in a Hindu temple in Madurai district, state of Tamil Nadu, could not be prevented from performing temple rituals. Traditionally, only men could be appointed priests to Hindu temples. The court invoked Article 15 of the Indian Constitution (the prohibition of discrimination on the grounds of sex) and also Article 51A (enshrining a fundamental duty of every citizen to renounce practices derogatory to the dignity of women).[61] In 2016, the Delhi High Court pronounced a path-breaking judgment maintaining that women can be a *karta* (a manager and administrator of the coparcenary

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56 D.K. Srivastava, "Personal Laws and Religious Freedom", *Journal of the Indian Law Institute* 18:4 (1976) 551-586.

57 For details, see judgment of Bombay High Court in *State of Bombay vs. Narasu Appa, Mali* AIR 1952 Bom 84; See also Mihir Desai, "Flip Flop on Personal Laws", *Combat Law* 3: 4, (November-December 2004).

58 *Harvinder Kaur vs. Harmander Singh Choudhary* AIR 1984 Del 356.

59 *Mary Roy vs. The State of Kerala* AIR 1986 SC 1011: 1986 SCR (1) 371

60 For example, *Mrs. Githa Hariharan vs. Reserve Bank of India* (1999) 2 SCC 228

61 *Pinniyakkal vs. District Collector & Others*, judgment delivered by Justice K.Chandru of the Madras High Court (Madurai Bench) on 1 September 2008 in W.P. (MD) No. 9704 of 2007 and M.P. (MD) Nos. 1 of 2007 and 1 of 2008.

property) of a Hindu Joint Family on the basis of Articles 14 and 15 that provide constitutional protection in cases of discrimination against women.[62] In 2020, the Supreme Court clarified and reiterated equal rights to women in Hindu property law.[63] These judgments have drawn upon constitutional guarantees of fundamental rights, such as right to life, to equality, and non-discrimination to promote gender justice in various aspects of Hindu law.

In light of a 2017 Supreme Court judgment upholding privacy as a fundamental right,[64] a fresh challenge to the constitutionality of the provision of restitution of conjugal rights was made, which is currently pending before the Supreme Court of India.[65] The Indian government has reportedly countered the submission of the petitioners by stating that there is a "legitimate state interest" in ensuring the continuation of marriage and the provision has a “reasonable nexus with the objective of binding individuals to their marital commitments”.[66] In recent times, the matrimonial remedy has been criticized by feminist scholarship, using the yardsticks of the Indian constitution and human rights.[67]

2.8 Relevance of International Human Rights Standards

Among all the international human rights treaties that India ratified and is bound by, the UN Convention on Elimination of Discrimination Against Women (CEDAW), ratified by India in 1993, is of particular relevance to the reform of the Hindu law.[68] CEDAW has accurately identified marriage and family as sites of discrimination against women. It mandates state parties to

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62 *Mrs. Sujata Sharma vs. Manu Gupta* (2016) 226 DLT 647.

63 *Vineeta Sharma vs. Rakesh Sharma & Others* (2020) SCC Online 641.

64 *K Puttaswamy vs. Union of India* (2017) 10 *SCC* 1.

65 *Ojaswa Pathak & Others vs. Union of India & Others* WP (civil) 250/2019 filed before the Supreme Court of India.

66 Utkarsh Anand, “Conjugal rights make sure couples cohabit or divorce: Centre tells SC”, *Hindustan Times*, September 6, 2022.

67 See for instance, Kanika Sharma, ‘Withholding Consent to Conjugal Relations Within Child Marriages in Colonial India: Rukhmabai’s Fight’ (February 2020) 38(1) *Law and History Review* 151–175; Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Gurugram: Harper Collins India, 2019), 216-250; Saumya Uma, ‘Wedlock or Wed-Lockup? A Case for Abolishing Restitution of Conjugal Rights in India,’ *International Journal of Law, Policy and The Family*, Vol. 35, Issue 1, 2021, 1-23.

68 United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted on 18 December 1979, entered into force on 3 September 1981, 1249 UNTS 13.

the convention (including India) to prohibit and eliminate discrimination in matters pertaining to marriage and family and emphasizes equal rights and the responsibilities of the parties to the marriage within the matrimonial relationship and upon its dissolution.[69] The CEDAW committee's observations and recommendations are based on alternative NGO reports on the CEDAW that have consistently noted that the Indian state was duty-bound to address discriminatory family laws for Hindus and highlighted the discriminatory aspects of Hindu family law and its ramifications for women.[70]

At the time of ratification, India made a declaration that it would abide by Articles 5(a) and 16(1) that mandates that the state eliminates gender stereotypes and ensures equality within marriage respectively "in conformity with its policy of non-interference in the personal affairs of any community without its initiative and consent".[71] This declaration was made in 1993. Many changes have occurred in the past twenty-seven years and the "policy of non-interference" holds little relevance given the legislative reforms that have been initiated. Hence, it is time for the Indian government to heed the repeated calls of the CEDAW committee to withdraw the declaration as it obstructs effective implementation of the CEDAW in its true spirit.[72] Complementing the CEDAW framework, the UN Special Rapporteur on Freedom of Religion or Belief has observed that the freedom of religion or belief and women's right to equality and non-discrimination are mutually reinforcing rights and that the former should not be used to perpetuate discrimination against women.[73]

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69 See above, Article 16.

70 See for instance, The National Alliance of Women, *Alternative NGO Report on CEDAW: Initial Submission to the CEDAW Committee*, January 2000, https://pldindia.org/wp-content/uploads/2013/06/First-NGO_Alt_rep.pdf, 59-63; see also The National Alliance of Women, 4th and 5th NGO Alternative Report on CEDAW, July 2014, http://www.kalpanakannabiran.com/pdf/CEDAW-BOOK2014.pdf, 115-126

71 For more details, see International Women's Rights Action Watch Asia Pacific, "The Validity of Reservations and Declarations to CEDAW: The Indian Experience", *IWRAW Asia Pacific: IWRAW Asia Pacific Occasional Paper Series No. 5* (2005), 12.

72 See for example CEDAW Committee's Concluding Observations on India, A/55/38 (2000) – paras 44 and 60; see also CEDAW/C/IND/CO/3 (2007) para 11.

73 Report on Freedom of Religion or Belief and Gender Equality, A/HRC/43/48 (February 27, 2020).

3. The Roadmap for the Future

This article has examined the status of women in Hindu law through historical, socio-legal, and feminist perspectives. The first part of the article discussed various aspects of Hindu law that exist in independent India (1947 onwards) where, despite a constitutional guarantee of women's equality rights, the denial of the agency and autonomy of Hindu women within marriage and matrimonial relation was unmistakable. The second part investigated various law reform initiatives that have been undertaken or recommended from 2000 onwards, both through legislative amendments and landmark judgments, and the persistence of discriminatory provisions against women in Hindu law. Law reform on these issues form the potential agenda in the roadmap for the future. Additionally, matrimonial property is an issue that must be addressed in a substantial manner, keeping the overall framework of gender justice in place. Marriage must also be recognized as an equal economic partnership and women's contributions to the marriage, marital home, family, and the household economy must be acknowledged through the concept of matrimonial property as argued by some family law scholars.[74]

It is undeniable that through the centuries, Hindu law has undergone transformations to meet the changing socio-economic and political needs and to eliminate aspects that discriminate against women. It has been a field of dynamic and robust contestations between the personal autonomy and agency of women, on one hand, and casteist, communal, and patriarchal authorities asserting their freedom of religion, on the other. The reforms were not offered on a platter by the benevolent Indian State to Hindu women. Rather, the All India Women's Conference and women members of the Constituent Assembly, such as Renuka Ray, worked hard to prohibit discriminatory marriage and inheritance laws in the newly independent India.[75] Concerted efforts were made by individuals and women's rights groups through memorandums, depositions, and advocacy before equal

[74] See for instance, Vijender Kumar. "Matrimonial Property Law In India: Need Of The Hour". *Journal of the Indian Law Institute*, *57*(4), 500–523.

[75] Discussed in Archana Parashar, *Women and Family Law Reform in India,*133; for a detailed discussion on role of women's movements in Hindu law reform, see also Jana Matson Everett, *Women and Social Change in India* (New Delhi: Heritage Publishers, 1979) 141-89.

coparcenary rights to daughters in Hindu law could be achieved.[76] However, the project of gender-just reforms in Hindu law is an ongoing one. The retention of gender discriminatory provisions in Hindu law cannot be justified or ignored on the grounds of the freedom of religion or the preservation of the institutions of marriage and family as the state's legitimate interests. Hindu law, as it exists today, carries with it the remnants of sources from religious texts. Indeed, very little of religion remains in Hindu law today, as it has been shaped by customs, legislations, and judicial interpretations synthesized with British colonial law (such as monogamy and the restitution of conjugal rights). Moreover, that does not make it divine, infallible, or cast in stone. Given the history of discrimination against women in Hindu law, as illustrated in this article, it is important to delink religion and the state in Hindu family law.[77]

The proposal of a Uniform Civil Code (UCC) that will be a common family law applicable to all religious communities theoretically presents a potential opportunity to eliminate gender discriminatory aspects in Hindu law. However, feminists in India have long opined that the clamor for the UCC, arising from a Hindu nationalist government, is not about women or gender justice but rather a tool to 'discipline' Muslims.[78] Majoritarianism and its adverse impact on all religious minorities has been discussed elsewhere.[79] If the UCC were to be modelled on Hindu law, as is being feared, it is likely to carry with it discriminatory gender provisions. This will undermine feminist efforts at making the law gender-just. Feminist scholars have argued in favor of legal pluralism and argued against the UCC.[80] In 2018, the Law

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76 For details, see Bina Agarwal, "Landmark Step to Gender Equality", *The Hindu*, September 25, 2005.

77 This aspect is discussed in detail in Indira Jaising, "Besides Gender Justice, Triple Talaq Case Was Also About Separating Religion and State in Family Law", *The Wire*, August 24, 2017.

78 Nivedita Menon, "It Isn't About Women", *The Hindu*, July 15, 2016.

79 Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* (New Delhi: Routledge, 2012) 272-304; see also Kalpana Kannabiran, 'India' in Mahnaz Afkhami, Yakın Ertürk, and Ann Elizabeth Mayer (eds.), *Feminist Advocacy, Family Law, and Violence against Women: International Perspectives* (New York: Routledge, 2019) 51-70.

80 See for instance Flavia Agnes, "Diverse Personal Laws, Gender Justice and Controversy Over the Uniform Civil Code," in **Melvil Pereira,** Bitopi Dutta & Binita Kakati (eds.), *Legal Pluralism and Indian Democracy: Tribal Conflict Resolution Systems in Northeast India*. New Delhi: Routledge, 2019, 44-66.

Commission of India, a government body that was entrusted with the responsibility of suggesting family law reforms for all communities, studied all family laws and found that the UCC is not desirable in the current context. It urged that, first, there should be an attempt by the Legislature at guaranteeing equality between men and women *within* each religious community in conformity with the constitutional guarantee of fundamental rights, rather than equality *between* various religious communities.[81] This is a clear statement in support of legal pluralism. From 2018 to 2023, no attempts have been made by the Legislature in this regard, indicating that its intent is suspect. The Law Commission's recommendation would help achieve true gender-just family laws (in plural) for Hindu women as well as women from other religious communities and for those who are governed by an optional secular law. After all, sameness of laws through one uniform family law for all communities would only bring about formal equality. Since men and women within marriage are not in an equal position, the yardstick of formal equality will not be useful to women. In fact, treating un-equals as equals will be detrimental for women. Instead, substantive equality would warrant a recognition of the context of women's specific disadvantage within their socio-religious context and make amends through the law for the historic discrimination. An application of feminist discourses on formal and substantive equality is imperative in the context of the UCC debate.[82]

Ultimately, all family laws aim to ensure the security of family relationships and the security of the rights of parties within the institutions of marriage and family (including children and elderly dependents), evehn upon the dissolution of marriage. As long as women do not face *de jure* or *de facto* discrimination within the family laws and the institutions of marriage and family are not given superior importance over and above rights of women who live in the same, such family laws, even if in plurality, could gain legitimacy.

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81 Law Commission of India, Consultation Paper on Reform of Family Law, New Delhi: Ministry of Law and Justice, Government of India, 2018. https://archive.pib.gov.in/documents/rlink/2018/aug/p201883101.pdf

82 For a detailed discussion, see Flavia Agnes, Examining Family Laws from the Prism of Feminist Jurisprudence, 1 December 2021, https://www.impriindia.com/insights/examining-family-laws-prism-of-feminist-jurisprudence/

In contemporary India, even judges holding constitutional posts hail the *Manusmriti*, a Hindu religious text steeped in patriarchy and casteism, as a torchbearer for women's rights. [83] Given this context, the risk of erosion or dilution of women's rights in Hindu family law is imminent. Constitutional guarantee of fundamental rights and international human rights standards that India is mandated to adhere to ought to be the guiding principles to mold, transform, and shape Hindu law in the near future, rather than an (re)interpretation of Hindu religious texts based on dubious claims of a "glorious past". [84] The landmark judgments of Indian courts and the recommendations of the Law Commission of India in recent years discussed in this article have sought to address and arrest the remnants of the patriarchy that exist in provisions of Hindu law. This trend holds a beacon of hope that women's equality in Hindu law will not remain a distant dream but a radical and potential reality.

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[83] Express Web Desk, 'Scriptures like Manusmriti give respectable position to Indian women: Delhi HC Judge', *The Indian Express*, August 11, 2022.

[84] Vikas Pathak, "The Quest For Our Glorious Past Is How The Right-Wing Woos The People", *Outlook*, October 8, 2021. See also Madhav Nayar, "The 'Glorious' History of Hindutva and its Hypocrisies", *Livewire*, August 13, 2019.

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